REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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

21/06/2017
DATE

SIGNATURE

CASE NO: 10927/2017

In the matter between:

FREDERIK MATTHYS CALITZ	Applicant
and	
THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	First Respondent
TRANSNET PENSION FUND	Second Respondent
TRANS 50	Third Respondent
MOMENTUM HOLDINGS LTD	Fourth Respondent
SANLAM LIFE INSURANCE LIMITED	Fifth Respondent
PROFESSIONAL PROVIDENT SOCIETY OF SOUTH AFRICA	Sixth Respondent

Summary - Practice of state attorney not to comply with the rules of court in respect of the time periods for filing of answering affidavits to be discouraged - practice directive 9.9.4 does not entitle a litigant, as of right, to a hearing in the opposed motion court upon appearing in the unopposed motion court and announcing that the matter is now opposed – failure to paginate application, prior to service of the application, does not suspend the *dies* for filing of answering affidavits

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REASONS IN TERMS OF RULE 49 (1) (C)

OPPERMAN J

[1] On 31 May 2017 this court, having heard counsel for the applicant and the first respondent ('*SARS*'), granted the following order:

> '1. the third party agency appointments of the fourth, fifth and sixth respondents are set aside;
>
> 2. the first respondent is directed to pay the applicant the sums of:
>
> 2.1 R470 790.86, being the monies incorrectly collected by SARS from the fourth respondent in terms of the agency appointment, together with interest at the prescribed applicable rate in terms of the Income Tax Act 58 of 1962 as amended, from 16 May 2016 to date of payment;
>
> 2.2 R107 705.19 incorrectly collected from the third respondent in terms of an agency appointment together with interest at the prescribed applicable rate in terms of the Income Tax Act 58 of 1962 as amended from 31 July 2013 to date of payment;
>
> 2.3 R67 941.22 incorrectly collected by SARS from the fifth respondent by virtue of an agency appointment of the fifth respondent together with interest at the prescribed legal rate applicable in terms of the provisions of the Income Tax Act 58 of 1962 as amended from 11 May 2016 to date of payment;

2.4 R77 251.81 incorrectly collected by SARS from the sixth respondent in terms of an agency appointment together with interest at the prescribed applicable rate in terms of the provisions of the Income Tax Act 58 of 1962 as amended from 16 May 2016 to date of payment;

3. The first respondent is directed to pay the applicant's costs occasioned by the application;

4. The costs for the hearing on 31 May 2017 are to be limited to unopposed costs;

5. The operation of the order granted in terms of paragraph 2 is suspended for a period of 21 days from the date of the granting of this order.'

[2] On 7 June 2017 this court received a request for reasons in terms of rule 49 (1)(c).

[3] On 28 March 2017 the applicant, aggrieved by incorrect tax assessments by SARS and having had no say in the amounts allegedly due in terms of these flawed assessments having been paid over to SARS by SARS 'agents', Trans 50, Momentum, Sanlam and PPS (the third, fourth, fifth and sixth respondents respectively), whose third party agency appointments to make such payments to SARS at the taxpayer's expense is established by statute, launched an application against SARS seeking the following relief:

1. Rescinding the judgment granted by this Honourable Court on 13 January 2015;

2. Setting aside the third party agency appointments of the third, fourth, fifth and sixth respondents;

3. Directing that SARS pay to the applicant the sum of:

3.1 R470 790.86, being the monies incorrectly collected by SARS from the fourth respondent in terms of the agency appointment, together with interest at the prescribed applicable rate in terms of the Income Tax Act 58 of 1962 as amended, from 16 May 2016 to date of payment;

3.2 R106 705.19 incorrectly collected from the third respondent in terms of an agency appointment together with interest at the prescribed applicable rate in terms of the Income Tax Act 58 of 1962 as amended from 31 July 2013 to date of payment;

3.3 R67 941.22 incorrectly collected by SARS from the fifth respondent by virtue of an agency appointment of the fifth respondent together with interest at the prescribed legal rate applicable in terms of the provisions of the Income Tax Act 58 of 1962 as amended from 11 May 2016 to date of payment;

3.4 R77 251.81 incorrectly collected by SARS from the sixth respondent in terms of an agency appointment together with interest at the prescribed applicable rate in terms of the provisions of the Income Tax Act 58 of 1962 as amended from 16 May 2016 to date of payment;

