REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

HELD AT GAUTENG LOCAL DIVISION, JOHANNESBURG

Case NO: IT 25117

(1) REPORTABLE: ~~YES/~~**NO**

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

..... **.....**

SIGNATURE DATE

In the matter between:

COMMISSIONER FOR THE Appellant
SOUTH AFRICAN REVENUE SERVICE

and

SAV SOUTH AFRICA (PTY) LTD Respondent

J U D G M E N T

This judgment has been handed down remotely and shall be circulated to the parties by way of email. Its date of hand down shall be deemed to be 18 November 2021

Mali J

Introduction

[1] The applicant South African Revenue Service ("SARS") seeks an order against the respondent ("SAV") in terms of rule 30 of the Uniform Rules of Court ("the Rules") in the following terms:

> "1. That the Application for default judgement dated 30 November 2020 brought by the Respondent, SAV South Africa (Pty) Ltd (in business rescue) under case number IOT 25117 **("the default judgement application")** is irregular.
>
> 2. That the default judgement application be set aside.
>
> 3. That the Respondent pay the costs of this application.
>
> 4….."

Brief background

[2] It is common cause that on 22 May 2019 the respondent filed its appeal against the additional assessments for the 2014, 2015 and 2016 income tax years of assessment. The applicant failed to deliver the rule 31 statement within a period of 45 days prescribed under rule 31.

[3] On 2 September 2019, approximately after 12 months lapse respondent addressed a letter to the applicant wherein it specifically wrote as follows:

> "[SAV] has to date hereof not received SARS 'rule 4 request for an extension to deliver its rule 31 Statement before the expiry of the 45 days period in which SARS' rule 31 Statement had to be delivered, or received notice of SARS' intention to formally apply to the Tax Court for an order condoning its non- compliance with the rules."

[4] The applicant, did not respond to the above. Respondent proceeded on 13 October 2020 to serve a notice in terms of rule 56(1)(*a*) calling upon the applicant to remedy its default within 15 business days as prescribed by the rule 56. On 20 October 2020 the applicant delivered its rule 31 statement. The delivery occurred in a period of 310 business days after the expiry of 45 days.

[5] On 30 November 2020 the respondent launched application for default judgment against the applicant. This is because the applicant did not apply for condonation when filing rule 31 and or invoke the provision of rule 4(2) regulating extension of time periods, before filing rule 31. The respondent is of the view that there is no rule 31 in existence, therefore it is entitled to move to the next step. The applicant requested the respondent to reconsider its

position in regard to the application for default judgement, nevertheless the respondent remained resolute.

[6] On 14 December 2020, the applicant served a notice in terms of rule 30 of the Uniforms Rules of Court. ("the Uniform Rules"). The step followed by the respondent in launching application for default judgment is considered irregular step by the applicant hence this application. Simultaneously with the service of the irregular step notice, applicant served a notice to oppose the default judgment application.

[7] Rule 30 of the Uniform Rules provides that when a party to a cause takes an irregular step, other party or parties may apply to court to set it aside. Such application must be brought on notice to all parties specifying particulars of the irregularity or impropriety alleged. The application may only be made if the applicant.

[8] The argument advanced on behalf of the applicant is that the prescripts of rule 56(1)(*a*) are unequivocal and do not require a party who has timeously remedied its default to additionally apply for condonation.

Rule 56(1)

[9] Rule 56(1) provides as follows:

> "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 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 courts order by the due date, make an order under section 129(2) without further notice to the defaulting party."

[10] In the present it is common cause that the applicant, the then defaulting party had complied within 15 days. Nevertheless, respondent raises the issue that applicant is not in full compliance because it did not invoke rule 4(2). Rule 4(2) provides that a request for an extension **must** be delivered to the other party before expiry of the period prescribed under these rules unless the parties agree that the parties may be delivered after expiry of the period **(own emphasis)**. It is common cause that the applicant never applied before the expiry of 45 days to file rule 31, and it neither sought agreement with the respondent.

[11] Respondent's argument is that the applicant before filing rule 31 or with the filing of same should have applied for condonation for late filling since it did not bother to comply with rule 4(2). Rule 31 provides that ("SARS must deliver to the appellant a statement of the grounds of assessment and opposing the appeal within 45 days after delivery of…").

[12] My understanding of respondent's argument is that rule 31 is not before tax court as it has been filed without agreement between the parties due to its lateness. As a result of applicant's failure to file rule 31 in the above fashion, the respondent is entitled to file application for default judgment.

