**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Reportable**

Case no: 1303/2023

In the matter between

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

and

**VIRGIN MOBILE SOUTH AFRICA (PTY) LTD** **RESPONDENT**

**Neutral citation:** *Commissioner for the South African Revenue Service v Virgin Mobile South Africa (Pty) Ltd* (1303/2023) [2025] ZASCA 77 (04 June 2025)

**Coram:** NICHOLLS AND KEIGHTLEY JJA AND MUSI, WINDELL AND MOLITSOANE AJJA

**Heard:** 28 February 2025

**Delivered:** This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website, and by release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 04 June 2025.

**Summary:** Tax law – Tax Administration Act 28 of 2011 – default judgment – condonation – whether a party is exempted from applying for condonation for the late filing of a Rule 31 statement when that party files their statement after receiving a notice in terms of Rule 56(1) – whether the high court correctly interpreted the provisions of Rule 56(1) of the Tax Court Rules.

## ORDER

**On appeal from:** Gauteng Division of the High Court, Pretoria Mabuse J (minority) Van Niekerk AJ and Sethusha-Shongwe AJ (majority), sitting as a court of appeal:

1 The appeal is upheld with costs, including the costs of two Counsel.

2 The order of the high court is set aside and replaced with the following:

'2.1 The appeal is upheld with costs.

2.2 The order of the tax court is set aside and replaced with the following:

"2.2.1 The application for default judgment is declared an irregular step and set aside.

2.2.2 The taxpayer is ordered to pay the costs of this application."'

## JUDGMENT

**Musi AJA (Nicholls and Keightley JJA and Windell and Molitsoane AJJA concurring):**

### Introduction

[1] This appeal is against the majority judgment and order of the full court of the Gauteng Division of the High Court, Pretoria (the high court), in which it dismissed an appeal against a judgment from a single judge of that court, sitting as the Tax Court (the tax court). The tax court had dismissed an application in terms of Rule 30(1) of the Uniform Rules in which the appellant, the Commissioner for the South African Revenue Service (SARS), sought an order to set aside a default judgment application against it by the respondent, Virgin Mobile South Africa (Pty) Ltd (taxpayer), as an irregular step. Before the hearing, this Court requested the parties to file supplementary heads of

argument on whether the full court's order is appealable. Any reference to the Rules in this appeal is a reference to the Tax Court Rules,[1] unless otherwise stated.

[2] SARS issued an additional assessment against the taxpayer for the 2014, 2015 and 2016 tax years. The taxpayer filed a notice of appeal against the assessment on 22 May 2019. In terms of Rule 31, SARS was then obliged to file a statement within 45 days in response to the appeal. SARS failed to file its statement.

[3] Despite compliance reminders being sent to SARS, it remained in default. On 13 October 2020, the taxpayer filed a notice in terms of Rule 56(1)*(a)* calling upon SARS to remedy its default within 15 days, failing which, it would apply for default judgment against it. On 20 October 2020 (five days after the notice was served) SARS complied with the notice and filed its Rule 31 statement. Notwithstanding SARS' compliance with the notice, the taxpayer applied for default judgment, on 30 November 2020.

[4] On 14 December 2020, SARS filed a notice in terms of Rule 30 of the Uniform Rules, read with Rule 42, calling upon the taxpayer to withdraw the default judgment application, failing which, it would launch an application to set it aside as an irregular step. SARS contended that it had complied with the taxpayer's notice, thereby curing its default.

[5] The taxpayer disagreed, prompting SARS to launch the Rule 30 application, which the tax court dismissed with costs. SARS, in turn, appealed against the tax court's order to the high court, the majority of which dismissed the appeal with costs. This Court granted SARS leave to appeal. I now turn to decide the appealability issue before determining the merits.

[6] The taxpayer argued that the order is not appealable because: (a) it is not final in effect, and (b) it is interlocutory. SARS contended that it would be in the interests of justice

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[1] Rules Promulgated under section 103 of the Tax Administration Act 28 of 2011 published in Government Gazette No. 37819 of 11 July 2011.

for this Court to decide the main issue due to the divergent judgments in different tax courts. It further contended that a decision of this Court would create certainty.

