



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

Reportable

Case no: 1110/2024

In the matter between:

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

APPELLANT

and

POULTER

RESPONDENT

Neutral citation: *The Commissioner for the South African Revenue Service v Poulter* (1110/2024) [2026] ZASCA 68 (12 May 2026)

Coram: ZONDI DP and SMITH and COPPIN JJA and BASSON and NORMAN AJJA

Heard: 18 March 2026

Delivered: 12 May 2026

Summary: Interpretation of ss 12 and 125 of the Tax Administration Act 28 of 2011 (TAA) – Rule 44(7) of the Tax Court Rules and s 25 of the Legal Practice Act 28 of 2014 – Right of appearance in Tax Court – whether a non- legal practitioner may appear on behalf of the taxpayer in the Tax Court – Neither s 125 of the TAA nor rule 44(7) of the Tax Court Rules requires a taxpayer’s representative to be a legal practitioner – Order of the Tax Court prohibiting taxpayer’s duly representative to appear in Tax Court on behalf of taxpayer, not competent – Appeal dismissed.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Binns-Ward J with Nuku and Slingers JJ concurring) sitting as a full court:
The appeal is dismissed with costs.

JUDGMENT

Zondi DP (Smith and Coppin JJA and Basson and Norman AJJA concurring):

Introduction

[1] This is an appeal against the judgment and order of the full court of the Western Cape Division of the High Court, Cape Town (the full court) in which it set aside the judgment and order of the Tax Court. In that judgment the Tax Court had found that Mr Gary Van der Merwe (Mr Van der Merwe), a lay person, whom the taxpayer, Ms Candice-Jean Poulter (the taxpayer) had duly authorised to appear on her behalf in the Tax Court, was not authorised to appear in that court. This was because, reasoned the Tax Court, s 12 and s 125 of the Tax Administration Act 28 of 2011 (the TAA) read with rule 44(7) of the Tax Court Rules (the TCR), which govern representation by or on behalf of the parties before the Tax Court, preclude non-legal practitioners from appearing in the Tax Court. The appeal is with the special leave of this Court.

[2] The appeal concerns the proper interpretation of s 12 and s 125 of the TAA read with rule 44(7) of the TCR. The question therefore is whether they preclude a non-legal practitioner from appearing on behalf of the taxpayer in the Tax Court, and if they do, whether the Tax Court is a court of law as envisaged by s 166(e) of the Constitution.

Facts

[3] The factual context within which these and the other related issues should be considered are briefly the following. The taxpayer's appeal against the tax assessment for the 2018 tax year was set down for hearing in the Tax Court on 16 November 2022. She did not attend the hearing, but she had executed a power of attorney in favour of

her father, Mr Van der Merwe, authorising him to appear and present her case on her behalf in the Tax Court. When Mr Van der Merwe appeared in the Tax Court and sought to present the case on behalf of the taxpayer, the appellant, the Commissioner for the South African Revenue Service (SARS), objected thereto on the ground that Mr Van der Merwe was not a legal practitioner and was thus precluded from representing the taxpayer. The Tax Court upheld the objection and ruled that Mr Van der Merwe was precluded from appearing on the taxpayer's behalf. At the request of SARS, the Tax Court in terms of rule 44(7) of the TCR proceeded to decide the appeal under s 129(2) of the TAA. It confirmed the taxpayer's original tax assessment for the 2018 tax year and ordered her to pay SARS' costs on an attorney and client scale, including the costs of two counsel.

[4] In support of its decision prohibiting Mr Van der Merwe from appearing on behalf of the taxpayer, the Tax Court relied on s125 of the TAA and s 25 of the Legal Practice Act 28 of 2014 (LPA) and the judgments of this Court in the *Commissioner for the South African Revenue Service v Candice- Jean van der Merwe*¹ (*Van der Merwe*) and of the full court in the *Commissioner for the South African Revenue Service v Poulter*² (*Poulter*) in which it was held that Mr Van der Merwe, who is not a legal practitioner, was not entitled to appear in the Tax Court.