4. Directing that the first respondent issues the applicant with a reduced assessment for the 2009 year of assessment after taking into account the payment of R592 729.75 paid in March 2008, with accrued interest improperly raised;

5. Directing that the respondent pays the applicant's costs occasioned by the application on a scale as between attorney and client;

6. Further and/or alternate relief.'

[4] At the hearing of the matter it was common cause that prayers 1 and 4 had become academic in that SARS had reduced the 2009 assessment in terms of section 93 of the Tax Administration Act 28 of 2011 ('*TAA*'), being satisfied that there was an error in the assessment and as a result of the reduced assessment, SARS had withdrawn the '*debt management certified statement under section 172*' which has been loosely referred to in the applicant's prayers as a '*judgment*'.

[5] On 26 April 2017 SARS filed a notice of intention to oppose. SARS' affidavit was due fifteen days from filing of the notice of opposition ie 15 days calculated from 26 April 2017. It was not filed within such period or at all. The matter was accordingly enrolled for hearing on 31 May 2017.

[6] Mr Pierre Retief, applicant's attorney of record, deposed to an affidavit in which he recorded the following:

6.1. On 24 April 2017 his office received an email from Maureen Maponya of SARS "*Legal council: Delivery Support and Dispute Resolution, Gauteng Central, Megawatt Park, SARS*". She requested a meeting to endeavour to discuss the matter and to go through the issues with a view to settle the matter out of Court.

6.2. He attended a meeting with Ms Maponya on 3 May 2017. He was requested to apply, in terms of Section 93 of the TAA, for a reduced assessment on behalf of the Applicant in order to rectify the Applicant's income tax statement of account. He requested that the matter be concluded by 18 May 2017.

6.3. On 3 May 2017, the aforesaid request in terms of Section 93 of the TAA was sent to SARS.

6.4. On 4 May 2017, his offices received a letter from the State Attorney's office requesting that the Applicant "*must paginate the Notice of Motion, founding affidavit and annexures thereto, prior to serving the documents on the other party*".

6.5. On 8 May 2017, his office responded. An Index was sent to the State Attorney's office recording that SARS was not prejudiced by the omission to index the notice of motion. He also advised the State Attorney of the meeting which had taken place the previous week on 3 May 2017.

6.6. By the morning of 19 May 2017, his offices had had no response from either the State Attorney or SARS. A letter was addressed to the State Attorney and SARS was copied indicating that his instructions were to proceed with the matter on the unopposed roll.

6.7. On 19 May 2017 he received a mail from SARS, recording that correspondence dated 15 May 2017 had been sent from SARS to the Applicant's postal address, advising the Applicant that the 2009 year of assessment had been revised and the necessary adjustments had been made.

6.8. He immediately contacted the Applicant who denied that he had received the aforesaid notice. He urged the Applicant to look on his

e-filing profile to see whether the adjustments had been made on his Income Tax account. The Applicant later confirmed that the necessary adjustments had been made. SARS further recorded in its correspondence of 19 May 2017, that it would consider the rescission of the judgment.

6.9. He replied to the correspondence from SARS in a letter dated 24 May 2014. He advised that no notice of a reduction of the account, no rescission of the judgment, no setting aside of the third party appointments had occurred and no costs had been tendered.

[7] The matter was accordingly set down on Thursday, 25 May 2017 for hearing on 31 May 2017.

[8] On Friday, 26 May 2017 the first respondent withdrew the judgment. On the same day the applicant was made aware that the third party appointment of the third respondent had been withdrawn on Tuesday, 23 May 2017.

[9] By 31 May 2017, SARS had thus complied with prayers 1 and 4. The applicant persisted with the relief in prayer 2 (only in respect of the 4th, 5th and 6th respondents), the payments in prayer 3 and costs.

[10] On 31 May 2017, Mr Mahlatsi, representing SARS, appeared and argued that the matter should be struck off the roll with costs as between attorney and client

contending that the applicant set down a partially settled opposed matter on an unopposed roll despite the *dies* for filing an answering affidavit by SARS not having expired. He argued that the *dies* for filing an answering affidavit only started to run when properly paginated papers were filed and served and that this had only occurred on 25 May 2017.

