The duty to exhaust internal remedies before applying to the High Court for a review of a SARS decision in terms of the Promotion of Administrative Justice Act

One of the most significant developments in South Africa’s fiscal law since its birth, some hundred years ago, has been the coming into existence of a constitutional right (as distinct from a very limited antecedent common law right) to administrative justice.

This is one of the rights enshrined in the Constitutional Bill of Rights. It finds detailed expression in the Promotion of Administrative Justice Act 3 of 2000 (‘PAJA’).

It is beyond dispute that decisions of the Commissioner of the South African Revenue Service and his officials that impact on a particular taxpayer’s potential tax liability constitute administrative action, as envisaged in PAJA, where such decisions are made in terms of powers under charging legislation or under the Tax Administration Act 28 of 2011.

Consequently, administrative action by the Commissioner and his officials is no longer impugnable, as was the case at
common law, only on the narrow grounds of mala fides, self-interest or the failure of the officials to properly apply their minds. It is now reviewable on the far more extensive basis provided for in the Promotion of Administrative Justice Act.

The respective review jurisdictions of the Tax Court and the High Court

It needs to be borne in mind that only the High Court has jurisdiction to adjudicate an application for review in terms of the Promotion of Administrative Justice Act. Thus, if taxpayers elect to bring a review application in terms of this Act, they have no choice but to institute the proceedings in the High Court.

The statutory duty to exhaust internal remedies

The particular focus of this note is section 7(2)(a) of PAJA, which provides that –

‘... no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.’ (Emphasis added.)

This provision raises the question as to what is meant by an internal review – an expression not defined in the Act.

In this regard, the availability of internal remedies that can be invoked in the Tax Court in terms of the rules of that court looms large.

Thus, for example, Rule 51(2) provides for an ‘interlocutory application relating to an objection or appeal’ to be heard in the Tax Court. It seems, therefore, that any issue which can be adjudicated by the Tax Court in such an interlocutory application cannot be the subject of an application to the High Court – at least not until the Tax Court has given its
The common law did not require internal remedies to be exhausted before the High Court is approached

In Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining And Development Company Ltd (2014 (3) BCLR 265 (CC); 2014 (5) SA 138 (CC)) [2013] ZACC 52; [2013] ZACC 48, the Constitutional Court elaborated on the duty in terms of PAJA to exhaust internal remedies, saying that –

‘[119] In clear and peremptory terms, section 7(2) prohibits courts from reviewing “an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted”. Where, as in this case, there is a provision for internal remedies, the section imposes an obligation on the court to satisfy itself that such remedies have been exhausted. If the court is not satisfied, it must decline to adjudicate the matter until the applicant has either exhausted internal remedies or is granted an exemption. Since PAJA applies to every administrative action, this means that there can be no review of an administrative action by any court where internal remedies have not been exhausted, unless an exemption has been granted in terms of section 7(2)(c).’

The statutory duty to exhaust internal remedies represents a change in the law, for as the Constitutional Court had earlier pointed out in Koyabe v Minister for Home Affairs ZACC 23; 2009 (12) BCLR 1192 (CC); 2010 (4) SA 327 (CC) –

‘Under the common law, the existence of an internal remedy was not in itself sufficient to defer access to judicial review until it had been exhausted. However, PAJA significantly transformed the relationship between internal administrative remedies and the judicial review of administrative decisions. . . . Thus, unless exceptional circumstances are found to exist by a court on application by
the affected person, PAJA, which has a broad scope and applies to a wide range of administrative actions, requires that available internal remedies be exhausted prior to judicial review of an administrative action.’ (Footnotes omitted.)

What is an internal remedy?

The decision in Reed v Master of the High Court [2005] ZAECHC 5;[2005] 2 All SA 429 (E), in which judgment was given on 27 January 2005 in the Eastern Cape High Court, remains the leading authority on what constitutes an internal remedy.