[7] Section 117(3) of the Tax Administration Act 28 of 2011 (TAA) deals with the jurisdiction of the tax court. In terms of s 117(3), it may hear and decide an interlocutory application or 'an application in a procedural matter relating to a dispute under … Chapter 9 as provided for in the "rules".' Section 129(2) of the TAA prescribes the powers of the tax court. It provides:

'In the case of an assessment or "decision" under appeal or an application in a procedural matter referred to in s 117(3), the tax court may–

(a) confirm the assessment or "decision";

(b) order the assessment or "decision" to be altered;

(c) refer the assessment back to SARS for further examination and assessment; or

(d) make an appropriate order in a procedural matter.'

[8] Section 133(1) addresses the issue of appealability in respect of decisions of the tax court: a taxpayer or SARS may appeal against 'a decision of the tax court under ss 129 and 130'. Section 130 has no relevance to this appeal. The question is thus whether the dismissal of an application in terms of Rule 30 of the Uniform Rules is a decision as contemplated in s 129(2) of the TAA.

[9] Section 129(2)(d) gives the tax court the power to make appropriate orders in procedural matters. This power is linked to that court's jurisdiction under s 117(3) to hear applications in procedural matters relating to disputes. The taxpayer's appeal against SARS' additional assessment was a dispute under Chapter 9 of the TAA. Was the Rule 30 application filed by the taxpayer a procedural matter relating to that dispute? If so, the decision of the tax court is appealable. The Rules do not provide for a procedure akin to Rule 30 of the Uniform Rules. In the absence of any Rule in this regard, a party may, in terms of tax court Rule 42, utilise the most appropriate Rule under the Uniform Rules. In this instance, it appears that rule 30 of the Uniform Rules is the most appropriate rule to

have a step declared irregular. In *SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw*[2] it was said:

'I have no doubt that Rule 30 (1) was intended as a procedure whereby a hindrance to the future conducting of the litigation, whether it is created by a non-observance of what the Rules of Court intended or otherwise, is removed.'[3]

[10] Essentially an irregular step is taken when one party takes a procedural step inconsistent with the Rules, in order to advance the litigation, to the prejudice of the other party. This was illustrated in *Wingate-Pearse v Commissioner South African Revenue Service* (*Wingate-Pearse*),[4] in which this Court held that an application in a procedural matter relating to a Chapter 9 dispute as provided in the Rules, is appealable.

[11] *Black Mountain Mining (Pty) Ltd v Commissioner for the South African Revenue Service (Black Mountain)* [5] qualified the appealability of an order in a procedural matter thus:

'We therefore conclude that the reference to an "interlocutory" application in s 117(3) refers to a simple interlocutory application and resulting order, whilst reference to "an application in a procedural matter relating to a dispute under this Chapter as provided for in the "Rules", refers to those orders arising from applications specifically provided for in the Rules; provided they are final in effect and cannot be altered by the Tax Court, are definitive of the parties' rights and dispositive of at least a substantial portion of the issues.'[6]

[12] The proviso, in *Black Mountain*, with regard to the appealability of orders in procedural matters, as described in the TAA, is couched in similar terms as the common law test for appealability laid down in *Zweni v Minister of Law and Order*[7] (*Zweni*). It postulates a bifurcated enquiry in order to determine the appealability of an order in a

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[2] *SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw* 1981 (4) SA 329 (O).
[3] Ibid at 333G-H.
[4] *Wingate-Pearse v Commissioner, South African Revenue Service* [2017] ZAGPJHC 218; 2017 (1) SA 542 (SCA) para 14.
[5] *Black Mountain Mining (Pty) Ltd v Commissioner for the South African Revenue Service* [2021] ZAGPJHC 800; 2021 JDR 3319 (GJ).
[6] Ibid para 36.
[7] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532I-533A.

procedural matter. First, it must be subjected to the *Zweni* test and, if it does not meet those requirements, then the interests of justice standard should be applied.

[13] The factors in *Zweni*, though still relevant, have been subsumed by the interests of justice standard which is now the only standard to be met.[8] Whether it would be in the interests of justice to determine the appealability of an order in a procedural matter must be decided on a case-by-case basis, after weighing-up all the relevant factors, including those in *Zweni*. In my view, the better approach would be that an application in a procedural matter relating to a dispute under Chapter 9 of the TAA is appealable, provided it is in the interests of justice to consider the appeal. I turn to consider the relevant factors in this matter.

