REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

(HELD AT MEGAWATT PARK)

CASE NO: 0034/2019

(1) REPORTABLE: YES/**NO**
(2) OF INTEREST TO OTHER JUDGES: YES/**NO**
(3) REVISED.

3 June 2020 **LP SIGOGO**
DATE SIGNATURE

In the matter between:

BCD (PTY) LTD	APPLICANT
and	
COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	RESPONDENT

J U D G M E N T

SIGOGO AJ

INTRODUCTION

[1] The applicant BCD (Pty) Ltd ("BCD") is a private railway company operating in South Africa. It was founded in 1989 and runs its train hotel to a regular schedule on various routes throughout Africa from South Africa to Namibia, Dar es Salaam and Tanzania. Local travel packages include Vic Falls, Cape Town, St James and Durban.

[2] The applicant is a registered vendor for purposes of the value-added tax and conducts its business exclusively on the principle of the transport of fare paying passengers.

[3] On 12 February 2019, the applicant, launched the present application seeking an order directing that the assessments issued by the respondent, the Commissioner for the South African Revenue Service ("SARS") on 14 February 2017 in respect of the 07/2016 VAT period, be altered in the manner contemplated in the applicant's notice of objection.

[4] Previously, the applicant launched the application in terms of Rule 56 of the Tax Court Rules,[1] read with section 129(2) of the Tax Administration Act 28 of 2011.

[5] Rule 56[2] provides a remedy *inter alia* in a procedural matter to an innocent party upon due notice being given, in the event that the other party failed to comply with a period or obligation prescribed under the rules or an order by the tax court under Part F.

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1 Rules promulgated under section 103 of the Act, prescribing the procedures to be followed in lodging an objection and appeal against an assessment or a decision subject to objection and appeal referred to in section 104 (2) of that Act, procedures for alternative dispute resolution, the conduct and hearing of appeals, application on notice before a Tax Court and Transitional Rules.

2 Rule 56 provides as follows:

"**56. Application for default judgment in the event of non-compliance with rules.**—(1) If a party has failed to comply with a period or obligation prescribed under these rules or an order by the tax court under this Part, the other party may—

(*a*) deliver a notice to the defaulting party informing the party of the intention to apply to the tax court for a final order under section 129 (2) of the Act in the event that the defaulting party fails to remedy the default within 15 days of delivery of the notice; and

(*b*) if the defaulting party fails to remedy the default within the prescribed period, apply, on notice to the defaulting party, to the tax court for a final order under section 129 (2).

(2) The tax court may, on hearing the application—

(*a*) in the absence of good cause shown by the defaulting party for the default in issue make an order under section 129 (2); or

(*b*) make an order compelling the defaulting party to comply with the relevant requirement within such time as the court considers appropriate and, if the defaulting party fails to abide by the court's order by the due date, make an order under section 129 (2) without further notice to the defaulting party."

[6] Section 117(3)[3] of the Tax Administration Act, empowers this court to hear and decide an interlocutory application or an application in a procedural matter relating to a dispute under this Chapter as provided for in the rules, and section 129(2)[4] of the Tax Administration Act, *inter alia* provides for different orders that can be competently made by the court including an appropriate order in a procedural matter.

[7] When originally launching the application, BCD *inter alia* alleged that an incident of non-compliance with rules occurred when SARS failed to decide the objection to the assessment filed by BCD on 20 June 2018, within the period prescribed by the rules.

[8] On 13 September 2019, this court per Davis J heard the application for default judgment and granted an order giving directions on the appropriate procedure to be followed by the parties in resolving their dispute.

[9] Pursuant to the above order BCD re-enrolled this application alleging non-compliance with the abovementioned court order by SARS.

THE ISSUES IN DISPUTE

[10] The issue for adjudication in this matter is whether SARS contravened the court order of Davis J granted on 13 September 2019.

[11] The applicant contends that paragraph 3 of the court order contemplated the resolution of the objection and not the issuing of audit findings by SARS.

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3 Section 117 provides as follows:

"**117. Jurisdiction of tax court.**—(1) The tax court for purposes of this Chapter has jurisdiction over tax appeals lodged under section 107.

(2) The place where an appeal is heard is determined by the 'rules'.

(3) The court may hear and decide an interlocutory application or an application in a procedural matter relating to a dispute under this Chapter as provided for in the 'rules'."

