THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 848/2023

In the matter between:

FIKILE NTAYIYA **APPELLANT**

and

SOUTH AFRICAN REVENUE SERVICE **RESPONDENT**

Neutral Citation: *Ntayiya v South African Revenue Service* (848/2023) [2025] ZASCA 183 (1 December 2025)

Coram: MAKGOKA ADP and MOTHLE, MEYER and SMITH JJA and KUBUSHI AJA

Heard: 27 August 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The time and date for hand-down is deemed to be 11h00 on 1 December 2025.

Summary: Tax law – Income Tax Act 58 of 1962 – Tax Administration Act 28 of 2011 – assessments of taxpayer – whether submission of nil returns by taxpayer triggers imposition of penalties under s 222 of the Tax Administration Act – whether penalties justified in the circumstances.

ORDER

On appeal from: Eastern Cape Division of the High Court, Mthatha (Shene AJ sitting as court of first instance):

1 The application for leave to present new evidence is dismissed with costs, including the costs of two counsel.

2 The appeal is dismissed with costs, including costs of two counsel.

JUDGMENT

Mothle JA (Makgoka ADP and Meyer, Smith JJA and Kubushi AJA concurring):

[1] This is an appeal, with the leave of this Court, against the judgment and order of the Eastern Cape Division of the High Court, Mthatha (the high court). That court dismissed an application by the appellant, Mr Fikile Ntayiya, against the respondent, the South African Revenue Services (SARS) for repayment of a sum of R762 335.08. The repayment was claimed as a set-off against funds attached by SARS, from the appellant's business to secure a tax debt owed by the appellant.

[2] The appellant is an attorney conducting practice in Mthatha, Eastern Cape, under the name and style of Fikile Ntayiya & Associates (Pty) Ltd (the law firm), of which he is the sole director and shareholder. In 2014, SARS conducted an audit on the appellant's personal tax affairs for the six-year tax period between 2008 and 2013, resulting in the 2014 assessments. For each of these years, the appellant, assisted by MNG Business Consultants (MNG), filed nil returns, suggesting that he had not earned any taxable income. It is necessary to emphasise that the 2014 assessment concerned the appellant's income in his personal capacity, as distinct from the law firm, which is a legal persona and a taxpayer in its own right.

[3] The audit which entailed an analysis of the appellant's bank statements, revealed that the appellant had, in fact, earned taxable income in each of the six years of assessment. SARS assessed the appellant's tax liability in the amount of R3 600 000, inclusive of interest and penalties for the understatement (the USP) of income. The appellant lodged an objection to the assessment in terms of s 104 of the Tax Administration Act 28 of 2011 (the TAA), contending that he conducts a small law practice from which he could not have generated such huge gross earnings to attract the assessed tax liability. In June 2015, SARS disallowed the objection in terms of s 106 of the TAA.

[4] Towards the end of 2015, the appellant noted an appeal against the disallowance in terms of s 107 of the TAA. At that time, the appellant contended that he had submitted nil returns based on erroneous calculations by MNG. SARS also dismissed the appeal against the dismissal of the objection on the ground that the merits of his appeal fell short of the requirements of s 93(1)*(d)* or 93(1)*(e)* of the TAA. These provisions cater for two instances with a subtle difference. First, s 93(1)*(d)* applies where *SARS* is satisfied that there is a readily apparent undisputed error in its assessment or that of the taxpayer in a tax return. Second, s 93(1)*(e)* applies where a *senior SARS* official is satisfied that an assessment was based on a submission of an incorrect tax return by a third party under s 26 of the TAA'. Section 26 of the TAA deals with third party returns. (Own emphasis.)

[5] In dismissing the appeal lodged by the appellant, SARS in essence reasoned that, on 4 April 2012, the appellant had deposed to an affidavit stating that he had not been generating any income during the first four years of assessment, ie 2008, 2009, 2010 and 2011. SARS compared the money deposited in the business and private accounts with the submitted nil return financial statements, and concluded that all the financial statements reflected that the appellant did receive taxable income. The conclusion was that the appellant had grossly understated his income. Consequently, SARS imposed the USP on the appellant in terms of s 223(1)(vi) of the TAA, on the basis that, by submitting nil returns, the appellant's conduct amounted to intentional tax evasion. Upon receipt of this response, the appellant

launched an application against SARS in the high court, to review and set aside SARS' assessment.

