REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 24578

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

VALLY J SIGNATURE — **8 April 2022** DATE

In the matter between:

MB Appellant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

In Re:
the matters between:

MB Applicant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

AND

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Applicant

and

MB Respondent

AND

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Applicant

and

MB Respondent

J U D G M E N T

Vally J:

[1] The rule of law is fundamental to our present social existence. It concerns serious matters: it concerns lives and livelihoods, it concerns rights and obligations of people and corporates, it concerns issues such as the power of the few and the powerlessness of the many, it concerns issues of wealth, poverty and inequality and the lawfulness or unlawfulness of actions by the executive and the legislature as well as the administration such as the South African Revenue Service, which is represented by the Commissioner in this matter. The rule of law sets out the rules that are applicable to all. It calls for the implementation of those rules without fear, favour or prejudice. Without it individuals and corporates would remain vulnerable to unlawful, unfair, oppressive and abusive treatment. Without it society would lose its anchor, easily degenerate and anarchy and chaos would take root. It is in this context that the *dictum*, "Litigation is not a game"[1]

[1] *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) at [120]; *Cadac v Weber-Stephen Products* 2011 (3) SA 570 (SC) at [10]; *Democratic Alliance v Brummer* 2021 (6) SA 144 (WCC) at [53].

has to be appreciated. The veracity of the *dictum* admits of neither doubt nor debate. The *dictum* is of particular relevance to this matter.

[2] There are three applications before me. They all derive from, an appeal brought by MB against additional assessments initiated by the Commissioner for the SA Revenue Services (the Commissioner) in relation to the 2013, 2014 and 2015 tax years. That appeal is the main matter that is before this court. It is a matter with a tortuous history, more of which will be provided. What need be noted now is that the matter has engaged the resources of this court for a considerable amount of time, and yet it is far from being finalised. The matter is moored in procedural waters. There simply appears to be no end in sight. Moreover, once finalised in this court it may still remain *lis pendens*[2] for some time if an appeal is launched.

[3] MB owns and operates three mines: AA, BB and CC. The dispute between the parties focusses on whether it is correct, lawful or appropriate for MB to deduct capital expenditure incurred at its AA mine from the revenue earned at its BB and CC mines. In support of its case, MB annexed a document to its Rule 32 notice of appeal. This document, referred to as "BMM" in the papers, is key to the case. It is a short, two-page document which consist of a table with six columns and about 89 rows. Three of the columns are dedicated to 2013, 2014 and 2015 tax years. Each row describes a particular expenditure as well as the amount expended during each of the tax years. The expenditure is presented as a globular figure for the relevant year. There is no breakdown of each of the items of expenditure and, more importantly, there is no indication as to which or how much of the respective expenditure was incurred at which particular mining operation. The evidence for all of this will, no doubt, be presented at the hearing. For the moment it bears recording that more than 10 000 pages of potential documentary evidence has been discovered, and 8 000 of these have been identified as relevant by the parties. These have been compiled into bundles and form part of the Trial Bundle that will be utilised at the hearing.

[4] There are three applications before me. The Commissioner launched two applications: one for better discovery and one for further and better particulars. The application for better discovery is brought in terms of rule 35(7) of the Uniform Rules of Court (Uniform Rules) (application for better discovery). The application for further and better particulars is brought in terms of rule 21 the Uniform Rules (the application for further and better particulars). While these applications were in motion MB elected to bring an application to have the additional assessments set aside. This application is brought in terms of rule 56 of the Tax Court rules (rule 56 application). This judgment attends to all three applications. It is convenient to commence with

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[2] A pending suit.

the rule 56 application, to follow it up with the application for discovery and then conclude with the application for further and better particulars.

MB's grounds of appeal

[5] Two of the main issues in the appeal are: (i) whether certain expenses incurred by MB – particularly expenses incurred at the AA mine - in the 2013 to 2015 tax years constitute expenditure incurred in the production of taxable income or capital expenditure, and (ii) whether the taxable income in MB's tax returns for each of these years was understated and whether an understatement penalty (UP) should be imposed on MB. To decide these issues, the court will, amongst others, engage in the question of whether the AA mine is contiguous to the BB and CC mines.

Chronological developments in the matter

2014

[6] On 31 March MB filed its tax return form – ITR14 – for the 2013 tax year. On 1 May the Commissioner issued a notice of assessment in relation to MB's tax liability for the 2013 tax year.

2015

[7] On 30 March MB filed its tax return form for the 2014 tax year. On 1 June the Commissioner issued a notice of assessment in relation to the tax liability of MB for the 2014 tax year.

2016

[8] On 4 September MB filed its tax return form for the 2015 tax year. On 14 November 2016 the Commissioner issued a notice of assessment in relation to the tax liability of MB for the 2015 tax year, and also issued a letter to MB requesting MB to provide him with some documentation.

2017

[9] On 26 January MB responded to the request of the Commissioner. On 22 February 2017 the Commissioner completed his audit of MB's financial affairs and sent the findings to MB. On 24 March MB responded to the audit findings of the Commissioner. On 3 April the Commissioner finalised his audit of the financial affairs of MB for the 2013, 2014 and 2015 tax years. On 1 May he issued a notice of additional assessments for the three tax years. On 19 June MB filed its notice of objection to the additional assessments. On 6 September the Commissioner issued its

decision on the objection: it partially allowed the objection. On 17 November MB filed its grounds of appeal.

2018

[10] Four months after the grounds of appeal were filed, on 26 March, the Commissioner issued a notice for the matter to proceed to this court. Three months later, on 21 June MB filed a notice to compel the Commissioner to file his grounds of assessments as well as his opposition to the appeal. One month later, on 18 July the Commissioner filed his rule 31 statement. Four months later, on 20 November, MB filed its rule 32 statement. Hence, it took the Commissioner eight months from the date when the appeal was lodged to file his rule 31 statement and it took MB four months after that to file its rule 32 statement.