4 Section 129 provides as follows:

"**129. Decision by tax court.**—(1) The tax court, after hearing the 'appellant's' appeal lodged under section 107 against an assessment or 'decision', must decide the matter on the basis that the burden of proof as described in section 102 is upon the taxpayer.

(2) In the case of an assessment or 'decision' under appeal or an application in a procedural matter referred to in section 117 (3), the tax court may—

(*a*) confirm the assessment or 'decision';

(*b*) order the assessment or 'decision' to be altered;

[Para. (b) amended by s. 19 (a) of Act No. 22 of 2018.]

Wording of Sections

(*c*) refer the assessment back to SARS for further examination and assessment; or

[Para. (c) amended by s. 19 (b) of Act No. 22 of 2018.]

Wording of Sections

(*d*) make an appropriate order in a procedural matter.

[Sub-s. (2) amended by s. 52 (a) of Act No. 39 of 2013 deemed to have come into operation on 1 October, 2012. Para. (d) added by s. 19 (c) of Act No. 22 of 2018.]"

[12] SARS denies these allegations and contends that it has substantially complied with the court order. Based on the aforesaid it was contended that the present re-enrolment of the application for default judgment is premature.

RELEVANT BACKGROUND FACTS

Period prior to the court order of 13 September 2019

[13] On 25 August 2016, the appellant submitted a VAT return for the period 07/2016.[5] Pursuant to this submission, SARS issued an electronically generated notice under case number 211766074, titled "*Verification of Value Added Tax declaration (VAT 201)*". In terms of this notice, it was, *inter alia*, indicated that:

> "The South African Revenue Service (SARS) thanks, you for submitting your VAT 201 declaration for the 2016/07 tax period.
>
> Please note that, in terms of the Tax Administration Act, your VAT 201 declaration has been identified for verification as a result of variances detected in the submission.
>
> Please review your VAT 201 declaration against your relevant value added tax (VAT) calculations and relevant material. If you find any errors, correct them by submitting a request for correction.
>
> If you cannot find any errors pertaining to the VAT 201 declaration, you are required to submit the following relevant material: the output tax schedule, input tax schedule, all documents relating to capital expenditure claimed (if applicable), and other transactional documents that would, for example, substantiate any increase/ decrease in sales, inventory, change in use adjustment or bad debts.[6]
>
> Note that you have 21 days from the date of this letter to comply in order to enable SARS to finalise the verification."

[14] SARS contends that the applicant failed to respond to its request of 25 August 2016, resulting in a further request being electronically generated and issued on 15 September 2016.[7]

[15] On 19 September 2016, the applicant uploaded information through the e-filing system of SARS.[8]

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[5] Founding affidavit para 11, answering affidavit para 10 and Annex MJT1.
[6] Founding affidavit para 12 and Annex RRT3 and opposing affidavit paras 11–13 and Annex MJ2.
[7] Opposing affidavit paras 14–15.
[8] Founding affidavit para 13 and opposing affidavit paragraph 16 and Annex MJT4.

[16] A dispute ensued between the parties relating to the sufficiency of the documents provided. SARS contended that the documentation uploaded by the applicant was incomplete in that it did not address all the requirements set out in the letter issued by SARS, dated 25 August 2016, which requested the applicant to provide detailed tax input and output schedules in order for the taxpayer to comply with its section 102 obligation in terms of the Tax Administration Act. SARS contended that the information provided by the applicant was not in accordance with the said letters from the respondent, nor sufficient to enable the respondent to verify the returns submitted by the applicant. It was further alleged by SARS that this default on the part of the applicant resulted in the case being automatically allocated its official Mr F, an internal auditor at SARS and who was allocated the case through one of the respondent's management systems, leading to the comments made of an audit process of the relevant tax return.[9]

[17] It is alleged that Mr F made attempts to contact the applicant's registered official, Mr S, on a cellphone but his phone was on voice mail. Subsequently, a short message service ("sms") was sent to another number on the respondent's system, namely, xxx, to alert the recipient that there is an important message from the respondent that requires urgent attention.[10]

[18] Subsequently, the matter was transferred to Mr E, who has since left SARS. According to the notes in the possession of SARS that he prepared, on or about 1 November 2016, he telephoned the applicant but was unsuccessful.[11]

[19] Further allegations made were that contacts made by E to the applicant include a contact to Ms MM, who referred him to one Mr W at 083 377 7691, but an attempt to contact Mr W was also unsuccessful.[12]

[20] On 7 November 2016, Mr E telephoned the landline of the applicant on 011 698 0329 and asked to speak to Mr S. He was informed that Krause was out of office and left another message for Mr S.