[6] On 18 January 2018, the high court held that the appellant had failed to notify the Commissioner of SARS of his intention to institute proceedings in the high court, as required by ss 11(4) and (5) of the TAA.[1] Accordingly, the high court dismissed the appellant's review application with costs. Undeterred, the appellant appealed to the full court of the same division (the full court) against that order. The appeal was upheld and the matter was referred back to the high court for the determination of the merits. It is apposite to mention that the thrust of the appellant's case before the full court was to challenge the correctness of the USP arising from the 2014 assessment based on the nil returns he had submitted annually during the relevant six-year period. Prior to the hearing before the full court, the appellant submitted that he had enlisted the assistance of new accountants, APAC Accounting and Tax Specialists (APAC), who had prepared revised and corrected financial statements for the same six-year 2014 assessment period. In its judgment, the full court in passing, drew the parties' attention to the option of exploring the alternative dispute resolution (ADR) process provided for in s 105 of the TAA.

[7] The parties accepted the proposal to pursue ADR and agreed to the terms of engagement as outlined by SARS in an email dated 28 February 2018. The email stated thus:

'1. The Annual Financial Statements (AFS) for the 2008 to 2013 tax years which you are satisfied are correct will be provided to the SARS auditor, Mrs Karin Van Straten.

2. These AFS will be considered by Mrs Van Straten.

3. Your accountants (APAC) will liaise with Mrs Van Straten and furnish her with the AFS, general ledger and any supporting documentation required to substantiate any differences between the information currently at SARS disposal and the AFS to be provided.

4. Thereafter, any decisions made in respect to the SARS audit assessments will be subject to the approval of a SARS Governance Committee.

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[1] Sections 11(4) and 11(5) of the Tax Administration Act 28 of 2011 provides:

'11(4) Unless the court otherwise directs, no legal proceedings may be instituted in the High Court against the Commissioner unless the applicant has given the Commissioner written notice of at least one week of the Applicant's intention to institute the legal proceedings.'

'11(5) The notice or any process by which the legal proceedings referred to in subsection (4) are instituted, must be served at the address specified by the Commissioner by public notice.'

5. If the parties are unable to reach any agreement herein, the matter can be referred back to the High Court for further litigation…'

[8] APAC, on behalf of the appellant and in response to SARS' invitation, submitted the revised AFS to SARS. On 20 November 2019, SARS responded to the new information with revised calculations of some items in the assessment. However, the revised calculations did not result in a substantial decrease of the appellant's tax liability. The appellant was dissatisfied and contended that the assessed amount was far more than his taxable income and therefore incorrect. The revised amount also included a 150% USP for intentional tax evasion, as well as an estimated amount for taxation on the use of motor vehicles, calculated in terms of the Seventh Schedule to the Income Tax Act 58 of 1962 (ITA). In addition to the USP and the tax levied on the use of motor vehicles, on 13 December 2019, SARS attached the appellant's law firm's business bank account as security for the tax debt. An amount of R1 200 000 in the account was frozen.

[9] In the light of this development, the appellant returned to the high court. In that court, he delivered an amended version of the notice of motion, in which he stated the new relief as follows:

'1. That the assessments made by the auditor, Mrs Van Niekerk who is an official of the respondent be reviewed and set aside.

2. That the Annual Financial Statements prepared by MNG Business Consultants for the years 2008-2013 be declared incorrect and be set aside.

3. That the annual financials for the years 2008-2013 submitted by APAC Accounting & Tax Specialists to the respondent be accepted as the correct annual financials.

4. That the respondent be ordered to pay back to the applicant's account No. 62001541912, held at First National Bank, the sum of R 762 335-08 which is due to him forthwith with interest from 13 December 2019 to date of payment.