[5] The Tax Court relied on Rule 44(7) of the TCR, as providing authority for it to decide the appeal in the taxpayer's absence. This rule provides as follows:

'If a party or a person authorised to appear on the party's behalf fails to appear before the Tax Court at the time and place appointed for the hearing of the appeal, the Tax Court may decide the appeal under section 129(2) upon-

- (a) the request of the party that does appear; and
- (b) proof that the prescribed notice of the sitting of the Tax Court has been delivered to the absent party or absent party's representative, unless a question of law arises, in which case the Tax Court may call upon the party that does appear for argument.'

[6] Section 129(2) of the TAA, to which rule 44(7) of the TCR refers, provides as follows:

¹ *The Commissioner for the South African Revenue Service v Candice-Jean van der Merwe* [2022] ZASCA 106; 85 SATC 10; 2022 JDR 1782 (SCA).

² *The Commissioner for the South African Revenue Service v Poulter* [2022] ZAWCHC 206; 2022 JDR 3125 (WCC).

'In the case of an assessment or 'decision' under appeal or an application in a procedural matter referred to in section 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.'

[7] The order that was made by Davis J (the Davis Order) on 9 November 2020 at the interlocutory stage of the proceedings, was also central to the Tax Court's findings on Mr Van der Merwe's right of appearance. In terms of the Davis Order the preclusion of Mr Van der Merwe was based on the ground that s 125 (2) of the TAA which allowed non-legal practitioners to appear on behalf of the taxpayers in Tax Court had been repealed. The Davis Order was issued in a form of rule *nisi*, calling upon the taxpayer to appear in court to show cause on 23 November 2020 why the order proposed in the notice should not be made. The relevant terms of the Davis Order provided the following:

- '2. The appellant is entitled to appear on her own behalf or to be represented by a representative who has a right of appearance in the High Court as an attorney or an advocate.
- 3. Mr. Gary van der Merwe is not entitled to appear on behalf of the appellant in that section 125 (2) of the Tax Administration Act 28 of 2011 has been repealed.
- 4. The costs of the hearing of 9 November 2020 to be paid by the Appellant on an attorney and client scale.'

Full court's findings

[8] On appeal, the full court set aside the decision of the Tax Court and remitted the matter to the Tax Court for a fresh determination. The full court found that the Tax Court is not a court of law but an administrative decision-maker and does not fall within the judicial system provided in s 166 of the Constitution. It held that the TAA does not preclude a lay person from representing a natural person taxpayer in the Tax Court. The full court reasoned that:

' . . . the Tax Court functions as a body of ultimate assessment in terms of the TAA. Stepping into the shoes of the Commissioner for that purpose, it fulfils an administrative function

directed at achieving one of the important goals of the Act, namely the correct assessment and recovery of taxes.’³

[9] In reaching that conclusion, the full court analysed various provisions of the TAA starting with s 116 which provides for the establishment of the Tax Court. In its view, the Tax Court is established by the President, not directly by the TAA. It pointed out that the fact that it is a court recognised in terms of an Act of Parliament in terms of s 166(e) of the Constitution, has jurisdiction to decide appeals in terms of s 107 of the TAA, and may determine any procedural questions arising in respect of such appeals, does not by itself answer the question whether what has been established by the Act of Parliament in question is indeed a court within the state's judicial system, ie a ‘court of law’.

[10] As regards representation in the Tax Court, the full court held that the Tax Court misdirected itself in refusing to permit Mr Van der Merwe’s appearance as the taxpayer’s representative at the hearing of the appeal. The full court stated that there is nothing in the TCR to suggest that references in them to a taxpayer’s representative are limited to persons admitted as legal practitioners. It observed that in the past, taxpayers were often represented in proceedings before the Tax Court by accountants or similarly qualified tax practitioners. The deletion of s 125(2) of the TAA, proceeded the full court, did not alter the hitherto obtaining position and evidently was not intended to alter that position.

[11] With regards to the status of the Davis Order and whether it remained extant until set aside on judicial review, the full court held that:

‘The ruling made earlier by another judge in the Tax Court at an earlier stage of the proceedings could not grant the court a warrant to make an order in terms of rule 44(7) when a person authorised to appear on the taxpayer’s behalf appeared before it. The order that the court purported to grant in terms of rule 44(7) notwithstanding Mr. Van der Merwe’s appearance as the appellant’s representative at the hearing of the appeal was plainly outside its powers in terms of the subrule, and, consequently, susceptible to correction on appeal to [the full court].’

³ *Poulter v Commissioner for the South African Revenue Service* [2024] ZAWCHC 97; [2024] 2 All SA 876 (WCC); 86 SATC 41 para 34.