[21] On the same date, a further system-generated letter was issued to the applicant and a sms reminder sent to the registered number. A link was created for the applicant to upload the relevant documentation.[13] On the same date, Mr E again sent two system-generated letters to Mr S and requested him to provide detailed VAT input and output schedules.[14]

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9 Answering affidavit paras 18–20.
10 Answering affidavit paras 18–20.
11 Answering affidavit paras 21–23.
12 Answering affidavit para 24.
13 Answering affidavit para 26 and Annex MJT6.
14 Answering affidavit para 26 and Annex MJT7 (a)-(b).

[22] On 15 November 2016, the applicant submitted information to SARS, per email to **contact.north@sars.gov.za** for the attention of Mr E.[15]

[23] SARS acknowledged receipt of the uploaded documents.[16] However, SARS alleged that the documents uploaded in an email of 15 November 2016 comprised of tax invoices, pro forma invoices, invoices, summary of cash flow, emails, input documents, control account, tax type report and a covering letter dated 15 November 2016. Further that many of these documents were repetitive and the applicant's attorneys were instructed to simply annex them as uploaded and printed.[17]

[24] At paragraph 6 of the covering letter, Annex "MJT8 (a)", the following is stated:

> "6. It is submitted that on review of the VAT 201 return for the said period, the VAT vendor made an error by amalgamating the values for zero-rated supplies with exempt supplies. Per annexure A it can be shown that for the period 1st January 2015 to 1st December 2015, the total zero-rated turnover for international transport amounted to R165 826 326,59 and total exempt turnover related to total transport amounted to R131 627 777,44, comparatively the values for application for input allowable deduction is 55.75%.
>
> 7.The vendor requests that SARS review the submission and should SARS require any additional information and/or documentation that such request is forwarded the vendor is willing to cooperate with SARS in this regard, however to upload the SARS extensive list as per the initial request is impractical due to the large volumes of documentation."

[25] On 15 December 2016, Mr E addressed an email correspondence to the applicant, *inter alia*, indicating that the apportionment for claiming of input tax has been wrongly calculated and raised further questions pertaining to the documentation previously provided to SARS.[18]

[26] On 20 December 2016, the applicant responded to Mr E's email of 15 December 2016. The respondent alleged that the response was insufficient and merely attached documents previously provided to SARS that were found to be non-compliant.[19] Further that the applicant's letter only summarised ledger accounts and failed to provide the respondent with the required information and in the required format.

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[15] Founding affidavit para 15 and Annex RRT5 and Answering affidavit para 28 and Annex MJT8 (a)-(j).

[16] Answering affidavit para 29 and Annex MJT9.

[17] Answering affidavit para 30.

[18] Founding affidavit para 16 and Annex RRT6, as well as Answering affidavit para 38 and Annex MJT10.

[19] Answering affidavit paras 39–45 and Annex MJT11.

[27] On or about 26 January 2017, SARS effected a refund to the applicant in the amount of R10 457 014.39 and interest in the amount of R353 880.00.[20] The applicant alleged that based on this refund it was satisfied that the dispute with SARS was resolved.[21] According to the deponent to the respondent's answering affidavit, the authorisation of the refund could not be established and was erroneously done.[22]

[28] On 14 February 2017, SARS issued a notice of assessment, VAT 217e for the period 07/2016, effectively reversing the refund.

[29] SARS stated as its grounds of assessment that *"burden of proof not discharged"*, as is apparent from the notice of assessment, annexure MJT14 to the answering affidavit VAT 217. The applicant alleges that it has no knowledge of why it has a debt or the facts and law upon which SARS's decision was based.[23]

[30] The applicant further alleges that the revised assessment was issued in contravention of section 42 of the Tax Administration Act in that SARS failed to issue a letter of findings prior to issuing the revised assessment.[24]

[31] On 24 February 2017, the applicant requested reasons for the assessment in terms of Rule 6(1).[25] This was done simultaneously with the request for suspension of payment in terms of section 164 of the Tax Administration Act.