[11] No authority for this proposition was quoted and I know of none. The notice of motion, quite clearly, and in accordance with rule 6, required SARS to file its answering affidavit within fifteen days of filing its notice of opposition. It did not do so. SARS did not comply with the rules of this court.

[12] At the hearing of the matter it was common cause that prayers 1 and 4 had become academic in that SARS had reduced the 2009 assessment being satisfied that there was an error in the assessment in terms of section 93 of the TAA and as a result of the reduced assessment, SARS had withdrawn the judgment.

[13] The applicant had been advised that a refund, in his favour, was being processed and should be paid to him in due course but subject to the finalization of internal processes.

[14] SARS filed a practice note in which Mr Mahlatsi defined the issues for determination as follows:

> '5. The real issue that falls for determination in these proceedings is whether the applicant is entitled to set down an opposed partially settled

matter on an unopposed Roll where prayer 1 and 4 in his notice of motion have become moot.

6. Whether the applicant ought to have set down the matter for hearing on an unopposed Roll where the dies for filing an answering affidavit by the first respondent had not expired, given the fact that properly paginated papers were only served on the first respondent on 25 May 2017, the very same day when the matter was enrolled.

7. Whether as a result of the aforesaid the applicant should not be mulcted by the above Honourable Court with costs on an attorney and own client scale of the opposed motion roll.'

[15] Practice directive 9.9.4 provides:

' **9.9.4 Enrolment of applications after notice of intention to oppose**

1. Where the respondent has failed to deliver an answering affidavit and has not given notice of an intention only to raise a question of law (Rule 6(5)(d)(iii) or a point *in limine*, the application must not be enrolled for hearing on the opposed roll. Such an application must be enrolled on the unopposed roll.

2. In the event of such an application thereafter becoming opposed, the judge hearing the matter will give the necessary directions for the future conduct of the matter. '

[16] At the hearing Mr Mahlatsi submitted that paragraph 2 of chapter 9.9.4 entitles a litigant, upon appearing and announcing that the matter is opposed, to a hearing in the opposed court. Once there is opposition, so the argument ran, the court is obliged to refer the matter to the opposed court. He accordingly submitted that his client was, as of right, entitled to have the matter referred to the opposed motion court to argue costs. This demand was boldly made despite the concession that the applicant was entitled to the limited relief it sought and that SARS had no defence to

it. The applicant being substantially (in fact, completely) successful, it is difficult to fathom how another court would have come to another conclusion in respect of costs. As to the proper approach to issues of costs once the relief has been conceded see *Jenkins v S.A. Boiler Makers, Iron & Steel Workers & Ship Builders Society* 1946 (WLD) 15.

[17] As to the practice of '*last-minute-opposition*' by the State Attorney and its counsel, see the following dictum by Van Oosten J in *Minister of Safety & Security v G4S International UK Ltd: In re G4S International UK Ltd v SA Airways (Pty) Ltd & others (Protea Aviation (Pty) Ltd as third party)* [2012] JOL 28815 (GSJ) at [15] and [16], which would tend to suggest that in the space of five years the State Attorney in this Division has learned nothing about the undesirability of sending in counsel at the last minute to oppose matters that have properly been placed on the unopposed role and expecting to obtain postponements as of right. This is what Van Oosten J. said in 2012:

> [15] ... I consider it necessary to digress and to address the alarming neglect of duty by the State Attorney that appears to have become the order of the day in this Division. I will confine the comments I am about to make to cases involving the State Attorney that have served before me in the last few weeks. A number of applications for default judgment against the Minister appeared on the unopposed motion court roll. In those matters the summons had been properly served on the State Attorney, on behalf of the Minister. Those cases all involved claims for an alleged wrongful arrest and detentions by the SAPS. In the absence of a notice of appearance to defend by the State Attorney, they were enrolled on the unopposed motion court roll, for default judgment. **At the last moment when the matters were called in court, an appearance from or on behalf of the State Attorney's office was made** resulting in a postponement and, of course, unnecessary wasted costs. No explanation was tendered for the State Attorney's non-entry of an appearance to