SARS' submissions

[12] SARS takes issue with the full court's findings. It contends that the Tax Court is a court of law envisaged in s 166 of the Constitution and therefore subject to the same statutory provisions that bar party representation by lay persons in other courts of law. Therefore, proceeds the argument, a lay person may not represent a natural person taxpayer in the Tax Court. The taxpayer must be represented by a legal practitioner. For this contention SARS relies, first, on this Court's judgment in *Van der Merwe*⁴, which was followed by the full court of the Western Cape Division of the High Court in *Poulter*, second, on s 12 read with s 125 of the TAA, s 25(2) of the Legal Practice Act 28 of 2014 and rule 44(7) of the TCR and thirdly, the Davis Order.

[13] Counsel for SARS contends that the legislature did not intend to permit a lay person to represent a taxpayer in the Tax Court. This is so because, first, it is not provided for in the TAA or any other law. Second, right of appearance on behalf of SARS in the Tax Court is granted, in terms of s 12 of the TAA, to a senior SARS official who is a legal practitioner duly admitted and enrolled under the LPA and this position is reaffirmed by s 125 of the TAA. Counsel submits that these sections would be unnecessary if anybody could act for SARS or any taxpayer in a tax appeal. She submits that since there is no provision in the TAA regulating the appearance of a lay person on behalf of the taxpayer in the Tax Court, the TAA intended s 25 of the LPA to regulate the position. This section provides as follows:

'(1) Any person who has been admitted and enrolled to practise as a legal practitioner in terms of this Act, is entitled to practise throughout the Republic, unless his or her name has been ordered to be struck off the Roll or he or she is subject to an order suspending him or her from practising.

(2) A legal practitioner, whether practising as an advocate or an attorney, has the right to appear on behalf of any person in any court in the Republic or before any board, tribunal or similar institution, subject to subsections (3) and (4) or any other law.'

Counsel relied on the judgments of this Court in *Van der Merwe* and of the full court of the Western Cape High Court in *Poulter* in which it was held that in terms of the common law, which now finds expression in s 25 of the LPA, it is not permissible for a lay person to represent a natural person in a court of law and there is no discretion to allow a lay person to represent a natural person in a court of law.

⁴ Op cit fn 1 para 45.

[14] SARS submits further that the full court erred, firstly, in characterising the Tax Court as an administrative decision-maker with its functions essentially those of an administrative tribunal which position it outside the judicial system provided in s 166 of the Constitution, secondly, in finding that the Tax Court is not a court of law and that being the case, a lay person has a right of appearance in the Tax Court, thirdly, in finding that the Davis Order could not grant the Tax Court a warrant to make an order in terms of rule 44(7) of the TCR when a person authorised to appear on the taxpayer's behalf appeared before it and, fourthly, in finding that the Tax Court erred in proceeding to determine the appeal in terms of rule 44(7). These are the principal submissions of SARS.

[15] At the hearing, counsel for SARS abandoned its contention that the order of the full court setting aside the order of the Tax Court and remitting the matter to the Tax Court, was incompetent. Counsel conceded, rightly so in my view, that the order of the full court was competent.

Taxpayer's submissions

[16] The taxpayer disputes SARS' contentions. She supports the reasoning and the conclusion of the full court. In addition, the taxpayer contends that the Davis Order is irrelevant to the proceedings before the Tax Court and has no bearing on the substantive issues before this Court. She argues that the prohibition against Mr Van der Merwe's appearance on her behalf, plainly pertains only to the proceedings on the return date. It was not intended to operate as a general prohibition applicable to all future proceedings between the parties in the Tax Court. Further, she contends that this Court's decision in *Van der Merwe* is distinguishable on the facts. There this Court was dealing with the right of appearance before a court of law, and more particularly before this Court. The Tax Court is not a court of law in the sense contemplated in that judgment.

Issues

[17] Arising from the parties' submissions therefore, the issues that this Court must traverse are the following:

1. whether, properly interpreted, the statutory provisions regulating the conduct of proceedings in the Tax Court require a taxpayer to be represented only by a legal

practitioner, and if they do, whether the Tax Court is a court of law contemplated in s 166 of the Constitution; and

2. whether the Davis Order provided a sufficient basis for the Tax Court to exclude at the appeal hearing Mr Van der Merwe from representing the taxpayer.