[32] In the request for reasons, it was, *inter alia*, indicated that:

> "7.The vendor wishes to know exactly why the assessment was raised.
>
> 8. In addition, we also require detail on what specifically the vendor failed to discharge in its burden of proof form, resulting in SARS' latest decision in the assessment.
>
> ...
>
> 11. The assessment does not contain any reasons why the tax liability was raised. Consequently the vendor has no knowledge of why it has a tax debt, or the facts and law upon which SARS' decision is based. Until it receives proper reasons, the vendor is unable to meaningfully challenge same."

[33] SARS failed to respond to the applicant's letters.[26]

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[20] Founding affidavit paras 17–18 and Answering affidavit para 46.
[21] Replying affidavit para 10.21.
[22] Answering affidavit paras 49–50.
[23] Founding affidavit para 19.
[24] Founding affidavit para 20.
[25] Founding affidavit para 21, read with Annex RRT8, and Answering affidavit para 77 and Annex MJT15(a) and MJT15(b).
[26] Founding affidavit paras 24–25; Answering affidavit para 78.

[34] SARS alleged that the applicant sought condonation for the late request for reasons on or about 23 May 2017, which was responded to on 8 June 2017.[27]

[35] On evaluating annexure MJT18, a dispute-resolution form titled DISP01 under the heading "*Reasons for objection against SARS' decision*", the applicant indicated the following:

> "Previous requests have been submitted within the required timeframe, please see attached documents."

[36] Annexure MJT18 is SARS's response to the aforesaid DISP01 document. In terms of annexure MJT18, it was indicated that *"late submission has been declined for the following reasons. Tax period 2016/07 reasons provided for the late submission of your dispute was not regarded as reasonable. Your request for reasons can therefore not be processed".* It was indicated that, if not satisfied with the decision, the applicant had the right to object to SARS's decision.

[37] Again, on 27 June 2017, the applicant filed an objection against SARS's decision.[28] This objection was declined by SARS on 10 August 2017, as per annexure MJT20, inviting the applicant to file an appeal if not satisfied with the outcome. There was no communication between the parties between August 2017 and 20 June 2018.[29]

[38] On 20 June 2018, the applicant filed a notice of objection against SARS's assessment.[30]

[39] On 3 October 2018, the applicant filed a notice in terms of Rule 56(1)(*a*) of the Tax Administration Act.[31] In the notice it was, *inter alia*, indicated that:

> "3. In terms of Rule 9 of the rules promulgated under section 103 of 30A (GN550 of 11 July 2014), you have 60 days after the taxpayer has submitted the objection, to notify the taxpayer of the allowance or disallowance of the objections.
>
> 4. According to our calculations, the 60 days prescribed by Rule 9 has expired on 11 September 2018.
>
> 5. Without reiterating the content and emails and without delving into the substantive merits of the current dispute-resolution procedures before you, it remains common cause that to this very date you have failed to notify our client of the allowance or disallowance of the objection submitted on 20 June 2018.

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[27] Answering affidavit paras 80–81, read with Annex MJT17 and MJT18.
[28] Answering affidavit para 81 to 83 read with annexure MJT18 and annexure MJT19.
[29] Answering affidavit para 87.
[30] Founding affidavit para 26, read with Annex RRT10.
[31] Founding affidavit para 30, read with Annex RRT2.

> 6. In respect of your failure to comply with Rule 9 we hereby formally demand in terms of Rule 56(1)(*a*) that you remedy your default within 15 days, failing which we hold instructions to proceed with an application for default judgment in terms of Rule 56 of the rules promulgated under section 103 of Act 28 of 2011."

[40] Again, there was a communication gap between 20 June 2018 to February 2019, as is apparent from the answering affidavit, paragraph 165.3, read with annexure MJT22, and paragraph 171, together with annexure MJT23.

[41] There was a further exchange of correspondence between the applicant and the respondent between February 2019 and September 2019, culminating in the hearing before the Tax Court.

[42] On 13 September 2019, the court granted an order per Davis J.

Events after the court order of 13 September 2019

[43] On 27 September 2019, subsequent to the court order, the applicant addressed an email to the respondent alleging that it had complied with its obligations in terms of paragraphs 1 and 2 of the court order regarding the delivery of information and supporting documents.[32] The applicant also requested the respondent to comply with the balance of the court order within the specified time periods.