2019

[11] Nothing then occurred for ten months. On 30 September, MB filed a notice calling on the Commissioner to file his discovery affidavit. On 18 October MB filed its own discovery affidavit. On 31 October MB filed a rule 56(1)(*a*) notice informing the Commissioner that if he failed to file his discovery affidavit which, in terms of the Tax Court rules was due 20 days after 31 October, it would ask for the Commissioner's opposition to the appeal to be struck-down and an order in terms of section 129(2) be made in its favour. Eleven calendar days later, on 11 November, the Commissioner finally filed his discovery affidavit. On 18 November MB filed a rule 36(6) notice calling on the Commissioner to discover additional documents. The documents it sought are the subject of the rule 56 application dealt with below. On 27 November the parties held a pre-trial conference. At this conference they agreed to provide each other with a USB memory stick containing digital copies of their respective discovered documents. The discovered documents consist of thousands of pages. On 29 November the Commissioner wrote to the Registrar asking for ten court days to be allocated for the trial. On 2 December the Commissioner responded to the request for better discovery by refusing to accede to the request on the ground, amongst others, that the documents sought constitute privileged information.

[12] With the exception of a week in late November and early December, during the entire period of 2019 the parties did no more than file discovery affidavits and a notice for better discovery. They demonstrated complete disregard for the time periods prescribed in the rules of the Tax Court. Had the parties complied with those rules the appeal may well have been finalised, at least in this court. While they both were responsible for this state of affairs, the Commissioner must be severely criticised for taking so long to attend to his legal obligation to file his documents

timeously. His conduct fell woefully short of his obligations in terms of subsections 195(1)(*a*) and (*b*) of the Constitution of the Republic of South Africa, Act 108 of 1996[3] (the Constitution).

2020

[13] The Registrar set the matter down for five days commencing on 17 February. The parties were of the view that five court days were insufficient to finalise the matter and so agreed to have the matter postponed *sine die*. Nevertheless, six months later, on 12 August, the parties held another pre-trial conference. Once again, they agreed to provide each other with a USB memory stick containing digital copies of their respective discovered documents. Presumably this was necessary because, despite agreeing to do so on 29 November 2019, they failed to adhere to their self-imposed commitments. Also on 12 August the Commissioner sent MB a letter recording the agreement between them as to which of the discovered documents they both intended to rely upon. But then, on 19 August, MB filed a supplementary discovery affidavit. It did so again on 27 August. There is no explanation as to why the documents referred to in these supplementary discovery affidavits were not referred to in the initial discovery affidavit. It bears mentioning that the supplementary discovery affidavit refers to many documents, and runs into thousands of extra pages. On 28 August the Commissioner notified MB of its intention to call an expert witness. At the same time, he filed the expert's opinion. On 3 September MB sent a letter to the Commissioner indicating what it saw as the common cause and disputed facts in the case. On 10 September both parties filed opinions of the expert witnesses they intend to call at the hearing. On 25 September the Commissioner called for discovery and for inspection of certain documents he believed MB to be in possession of but which were not included in the discovered documents. Also on 25 September MB filed a notice of amendment of its rule 32 statement. On 1 October the Commissioner filed another supplementary discovery affidavit in which he included a document spelling out how he came to calculate the UP. On 5 October the Commissioner's attorney signed the pre-trial minute of 27 November 2019. This is almost an entire year later. At or about this time, MB indicated that it intended to amend its rule 32 statement. The Commissioner indicated that he would be opposing any amendment. On 6 October the parties attended a case management meeting with my sister, Collis J. At the instance of the parties Collis J issued an order setting out time periods for the filing of affidavits regarding the intended amendment of MB's rule 32 statement, and postponed the matter to 17 May – 1 June 2021. Hence, the introduction of an

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[3] Sub-sections 195(1)(*a*) and (*b*) of the Constitution read:

> **"195. Basic values and principles governing public administration**
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> (1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
>
> (*a*) A high standard of professional ethics must be promoted and maintained.
>
> (*b*) Efficient, economic and effective use of resources must be promoted."

application to amend the rule 32 statement resulted in the merits of the matter being postponed for eight months. On 9 October MB filed its response to the Commissioner's call of 25 September for better discovery. MB indicated that it was not in possession of the documents sought, save for one which it had already discovered. Also on 9 October MB filed another supplementary discovery affidavit. Again, there is no explanation as to why the documents referred to in this affidavit were not referred to in its initial discovery affidavit or in its subsequent supplementary discovery affidavits. On 22 October this court heard MB's application to amend its rule 32 statement. For the rest of the year the parties awaited judgment in the application.

[14] In summary, most of 2020 was consumed by, once more, the discovery of more documents and then towards the end of the year for an application by MB for an amendment to its rule 32 statement. The reasons for this conduct are not clear on the papers. Nevertheless, the fact that the matter was progressing at such a slow pace is a matter for concern.

2021

[15] On 27 January judgment in the application for the amendment of the rule 32 statement was rendered. The application was dismissed with costs. More than a month later, on 1 March MB filed a notice of appeal against the judgment. On 23 March my brother, Sutherland DJP, directed the parties to attend a case management meeting with himself on 9 April. The appeal was heard on 21 May. Judgment was rendered on 7 September. The appeal was successful. MB was granted authority to amend its rule 32 statement, which it did. On 20 September in response to MB's amendments, the Commissioner amended his rule 31 statement. On 27 September MB filed a supplementary expert opinion. On 12 October the Commissioner filed a reply to the amended rule 32 statement. On 13 October MB filed another supplementary discovery affidavit. Again no explanation was given as to why the documents referred to in this discovery affidavit were not referred to in its initial discovery affidavit, or even in its two previous supplementary discovery affidavits. On 13 and 14 October the trial bundles were produced. On 14 October the parties held another pre-trial conference. The matter was set down for 25 October to 9 November. It had to be postponed *sine die* again because the parties were not ready. Between 25 October and 9 November two expert witnesses – one from each party – conferred. On 25 October I hosted a case management meeting with the parties, one of the many case management meetings I hosted over time. On 25 October I indicated to the parties that the filing of witness statements should be considered. I also directed that the parties file a statement identifying all the common cause facts and all the disputed facts. Later that day MB wrote to my office indicating that it objected to the filing of witness statements. On 26 October the Commissioner wrote to my office indicating that it was in favour of filing witness statements. On 4 November after hosting a formal

