REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: VAT1826

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

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

(3) REVISED.

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SIGNATURE DATE

In the matter between:

TAXPAYER M Appellant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

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J U D G M E N T

THIS JUDGEMENT WAS PREPARED AND AUTHORED BY THE JUDGE WHOSE NAME IS REFLECTED AND IS HANDED DOWN ELECTRONICALLY BY CIRCULATION TO THE PARTIES/THEIR LEGAL REPRESENTATIVES BY EMAIL AND BY UPLOADING IT TO THE ELECTRONIC FILE OF THIS MATTER ON CASELINES. THE DATE FOR HAND-DOWN IS DEEMED TO BE 10 MAY 2022.

WINDELL, J:

INTRODUCTION

[1] The applicant, Taxpayer M, applied for default judgment in terms of Tax Court rule 56(1), read with section 129(2)(*b*) of the Tax Administration Act (TAA),[1] after the respondent, the Commissioner for the South African Revenue Service ("SARS"), failed to deliver its statement of grounds of assessment and opposing the appeal, in terms of Tax Court rule 31 ("the rule 31 statement"). The applicant prays for a final order, namely, that the respondent's understatement penalty assessments, totalling some R175 million, be set aside.[2] The respondent opposed the application for default judgment and brought a counter-application for condonation for the failure to file the rule 31 statement timeously. The applicant, in turn, opposed the respondent's application for condonation.

[2] The main issue for determination is:

1. Whether the respondent has shown good cause for its default to timeously file the statement and whether the court should condone the late filing of the respondent's statement in terms of Tax Court rule 31 and direct that the appeal (against the imposition of understatement penalties) proceeds on the merits.

2. If the failure is not condoned, whether default judgment in terms of rule 56(1)(*a*), read with section 129 of the TAA should be granted in favour of the applicant.

[3] Ancillary to the main issue, this court is also requested to consider whether the applicant's two applications to strike out in terms of Tax Court rule 42 read with Uniform rules 6(15) and 23(2) should succeed.

CONDONATION APPLICATION

[4] The applicant contends that the respondent failed to deliver its rule 31 statement for a period of almost two years and that it has failed to give a full account of the reasons for the default. The respondent, so it is argued, has therefore not shown good cause for the indulgence that it now seeks. The respondent disputes that it has been in default for two years and contends that there was an agreement between the parties to suspend litigation, which only lapsed in April 2021.

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1 Act 28 of 2011.

2 The following relief is sought: An order setting aside the notices of assessment for the 2013/11 to 2014/07 tax periods in respect of the USP's raised by the respondent in terms of section 96 read with section 222 and section 223 of the TAA, dated 28 March 2018, and thus reducing the USP's (and interest thereon) to R-nil.

The respondent further submits that the rule 56 notice was premature and defective and that the delay in filing the rule 31 statement was slight and should be condoned.

Was there an agreement to suspend litigation?

[5] On 3 June 2019, the applicant delivered its notice of appeal against the respondent's disallowance of objection letter. Tax Court rule 31(1)(*d*) grants the respondent 45 (forty-five) business days to deliver its rule 31 statement, calculated from the date on which the applicant had filed its notice of appeal. The respondent was therefore required to file its rule 31 statement on or before 6 August 2019.

[6] On 31 July 2019, Mr T, the attorney acting on behalf of the respondent, addressed an email to Ms H, the attorney acting on behalf of the applicant, copying Adv A and his junior (Adv A being counsel briefed on behalf of the applicant). In the email Mr T said: "*Further to the emails below, SARS has requested that litigation be pended until the meeting between the parties' legal representatives. Plse confirm per return email."* On 1 August 2019, Adv A responded, copying the attorney for the applicant, and stated *"Noted, with thanks."* On 15 August 2019 and 29 August 2019, Mr T addressed a further two emails to Ms H, wherein he again confirmed that the litigation was suspended until further notice. Ms H responded on 19 August and 4 September respectively, and took no issue with the litigation being suspended until further notice. She instead noted that their instructions were to obtain three alternative dates for a meeting between the parties' legal representatives in an attempt to curtail legal proceedings and suggested that *"the parties continue to hold over pleadings so as to provide an opportunity to ventilate the disputes…"*

[7] Having regard to the clear and unambiguous wording of the email from Adv A and all the subsequent correspondence confirming such arrangement, I am satisfied that the agreement to pend litigation until further notice was already reached on 1 August 2019. Therefore, the objective facts clearly demonstrate that the respondent was not, as alleged by the applicant, in default in filing its tule 31 statement at the time the agreement was reached, and most definitely not for a period of almost two years.