[44] In this email correspondence, it was stated that:

> "Dear Sirs
>
> We attach hereto the court order in respect of the above matter.
>
> We attach hereto supporting documents and all relevant information as set out in the respondent's letter dated 5 September 2019 that was annexed as MJT22, and in particular the required paragraphs 5.4 to 5.15 thereof.
>
> We confirm that this accordingly constituted compliance with paragraph 1 and 2 thereof. The turnover per VAT 201 has been included in 5.15.
>
> We now kindly request that you comply with the balance of the court order within the prescribed time periods, and revert to the documents provided."

[45] It is further alleged that the detailed information is set out in annexures RRT3.2.1 to RRT3.2.15, comprising just under 100 pages.

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[32] Applicant's supplementary affidavit para 23, read with annexure RRT3.1.

[46] On 7 October 2019, the respondent, through its attorneys JKL Attorneys, requested additional information from the applicant. In the email communication transmitting the request, it was indicated that:

> "In the attached schedule, the line items are highlighted in yellow and our client requests that you provide the invoices for those items for purposes of the audit being undertaken."

[47] The email communication was despatched to the applicant's attorneys on 7 October 2019 at 3:17pm.[33]

[48] On 8 October 2019, the representatives of the applicant addressed a further email communication to the respondent's legal representatives requesting clarity on the information requested.[34]

[49] On 8 October 2019, at 8:09pm, the respondent's attorneys addressed an email to the applicant's attorneys, as follows:

> "We refer to the above matter and our request for additional information.
>
> We note the information you provided earlier today which shall be circulated to our client for audit purposes.
>
> We have confirmed with our client that the information requested from yourselves is information as per paragraph 1 and paragraph 2 of the court order and is not additional information. We have attached herewith, a document marked summary of additional information required further clarifying the information our client is requesting from your client and you will note that the information is actually the information contemplated in the court order.
>
> You will recall from yesterday's email to yourselves, we only attached a five-page document with only two items highlighted in yellow wherein we requested that you provide us supplementary information thereto. Please be advised that there was an omission to circulate the rest of the information required by our client's auditors to your client. We thus attach herewith, documents marked document A, B, C, D, E highlighting the rest of the information our client requests from your client.
>
> According to our client your client's submission includes a schedule providing a summary and pro forma invoices. What our client requires are the actual tax invoices to verify the VAT input claimed by your client in their submissions in question. A schedule providing a summary and pro forma invoices will not suffice for purposes of verifying the claimed amounts, tax invoices must be provided.
>
> As you had noted in your correspondence earlier today that our client's request for information does not negate the time periods in terms of the court order, our client therefore requires the information to be provided to us before close of business tomorrow, on 9 October 2019, to allow

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33 Supplementary affidavit para 24, read with Annex RRT4.1 and RRT4.2.

34 Annex RRT6, RRT7.1, Supplementary affidavit para 27.

our client to proceed and complete the audit before the required date for completion of the verification and/or audit in terms of the court order expires.

According to our client, the only thing standing in their way of completing the audit, is your client's continuous failure/refusal to provide tax invoices in respect of items listed in the schedule in respect of which your client is making its claim for VAT input. It is further our client's instruction that it is incorrect to hold that the information requested in this regard is additional information. The information being requested ought to have been provided by your client as part of their earlier submission for additional of information as required in terms of the court order.

We hope you find the above in order and shall await to hear from you.

Kind regards"

SARS's audit findings letter

[50] On 9 October 2019, the applicant provided the additional information requested by SARS.[35]

[51] There were further email correspondences exchanged between the parties on 10 and 11 October 2019, regarding the alleged outstanding information.[36]

[52] On 16 October 2019, SARS issued audit findings, allegedly despatched to the applicant on 17 October 2019.[37]

[53] On 22 October 2019, pursuant to receiving the letter of audit findings, the applicant addressed a communication to the respondent, *inter alia*, contending that the issuing of the audit findings letter was in contravention of the court order and the provisions of administrative justice as well as in non-compliance with the Rules. Based on the aforesaid, the applicant re-enrolled the application for hearing, relying on the provisions of the court order.