5. That the respondent pay costs of the application, which costs shall include the costs of two Counsel.

6. Further and/or alternative relief.'

[10] The dispute between the appellant and SARS had morphed into a review of SARS's 2014 assessment, declaratory relief and a claim for repayment by SARS of a specified amount. At the commencement of the hearing in the high court, counsel

for the appellant informed the court that, of the first four grounds of relief sought in the amended notice of motion:

'[T]he appellant has abandoned the relief sought in paragraphs 1, 2 and 3. The appellant will only seek an order in terms of paragraph 4 of the amended notice of motion, ie the repayment of the specified amount.'

[11] Consequent to the abandonment of part of the relief, the high court, per Shene AJ, could thus not deal with the relief sought in prayers 1, 2 and 3 of the amended notice of motion. Regarding prayer 4 of the amended notice of motion for the repayment of money, the high court concluded that there were disputes of fact between the parties. Applying the well-known test formulated in *Plascon-Evans*,[2] the high court dismissed the appellant's application with costs.

[12] Prior to the hearing of the appeal, the appellant delivered an application to lead new evidence on appeal. The new evidence was premised on an affidavit deposed to by Ms Ronell Erna Didloff, a Functional Specialist, Debt Management: Investigative Audit Debt at SARS. She describes her duties as being to collect debts due to SARS from taxpayers. In the affidavit she states at paragraph 17 that:

'[T]he TPA which I auctioned was in respect of the personal income tax of the applicant. I therefore correctly auctioned deduction from the personal account of the applicant relating to his personal income tax.'

Significantly, the essence of her statement is that she did not authorise SARS officials to attach the law firm's business bank account at First National Bank, but the appellant's personal bank account at Standard Bank.

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[2] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A); [1984] 2 All SA 366 (A) at 634H-635A. The test as refined in this case state that: '…*where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavit which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact…If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court…and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief it seeks…Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers…*' (Authorities omitted.)

[13] The proposed new evidence concerned money that SARS purportedly attached in terms of s 179 of the TAA. SARS took the view that the law firm stands as a third party in relation to the appellant, and objected to the leading of the new evidence on appeal. It is convenient to dispose of that issue here. The leading of new evidence on appeal is governed by s 19*(b)* of the Superior Courts Act 10 of 2013. This Court in *PAF v SCF*[3] expressed the following view about the leading of new evidence on appeal:

'Section 19*(b)* of the Superior Courts Act [10 of 2013], empowers this Court to "receive further evidence". In *Colman v Dunbar* 1933 AD 141 (A) at 161-163, this Court said that the relevant criteria as to whether evidence should be admitted on appeal are: the need for finality, the undesirability of permitting a litigant who has been remiss in bringing forth evidence, to produce it late in the day, and the need to avoid prejudice. This was approved by the Constitutional Court in *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others*[4]. Referring to s 22 of the repealed Supreme Courts Act 59 of 1959, which is similar to s 19*(b)* of the Superior Courts Act, the court cautioned that the power to receive further evidence on appeal should be exercised "sparingly" and that such evidence should only be admitted in "exceptional circumstances". In addition, the evidence must be weighty, material and presumably to be believed." In *O'Shea NO v Van Zyl NO and 5 Others (Shaw NO and Others Intervening)*[5] , this Court considered that one of the criteria for the late admission of the new evidence is that such evidence will be practically conclusive and final in its effect on the issue to which it is directed.'

[14] It is trite that the law firm as a company, is a legal persona and a taxpayer in its own right, separate from the appellant, and is entitled to litigate in its own name. As matters stand, the law firm is not part of the proceedings in this Court. It is a distinct legal entity with capacity, in law, to defend the unauthorised attachment of its assets, wherever they may be. This Court thus finds that, the law firm not being a party to the proceedings, the proposed new evidence would not be practically conclusive and final in its effect, considering the relief sought by the appellant in this appeal. The proposed new evidence concerns money attached from the law firm's bank account, and not the appellant's bank account.

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[3] *P A F v S C F* [2022] ZASCA 101; 2022 (6) SA 162 (SCA) para 9.
[4] *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* [2004] ZACC 20; 2005 (2) SA 359 (CC) paras 41-43.
[5] *O'Shea NO v Van Zyl NO and 5 Others (Shaw NO and Others intervening*) [2011] ZASCA 156; 2012 (1) SA 90 (SCA); [2012] 1 All SA 303 (SCA) para 9.