When did the suspension lapse?

[8] After the agreement was reached to suspend litigation, the parties attempted to settle the disputes in respect of various tax issues. It is not necessary for purposes of this application to deal with any of those attempts. On 14 October 2020, the applicant proposed a without prejudice settlement of the disputes against the respondent, including this dispute. On 12 April 2021, the respondent rejected the applicant's settlement proposal. On 15 April 2021, the applicant sent a notice of default, purportedly in terms of rule 56(1), to ABC Inc (and not to T Attorneys). In terms

of this notice the respondent was given 45 days to file its rule 31 statement. That meant that the respondent had to file its statement on or before 21 June 2021.

[9] On 26 April 2021, Mr T informed Ms H that the notice was sent to the incorrect attorney, and, as a result, the respondent only became aware that the agreement to pend litigation was terminated by the applicant, when ABC Inc, informed Mr T of the notice on 22 April 2021. If 22 April 2021 is taken as the day when the notice came to the respondent's attorney's knowledge, then the 45 days lapsed on Monday, 28 June 2021. If it is calculated from 15 April 2021 (the day on which the notice was sent), then the 45 days would have lapsed on 21 June 2021. The respondent filed its statement a month later on 21 July 2021.

[10] There was therefore no default on the part of the respondent prior to 21 June 2021 as there was an agreement in place that all litigation was pended, including the exchange of pleadings. This agreement was only terminated, at best for the applicant, on 15 April 2021, when the notice was served on ABC Inc.

The validity of the notice

[11] Before I return to the condonation application, there is an overlapping issue which first needs to be dealt with. That is whether the notice that was sent to the respondent is in fact a notice as envisaged in rule 56. Rule 56(1) of the Tax Court rules reads as follows:

> "(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
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> (*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)."

[12] Therefore, before an application for default judgment can be launched, the applicant has to meet the following jurisdictional requirements: (a) Prior to the delivery of the notice in terms of rule 56(1)(*a*), the respondent must have been in default with an obligation or failed to comply with a period prescribed under the Tax Court rules; (b) The applicant has delivered a notice in terms of rule 56(1)(*a*) of the Tax Court rules; and (c) The respondent has failed to remedy the default complained about in the rule 56 notice.

[13] There was an agreement between the parties to suspend litigation, which agreement, on applicant's version, was only terminated on 15 April 2021. The respondent was therefore not in default of delivery of its rule 31 statement before 15 April 2021. At best, the notice advised the respondent that the exchange of pleadings was no longer suspended and the applicant now expected the respondent to proceed with the exchange of pleadings. The applicant, in my view, had two possible options that it could have followed: One, the 45 day period provided for in rule 31(1)(*d*) to deliver the rule 31 statement starts afresh, in other words, the respondent now has 45 days in which to file his rule 31 statement, or two, the remaining period from the first 45 days (i.e from 1 August 2019 to 6 August 2019 = 7 days) starts running from the date on which the respondent became aware of the termination of the agreement to suspend. In the notice the applicant granted the respondent 45 days as envisaged in rule 31 to file its statement.

[14] The notice was sent on 15 April 2021, the same day as when the respondent was informed of the termination of the agreement to suspend litigation. The subrule is clear, there must be a default **prior** to the delivery of a rule 56 notice. If the applicant wanted to rely on the respondent's alleged failure to file a rule 31 statement, it should have, after the expiry of the 45-day period, served a formal rule 56(1) notice, in which it ought to have given the respondent 15 days in which to file its rule 31 statement. The 15-day period is the period afforded to a litigant in which to remedy its default identified in the rule 56(1) notice. Should the litigant being notified of its default, fail to remedy the default in the 15 days, the party serving the notice would have the necessary *locus standi* to launch an application as envisaged in rule 56(1)(*b*). The applicant failed to give the respondent the further 15-day period as prescribed in rule 56(1) and instead elected to launch this default application. Therefore, the applicant's application for default judgment is premature and fatally defective.

[15] But, there is another reason why the notice is not valid. The default relied on by the applicant in the notice, is the failure to advise whether alternative dispute resolution ("ADR") proceedings would be appropriate and not the respondent's failure to file a rule 31 statement. I agree with the respondent that the case that the applicant is attempting to advance in the default application, is in fact in conflict with its "rule 56 notice". The capital assessments are already subject to a tax appeal and the pleadings therein are closed. It is therefore evident that the dispute concerning the understatement penalties could never qualify for the ADR process. As a result, the notice does not constitute a valid notice, nor was the respondent placed in default thereby.

The condonation application: Explanation for the default.