[54] On 10 December 2019, the applicant filed a supplementary affidavit alleging that the respondent failed to comply with the terms and time periods of the court order and re-enrolling the application as contemplated in paragraph 6 of the court order.[38]

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35 Supplementary affidavit para 34 to 36.
36 Supplementary affidavit paras 37 and 38.
37 Founding affidavit para 44.
38 Applicant's supplementary affidavit paras 5, 6, 10 and 11 and Annex RRT1 and RRT2.

THE RELEVANT COURT ORDER

[55] The court order states the following:

"Order

1. The applicant is ordered to furnish the respondent with the supporting documents and/or relevant information as set out in the respondent's letter dated 5 September 2019 (annexed hereto marked MJTS22), and specifically, in paragraphs 5.4, 5.5, 5.6, 5.7, 5.8, 5.9, 5.10, 5.11, 5.12, 5.13, 5.14 and 5.15 thereof. It is ordered that the applicant will provide amended monthly VAT 201's manually showing the turnover split between the guest house/shop/gift business and the BCD Rail business reflecting the relevant standard rated, zero rated and exempt turnover per business unit for the period in question reflecting the correct apportionment methodology used by the appellant.

2. The applicant is ordered to furnish the respondent with the abovementioned relevant documents and information within 14 days of 13 September 2019;

3. The respondent is ordered to complete the dispute based on the documents provided within 10 days of receipt of the applicant's relevant supporting documents.

4. In the event that the applicant is not satisfied with the result of the conclusion of the respondent the respondent condones the reported late filing of the applicant's notice of objection dated 20 June 2018, and the applicant may amend its notice of objection which the respondent must adjudicate in terms of Rule 9 of the Tax Administration Act 28 of 2011 ('TAA') timeously from the date that the amended objection is filed by the applicant;

5. The applicant is granted leave to apply the dispute-resolution proceedings in the TAA including the rules of the TAA;

6. The respondent is granted leave to file whatever process necessary to deal with the above dispute on condition it strictly complies with the timelines and rules applicable, failing which this application under case number 0034/2019 may be re-enrolled for default judgment against the respondent;

7. Costs of this application are reserved provided that if the applicant is successful or partially successful in the objection or any subsequent dispute-resolution proceedings, the applicant will be entitled to the party and party costs of this application;

8. This matter is postponed sine die."

RELEVANT LEGAL PRINCIPLES

[56] Mr A, on behalf of the applicant, detailed the history relating to the genesis of the dispute between the parties since 2016, until the order of Davis J on 13 September 2019 and the subsequent events.

[57] He submitted that SARS has, for more than 18 months, failed to adjudicate on the objection, contrary to the Rules, in particular, Rule 9, resulting in the applicant instituting the application for default judgment.

[58] He argued that the applicant wants to move forward pursuant to the order of Davis J and he submitted, in this regard, that SARS ought to have, but had failed to consider the information at hand and made a decision, either allowing or disallowing the objection.

[59] In this regard, Mr A argued that SARS's request for information on 8 and 11 October 2019 was unnecessary. According to him the proverbial straw that broke the camel's back was the purported letter of audit findings issued by SARS on 16 October 2019, pursuant to delivery of the requested documents by the applicant.

[60] He argued that by issuing this letter, SARS had acted incorrectly. All that SARS ought to have done under the circumstances was to either allow or disallow or partially disallow the objection, and not have issued a letter of audit findings. Mr A based his argument on the interpretation of the court order, specifically paragraph 3 and 6. He contended that a reference to the dispute therein was intended to mean that the objection must be taken forward and not for SARS to create a new process.

[61] In response, Mr M for the respondent argued that there was substantial compliance with the court order by SARS and that this compliance is confirmed by the issuance of the letter of audit findings. He argued that, correctly interpreted, the court order contemplated that SARS should issue audit findings in resolution of the dispute as envisaged in paragraph 3 of the court order. He submitted that it would not make sense for the taxpayer to be asked to object on top of the objection.

[62] He submitted that SARS's queries were answered on 9 October 2019, thereby rendering the applicant compliant with paragraphs 1 and 2 of the court order.

[63] He argued that for the applicant to approach the court by re-enrolling the default judgment was premature and prejudicial to SARS.

[64] In reply, Mr A argued that the bottom line was that there was no compliance with the court order by the respondent. SARS responded late and its interpretation that it understood the dispute to relate to finalising the audit is not supported by the objective evidence.