[14] In terms of Uniform Rule 30(2)*(a)* an application to set aside an irregular step may be made only if the applicant has not taken a further step in the cause with knowledge of the irregularity. If SARS were to apply for condonation, it would amount to a further step in the progress of the matter and it would not be able to utilise the Rule to complain about the same irregular step. The order has a final effect and cannot be revisited by the tax court.

[15] There are conflicting decisions in the tax court on the main issue, which creates uncertainty. Uncertainty as to the correct legal position is not in the interest of justice. Rather, the interests of justice require clarity regarding the proper interpretation of Rule 56(1).

[16] Accordingly, the application in terms of Uniform Rule 30(1) to remove the irregular step, is an application in a procedural matter as contemplated in the TAA and it would be in the interests of justice to hear and determine the appeal. I turn now to the merits of the appeal, commencing with the relevant Rules.

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[8] *City of Tshwane Metropolitan Municipality v Afriforum and Another* [2016] ZACC 19; 2016 (6) SA 279 (CC); 2016 (9) BCLR 1133 (CC) para 40. See also: *United Democratic Movement and Another v Lebashe Investment Group* (Pty) Ltd [2022] ZACC 34; 2022 (12) BCLR 1521 (CC); 2023 (1) SA 353 (CC) paras 34 to 35.

[17] Since SARS had not complied with Rule 31, this Rule serves as a convenient starting point. It states:

‘Statement of grounds of assessment and opposing appeal

(1) SARS must deliver to the appellant a statement of the grounds of assessment and opposing the appeal within 45 days after delivery of—

(a) the documents required by SARS under rule 10(5);

(b) if alternative dispute resolution proceedings were followed under Part C, the notice by the appellant of proceeding with the appeal under rule 24(4) or 25(3);

. . . .

(2) The statement of the grounds of opposing the appeal must set out a clear and concise statement of—

*(a)* the consolidated grounds of the disputed assessment;

*(b)* which of the facts or the legal grounds in the notice of appeal under rule 10 are admitted and which of those facts or legal grounds are opposed; and

*(c)* the material facts and legal grounds upon which SARS relies in opposing the appeal.

(3)… ’

[18] Rule 4 reads:

‘Extension of time periods

(1) Except where the extension of a period prescribed under the Act or these rules is otherwise regulated in Chapter 9 of the Act or these rules, a period may be extended or shortened by agreement between—

*(a)* the parties;

*(b)* a party or the parties and the clerk; or

*(c)* a party or the parties and the registrar.

(2) A request for an extension must be delivered to the other party before expiry of the period prescribed under these rules unless the parties agree that the request may be delivered after expiry of the period.

(3) If SARS is afforded a discretion under these rules to extend a time period applicable to SARS, SARS must in the notice of the extension state the grounds of the extension.

(4) . . . ’

[19] Rule 52(6) provides:

‘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.’

[20] Rule 56(1) stipulates:

‘(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

*(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).’

[21] The tax court held that where a party has not complied with the period in Rule 31 it must request an extension of time in terms of Rule 4(2). It found that the delivery of a Rule 56(1) notice and timeous response thereto, does not exempt the defaulting party from compliance with Rule 4(2). It reasoned that, absent an application for condonation or a Rule 4(2) extension, there is no impediment against an application for default judgment by the innocent party because in these circumstances the Rule 31 statement is invalid.

[22] The majority of the high court found that ‘obligation’ in the context of Rule 56(1) read with ‘default’ refers to SARS’ obligation to file a statement in terms of Rule 31 which complies in substance, form and time with the prescripts of Rule 31 and failing which SARS must cure the defect in terms of Rule 4 or Rule 52(6). It opined that to hold otherwise, would render Rules 4 and 52(6) superfluous. The minority found that, since SARS complied with the Rule 56(1) notice, there was no need for it to apply for condonation or an extension of time. It would have held that the application for default judgment was an irregular step.

[23] In this appeal, SARS argued that the 15 days in the Rule 56(1) notice is an extension of a period ‘otherwise regulated’ as contemplated in Rule 4(1) and that the latter

Rule is therefore not applicable. It further argued that it cured the default as called upon and nothing further was needed. However, the taxpayer contended that, above and beyond SARS' compliance with Rule 56(1), it had an obligation to apply for condonation. SARS' failure to do so opened a pathway for it to apply for default judgment.