hearing I directed that parties file submissions on the issue of whether an order compelling them to file witness statements should be made. On 5 November two of the respective expert witnesses filed their joint minute. On the same day the Commissioner responded to the supplementary discovery affidavit of MB which was filed on 27 September by filing a notice calling for better discovery. MB elected to resist the notice, which led to the launching of one of the applications that is dealt with below. Between 9 November and 8 December the parties engaged each other on the issues such as common cause facts, the admission of documents and their contents and the Commissioner's call for better discovery. On 14 December MB filed yet another discovery affidavit, and again there was no explanation as to why the documents were not mentioned in any of its numerous discovery affidavits previously filed. On 15 December MB filed a notice seeking discovery of documents concerning the imposition of a UP. The notice is a repeat of one it had earlier filed, and which led to it bringing a rule 56 application, which application it withdrew. The Commissioner, as he had done with the previous calls for these very same documents, refused to furnish them.

[16] The entire 2021 then was consumed with an application for amendment to the rule 32 statement, the subsequent amendments of the rule 32 and rule 31 statements, the filing of further discovery affidavits by MB, the exchange of expert witness testimonies, the call for better discovery from the Commissioner, and a repeat of a call by MB for discovery of certain documents from the Commissioner. In the meantime, the Registrar had set the matter down for hearing on two occasions during this year.

2022

[17] The matter was set down for 31 January – 11 February. On 7 January MB filed its core trial bundle. But, as has become the norm, the matter was not ripe for hearing. On 3 February I held a case management meeting with the parties where they informed me that they each intended to bring interlocutory applications. The interlocutory applications were foreshadowed in numerous letters and emails that were exchanged between the parties. On 10 February I had another case management meeting with the parties, and after hearing from the parties, I issued a directive compelling the parties to immediately bring their interlocutory applications. I imposed very strict and truncated time limits. In fact, I ordered them to furnish answering affidavits within one day of receiving the founding affidavits, and replying affidavits within one day of receiving the answering affidavits. Thereafter I allowed one week for heads of argument to be filed, and heard the matter on 4 March. I must relate my appreciation to the parties' legal representatives for complying with my directives, despite the inconvenience it may have caused them. It has made it possible for these procedural matters to be brought to an end.

The rule 56 application

[18] As can be noted from MB's grounds of appeal one of its grievances lies in the decision of the Commissioner to impose a UP. To make out its case on appeal, it sought certain documents from the Commissioner. These are 'true copies of minutes of meetings held' by the respective staff members of the Commissioner who 'considered and/or completed the audit findings relating to the 2013 to 2015 tax years of assessment', as well as all documents, including presentations to, and minutes of meetings held by, any committee or officials employed by the Commissioner, in coming to the conclusion to levy UPs. MB is essentially seeking the record of the deliberations of the Commissioner's staff who decided that a UP should be imposed for each of the tax years in question. The Commissioner refused to provide said documents on the ground that they are privileged and constitutes confidential information. MB contends that the refusal of the Commissioner is unlawful, and accordingly it is entitled to an order in terms of rule 56.

[19] It launched the application on 17 September 2021 and then withdrew it on 1 October 2021. It claims that the application was withdrawn because the matter had been set down for hearing on 25 October to 9 November, and if the rule 56 application was to proceed the matter would automatically have to be postponed as there was insufficient time for all the pleadings in the application to be exchanged. This, I must say, is a most unconvincing explanation for the withdrawal of the application. If it believed it had a strong case, then the fact that pleadings would not have closed is of no moment. MB should have pursued the application, in which case the hearing of the main matter would have to await the outcome of the application. If MB succeeded, as it expected to, then the main matter would dissipate. Thus, to not pursue the application because there was not enough time for pleadings to be exchanged is simply illogical.

[20] Still believing in the rectitude of the discarded rule 56 application it decided to revive it on 16 February 2022.

[21] Rule 56 attends to the situation where a party fails to comply with the rules of the Tax Court. It allows for the court to grant default judgment against the party for failing to comply with the rules. The order the court can issue could be a final one in terms of section 129(2) of the Tax Administration Act, 28 of 2011 (TAA) or it could be one that compels the defaulting party to purge its non-compliance. MB really seeks the former order: a final order which, if granted, would put an end to the matter by upholding the appeal and overturning the assessments in their entirety – and not just the imposition of the UP - of the Commissioner for the 2013, 2014 and 2015 tax years.

[22] This is an appeal, not a review. It is concerned with whether the decisions to impose a UP for each of the tax years was correct or not. To make a determination in that regard this court will need to examine all the evidence that the Commissioner and MB place before it. It is not concerned with why or how the Commissioner came to the decision to impose the UPs. It is not concerned with the rationality or the reasonableness of the Commissioner's decisions. If it were concerned with that then it may be necessary for this court to have regard to the record of the proceedings before the Commissioner, which would include the record of any submissions the Commissioner received from MB, the record of any formal, without prejudice, meetings the Commissioner had with MB and even minutes of any internal meetings held between the Commissioner's staff in the process of taking the decision.

[23] As is usual in tax matters where the Commissioner makes an assessment of the tax liability of a taxpayer, the Commissioner in this case received documents from MB, conducted an audit on the financial affairs of MB and made his decision unilaterally. He made his decision on the basis of the documents and information supplied by MB. MB, like every taxpayer, has a right to challenge the correctness – not rationality or reasonableness – of his decision, including the decision to impose a UP. When a taxpayer challenges the Commissioner's decision to impose a UP, the Commissioner, in terms of section 129(3) of the TAA, bears the onus to prove that the UP should be imposed.

[24] The UP is imposed in terms of section 222 of the TAA. It is triggered by an understatement made by MB. Whether MB is guilty of making an understatement or not is a factual issue. To succeed in resisting the challenge of MB against the UP the Commissioner would, in terms of section 129(3) of the TAA, have to prove, (i) the facts upon which the UP was based and, (ii) that he was prejudiced as a result of the understatement by MB.