[65] In this regard, it was contended that the order of court emanates from the objection that was not adjudicated and the only meaning to be assigned thereto is that the dispute in paragraph 3 related to the objection, because the objection had not been adjudicated upon. It was further contended that how SARS interpreted that to mean restarting the process was

irrational and further that SARS had had ample opportunity to adjudicate on the objection, but had failed to do so.

[66] It was argued that the reason why SARS delivered the letter of audit findings was in an attempt to remedy the defect regarding the non-explanatory reassessment. He argued that the court order did not give SARS an opportunity to go back in time and that paragraphs 4 and 6 negate SARS's interpretation.

[67] In my view, the court order of 13 September 2019, sought to lay down a new procedure regulating the conduct of the parties when resolving the dispute between them at the time. Therefore, the court order sought to end the protracted dispute by bringing in a new dawn whereby parties do not embark on long drawn skirmishes, but attempt to resolve the tax dispute in a procedural manner.

[68] In my view, a reference to the dispute in the court order is reference to the dispute concerning the VAT period 07/2016. The information and documentation sought by SARS and the refund that was paid and reversed related to the assessment made in respect of this period.

[69] Previously, the applicant complained that SARS's purported assessments raised in respect of this period did not comply with the provisions of the Act and also that SARS had failed to adjudicate on the objection pertaining to this assessment.

[70] It is for this reason that the court order as provided for by section 129 of the Tax Administration Act, implemented a dispute-resolution mechanism, strictly in accordance with the Rules, as per paragraphs 4 and 5 of the court order. Otherwise the reference to the objection process in these paragraphs would be rendered nugatory.

[71] If the applicant is not satisfied with this letter of audit findings, the process as outlined in the court order prescribes that it needs to pursue an objection process as set out in paragraph 4 of the order, as a means of resolving such dispute.

[72] Secondly, it is envisaged in the court order, as per paragraph 5, that any such dispute would include, in pursuance thereof, alternative dispute-resolution means as contemplated in paragraph 5.

[73] Thirdly, the court order makes no reference to an appeal in the event that the applicant is not satisfied with the resolution of the dispute, thus confirming that the next step in the envisaged process is to lodge objection rather than an appeal process, which would have been specified had it been the next step envisaged by the court order.

[74] *Mkhize v Umvoti Municipality and Others*,[39] is the case in point as regards the interpretation of court orders. I quote paragraphs 16 and 17 of the judgment where the following is stated:

> "[16] These conflicting contentions raise a question of the proper construction of the judgment and orders granted in Jaftha. The approach to be adopted was dealt with in a well-known passage from the judgment in *Firestone South Africa (Pty) Ltd v Gentiruco AG* where Trollip JA said: 'First, some general observations about the relevant rules of interpreting a court's judgment or order. The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. …Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, it was common cause that in such a case not even the court that gave the judgment or order can be asked to state what is subjective intention was in giving it … But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court's granting the judgment or order may be investigated and regarded in order to clarify it; for example, if the meaning of a judgment or order granted on an appeal is uncertain, the judgment or order of the court a quo and its reasons therefor, can be used to elucidate it. If, despite that, the uncertainty still persists, other relevant extrinsic facts or evidence are admissible to resolve it.'
>
> [17] I would only add that since that judgment was delivered it has been accepted that in the process of ascertaining the meaning of words in a document the court must pay regard to the whole factual matrix or context surrounding the use of those words and is not restricted to what was formerly described as 'background circumstances', with reference to 'surrounding circumstances' being limited. Also one does not start with some a priori view of the meaning but determines the meaning of the words in question in the light of the entire context. When a question of the interpretation of one of its orders arose before the Constitutional Court, Kriegler J analysed the factual context in which the order was made and what points had been in issue on the papers and in the course of argument and said further: "Proper interpretation of an order of court also entails determining the legal context within which the words were used.' That then is the enquiry on which I must embark in order to resolve the dispute between the parties."

[39] (8701/06) [2010] ZAKZPHC 20; 2010 (4) SA 509 (KZP); [2011] 1 All SA 144 (KZP) (21 May 2010).

[75] The Supreme Court of Appeal case of *Natal Joint Municipal Pension Fund v Endumeni Municipality*[40] is instructive regarding the interpretation of documents. The court held as follows:

> "The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used."