Whether lay persons are prohibited from representing taxpayers in the Tax Court

[18] The validity of SARS' submissions will depend on the correct interpretation of ss 12, 125 of the TAA as read with rule 44(7) of the TCR, regulating the conduct of appeals in the Tax Court, and s 25 of the LPA. The approach to the interpretation of statutes is well settled by our courts. The text, context, and of course purpose of legislation must be considered in a unitary exercise.⁵ Furthermore, the statute must be constructed as a whole to ensure a harmonious interpretation of all its provisions.

[19] It is well established that reading the text of a provision contextually includes the internal and statutory context, taking into account the mischief sought to be addressed, the social and historical background of the legislation and other legislation.⁶ In undertaking interpretive exercise, the starting point is the Constitution.

[20] Section 39(2) of the Constitution enjoins every court when interpreting any legislation to promote the spirit, purport and objects of the Bill of Rights. The Constitutional Court held, in *Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd*⁷, that:

'... courts must also interpret legislation to promote the spirit, purport and object of the Bill of Rights. Again, courts should not unduly strain the reasonable meaning of words when doing so. But this obligation entails understanding statutes to 'lay the foundations for a democratic and open society, improve the quality of life for all and build a united and democratic South Africa.'

The right that is directly implicated in this case is the taxpayer's constitutional right of access to the Tax Court and to be represented by a person of her own choice.

⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.

⁶ *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (10) BCLR 1027 (CC); 2007 (6) SA 199 (CC).

⁷ *Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd* [2019] ZACC 12; 2019 (6) BCLR 749 (CC); 2019 (5) SA 29 (CC) para 32.

[21] Sections 12 and 125 of the TAA provide for right of appearance in proceedings by SARS officials. In particular s 12(2) provides:

‘(2) A senior SARS official may appear in the tax court or a High Court only if the person

(a) is an advocate duly admitted under

(i) the Admission of Advocates Act, 1964 (Act No. 74 of 1964); or

(ii) a law providing for the admission of advocates in an area in the Republic which remained in force by virtue of paragraph 2 of Schedule 6 to the Constitution of the Republic of South Africa, 1996; or

(b) is an attorney duly admitted and enrolled under

(i) the Attorneys Act, 1979 (Act No. 53 of 1979); or (ii) a law providing for the admission of attorneys in an area in the Republic which remained in force by virtue of paragraph 2 of Schedule 6 to the Constitution of the Republic of South Africa, 1996.’

[22] Section 125(1) provides:

‘A senior SARS official referred to in section 12 may appear at the hearing of an appeal in support of the assessment or ‘decision’.

Both sections are silent on right of appearance of the taxpayer in the Tax Court proceedings. This was specifically provided for in s 125 (2) before it was deleted with effect from the 18 of December 2017 in terms of s 26 of the Tax Administration Laws Amendment Act 13 of 2017.

[23] Prior to its deletion s125(2) of the TAA provided as follows:

‘The appellant or the appellant’s representative may appear at the hearing of an appeal in support of the appeal.’

It is apparent that s 125(2) of the TAA did not place any limitation on whom the taxpayer might appoint as a representative. The subsection did not qualify the word ‘representative’. Now the question is whether the deletion can be understood as implying that the taxpayer was no longer entitled to appear at the hearing or to be represented before a Tax Court. It is clear that such interpretation would be absurd because it would mean that the taxpayer, who has objected to the income tax assessment would be prevented from attending the tax appeal hearing or authorise a person to do so on his behalf.

[24] Such an interpretation would clearly be contrary to the provisions of s 39(2) of the Constitution which enjoins the courts to promote the spirit, purport and object of the Bill of Rights when interpreting any legislation. The rights and values enshrined in

s 34 of the Constitution can only be meaningfully promoted by reading the subsection in a manner that continues to permit the taxpayer or his authorised representative to 'appear at the hearing of an appeal in support of the appeal'. If the intention with the deletion of the sub-section was to deprive the taxpayer of his or her right to representation in the Tax Court or to limit it to legal practitioner, that should not have been left for speculation, or as a matter that ought to be implied. The full court therefore correctly found that a provision excluding any right of representation for the taxpayer would be unconstitutional on grounds of unfairness. Therefore, the position which obtained before the deletion of s 125(2) of the TAA remained unaffected after the deletion.