[25] The Commissioner has already disclosed all the facts he relied upon to impose the UP and would now be relying upon to overcome his burden of proof. MB has access to them. This court has been provided with those facts in the pleadings, in the bundles and in the witness statements of the Commissioner. Those facts are all that this court will be scrutinising in its determination of whether the decision to impose the UP should stand or not. This court is not at all interested in what deliberations the Commissioner's staff engaged in when coming to the conclusion that a UP should be imposed on MB since their deliberations will be of no assistance to the court. In short: those deliberations bear no probative value at all. The legal questions that arise from those facts will be answered independently of the deliberations of the Commissioner's employees. At the same time those deliberations will neither advance nor prejudice the case of MB. MB has been provided with the facts the Commissioner relied upon. That is all it requires to

meet the case the Commissioner will make out at the hearing of the matter. The court will only be concerned with the veracity of those facts.

[26] The documents bearing no relevance to the determinations of the issues before this court should not be placed before the court: their irrelevance makes it unnecessary for the Commissioner to disclose them. And since MB's case is neither advanced nor prejudiced by being denied access to them, it is not entitled to access them.

[27] Furthermore, the Commissioner is correct to invoke the protection afforded by confidentiality of his internal operations. Those operations are not the subject of the appeal. Sub-section 68(1)(*e*) of the TAA offers the Commissioner this protection. It reads:

> "6**8 SARS confidential information and disclosure**
>
> (1) SARS confidential information means information relevant to the administration of a tax Act that is—
>
> (*a*) …
>
> …
>
> (*e*) information related to the operations of SARS, including an opinion, advice, report, recommendation or an account of a consultation, discussion or deliberation that has occurred, if—
>
> (i) the information was given, obtained or prepared by or for SARS for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law; and
>
> (ii) the disclosure of the information could reasonably be expected to frustrate the deliberative process in SARS or between SARS and other organs of state by—
>
> (*aa*) inhibiting the candid communication of an opinion, advice, report or recommendation or conduct of a consultation, discussion or deliberation; or
>
> (*bb*) … "

[28] The deliberations of the Commissioner's employees dealing with MB's tax affairs are discussions 'or deliberations undertaken in the exercise of a power or performance of a duty conferred or imposed by law' and their disclosure would inhibit the candid communications of these employees. The kind of communications that these employees engaged in when considering whether each of the relevant MB's tax returns was blemished with an understatement,

and whether in terms of section 222 of the TAA they were obliged to impose a UP, is precisely the one that is protected from disclosure by legislative fiat.

[29] For these reasons the rule 56 application stands to be dismissed.

The better discovery application

[30] The main matter was set down for hearing for 25 October to 9 November. Seven court days before that, on 13 October 2021, MB delivered a supplementary discovery affidavit, which included four new documents.[4] No doubt, the new documents were discovered because MB took the view that their contents were relevant for the determination of the issues in dispute. The documents are spreadsheets reflecting, (i) the historical production profile at its various mines, (ii) the head grades and quantities at various mines, (iii) the employee costs at various mines and (iv) the sale of minerals at various mines. The spreadsheets were generated using Microsoft Excel software. The information furnished on these spreadsheets reveal certain expenses incurred and assets acquired for purposes of operating the various mines. The Commissioner intends to use them at the hearing of the main matter. The spreadsheets record that some of these expenses were incurred at the AA mine. One of the spreadsheets reflects the amount of ore that was mined at AA. At the hearing of this application it was pointed out by MB that one of its witnesses has averred in his witness statement that no ore was mined at the AA mine during the relevant tax years. The Commissioner intends to challenge the veracity of the particular averment. All the documents would be utilised to establish the truth of the averment and as such the documents sought bear direct relevance to an issue in the appeal. In short, the Commissioner's view is that the contents of the spreadsheets raised many questions that could not candidly be answered without reference to the source documents without which the spreadsheets could not have been compiled.

[31] The Commissioner is of the view that the information presented on the spreadsheets contradicts some of the claims made in the rule 32 notice of appeal, as well as some of the information contained in other documents discovered by MB. More importantly it contradicts the information reflected in BMM. It has to be remembered though that the discovery of the spreadsheets late in the day led to a postponement of the matter. The Commissioner claimed that this late discovery made redundant much of his preparation for trial. Hence his call for better discovery.

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4 They are referred to as Bundle U, Bundle S and Bundle X in the trial bundle.

[32] The Commissioner brings the application in terms of Tax Court sub-rule 36(6) alternatively in terms of sub-rule 35(7) of the Uniform Rules.

[33] MB raised three points *in limine* as part of its resistance to the application: (i) the notice of motion was not signed by the Commissioner's attorney and therefore there is a lack of authority to institute the application; (ii) the relief sought cannot be granted by the Tax Court as it is not catered for in rule 36 of the Tax Court rules, in other words, this court does not have the jurisdiction to entertain the matter; and, (iii) relief sought cannot be granted under the pretext that it is done in terms of rule 35(7) of the Uniform Rules, as that particular rule has no application here. The first point *in limine* is no longer being pursued by MB. As for the merits of the defence, MB claims that the request for some of the documents is too vague, making it impossible for it to grant access to them. Access to others has been granted in the form of an invitation to the Commissioner to inspect them at its attorneys' office.

[34] In my view, points (ii) and (iii) are inextricably intertwined and therefore can be dealt with together.

[35] Tax Court sub-rule 36(6) allows a party that is not satisfied with the discovery made by the other party to seek better discovery from that other party. Rule 36(6) is similar to rule 35(3) of the Uniform Rules. It reads:

> "(6) If either party believes that, in addition to the documents disclosed, there are other documents in possession of the other party that may be relevant to a request under subrule (1) or (2) or the issues in appeal, as the case may be, that have not been discovered, then that party may give notice of further discovery within 10 days of the discovery under subrule (4), or of the inspection of the documents under subrule (5), to that other party requiring the other party to within 10 days—
>
> (*a*) make the further documents available for inspection; or
>
> (*b*) state under oath that the documents requested are not in that party's possession, in which event the party must state their whereabouts, if known."