[16] Rule 52(6) of the Tax Court rules provides that:

> "A party who failed to deliver a statement as and when required under rule 31, 32 or 33, may apply to the tax court under this Part for an order condoning the failure to deliver the statement and the determination of a further period within which the statement may be delivered."

[17] The respondent had to file its rule 31 statement on 21 June 2021. The respondent filed the statement on 21 July 2021. The respondent provided the following explanation for the late filing of the rule 31 statement: After receiving the "rule 56 notice" on 22 April 2021, the respondent immediately commenced with the compilation of all the documents required in order to brief counsel to assist with the drafting of the rule 31 statement. On 4 June 2021, Ms H provided the counsel, briefed to draft the rule 31 statement, with the documentation received from the respondent. During the beginning of June 2021, the respondent's attorney of record contracted covid-19 and only returned to the office on 23 June 2021. On 23 June 2021, the respondent's attorney of record enquired from the respondent's counsel as to why the rule 31 statement has not been submitted to client yet. The respondent's counsel advised the respondent's attorney of record that she had diarised the date for the filing of the rule 31 statement as 25 June 2021. On Thursday, 24 June 2021, the respondent's attorney formally requested an extension for the filing of the rule 31 statement. On Friday, 25 June 2021, the applicant refused the extension requested. On Monday, 28 June 2021, the respondent's junior counsel, who had been briefed to draft the rule 31 statement, because of her knowledge of the matter, tested positive for Covid-19. On Tuesday, 29 June 2021, the applicant served the application for default judgment. On 19 July 2021, the respondent's junior counsel returned to her practice. On 20 July 2021, the respondent's attorney of record attempted to serve the application for condonation for the late filing of the rule 31 statement and the answering affidavit electronically.

[18] Having regard to the timeline, the respondent was only in default for filing its rule 31 statement for a short period of time. The delay was not as a result of any non-compliance on the part of the respondent, but as a result of the conduct of the respondent's attorney and counsel. Although a litigant cannot always escape the consequences of any default that arose out of the conduct of its legal representatives, there are certain instances where the non-compliance on the legal representative's part is not severe and not attributable to any fault of the litigant. In those circumstances, a court will be loath to close the doors of the court to such litigant. Specifically, where the blame on the part of the legal representative is slight and the prejudice to the litigant would be severe.

Prospects of success in the tax appeal

[19] In *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others,*[3] the Constitutional Court held that in determining whether condonation may be granted, lateness is not the only consideration. The test for condonation is whether it is in the interests of justice to grant condonation. Ngcobo CJ, in *Bernert v Absa Bank Ltd,*[4] on the question as to whether condonation should be granted, concluded that factors relevant to a condonation enquiry include, but are not limited to, the extent and the cause of delay, the prejudice to other litigants, the reasonableness of the explanation for the delay, the importance of the issues to be decided in the intended appeal, and the prospects of success. None of these factors is however decisive; the enquiry is one of weighing each against the others and determining what the interests of justice dictate.[5]

[20] The respondent dealt in great detail with its prospects of success in the tax appeal concerning the imposition of understatement penalties. I agree with the respondent, that this is not an instance where the court should consider closing its doors to a litigant. The interest of justice requires that this dispute be adjudicated by an impartial forum, in accordance with the Tax Court rules and the provisions of the TAA. The respondent's potential prejudice, should this court not grant condonation for the late filing of the rule 31 statement, is manifest. The respondent will be precluded from defending the imposition of USP based on the understatements identified in the capital assessments in a Tax Appeal.

[21] It is trite that condonation is not merely had for the asking and that good cause must be shown to exist. The defaulting party must also give a reasonable and an acceptable explanation for the delay, which covers the entire period of delay. The standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case.

[22] The opposition to the condonation application was, in my view, unreasonable. The period for which condonation is sought is slight and the default was explained satisfactorily. Furthermore, there will be no significant prejudice to the applicant. Exercising my discretion, I find in favour of the respondent and the application for condonation is granted with costs.

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3 2010 (2) SA 181 (CC).
4 2011 (3) SA 92 (CC).
5 At [14].

STRIKING OUT APPLICATION

[23] Rule 6(15) of the Uniform Rules of Court provides that:

> "The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs including costs as between attorney and client. The court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted."

[24] The applicant applied to strike out certain portions of the respondent's answering affidavit in respect of the default application (which is also the founding affidavit in respect of the condonation application) and the respondent's entire replying affidavit in his condonation application. The applications are brought on the basis that the allegations therein constitute new matters, and/or are scandalous, and/or vexatious, and/or irrelevant. In addition, these allegations are argumentative.