[24] An interplay between the above Rules is discernible. Rule 4 governs agreements between the parties to extend or shorten periods. If a party fails to comply with Rules 31, 32 or 33, it may approach the tax court with a condonation application, in terms of Rule 52(6), and request a further period within which it may deliver the statement. This is a voluntary application by a party who has failed to comply with the Rules. Rule 56(1) is coercive in that the innocent party endeavours to force the defaulting party to comply on pain of a final order being made against it.

[25] It is common cause that SARS did not seek an agreement with regard to the extension of any time periods. Rule 4(2) does not contain an outer limit within which SARS could request an extension. However, SARS argued that given the history of legal skirmishes with the taxpayer, such a request would not have yielded a positive result.

[26] Rule 56(1) states that if a party has failed to comply with a period *or* obligation prescribed under the Rules or a tax court order (my emphasis), the innocent party may deliver a notice to the defaulting party calling upon it to remedy the default within 15 days, failing which, the innocent party may apply, on notice to the defaulting party, for a final order under s 129(2).[9] It is significant that the rule maker used the disjunctive 'or' and not the conjunctive 'and'.

[27] It is trite that words should be given their ordinary grammatical meaning, unless doing so would lead to an absurdity. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[10] it was said that in interpreting a document regard must be had to the text,

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[10] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 583 (SCA) para 18.

context and purpose of the document. The process of interpretation is unitary and objective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results.

[28] There is no reason why ‘or’ in the Rule should be read as ‘and’; the Rule makes sense as it is. There is no indication that ‘and’ would have been more sensible in this context. Rule 31 simultaneously contains a time period and obligations. SARS must deliver its statement within 45 days after the taxpayer has, inter alia, delivered its notice of appeal and failure to comply with the period could trigger a Rule 56(1) notice. However, non-compliance with the period is one basis for a Rule 56(1) notice. Another basis would be if SARS delivered an otherwise non-compliant statement and in so doing failed to comply with its obligations under the Rules.

[29] In terms of Rule 31(2), SARS must set out a clear and concise statement of (a) the consolidated grounds of the disputed assessment; (b) which facts or legal grounds in the notice of appeal are admitted and which are opposed; and (c) the material facts and legal grounds upon which SARS relies in opposing the appeal. These are obligations that SARS has to fulfil. Non-compliance with these obligations would only come to the other party’s knowledge after the statement had been delivered. If it fails to meet any of these obligations, it would be in default and the innocent party would be able to serve a Rule 56(1) notice on SARS. That is why it is either the period or the obligation that can trigger the Rule 56(1) notice.

[30] If the tax court has determined that SARS should, in terms of Rule 52(6), file its Rule 31 statement on a particular day and it fails to comply with the order, the innocent party may enforce compliance by way of a Rule 56(1) notice. This notice would be delivered because the defaulting party had not complied with the time determined by the court for the other party to receive the Rule 31, 32 or 33 statement. The innocent party would enforce the court order because the court gave it a procedural right to receive the relevant statement on a determined date. The order thus creates an obligation on the defaulter towards the innocent party.

[31] Any of the scenarios in paragraphs 29 to 31 above can trigger a Rule 56(1) notice being served on the defaulter. The Rule 56(1) notice serves the purpose of a compliance notice. It is a procedural mechanism which assists an innocent party to advance the appeal, either by ensuring compliance or by securing a default judgment. Absent compliance, the innocent party may, after giving the defaulter notice of its application, apply for default judgment. Since a final order under s 129(2) can be drastic, sufficient notice should be given before it is sought. However, the underlying objective of the Rule 56(1) notice procedure is not punitive. It is aimed at facilitating finality of the dispute by coercing compliance. Once compliance has been achieved, the Rule will have served its purpose.

[32] It is for this reason that, after compliance with the notice, there is no need for the defaulter to apply for condonation. Rule 56(1) is self-contained: its purpose was achieved when SARS complied with the demand that it files its Rule 31 statement within the period specified in the notice. The notice in this matter called upon SARS to remedy its failure to file its Rule 31 statement but incorrectly stated that SARS had 'consequently failed to comply with the periods *and* obligations under the Rules'. (My emphasis.)