[36] The problem arises when the defaulting party refuses to make the documents available for inspection or to furnish them. While both rules envisage such a scenario they offer different solutions. Sub-rules 36(7) of the Tax Court rules provides:

> "(7) A document not disclosed pursuant to a notice of discovery may not, unless the tax court in the interest of justice otherwise directs, be used for any purpose at the appeal by the party who failed to make disclosure, but the other party may use such document."

[37] Sub-rule 35(7) of the Uniform Rules, on the other hand, is slightly more extensive. It reads:

> "(7) If any party fails to give discovery as aforesaid or, having been served with a notice under subrule (6), omits to give notice of a time for inspection as aforesaid or fails to give inspection as required by that subrule, the party desiring discovery or inspection may apply to a court, which may order compliance with this rule and, failing such compliance, may dismiss the claim or strike out the defence."

[38] The difference is manifest on the plain reading of the sub-rules. The difference is that the Tax Court rule does not allow for an aggrieved party to approach the court for an order compelling the defaulting party to make the necessary discovery, whereas the Uniform Rules one does. Tax Court sub-rule 36(7) merely prevents the defaulting party from using the document it refuses to discover. There is no provision forcing the defaulting party to grant the other party access to the document. The other party would forever remain ignorant as to the contents of the document. It would never know if the contents of the document advances its case or not. Given the adversarial nature of our legal system, the fact that the defaulting party does not deny the existence of the document and refuses to allow its opponent access to it, no doubt creates a suspicion in the mind of the party seeking access to the document that the document is prejudicial to the case of the party refusing access thereto. Hence, the refusal to allow access to the document only serves to exacerbate the adversarial nature of their relationship. There are other consequences, particularly for the court invested with the duty to determine the dispute, which will be referred to later.

[39] Tax Court rule 42 is an all embracing rule that incorporates those rules of the Uniform Rules in situations where there is no Tax Court rule that can attend to any matter.

> "42. Procedures not covered by Act and rules
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> (1) If these rules do not provide for a procedure in the tax court, then the most appropriate rule under the Rules for the High Court made in accordance with the Rules Board for Courts of Law Act and to the extent consistent with the Act and these rules, may be utilised by a party or the tax court.
>
> (2) A dispute that arises during an appeal or application under Part F concerning the use of a rule of the high court must be dealt with by the president of the tax court as a matter of law under section 118(3) of the Act."

[40] But this can cause prejudice to the other party as it may want to use the document to advance its case or to rebut the case of the defaulting party. In this case it is the Commissioner who is aggrieved and who claims prejudice in that he is unable to challenge the veracity of the contents of various documents discovered thus far, of the averments in MB's rule 32 notice and of the contents of the witness statement of one of MB's witnesses. The conduct of MB would in

this circumstance result in the Commissioner and the court being prevented from exploring all the facts relevant to the dispute. Such a situation can defeat the ends of justice. It is untenable and should not be countenanced. It is precisely in a situation such as this that sub-rule 35(7) of the Uniform Rules read with rule 42 of the Tax Court rules need be deployed. It can be the tonic that prevents the injustice. The Commissioner is correct to approach this court, and once he has proven that an injustice could result then this court should entertain the application. At that point the jurisdiction of this court is engaged. Conceived differently, it is in the interests of justice that this court's jurisdiction as spelt out in rule 42(2) of the Tax Court rules be engaged when a potential injustice may ensue because of the *lacuna* created by rule 36 of the Tax Court rules.

[41] In this case, the Commissioner has amply demonstrated that such an injustice could ensue if this court turned a blind eye to MB's refusal to furnish the documents. Accordingly, I would dismiss the two points *in limine* dealing with the competence of the court to grant the relief and the competence of the relief sought itself.

[42] It is now necessary to see if the Commissioner has made out a case for the relief sought.

[43] The purpose of discovery is to ensure that all parties are fully aware of all the documents in the possession of each other so that no party is taken by surprise at trial by the production of a document it was unaware of. Once all documents are discovered, parties know what documents are available and can indicate their stance on whether they agree on what the documents purport to be and on the veracity of their contents. This allows for the narrowing of the issues at trial,[5] as well as providing clearer information as to what case a party intends to make and what case it would in all likelihood be required to meet. At the same time it is designed to ensure that a party's right to a fair trial is not unduly restricted.[6] It is a procedural tool that promotes the cause of justice by enhancing the forensic enquiry undertaken by the court and therefore has immense value to society.[7] The first rule of discovery then is that parties should discover all documents in their possession.

[44] However, as with so many things in life, the rule is not absolute. Firstly, there is no need to discover documents that are not relevant to the issues in dispute. Secondly, sometimes it comes into conflict with other rules or principles that, too, protect and advance the interests of justice. A party may sometimes be genuinely fearful of discovering certain documents, and may be able to show that discovering certain documents may be so harmful to its interests that justice

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5 *Durbach v Fairway Hotel Ltd 1*949 (3) SA 1081 (SR) at 1083.

6 *Independent Newspapers v Minister of Intelligence Services* 2008 (5) SA 31 (CC) at [25].

7 NBC Holdings v Absa Bank Ltd Gauteng High Court, Johannesburg (Case No.: 2724/2018); *Riddick v Thames Board Mills Ltd* [1977] 3 All ER 677 at 687a and 687c-d.

is better served by withholding the documents, even though such would be a constraint on the forensic enquiry. The court in that circumstance would have to engage in a balancing exercise of the competing rights, interests and constitutional values. The principles have been elegantly captured in the following *dicta* which, though lengthy, bears repeating:

> "[25] Ordinarily courts would look favourably on a claim of a litigant to gain access to documents or other information reasonably required to assert or protect a threatened right or to advance a cause of action. This is so because courts take seriously the valid interest of a litigant to be placed in a position to present its case fully during the course of litigation. Whilst weighing meticulously where the interests of justice lie, courts strive to afford a party a reasonable opportunity to achieve its purpose in advancing its case. After all, an adequate opportunity to prepare and present one's case is a time-honoured part of a litigating party's right to a fair trial.
>
> [26] In the context of civil litigation the right of access to information which is under the control of another litigating party is regulated by discovery procedures applicable in various courts. For instance, Rule 29 of the Rules of this Court specifically incorporates Rule 35(13) of the Uniform Rules for purposes of discovery, inspection and production of documents in application proceedings in this Court. It has long been recognised that adequate but equitable discovery procedures form an indispensable and integral part of a fair civil trial.
>
> [27] Even before the advent of the Constitution, courts often, and correctly in my view, recognised that when there is a claim of confidentiality over information that is sought to be discovered or disclosed other considerations of fairness arise. These are well recognised by Schutz AJ in *Crown Cork & Seal Co Inc and Another v Rheem South Africa (Pty) Ltd and Others* (*Crown Cork*):
>
> > 'A conflict arises] between the need to protect a man's property from misuse by others, in this case the property being confidential information, and the need to ensure that a litigant is entitled to present his case without unfair halters. And, although the approach of a Court will ordinarily be that there is a full right of inspection and copying, I am of the view that our Courts have a discretion to impose appropriate limits when satisfied that there is a real danger that if this is not done an unlawful appropriation of property will be made possible merely because there is litigation in progress and because the litigants are entitled to see documents to which they would not otherwise have lawful access. But it is to be stressed that care must be taken not to place undue or unnecessary limits on a litigant's right to a fair trial, of which the discovery procedures often form an important part.'
>
> [28] Independent Newspapers placed much reliance on this passage in urging us to give it access to the confidential documents for purposes of preparing its case. However, without detracting from the value of his reasoning, it is important to recognise that in that case Schutz AJ was concerned with measures to facilitate fairness and to avoid abuse of the discovery procedures within a civil suit connected to unlawful competition. We must keep in mind that the claim of Inde-

> pendent Newspapers is novel because it does not rely on any of the rights to discovery of documents or other information under the control of a party to litigation. It relies on the right to know or receive what is contained in a sealed part of a court record in order to decide whether to impugn its alleged confidential status. In effect, as non-parties to the underlying matter, the order it sought was to vindicate the right to know and to let the public know and nothing more."[8]

[45] In the present case, the Commissioner intends to use the documents at the hearing. He says that they allow him to test the veracity of some of the claims made by MB. By not availing them MB denies him this opportunity. They are the source documents which made it possible for MB to generate the spreadsheets. The spreadsheets provide greater detail of what is in BMM, which is a document – also generated by MB – that is fundamental to the case.

[46] MB objects to the request for better discovery on the grounds that:

a. it is calling for documents that are irrelevant to the issues in dispute: or,

b. it is "too wide, non-specific and vague"; or,

c. some of the documents have already been discovered or it has offered the Commissioner the access thereto by granting him the right to inspect them at the offices of its attorneys; or lastly

d. "certain documents do not exist" or MB does not know whether they exist.

[47] None of its objections, in my judgment, carry any weight. It is crucial to bear in mind that the Commissioner only seeks source documents. The documents are the ones used to compile the annexures contained in Bundles, U, S and X and which provide some of the detail to the annexure 'BMM'. The documents are, in my view, self-evidently relevant. They assist in establishing where the truth lies in this dispute. Those documents which have not been discovered but which have been offered for inspection should simply be provided. As MB has no objection to them being inspected it should have no objection to providing them. As for its last objection – (d) in the previous paragraph - if any document does not exist, the rule provides that it may simply state so under oath, and if a document does exist but is not in the possession of MB, it may simply state, again under oath, where it believes the document may be obtained. There is no further obligation on it. In this case, however, it has not been specific as to which document does not exist and which it does not possess and where that specific document can be found.

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8 *Independent Newspapers* n 5 at [25] – [28] (footnotes omitted).

[48] For these reasons, I hold that MB should avail the documents requested by the Commissioner. The documents are listed in Annexure 'A' to this judgment.

The application for further particulars

[49] Upon receipt of the spreadsheets referred to above, the Commissioner studied them carefully, in the course of which he compared the information contained therein with the information contained in the previously discovered documents, the averments in the rule 32 statement of MB and in the witness statement of one of MB's witnesses. The comparison, according to him, revealed that MB's case is inconsistent and contradictory. As a result, he elected to seek particulars from MB. The request is couched in the form of questions, but it also includes a call for further documents. MB denies that there is any inconsistency or contradiction in its case and therefore refused to answer the questions or furnish the documents.

[50] Hence, this application. The Commissioner asks this court to order MB to provide the answers to the question as well as furnish copies of the documents he seeks.

[51] As there is no provision in the Tax Court rules allowing a party to request further particulars, MB asks that the application be dismissed with costs.

[52] However, further particulars can be sought in the High Court in terms of rule 21 of the Uniform Rules. Tax Court rule 42, as we know from the discussion hereinbefore, allows for the invocation of any provision of the Uniform Rules in order to overcome any inadequacy in the Tax Court rules. Accordingly, the application can be entertained by this court.

[53] Rule 21 allows a party to seek only those further particulars that are strictly necessary for the preparation for trial. The learned authors of the authoritative work, *Erasmus, Superior Court Practice*, remind us that the:

> "purpose of permitting a party to call for further particulars for trial is (a) to prevent surprise; (b) that the parties should be told with greater precision what the other party is going to prove in order to enable his opponent to prepare his case to combat counter allegations; and (c) having regard to the aforegoing nevertheless not to tie the other party down and limit his case unfairly at the trial."[9]

[9] *Erasmus, Superior Court Practice*, D1-252 (footnotes omitted).

[54] It is inappropriate to call for documents in an application for further particulars. The documents are sought on the same basis as the documents sought in the request for further and better discovery which has been discussed above. The Commissioner cannot in this application be granted the order for documents to be furnished. He should have sought the documents in that application.

[55] As for the rest of the application the Commissioner seeks answers to questions that focus on alleged inconsistencies or contradictions in the case presented by MB. They go no further than that. The alleged inconsistencies or contradictions create uncertainty as to what MB's case at trial will be. The uncertainty makes it difficult for the Commissioner to prepare properly for trial. The questions relate to information supplied by MB in the various documents it has filed. They would therefore be strictly necessary for the preparation of the trial hearing.