In his judgment, Plasket J (with whom Dambuza AJ concurred) pointed out that section 7(2) applies to remedies and not to other forms of potential extra-curial redress: –

‘A remedy, in this context, is defined in the New Shorter Oxford English Dictionary as a “means of counteracting or removing something undesirable, redress, relief; legal redress”. Inherent in this concept as it is used in its legal context is the idea that a remedy, in order to qualify to be regarded as such, must be capable, as a matter of law, of providing what the Constitution terms appropriate relief: it must be an effective remedy. Section 7(2) does not, in other words, place an obligation on a person aggrieved by a decision to exhaust all possible avenues of redress provided for in the political or administrative system – such as approaching a parliamentary committee or a Member of Parliament, or writing to complain to the superiors of the decision-maker. Similarly, it is not required of an aggrieved person that he or she approach one or more of the Chapter 9 institutions – such as the Public Protector or the Human Rights Commission – prior to resorting to judicial review.’

Plasket J went on to say that –
‘The word “internal” qualifies the word “remedy” in s7(2) of the PAJA. The New Shorter Oxford English Dictionary defines internal (in this context) to mean “intrinsic”, “of or pertaining to or interior of something; within the limits of something” and “used or applying within an organisation”.

What then is the meaning of the composite expression internal remedy? In this regard, Plasket J said (at para [25] (footnotes omitted) that –

‘The dictionary definitions of the words “internal” and “remedy” that I have cited are in harmony with the way the composite term “internal remedy” is understood in the more specialised context with which this matter is concerned: when the term is used in administrative law, it is used to connote an administrative appeal – an appeal, usually on the merits, to an official or tribunal within the same administrative hierarchy as the initial decision-maker – or, less common, an internal review. Often the appellate body will be more senior than the initial decision-maker, either administratively or politically, or possess greater expertise. Inevitably, the appellate body is given the power to confirm, substitute or vary the decision of the initial decision-maker on the merits. In South Africa there is no system of administrative appeals. Instead internal appeal tribunals are created by statute on an ad hoc basis.’

Plasket J went on to say (at para [26]; footnotes omitted) that –

‘A distinctive feature of internal remedies is that they are extra-curial (or domestic). In Golube v Oosthuizen 1955 (3) SA 1 (T) for instance, De Wet J, in the context of deciding whether the applicant was under a duty to exhaust internal remedies, observed that the “mere fact that the Legislature has provided an extra-judicial right of review or appeal is not sufficient to imply an intention that recourse to a Court
Conclusion

It seems clear from the decision in Reed v Master of the High Court that a taxpayer’s duty in terms of PAJA to exhaust internal remedies in relation to a disputed assessment before applying to the High Court for relief does not, for example, require the taxpayer first to take the complaint to the Tax Ombud.

However, there are numerous unresolved questions regarding internal remedies available in terms of the Income Tax Act and the Value-Added Tax Act read with the Tax Administration Act and the Rules of the Tax Court.

If, for example, a taxpayer applies in terms of section 164(2) of the Tax Administration Act for payment of an assessed amount of tax to be suspended pending an appeal to the Tax Court, and the Commissioner refuses the application, does the Tax Administration Act provide for an internal remedy in terms of which the taxpayer can challenge that decision in the Tax Court?

In particular, can such a challenge be brought, for example, as an interlocutory application in terms of Rule 51(2)?

The answer is, probably not, since it is arguably not an application ‘relating to an objection or appeal’, as envisaged in Rule 51(2), but rather an application in relation to the ancillary issue of the pay-now-argue-later principle; but there is as yet no judicial decision on this point.

If such a challenge can indeed be brought by way of an interlocutory application in the Tax Court, then taxpayers would not be entitled to apply to the High Court in terms of the Promotion of Administrative Justice Act for a review of
the Commissioner’s refusal to suspend the obligation to pay the assessed tax until they have exhausted the remedy available to them by way of such an interlocutory application in the Tax Court.

Section 98 of the Tax Administration Act permits the withdrawal of an assessment in appropriate circumstances, despite the fact that no objection has been lodged or appeal noted. Can a taxpayer who has not lodged an objection or noted an appeal successfully challenge an administrative action if an application in terms of section 98 for withdrawal of an assessment were to be refused by SARS? In the circumstances that there may be no other internal remedy available, would the filing of an application under section 98 be sufficient to persuade a court that the taxpayer has exhausted all internal remedies?

This issue has not yet come before a court. Nevertheless, it would appear that section 98 of the Tax Administration Act relieves a taxpayer from the requirement to exhaust the internal remedies of objection and appeal. The application for relief under section 98 is itself the internal remedy. In the circumstances it would seem that a court should be prepared to adjudicate under PAJA where a taxpayer challenges a rejection by SARS of an application for the withdrawal of an assessment under that section.

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