[13] The issue to be determined is whether the step followed by the respondent is irregular. In order to get to the answer one must be in a position to decide whether there is a valid rule 31 statement filed by the applicant.

[14] As indicated above the applicant SARS, does not see why it should do or had done something else except to file rule 31 within 15 days to remedy its default. This then calls for the interpretation of the law pertaining to the Tax Court procedures.

[15] The government notice issued on 11 July 2014, reads as follows:

> "In terms of section 103 of the Tax Administration Act, 2011, I Nhlanhla Musa Nene, the Minister of Finance, after consultation with the Minister of Justice and Constitutional Development, hereby prescribe in the Schedule hereto, the rules governing the procedures to lodge an objection and appeal against an assessment or decision under Chapter 9 of The Act, **the procedures for alternative dispute resolution and the conduct and hearing of appeals before a Tax Board or Tax Court.**"

(Own emphasis)

[16] Rule 4 is part and parcel of the procedure and conduct and hearing of appeals in the Tax Court. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), paragraph 18, 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 un-business-like 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. To do so in regard to a statute or statutory instrument is to cross divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[17] Furthermore, the Constitutional Court in *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 at paragraph 28 held:

> "A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in absurdity. There are three important interrelated riders to this general principle, namely that statutory provisions should always be interpreted purposively; the relevant statutory provision must be properly contextualized; and all statues must be construed consistently with the constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity''.

[18] The legislation provides clear time periods for all the parties to be adhered to. The ordinary grammatical meaning of the final time limit of filing of rule 31 is 45 days, in the event it is not met there is a clear provision in the form of rule 4 which provides perfect grammatical meaning as to time extension. Rule 4 is equally applicable to all the parties. Rule 56 must not be read in isolation unless the applicant being SARS is exempted from of compliance with rule 4(2). The fact that the respondent proceeded to ask the applicant to comply with rule 56 must not be seen as a waiver of the provisions of rule 4(2). What would be the purpose of rule 4(2) be, if it is allowed to be superseded by other Rules. I do not read the law to mean that other rules are less important than others.

[19] I am encouraged by the case of *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development* 2013 (2) All SA 251 (SCA), in a case wherein the party in respect of prospecting rights its appeal lapsed for failure on the part of the appellant to prosecute the appeal timeously. At paragraph 13 the following is stated:

> "What calls for some acceptable explanation is not only the delay in the filing of the heads argument, but also the delay in seeking condonation. **An appellant should, whenever it realises that it has not complied with a rule of court, apply for condonation without delay** (*Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (A) at 449 G-H)."

(Own emphasis)

[20] In the present matter, the applicant is and was aware it did not comply with rule 4(2), as indicated above the applicant shrugged the warning by the respondent. I am alive to the prejudice alleged by the applicant if the matter is allowed to proceed on default because the issues will not be properly ventilated. SARS went to this trap with eyes open, when it was warned by the respondent it complained of abusive litigation strategy. The allegation of abuse is interesting, taking into account that SARS had ignored to file rule 31 for almost a year leaving the respondent with a disputed assessment. This is despite the eagerness shown by the respondent to have the issue resolved. In this regard I refer to paragraph 11 in *Dengetenge* above reading:

> "Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice (per Holmes JA in *Federated Employers Fire & General Insurance Co Ltd & another v McKenzie* 1969 (3) SA 360 (A) at 362F-G). I shall assume in Dentenge's favour that the matter is of substantial importance to it. I also accept that there has been no or minimal inconvenience to the court. I, however, cannot be as charitable to the appellant in respect of the remaining factors."

[21] Maybe to the applicant the matter has no significance hence it dragged its feet; so any prejudice allegedly apprehended it should be in a position to handle it. The applicant had already filed notice to oppose the default judgment application. It has all the opportunity to persuade the next court as to why it is in not willful default and advance its *bona defence* in that forum since it has chosen not to bother to request extension for the late filing of rule 31 and or apply for condonation.

[22] For the foregoing there is no valid rule 31 statement, therefore SARS the applicant remains in default. It was therefore open to the respondent taxpayer to apply for default judgment.

[23] In the result the following order is granted:

Order

1. The application is dismissed with costs.

N.P. MALI

JUDGE OF THE HIGH COURT

Date of hearing	:	27 August 2021
Judgement handed down on	:	18 November 2021