[56] Even if there is no inconsistency or contradiction in the case of MB, MB by providing the answers will be doing no more than clarifying what its case is. It suffers no prejudice by having to answer questions focussed on information contained in its documents.

[57] Accordingly, MB should provide the answers to the questions raised in the Commissioner's request for further particulars.

General comment

[58] The first dispute that arose in this matter concerns the tax liability of MB for the 2013 tax year. Nine years later it is not resolved in the court of first instance. It is eight years since the second dispute arose and seven years since the third dispute arose. The issues in all three disputes are the same, so it made sense, both from a logical as well as an optimal use of judicial resources perspectives to combine them. Hence it would be fair to say that it has taken a full seven years before the merits of the matter can be even heard in the court of first instance. The main reason for this is that the parties have allowed the matter to be mired in procedural matters. The Commissioner took too long to issue his rule 31 statement. MB decided to take advantage of the rule relating to discovery of documents – it discovered documents piecemeal, sometimes just a few weeks before the merits of the matter were to be entertained. Discovery was sometimes made after the pre-trial conference was already held. The court, too, has to accept some responsibility for the delays that ensued. The appeal judgment on a procedural issue - whether an amendment of the rule 32 statement should be allowed - was delivered seven months after the oral hearing was entertained. Thereafter, the procedural disputes simply continued. MB brought a rule 56 application, and then withdrew it. But, they continued to do battle on the issues of discovery and further particulars for preparation for trial. The parties allowed themselves to be

caught in a whirlwind of procedural skirmishes. These skirmishes were finally brought to a head when I directed that the parties identify all their procedural disagreements, bring the necessary interlocutory applications to have them finalised. The directive also required them to truncate the times available for the filings of their respective pleadings in the matters. This resulted in the three applications that form the subject matter of this judgment.

[59] The procedural skirmishes intensified as soon as the hearing of the matter was imminent. The hearings were, as per the request of the parties, set down for two weeks each time. The postponements caused significant inconvenience to the court. Judges were allocated for each set down and assessors were appointed. The assessors had gone out of their way to make themselves available for two weeks of public service only to be told at the last moment that their services were no longer required.

[60] The merits of the matter cannot be too complicated. It concerns, in the main, whether a particular expenditure qualifies as expenditure incurred in the course of earning an income, and whether MB's taxable income was understated in its returns. Such a dispute should never take seven years to be completed in the court of first instance. In fact, it should never take seven years to exhaust the appeal processes and be finalised once and for all. This is one of the consequences of a situation where parties treat litigation as a game of 'hide and seek'. As I say in the first paragraph to this judgment 'litigation is not a game'. Treating it like one, only serves to bring the principle of the rule of law into disrepute. It undermines public confidence in the judicial system, which is then seen as promising a lot but delivering very little. Responsible legal representatives, who are all officers of the court, should never allow themselves to be part of, or become entrapped in, practices that bring disrepute to the judicial system.

[61] This judgment should, hopefully, bring an end to all their procedural disagreements and allow for the matter to be finalised in this court, at least, during 2022.

Costs

[62] The Commissioner has been fully successful in the rule 56 application and the application for better discovery and he has been substantially successful in the application for further and better particulars. In the circumstances he should be awarded his costs. The matters combined warrant the employment of two counsel.

Orders

[63] The following orders are made:

1. Rule 56 application
   1.1. The appellant's (MB's) rule 56 application is dismissed.

2. The discovery application
   2.1. The appellant (MB) is to furnish the documents listed in Annexure A to this judgment to the respondent within five court days of this order:

3. The application for further and better particulars
   3.1. The appellant (MB) is to deliver (file and serve) detailed answers to questions listed in Annexure B to this judgment within five court days of this order.

4. Costs of all three applications
   4.1. The appellant (MB) is to pay the costs of the respondent which costs are to include those occasioned by the employment of two counsel

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Vally J

Date of hearings: 4 March 2022
Date of Judgment: 8 April 2022

Annexure A

A. Management Reports and Sale Records

1. All monthly management reports in respect of the AA mine for the period 1 January 2013 to 31 December 2015.

2. All monthly management reports in respect of the BB and CC mine for the period 1 January 2013 to 31 December 2015.

3. All monthly production records in respect of ore mined/extracted from AA for the periods falling in the 2013 to 2015 tax years.

4. All monthly production records in respect of ore mined / extracted from BB and CC for the periods falling in the 2013 to 2015 tax years.

5. All documents evidencing sales of zinc concentrate, including all applicable sale or offtake contracts, but not limited to and/or zinc concentrate produced from AA relating to the 2013 to 2015 tax years.

6. All documents evidencing sales of zinc concentrate, including all applicable sale or offtake contracts, but not limited to and/or zinc concentrate produced from BB and CC relating to the 2013 to 2015 tax years.

B. Production and Process Operation Document

7. All documents evidencing monthly plant operating results of the Hill concentrator relating to the 2013 to 2015 tax years.

8. All documents evidencing monthly stockpile movement of tonnes and zinc grade of the AA ore located at the Hill concentrator for the 2013 to 2015 tax years.

9. All plant production reports evidencing ore feed tonnage and grade by ore source for the AA pyrite, pyrrhotite and magnetite ore through the Hill concentrator relating to the 2013 to 2015 tax years.

10. All documents relating to the mine modifying factors for the AA underground mining operations for the 2013 to 2015 tax years.

11. All documents setting out the basis for allocation of the zinc concentrates to AA for the 2013 to 2015 tax years.

12. All documents in respect of the Appellant's chemical analyses of the zinc concentrate produced from AA ores, including the zinc and manganese grades in the zinc concentrate produced for the 2013 to 2015 tax years.

C. Policy and Procedures

13. All the documents in respect of the Appellant's ore blending policies and procedures applicable to the AA ore processed through the Hill concentrator that applied during the 2013 to 2015 tax years.