[25] This interpretation finds support in the Explanatory Memorandum on the objects of the Tax Administration Laws Amendment Bill of 2017 which states that the amendment was regarded as '...a technical correction. The right of the appellant or his or her representative to appear at the hearing before the tax board is implicit.' It is therefore clear that before the deletion of s 125(2) of the TAA, a taxpayer was entitled to representation by a person not enrolled as a legal practitioner and that right as the memorandum explains, was not taken away. It follows therefore that the Davis Order prohibiting the taxpayer's authorised non-legal practitioner from participating in the hearing was not competent. The Tax Court at the hearing of the appeal could not rely on such order for precluding Mr Van der Merwe from appearing on the taxpayer's behalf.

[26] There are other sections in the TAA, such as s 25(2), s 67(5) and s 73 which make references to a taxpayer's 'authorised representative'. For instance, s 25(2) which deals with submission of return contains a reference to 'the taxpayer's duly authorised representative'. Section 25(3) of the TAA requires a tax return to be signed by the taxpayer or the taxpayer's duly authorised representative.

[27] Similarly s 67(5) of the TAA which deals with general prohibition of disclosure contains a reference to a 'taxpayer's duly authorised representative'. Thus, in terms of s 67(5) of the TAA, the Commissioner is entitled to disclose the taxpayer's information to the extent necessary to counter or rebut false information which might have been disclosed either by the taxpayer or the 'taxpayer's duly authorised representative'. In

terms of s 73(1) of the TAA, a taxpayer or a taxpayer's duly authorised representative is entitled to obtain the taxpayer's confidential information from SARS.

[28] This analysis makes it clear that the statutory provisions governing the performance of certain acts, and the appearance by or on behalf of the taxpayer in the Tax Court do not impose a requirement that the person who performs certain acts or appear on behalf of the taxpayer should be a legal practitioner or practising legal practitioner. To do so, would disregard the fact that taxpayers engage accountants, auditors or bookkeepers in dealing with their tax disputes with SARS because of the specialist nature of tax laws and procedures. In any event, the prohibition contended for by SARS does not even appear in the TCR.

[29] The question is whether the Tax Court's reliance on rule 44(7) of the TCR to preclude the taxpayer's duly authorised lay representative from appearing in the Tax Court, was correct. For completeness' sake, rule 44(7) of the TCR will be quoted in full again.

'(7) If a party or a person authorised to appear on the party's behalf fails to appear before the tax court at the time and place appointed for the hearing of the appeal, the tax court may decide the appeal under section 129 (2) upon

- (a) the request of the party that does appear; and
- (b) proof that the prescribed notice of the sitting of the tax court has been delivered to the absent party or absent party's representative unless a question of law arises, in which case the tax court may call upon the party that does appear for argument.'

[30] The question is whether rule 44(7) of the TCR imposes the requirement that the person who appears on behalf of the taxpayer in the Tax Court must be a legal practitioner. This calls for an interpretation of the rule. To do so one must have regard to the text, context and purpose of the rule. As far as the text of the rule is concerned, the words, 'a party or a person authorised to appear on the party's behalf' must be given their ordinary grammatical meaning. Read in this way the rule does not require the person authorised to appear on the taxpayer's behalf to be a legal practitioner. In other words, any individual vested with the taxpayer's authority may appear on behalf of the taxpayer in the tax appeal matter before the Tax Court.

[31] With regards to the context, rule 44(7) is not the only rule in the Tax Court Rules which contains a reference to the party's duly authorised representative. Rule 2(1)(b) of the TCR provides that all processes that require to be issued must be signed by the taxpayer, or the 'taxpayer's duly authorised representative'. In a similar vein, rule 7(2)(d) of the TCR requires a prescribed form in which an objection is contained to be signed by the 'taxpayer's duly authorised representative'.

[32] Rule 10(2)(d) of the TCR requires a notice of appeal to be signed by the taxpayer or the taxpayer's duly authorised representative. Finally, rule 57 of the TCR governing applications brought on notice of motion, requires it to be signed by the applicant or the applicant's representative. It is clear that any act to be performed under the provisions of the rules, to which I have referred, may be performed either by the taxpayer personally or by his duly authorised representative who does not have to be a legal practitioner. This is consistent with the interpretation of s 125 of the TAA which makes it clear that the taxpayer's authorised representative does not have to be a legal practitioner.

