# IN THE TAX COURT OF SOUTH AFRICA,

# (HELD IN BLOEMFONTEIN)

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| **Reportable:** | **NO** |
| **Of Interest to other Judges:** | **NO** |
| **Circulate to Magistrates:** | **NO** |

Case number: 13868

In the matter between:

**XYZ CC** Appellant

and

**COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE** Respondent

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| **CORAM:** | DAFFUE, J |
| **HEARD ON:** | 27 February 2019 |
| **JUDGMENT BY:** | DAFFUE, J |
| **DELIVERED ON:** | 27 February 2019 |

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**REASONS**

[1] The Commissioner for the South African Revenue Service ("SARS") brought an application in terms of rule 56(1)(*b*) of the Rules of the Tax Court for default judgment against the taxpayer in terms of section 129(2) of the Tax Administration Act, 28 of 2011 ("the Act"). The parties are interchangeably referred to as appellant/respondent and applicant/respondent in the documents before me. In order to avoid confusion I shall consistently refer to SARS as the respondent and to the taxpayer as the appellant.

[2] I made the following orders after considering the papers and submissions by counsel:

[2.1] Appellant's application for condonation and postponement as well as the further relief claimed in the notice of motion filed today is dismissed with costs.

[2.2] An order is granted in terms of section 129(2) of the Tax Administration Act in terms whereof the assessments are confirmed and consequently the appeal is dismissed.

[2.3] Appellant is ordered to pay the costs of suit.

[2.4] My reasons shall follow in due course.

[3] My reasons as anticipated in paragraph 4 of the court order are contained herein.

[4] The history can be summarised as follows:

[4.1] Respondent issued a revised assessment on 28 November 2013 to appellant in its capacity as taxpayer based on the under declaration on income.

[4.2] Appellant objected to the assessment in its notice of objection dated 13 June 2014 which objection was disallowed by the Commissioner on 29 October 2014.

[4.3] On 19 November 2014 appellant filed a notice of appeal.

[4.4] An appeal meeting was apparently held in the beginning of 2017 and on 18 July 2017 respondent filed its statement of grounds of assessment and opposing the appeal in terms of rule 31(2). It is not my intention to deal with the evidence pertaining to the reasons for the revised assessment as set out fully in respondent's aforesaid statement, but need to point out that respondent referred to the notice of appeal and the fact that nothing was stated as to the relationship between appellant and the A Trust to which entity millions of rands had been paid for which amounts appellant sought deductions from its gross income.

[4.5] Appellant's representative, a certain Mr T of NN Tax Services, received the respondent's statement in terms of rule 31(2) and on 24 July 2017 requested an extension of time to file the rule 32 statement until 30 April 2018. Respondent granted extension until 15 December 2017 only.

[4.6] Appellant did not apply to the court for any further extension and on 16 February 2018 respondent filed a notice in terms of rule 56(1)(*a*) wherein it notified appellant of its intention to apply for default judgment. This was served as in the past on Mr T per e-mail.

[4.7] On 24 July 2018 respondent filed its application for default judgment in terms of rule 56(1)(*b*) read with section 129(2) of the Act. No response was forthcoming.

[4.8] On 3 September 2018 respondent applied for a date for the hearing of the appeal and upon a date being granted the matter was set down for hearing on 13 November 2018.

[4.9] On 7 November 2018 Mr F, appellant's new legal representative, made contact with Mr K, respondent's representative, complaining that appellant's documents were in possession of respondent.

[4.10] By agreement the Tax Court postponed the matter on 13 November 2018 to 27 February 2019. Appellant was ordered in terms of rule 56(2)(*b*) to file its rule 32 statement on or before 27 February 2019, failing which respondent would be entitled to default judgment.

[4.11] No statement in terms of rule 32 was filed as directed by the court.

[4.12] On the morning of 27 February 2019 and just before 10h00, appellant's legal representatives served and filed an application for condonation, postponement and other relief ("appellant's application"). Mr K requested time to read the document and to obtain instructions for which I granted half an hour. When the proceedings ensued Mr K indicated that the application was opposed and that he would argue the matter without having to file any affidavits.

[5] In appellant's application much is made of documents allegedly seized and/or removed by respondent which were in possession of appellant's previous representative, referred to as its tax practitioner. This is inadmissible hearsay evidence. No affidavit from Mr T was obtained. The written communication relied upon date back to 2015 and is also inadmissible as no confirmatory affidavit by the author, Mr T, has been filed.

[6] In any event, the rule 32 statement does not have to be accompanied by any documentation. Appellant had sufficient information to lodge an objection and it is also not entitled to expand its grounds of appeal beyond that contained in its objection.

[7] Rule 36 provides for discovery of documents. Appellant should have made use of this rule if it believed that it needed documents to comply with rule 32. It failed to act accordingly, but in appellant's application relief is also sought to the effect that respondent should comply with rule 36. This is a totally wrong approach.

[8] It is apparent that appellant was represented by Mr T, who is referred to as a tax practitioner, and it has been represented by an attorney and counsel since at least November 2018. Notwithstanding such legal representation it failed to comply with its statutory duties as set out herein, but more importantly disobeyed an order of court without providing any substantial reason for its non-compliance.

[9] Appellant is intentionally delaying the legal processes and again on the morning of 27 February tried to gain time in order to prevent the matter from being finalised. It is accepted that appellant has a right to have its dispute resolved in a court of law as enunciated in section 34 of the Constitution, but it cannot rely on such right when it is using delaying tactics all the time and preventing the appeal from being heard.

[10] The Constitutional Court has held recently that an application for postponement is not there for the taking and even if parties agree to a postponement, the court may insist on dealing with the matter and refuse postponement. See inter alia: *Psycological Society of SA v Qwelane* 2017(8) BCLR 1039 (CC). I mentioned that the application was served and filed minutes before the start of the court proceedings. Clearly, the application was not timeously made. At best for appellant it knew by the end of November 2018 that the documents it allegedly needed, could or would not be presented to it. Yet, it waited nearly two months to file its application a few minutes before the application was to be heard on 27 February 2019. No explanation for the delay was offered. The application was in any event not properly motivated and substantiated. The application was postponed by agreement on 13 November 2018 with the sole purpose to allow appellant to comply with rule 32. It has earlier filed grounds of objection and its rule 32 statement could have been drafted with relative ease, bearing in mind the facts within its knowledge. I refer to the explanation in paragraphs 29 to 32 of the founding affidavit which could and should have been contained in a rule 32 statement.

[11] Respondent was fully entitled to proceed in the manner it did in order to obtain finality. Appellant's application was therefore dismissed with costs and the further orders as set out in paragraph 2 *supra* were made.

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**J P DAFFUE, J**