[25] It is well established that an application to strike out will not be granted unless the applicant is prejudiced. The prejudice, so it is argued, is that the issue before the court for determination, insofar as the default application is concerned, is crisp and relatively straightforward, but the respondent "has successfully overburdened the record of the present application which now already encompasses more than 2,200 pages. It is submitted that this conduct "hides and confuses what is relevant".

[26] In the first application to strike out, the applicant is seeking to strike out paragraph 22 of the respondent's answering affidavit, including annexures "AA10", "AA11" and "AA12"; paragraph 23 of the respondent's answering affidavit; portion of paragraph 24 of the respondent's answering affidavit, with annexure "AA13"; and paragraph 26 of the respondent's answering affidavit. The respondent submits that both the application for default judgment, as well as the application for condonation can only be considered if the court has due regard to the historical interactions between the parties, the lengthy and protracted attempts to settle the disputes between the parties and the judgment by Fisher J.

[27] I agree with the applicant that the issue for determination is simple and straightforward. However, the applicant in its founding affidavit in support of the application for default judgment, failed to disclose material facts that should have been brought to the court's attention. The most import fact left out was the agreement reached between the parties to suspend the exchange of pleadings. Coupled with that is the alleged failure by the respondent to file its rule 31 statement for "almost two years" and the allegation that the respondent is "abusing its tax recovery powers" and its refusal to always abide by timelines and obligations imposed by the Tax Court rules. These allegations were made without reference to the history of the engagements between the parties which includes the urgent court proceedings before Fisher J. These are all detailed in the portions and annexures sought to be struck out. In light of the allegations made against the respondent these facts were material and relevant to the issues to be decided upon by this court in both the application for default judgment, as well as the application for condonation.

[28] The applicant has failed to indicate how the evidence relating to the historic engagements between the parties and the context of the agreement to pend litigation and the filing of pleadings, should not be considered and why it is prejudiced by it.

[29] In the second application to strike out, the applicant is seeking to strike out the entire replying affidavit filed on behalf of the respondent in the condonation application, alternatively, a large number of paragraphs of the respondent's replying affidavit in the condonation application. The basis for this application is that it contains new matter, and that it is scandalous, vexatious, irrelevant and argumentative.

[30] The respondent has filed an answering affidavit in the default application which also serves as the founding application in the condonation application. The factual basis for the application for default judgment forms part of the factual basis for the application for condonation. The applicant incorrectly contends that the respondent's case for condonation was only outlined in paragraphs 39 to 50 of its answering affidavit. This is supported by the fact that the respondent continuously referred to the facts detailed in the first portion of the answering affidavit in support of the contentions detailed in paragraphs 39 to 50 of its answering affidavit. In the replying affidavit the respondent was responding to the applicant's denial of certain of the respondent's allegations in support of its application for condonation. There is, therefore, no new matter raised in the replying affidavit.

[31] None of the allegations sought to be struck out constitute vexatious, scandalous or irrelevant matter, as envisaged in rule 6(15) of the Uniform Rules of Court. Furthermore, the applicant has failed to advance any basis on which it can be alleged to be prejudiced by any of the allegations detailed in the respondent's replying affidavit.

[32] However, the affidavits filed in the urgent application, the judgment of Fisher J and the other pending applications between the parties, made the papers in this matter more voluminous than what was necessary. It placed an unnecessary burden on the court and the applicant. The respondent argues that it had to provide this court with a complete and accurate picture of the engagement between the parties (including the applicant's predecessor) in order to enable the court to adjudicate these applications with all the facts and to prevent the applicant (in the default application) from making speculative allegations, which are not substantiated by the objective chronological facts. It is submitted that it is for that reason that the respondent annexed the complete urgent application papers to its answering affidavit and founding affidavit in the condonation application.

[33] I disagree. The respondent could have easily summarized the documents it wanted to rely on instead of annexing all of it to the papers. Such conduct not only inflates the high costs of litigation but also leads to a complete waste of valuable judicial time and is of inconvenience to this court.

[34] The courts have previously expressed its displeasure at papers that include unnecessary documents and have, where appropriate, ordered costs to be paid by the offending party. In my view, the respondent, although successful in its opposition of this application, should be deprived of any costs in the striking out application.

ORDER

[35] In the result the following order is made:

1. The application for default judgment is dismissed with costs, including the costs of two counsel.

2. The application for condonation is granted with costs, including the costs of two counsel.

3. The application to strike out is dismissed. No order as to costs.

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L. WINDELL

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

(*Electronically submitted therefore unsigned)*