[33] The Tax Court therefore misdirected itself by interpreting rule 44(7) of the TCR to mean that the taxpayer's duly authorised representative should be a legal practitioner. The rule may not be interpreted in a manner that contradicts the provisions of the enabling legislation, which in this case, is the TAA. In *Hamilton-Brown v Chief Registrar of Deeds* the court held:⁸

'It is not, however legitimate to treat the Act and the regulations made thereunder as a single piece of legislation and to use the latter as an aid to the interpretation of the former. The section in the Act must be interpreted before the regulation is looked at and, if the regulation purports to vary the section as so interpreted, it is *ultra vires* and void. It cannot be used to cut down or enlarge the meaning of the section (See *Clinch v Lieb*, 1939 T.P.D 118 at p. 125).'

[34] The Tax Court rules are made by the Minister in terms of s 103 of the TAA. The Minister may not make rules which contradict the TAA. If he did so, he would be acting *ultra vires*.⁹ Simply put, this means that the meaning to be placed on rule 44(7) of the

⁸ *Hamilton-Brown v Chief Registrar of Deeds* 1968 (4) SA 735 (T) at 737D.

⁹ *Minister of Finance v Afribusines NPC* [2022] ZACC 4; 2022 (4) SA 362 (CC); 2022 (9) BCLR 1108 (CC).

TCR should not contradict the provisions of the TAA, in particular s 125 of the TAA. The construction of rule 44(7) of the TCR proffered by SARS must be rejected.

[35] That leaves SARS' reliance on the judgments of *Van der Merwe and Poulter* and how they interpreted s 25(2) of the LPA. In *Van der Merwe*, a judgment delivered on 30 June 2022, this Court dismissed Mr Van der Merwe's application to represent the taxpayer in this Court on the basis that under the common law, which now finds expression in s 25 of the LPA, a lay person is not allowed to represent a natural person in a court of law and that it has no discretion to allow a lay person to do so. This Court held:¹⁰

'In terms of the common law, it is not permissible for a lay person to represent a natural person in a court of law. This common-law position now finds support in s 25 of the Legal Practice Act 28 of 2014, which provides in relevant part that:

"(1) Any person who has been admitted and enrolled to practise as a legal practitioner in terms of this Act, is entitled to practise throughout the Republic, unless his or her name has been ordered to be struck off the Roll or he or she is subject to an order suspending him or her from practising.

(2) A legal practitioner, whether practising as an advocate or an attorney, has the right to appear on behalf of any person in any court in the Republic or before any board, tribunal or similar institution, subject to subsections (3) and (4) or any other law."

It follows that there is no discretion to allow a lay person to represent a natural person in a court of law. In *Shapiro & De Meyer Inc v Schellauf* (*Shapiro*), this Court accordingly held that the respondent's wife was not entitled to appear and argue the appeal on behalf of the respondent. There is no justification for this Court to depart from its established practice, which is in accordance with the common law. The pitfalls of a natural person being represented by a person who is not a legal practitioner are obvious. The clearest example that comes to mind is that the rules of this Court would not oblige such a lay representative to file a power of attorney. This could cause a party to subsequently deny the authority of the representative, to the detriment of the administration of justice. These are the reasons why this Court refused to grant Mr Van der Merwe leave to represent the taxpayer.'

The judgment in *Shapiro & De Meyer Inc v Schellauf* (*Shapiro*)¹¹ cited by this Court in support of its findings in turn, referred to *Volkscas Motor Bank Ltd v Leo Mining Raise*

¹⁰ Op cit fn 1 para 45-46.

¹¹ *Shapiro & De Meyer Inc v Schellauf* [2001] ZASCA 131; [2001] JOL 9172 (A).

*Bone and Others (Volkskas Motor Bank Ltd)*¹² and *Yates Investments (Pty) Ltd v CIR (Yates)*.¹³

[36] In *Shapiro & De Meyer Inc*, this Court dealt with a matter in which respondent was sued by his erstwhile attorneys for unpaid legal costs which the attorneys had incurred before the respondent terminated their mandate. Shortly before the hearing of the appeal his wife indicated that she wished to bring an application to be joined as a party to the proceedings. At the hearing neither the respondent nor his wife had legal representation. She was allowed to argue the joinder application in person and in the course of that to deal with the merits of the appeal. The respondent himself did not wish to present his own case, but nothing prevented him from doing so. As this Court could see that this was a ploy to enable her to appear and argue the appeal on behalf of the respondent, it held that she was not entitled to do so and dismissed her application.