[15] There is another reason why the application to lead new evidence is misplaced. The appellant states that the amount of R762 335.08 he claims as a repayment, is calculated as being the 'difference between the assessed taxable income, being R1 950 180.30, minus *R1 464 400.00 already paid to the respondent* [SARS] plus R 780 072.12 (proposed settlement that excludes the 150% USP and 10% tax on the motor vehicles). The proposed new evidence would serve no purpose as the appellant in his calculations, has impermissibly conflated the law firm's money attached by SARS with his personal amounts, to pray for a set off in settlement of his personal tax liability. It would thus be a contradiction in terms for the appellant to contend that SARS should be ordered to pay back the amount attached from the law firm's account, and simultaneously plead that this Court must allow SARS to keep that amount for the purposes of the calculation justifying a set off. For these reasons, the application to lead new evidence on appeal, should be dismissed with costs. (Own emphasis.)

[16] I turn now to the merits of the appeal. As mentioned, the appellant seeks the reversal of the order of the high court dismissing his application for an order against SARS to pay back R762 335.08 taken from his firm's bank account with interest from 13 December 2019 to date of payment. The appellant concludes his averments in the supplementary affidavit as follows:

'It is clear from the correspondence which has been exchanged between the parties that there are two issues which remain in dispute namely; USP of 150% and 10% on private use of motor vehicles. Based on the facts and the law stated above in my affidavit it is clear that there was no intentional tax evasion, consequently USP of 150% finds no place in my case. Secondly, paragraph 7 of the Seventh Schedule is not applicable. If the Court is with me on this point, the respondent has to pay me the sum of R 762 335-08.'

[17] The appellant's case in this Court thus hinges on the determination of the two issues identified in the preceding paragraph, namely the 150% USP and the 10% tax on the use of motor vehicles. In the ADR terms of engagement proposed by SARS, an invitation was extended to the appellant's new accountants, APAC, to 'liaise with Mrs Van Straten and furnish her with AFS [Annual Financial Statements], general ledger and any supporting documentation required to substantiate any difference between the information currently at SARS's disposal and the AFS to be provided.'

[18] It appears from the exchange of correspondence between the parties that the appellant seemingly misconstrued the invitation to submit the revised documentation for the 2008-2013 assessments. He assumed that SARS had abandoned or waived the 2014 assessments for the period 2008 to 2013. There is no email, letter or any form of written communication from SARS to the appellant, his tax consultants or attorneys to support the appellant's stance.

[19] In addition, there are neither objections nor appeals pending wherein the validity of the 2014 assessments is assailed. The appellant, on his own initiative in the high court, abandoned the attack on the 2014 assessments. Furthermore, there is no evidence of a settlement agreement concluded between the appellant and SARS, pursuant to the ADR. Such an agreement would in any event require the approval of the Governance Committee of SARS, in accordance with the terms of engagement. The 2014 assessments remain final and binding on the parties in terms of s 100 of the TAA, until abandoned by SARS or set aside by a competent authority.

[20] In prayer 2 of the amended notice of motion, the appellant had sought relief to have the 2014 assessments declared incorrect, reviewed and set aside. The consequence of the abandonment of prayer 2 not only confirmed the finality of the 2014 assessments, but also left the submitted nil returns in each of the six years uncontested. The appellant's plea that the nil returns were an inadvertent *bona fide* error, would have been central to the relief sought in prayer 2 of the amended notice of motion. The high court correctly found that the issues had become academic in the light of the appellant's abandonment of prayers 1, 2 and 3.

[21] The high court, after dealing with the consequences of the abandonment of these prayers, concluded '…that the assessment has a direct bearing on the refund as contained in prayer 4 and until that is set aside, the decision [of SARS] stands'. It stands to reason that this Court is also in no better position than the high court to deal with the USP of 150%, as the penalty arises from, and is inextricably linked to, the nil returns that resulted in the 2014 assessments. This Court cannot deal with the USP in isolation from the submission of the nil returns. Besides, the evidence on which the appellant relies is woefully inadequate on the papers before this Court, as demonstrated below with reference to the legislative provisions.