14. All documents in respect of the Appellant's metal accounting policies and procedures applicable to AA ore processed through the Hill concentrator which applied during the 2013 to 2015 tax years.

D. As-built documentation for the AA operation

15. The Appellant's records relating to the as-built flowsheet for AA concentrator plant, including the basis for changes to the flowsheet as envisaged at November 2014.

16. The Appellant's records relating to the as-built line diagrams for the installations for the power and water supply to BB, CC and AA.

17. The Appellant's records relating to the as-built general arrangement plan for the AA operation, including tailings storage facility for AA.

E. AA North Pit Operations

18. All documents relating to the Appellant’s annual face positions of the North open pit at AA for the 2016 to 2021 tax years.

19. All documents relating to the Appellant's annual production of zinc concentrate from the north open pit from the AA concentrator plant, including the zinc and manganese grades for the 2016 to 2021 tax years.

F. AA South Pit operations

20. All documents relating to the Appellant's annual face positions of the South open pit at AA for the 2016 to 2021 tax years.

21. All documents relating to the Appellant's annual production of zinc concentrate from the south open pit from the AA concentrator plant, including the zinc and manganese grades for the 2016 to 2021 tax years.

G. Prospecting Operations

22. All documents relating to the applications, rights, permits and approvals filed with or received from the Department of Mineral Resources in respect of the AA south pit resource development drilling, including all correspondence sent or received for the 2013 to 2015 tax years.

H. Employment documents

23. All employment records and employment contracts of individuals who were employed for the mining operations at AA for the 2013 and 2014 tax years.

24. All job descriptions and specifications relating to the above employees for the mining operations at AA for the 2013 and 2014 tax years.

25. All payslips issued by the appellant to individuals employed to mine at the AA mine for the 2013 and 2014 tax years.

26. All employment records and employment contracts of individuals who were employed as part of the project team in relation to the AA project for the 2013 to 2015 tax years.

27. All paysllps issued by the appellant to individuals employed as part of the project team in relation to the AA project for the 2013 to 2015 tax years.

I. Other documents

28. The FINAL 3- 4Mtpa Definitive Feasibility Study (DFS) compiled by Tata Consulting.

29. All project plans considered and or discussed and or approved by the appellant in respect of AA for the 2016 to 2021 tax years.

30. All documents relating to the appellant's accelerated mining schedule prepared by ABGM.

31. All testwork reports and economic trade-off analysis to support the appellant's blending strategy and abandonment of the Skorpion refinery modifications, as envisaged in November 2014.

ANNEXURE B

Historical Production Profile:

1. To whom was the Historical Production Profile delivered and/or circulated?

2. How does the Appellant explain that it mined 138 793 tonnes of ore at the AA mine in the 2014 tax year?

3. The Appellant is required to explain how the quantity of 138 793 tonnes of ore mined at AA for the 2014 tax year was determined?

4. How were the 2623 tonnes of metal in concentrate ("**MIC**") for AA determined?

5. How was the R29 929 782.00 on AA Revenue for MIC established?

Head Grades and Quantities of Ore and Concentrate spreadsheet

6. Why does the AA metal in concentrate portion of ore processed during the 2013 and 2014 tax years differ to what is stated in Head Grades and Quantities of ore and concentrate spreadsheet under Trial Bundle 061: U. Transportation and Production Item 3 on CaseLines?

7. Who was/were the authors of the Head Grades and Quantities of ore and concentrate spreadsheet?

8. When was the Head Grades and Quantities of ore and concentrate spreadsheet generated?

9. Where is the supporting (source) documents used by the Appellant to compile the document?

10. Which of the amounts does the Appellant rely on?

Transportation and sale of ore

11. Was all the ore mined from AA during the 2014 tax year transported to the Hill Concentrator Plant? If so:

    11.1. How did the AA mine account for R29 929 782.00 in revenue from the sale of ore?

    11.2. Which documents reflect the sale of ore?

    11.3. How much ore was transported to the Hill Concentrator Plant?

    11.4. Was the ore mined at AA stockpiled at the Hill Concentrator?

        11.4.1. If so: when?

        11.4.2. Where is the supporting documentation showing that it was stockpiled at the Hill Concentrator Plant?

12. Given that the SPH cost summary for the transportation of AA ore to the Hill Concentrator plant shows no ore being transported from AA for the 2014 tax year, the Appellant is required to particularise on what factual basis the AA portion earned R29 929 782.00 in revenue.

Prospecting documents

13. What prospecting rights, permits, and approvals did the Appellant have in the 2013, 2014, and 2015 tax years, in respect of the AA South Pit?

14. What prospecting drilling took place in the 2013, 2014, and 2015 tax years in respect of the AA South Pit?

Employee Cost Summary spreadsheet

15. Was the AA mine a producing mine during the 2013 and 2014 tax years? If so:

    15.1. What were the specific duties of the relevant employees in relation to the mining operations for the 2013 and 2014 tax years?

    15.2. Which employees were part of the producing costs of the AA mining operation?

16. In the event that the AA mine was not producing during the 2013 and 2014 tax years, was the AA mine being developed into an open pit mine during this period? If so:

    16.1. Which employees formed part of the costs to develop the AA mine into an open pit mine?

    16.2. What were the specific duties of these employees in relation to the development of the AA open pit mine?

17. Is it alleged in the BMM annexure that the AA manpower expenses for the project team in 2013 was R13 447 292.00 in the 2013 tax year, R24 502 496.00 in the 2014 tax year and R10 702 975.00 in the 2015 tax year, with a total amount of R53 481 595.00 ? If so:

    17.1. Why does the manpower expense differ to what is stated in Employee Cost Summary spreadsheet under Trial Bundle 059: S. Employee Contracts Item 14 on CaseLines?

    17.2. Who was/were the authors of the Employee Cost Summary spreadsheet?

    17.3. When was the Employee Cost Summary generated?

    17.4. Exact detail is required with reference to the specific amounts of the employee costs spreadsheet.

    17.5. Where is the supporting (source) documents used by the Appellant to compile the document?

    17.6. Which of the amounts does the Appellant rely on?