[33] Firstly, it incorrectly used the word 'and'. Secondly, it assumed, without the benefit of the statement, that SARS would not comply with its obligations. An application for condonation was, at this stage, not one of SARS' obligations. It is trite that a party seeking condonation must make out a case entitling it to the court's indulgence.[11] The duty to apply for condonation for non-compliance with the Rules is a matter between the court and the defaulting party, whereas the reference to obligations in Rule 56(1) relates to obligations between the parties.

[34] The majority of the high court opined that SARS' contention that the defaulting party need not apply for condonation after delivery of a Rule 56(1) notice is incorrect because it would render Rules 4 and 52 superfluous. It does not. Rules 4 and 52 serve

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[11] *Grootboom v National Prosecuting Authority* [2013] ZACC 37; 2014 (2) SA 68 (CC) para 23.

different purposes before the delivery of a Rule 56(1) notice: respectively an extension of time by agreement and a determination of time by the tax court. The purpose of Rule 56(1) is to coerce compliance because a party has shunned the Rules, including Rules 4 and 52.

[35] The majority of the high court found it irrational that a party can ignore the Rules and wait for a Rule 56(1) notice to comply therewith and so avoid having to apply for condonation. It is how the Rules were designed. They allow a party to play possum even beyond non-compliance with a Rule 56(1) notice but before default judgment is granted. In *Taxpayer v Commissioner for the South African Revenue Services,*[12] the taxpayer's application for default judgment was refused after SARS failed to comply with a Rule 56(1) notice, without having applied for condonation. In that instance SARS did not comply within the 15-day period allowed by Rule 56(1).

[36] Compliance with a Rule 56(1) notice is akin to complying with a notice of bar in terms of Rule 26 of the Uniform Rules. If a party is served with a notice of bar, it is enjoined to file the required pleading in the five days set out in the notice. If such party complies, the bar is automatically lifted by dint of compliance with the notice. A condonation application is therefore not necessary.

[37] In terms of the Uniform Rules, a defendant may file a notice of intention to defend and fail to deliver a plea for years. Nothing will happen to advance the matter, until the plaintiff decides to deliver a notice of bar.[13] The defaulting defendant may then deliver its plea without applying for condonation. It may even do so after the application for default judgment had been filed, subject to an adverse costs order. No condonation application is necessary under these circumstances.

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[12] *Taxpayer v Commissioner for the South African Revenue Services* [2019] ZATC 17.
[13] Uniform Rule 22 read with Rule 26. See *Magdelena v Road Accident Fund* [2024] ZAGPPHC 398 (unreported Case no: 24056/2020 Gauteng Division, (Pretoria)) delivered on 15 April 2024 in which the defendant failed to file a plea for three years.

[38] In an adversarial system such as ours, where the Rules allow the parties to regulate the advancement of a matter, specifically before *litis contestatio*, it is important for the innocent party to timeously invoke a Rule that is aimed at ensuring compliance with the Rules. The innocent party must be vigilant. The law favours and assists those who timeously pursue their procedural and substantive rights, and not those who delay or neglect them. The taxpayer could have invoked Rule 56(1) immediately after the lapse of the 45 days stipulated in Rule 31.

[39] The high court ought to have held that a party who is served with a Rule 56(1) notice need not apply for condonation after complying with the notice. It should have found that the default judgment application was an irregular step and granted the Uniform Rule 30 application.

[40] There is no reason why the costs should not follow the cause. SARS was successful and is entitled to its costs.

[41] I, accordingly, make the following order:

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the high court is set aside and replaced with the following:

‘2.1 The appeal is upheld with costs.

2.2 The order of the tax court is set aside and replaced with the following:

“2.2.1 The application for default judgment is declared an irregular step and set aside.

2.2.2 The taxpayer is ordered to pay the costs of this application.”’

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C J MUSI

ACTING JUDGE OF APPEAL

**Appearances**

| | |
|---|---|
| For the appellant | K W Luderitz SC (with S T Seshoka) |
| Instructed by | Van Hulsteyns Attorneys, Johannesburg |
| | Hendre Conradie Inc., Bloemfontein |
| For the respondent | M J Bishop (with E Cohen) |
| Instructed by | Osborn Wellsted Paulsen Inc., Johannesburg |
| | Honey Attorneys, Bloemfontein. |