[22] Sections 221 to 223 of the TAA deal with 'understatement' penalties payable by a taxpayer. Section 221(1) of the TAA defines 'understatement' as meaning any prejudice to SARS or the *fiscus* as a result of one or more of a number of factors listed from subsection 221(1)*(a)*, including those relevant to this case, namely '*…(b) an omission from a return*; *(c) an incorrect statement in a return*; …'. Section 222(1) provides that:

'In the event of an understatement by a taxpayer, the taxpayer *must* pay, in addition to the "tax" payable for the relevant tax period, the understatement penalty determined under subsection (2) *unless the "understatement" results from a bona fide inadvertent error'*. (Own emphasis.)

[23] Section 223 provides for the understatement penalty percentage table. In that percentage table, under the title 'behaviour' or conduct of the taxpayer [found in breach of the s 221(1)] is stated under the second column. Item six (vi) in the second column provides for intentional tax evasion, which attracts a percentage penalty of 150% in the third column.

[24] In *Commissioner for Inland Revenue v McNeil*[6] the court held that the purpose of levying penalties is to ensure that returns shall be honest and accurate. In imposing the USP on the appellant, SARS advanced the following reasons as 'behaviour': First, the nil returns which appellant submitted in the six years, indicated that appellant did not receive any taxable income during that period. SARS analysed the bank statements and found evidence that the appellant did in fact receive income during that period. Second, SARS contends that the appellant deposed to an affidavit dated 3 April 2012, in which he stated that he did not earn an income during the period 2008-2013, which deposition, based on the appellant's bank statements, was false. Third, the appellant was able to purchase motor vehicles in that period, despite having asserted that he received no income. He was found to have purchased a Mercedes Benz ML 350, a Toyota Hilux and an Audi A6 during the same years he had filed nil returns. SARS's reasons for imposing the penalties are supported by documentation in the form of bank statements, reference to the affidavit and documentary proof of the purchase of these motor vehicles.

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[6] *Commissioner for Inland Revenue v McNeil* 22 SATC 374.

[25] The appellant's version is that by submitting nil returns, he acted on the calculations prepared and provided by the former tax accountants, MNG. According to the appellant, these calculations which resulted in submission of nil returns were incorrect, but resulted from a 'bona fide' error as envisaged in in terms of s 222(2).[7] He contends that the errors in the calculations by MNG were bona fide and not made with the intention to deceive SARS or the fiscus.

[26] For this proposition, the appellant sought reliance on the decision of the Tax Court in *ABC Holdings (Pty) Ltd v Commissioner for SARS* (ITC) 1890.[8] There, the Tax Court had to determine whether the taxpayer's conduct, acting on advice received by way of a tax opinion, constituted a bona fide inadvertent error, which would result in a penalty. The court held in that case that the bona fide inadvertent error implied an *'innocent misstatement by a taxpayer on his or her return, resulting in an understatement, while acting in good faith and without the intention to deceive*.'[9] (Own emphasis.)

[27] The decision by the appellant to abandon the first three prayers of the notice of motion, in particular prayer 2 in which he had sought to attack the validity of his nil returns, was consequential. It impeded the high court from considering the factual circumstances and evidence, if any, in regard to whether there was an inadvertent bona fide error that resulted in the submission of the nil returns. Moreover, the explanation provided by the appellant that he submitted nil returns, based on the calculations by MNG, without any corroboration is, to say the least, woefully inadequate.

[28] The appellant's contended reliance on the advice of auditors regarding his income is unconvincing. It is inconceivable that he would have been unaware of the fact that he earned income during that period. As the person in charge of the management of the firm, any drawings would have been authorized by him.

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[7] Section 222(2) of the Tax Administration Act 28 of 2011 provides:
'The understatement penalty is the amount resulting from applying the highest applicable understatement penalty percentage in accordance with the table in section 223 to each shortfall determined under subsections (3) and (4) in relation to each understatement in a return.'
[8] *ABC (Pty) Ltd v Commissioner for the South African Revenue Service* [2016] ZATC 7; 79 SATC 62.
[9] Ibid para 45.

Therefore, for the reasons stated, the decision by SARS to impose the USP of 150% remains valid and final, until set aside by a competent authority. Thus, the attack on the USP cannot, in this instance, be considered separate or independent from the 2014 nil returns. The appellant had the opportunity to launch the attack in terms of s 222(2) of the TAA. Instead, he abandoned it. Therefore, this ground of appeal is without merit and must fail.