[76] Three principles emerge from the *Endumeni Municipality* judgment. Firstly, an agreement must be interpreted in its own context taking into consideration the whole document. Secondly, the starting point in interpreting is to use ordinary rules of grammar and syntax. Thirdly, the interpretation must be business-like and not undermine the apparent purpose of the document.

[77] A starting point in interpreting a court order is to have regard to the historical background of the dispute between the parties detailed above, which is relevant in providing the context within which the judgment was given.

[78] Having regard to the relevant paragraphs, the court order places certain obligations to perform on the parties and also permits them to take certain steps in the event of non-performance by either of the parties.

[79] With reference to the court order of Davis J the following is apparent:

> [79.1] Paragraph 1 places an obligation on the applicant regarding what documents it is required to furnish to the respondent. Such documents are clearly identifiable and specified.

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[40] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593.

[79.2] Paragraph 2 places an obligation on the applicant to furnish such documents to the respondent as identified in paragraph 1, within a specified period of 14 days from the date of the court order, being 13 September 2019.

[79.3] There is no issue regarding these first two paragraphs. This the applicant alleges it complied with on 9 October 2019, and I accept this.

[79.4] Paragraph 3 places an obligation on the respondent to complete the dispute based on the documents provided (by the applicant), within 10 days after receipt thereof. The essence of this paragraph is that the respondent is required to finalise the dispute within 10 days, from the date that the documents are supplied.

[79.5] Paragraph 4 provides for a dispute-resolution mechanism between the applicant and the respondent in the event that the applicant is dissatisfied with the outcome of the dispute with SARS. Chronologically, this can only mean the dispute referred to in paragraph 3 of the order.

[79.6] In this regard paragraph 4 provides the applicant with a remedy to dispute the result of the conclusion of the respondent regarding the dispute. The envisaged manner in which this dispute is to be resolved is by way of an objection, with specific reference to the already filed objection dated 20 June 2018. Further, there is a proviso that the applicant is entitled to amend such objection. This paragraph also creates an obligation for the respondent to adjudicate such objection timeously as dictated in terms of Rule 9, from the date that the amended objection is filed by the applicant.

[79.7] Based on this interpretation of paragraph 4 of the court order, I am of the view that the nature of the dispute referred to in paragraph 3 cannot be an objection, but it must be a reference to a decision or assessment by SARS. This is because in terms of section 104 of the Tax Administration Act, a taxpayer is entitled to object to an assessment or decision by SARS.

[79.8] Paragraph 5 permits the applicant to pursue dispute-resolution proceedings in terms of the Tax Administration Act, including the rules. That is, if not satisfied, the applicant can pursue dispute-resolution proceedings, including an alternative dispute-resolution process.

[79.9] The above, must be evaluated *inter alia* within the historical context regarding previous attempts by the parties to pursue alternative dispute methods in this matter.

[79.10] Paragraph 6 permits SARS to file whatever process necessary to deal with the above dispute. The only proviso is that SARS must strictly comply with the time periods in the Rules. I view this paragraph as granting SARS wide options, obviously within the purview of the enabling legislation, being the Tax Administration Act. SARS is thereby permitted to utilise its powers in terms of the enabling legislation in order to resolve the dispute. The only overriding fact is that this must be done within the timelines prescribed by the rules and the relevant legislation.

[79.11] Furthermore, this paragraph also permits the applicant in the event that SARS defaults in its obligations mentioned above, to re-enrol the application for default judgment.

[79.12] Paragraph 7 regulates the issue of costs.

[80] The letter of audit findings provides the applicant with explanations regarding SARS basis for the proposed adjustment in respect of the VAT period 07/2016, as directed by the court order.

[81] As I see it, SARS's letter of audit findings seeks to resolve the dispute as envisaged in paragraph 3 of the court order. It grants the applicant an opportunity to resolve the dispute at a finding stage, a matter that the applicant was desirous to achieve.

[82] I agree with counsel for the respondent that the present dispute was brought rather prematurely, firstly, for the reasons already set out above and secondly, in light of the letter of audit findings having been issued by SARS.

ORDER

[83] In the circumstances, I make the following order:

[83.1] the application is struck from the roll.

[83.2] no order as to costs.

L SIGOGO

ACTING JUDGE OF THE TAX COURT OF SOUTH AFRICA

Date of hearing : 12 December 2019

Date of judgment : 3 June 2020

Electronically delivered per email