defend, the plaintiffs always content with a suitable costs order in their favour. This kind of neglect, regrettably, permeated into a large number of unopposed matters appearing on another section of the motion court roll: applications against the Minister to compel discovery of documents or compliance with some other notice delivered in terms of the rules. Again, the notices requesting discovery were duly served on the State Attorney, but the lack of compliance, despite despatch of a "courtesy letter" again demanding compliance, caused them to be launched. In one week 12 such matters served before me. **At the hearing there was an appearance by or on behalf of the State Attorney**. I was informed that all those matters had become settled in respect of which draft orders were handed up for confirmation albeit without any explanation for the reason for the non-compliance. The draft orders all provided for payment of the costs of the applications by the Minister. In the present matter, as I will deal with later, a further costs order against the Minister is about to follow. These all provide examples of the unnecessary waste of public funds due to deteriorating standards of service and the absence of diligence.

[16] The instances of neglect and the general decline in the standards of service rendered by the State Attorney's office, is a matter of grave concern which needs to be addressed. It cannot be allowed to endure any longer. An urgent in-depth investigation by the authorities concerned, in my view, is necessary. In order to set the process in motion I have decided to cause a copy of this judgment to be forwarded to the Minister of Police, as well as the Minister of Justice & Constitutional Development. It is hoped that the flashing red warning lights which are apparent from what I have set out above, will encourage an investigation and correction where necessary, in order to rectify a state of affairs that is not conducive to the delivery of justice by a well-established legal service provider in the public sector." (emphasis provided)

[18] By virtue of the concession made in the practice note filed by SARS i.e. that a refund in the applicant's favour was being processed and would be paid in due course '*subject to the finalisation of internal processes*', the court enquired from Mr Mahlatsi what a reasonable time would be for SARS to make payment to the applicant. The court was advised that a period of 21 days would constitute a reasonable time. It was because of this communication that the operation of my order

in respect of the payment by SARS to the applicant, was suspended for a period of 21 days.

[19] Because the application had been set down on the unopposed roll, the court limited the applicant's costs to unopposed costs for the hearing on 31 May 2017, this, despite the fact that the matter was heard for a couple of hours and that the entire court staff sat through lunch time to afford SARS an opportunity to argue its pagination point.

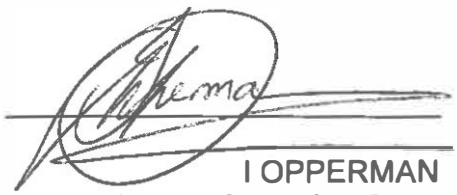
[20] It is unfortunate that scarce judicial resources have to be utilised to address issues which, have largely, become academic. It is also disappointing and unfortunate that tax payers' money is being spent on taking pagination points where no prejudice at all was suffered by SARS in respect of such alleged non-compliance.

[21] Although settlement is to be encouraged and SARS is to be commended for finally doing the right thing in this matter, the applicant in this matter had, by the time the matter came before court on 31 May 2017, in respect of some amounts, been out of pocket since July 2013, had sent the required notices prior to the launching of the application in respect of all amounts and had made considerable efforts to resolve the matter.

[22] SARS had not filed answering affidavits timeously or at all, requested (or rather demanded) that the matter be referred to the opposed motion court under circumstances where there were no triable issues (SARS had conceded that the

applicant was entitled to the limited relief he was seeking) and there was no reason why another court had to read the papers and consider the costs issues afresh. In any event, allowing parties to file affidavits to deal with costs issues only, should only be allowed in exceptional circumstances, if at all, see *Jenkins* (supra).

[23] Having the inherent jurisdiction to regulate its procedures, I consider the approach adopted by this court in this matter to have served the interests of justice in that the incurring of further unnecessary costs was avoided. Having a wide discretion in respect of costs and having considered all the facts and circumstances of the case, I consider the costs awards made, to have been appropriate. Having said that, the decision not to grant a punitive costs order, does, upon reflection, appear to have been merciful and I trust that the state attorney takes cognisance of this.



I OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

Heard: 31 May 2017
Reasons requested: 7 June 2017
Reasons provided: 21 June 2017
Appearances:
For Applicant: Adv CJ Dreyer
Instructed by: Pierre Retief Attorneys
For First Respondent: Adv PM Mahlatsi
Instructed by: The State Attorney
For second to Sixth Respondents: No appearances