[29] The 10% tax on the private use of the motor vehicle was not included in the 2014 assessments. According to SARS, the purchase of the motor vehicles was disclosed in the documents submitted by APAC for the ADR, in response to the invitation by SARS in terms of the terms of engagement. The documents included the appellant's revised AFS and supporting documentation for the 2008-2013 period. In the revised AFS, the appellant's accountants revealed for the first time that the appellant had purchased the following motor vehicles: a VW Polo in the 2008 year of assessment; a Mecedes Benz ML350 in the 2009 year of assessment; a Toyota Hilux in the 2010 year of assessment; and an Audi A6 in the 2011 year of assessment.

[30] There were deductions made from the income, for the expenses relating to the use of these motor vehicles. A dispute between the appellant and SARS ensued as to what constitutes the use of the motor vehicles and expenses thereof for the determination of an appropriate taxable amount. The appellant was of the view that the motor vehicles were used to service clients in the course of earning income. Despite SARS' request to the appellant to produce documentation to substantiate his contention, he could not do so.

[31] SARS received an email dated 22 October 2020 from Mr Peyana of APAC, proposing a split of ninety per cent (90%) business and ten per cent (10%) private use. SARS agreed to the proposal and was ready to recommend to the Governance Committee, to accept it. This estimate was based on the information readily available to SARS in terms of s 95(2) of the TAA. The appellant claimed that there should have been a 100% allowance on the tax of the motor vehicles.

[32] SARS requested the appellant to furnish information regarding the private use of the motor vehicles. He did not do so. Consequently, SARS invoked s 95(1)*(b)* of TAA, which empowers it to make an additional estimated assessment based in whole or in part if the taxpayer submits a return or information that is incorrect *or inadequate*. In doing so, SARS utilised the provisions of the Seventh Schedule of ITA. The appellant objected to the use of the Seventh Schedule, as it relates to the employer-employee relationship. SARS agreed with the appellant's contention, but pointed out that in the absence of information sought from the appellant, it had to rely on the estimates and the Seventh Schedule, which provided an acceptable basis to arrive at a resolution that is fair to both parties.

[33] SARS further referred to s 23*(g)* of ITA, which provides:

'No deductions shall in any case be made in respect of the following matters, namely-

(a)…

(g) any moneys claimed as a deduction from income derived from trade to the extent to which such moneys were not laid out or expended for the purposes of trade; …'

'Trade' is defined in s 1 of ITA to include 'every *profession*, trade, business, employment, calling, *occupation* or venture, including…' The legal profession is clearly included in this definition. The appellant could have, as is customary, produced logbooks which evidences any travel relating to the service of his clients. Such information is reconciled with the milage to arrive at a percentage split between private use and business use. He failed to do so. (Own emphasis.).

[34] The appellant contended that a 100% deduction from gross income for business travel should be made, in particular on his personal tax liability. There is no merit in the appellant's contention. It is not supported by any documentation that he ought to have produced when requested to do so by SARS. Moreover, the 10% tax was proposed by the auditors acting on his behalf. The appellant can hardly complain about taxation raised by SARS on the basis proposed by his agent. The appellant has thus not succeeded on the two grounds of appeal that he raised in this Court. The decision by the appellant to abandon paragraphs 1, 2, and 3 of the amended notice of motion, proved fatal to his case, both in the high court and in this Court. Consequently, the appeal should be dismissed. Costs should follow the result. I consider that the employment of two counsel was warranted.

[35] The following order is made:

1 The application for leave to present new evidence is dismissed with costs, including costs of two counsel.

2 The appeal is dismissed with costs, including costs of two counsel.

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S P MOTHLE

JUDGE OF APPEAL

Appearances:

For appellant:	TJ Machaba SC (with him K Maponya)
Instructed by:	Zilwa Attorneys, Mthatha
	Rampai Attorneys, Bloemfontein
For respondent:	AA Gabriel SC (with her DV Pitt)
Instructed by:	State Attorney, Mthatha
	State Attorney, Bloemfontein.