[37] *Volkskas Motor Bank Ltd* concerned a notice of intention to defend which was signed by a natural person defendant on his own behalf and also on behalf of the other defendant, who was also a natural person. The question was whether the notice of intention to defend signed by one natural person on behalf of another natural person complied with rule 19(1) of the Uniform Rules of Court which requires a defendant within a specified time, to deliver a notice of intention to defend 'either personally or through his attorney.' The court in *Volkskas Motor Bank Ltd*¹⁴ held that: '...where a natural person seeks to represent another natural person in delivering a notice of intention to defend, such representation is not competent in terms of rule 19(1) where the person purporting to represent the defendant is not himself an attorney.'

[38] In *Yates*, the court was not concerned with the legal representation in the Tax Court. The question which the court answered in the negative was whether a lay person could represent a juristic person in this Court. It had this to say:

¹² *Volkskas Motor Bank Ltd v Leo Mining Raise Bone CC and Others* 1992 (2) SA 50 (W); [1992] 3 All SA 764 (W).

¹³ *Yates Investments (Pty) Ltd v CIR* [1995] ZASCA 76; 1955 (2) PH F109 (AD); 1956(1) 364 (A) at 365C.

¹⁴ Op cit fn 12 at 53G-I.

'A litigant is entitled to appear in person in any division of the Supreme Court. The appellant, being an artificial person, cannot appear in person and must be represented by a duly admitted advocate: ... As far as the appellate division is concerned there are no statutory provisions which allow anybody who is not a duly admitted advocate to appear on behalf of a litigant.'

[39] But this case is no authority for the proposition that a lay person cannot represent a natural person in the Tax Court. It was not concerned with the representation in the Tax Court and therefore did not have to analyse the statutory provisions regulating the right of appearance of a duly authorised lay person to appear and present a case on behalf of the taxpayer in the Tax Court. It is therefore unhelpful.

[40] The decision in *Poulter* concerned, among others, an application by Mr Van der Merwe for leave to intervene in Ms Poulter's appeal against paras 2,3 and 4 of the Davis Order. In the first place the notice of appeal had been signed by Mr Van der Merwe who purported to be Ms Poulter's representative. Mr Van der Merwe is not an attorney or an advocate with right of appearance in the high court. Not only that the notice of appeal was signed by Mr van der Merwe, but it was also filed in the Tax Court instead of in the high court. It was filed in the wrong forum which resulted in the notice of appeal being filed out of time. Hence the taxpayer brought an application to condone the late filing of the notice of appeal. The condonation application was signed by Mr Van der Merwe, not by Ms Poulter. It was late and again filed in the wrong forum.

[41] The high court dismissed Mr Van der Merwe's application for leave to intervene because, first, he failed to demonstrate that he had a real and substantial interest in the appeal and secondly, it was found to have been nothing else but an attempt to represent the taxpayer in the high court proceedings in circumstances where he was not entitled to do so in the light of the judgment of this Court in *Van der Merwe*.

[42] These cases are distinguishable from the facts of the present case. The courts in those cases were not concerned with legal representation and the right of appearance by or on behalf of the taxpayer in the Tax Court. In *Poulter* the full court did not consider whether the Tax Court is a court of law or whether the Davis Order, which was sought to be appealed against, was appealable.

[43] In the light of the conclusion I have reached, it is unnecessary to answer the question whether or not the Tax Court is a court of law as contemplated in s 166(e) of

the Constitution. In any event, I fully agree with the full court's finding and reasoning that the Tax Court is not a court of law envisaged in s 166 of the Constitution, and that a lay person duly authorised by a taxpayer may appear and present a case on behalf of the taxpayer in that court.

[44] I say this for the following reasons. Section 165(1) of the Constitution vests judicial authority in the courts. The courts that form part of the judicial system are listed in s 166 of the Constitution as follows:

'The courts are—

- (a) the Constitutional Court;
- (b) the Supreme Court of Appeal;
- (c) the High Court of South Africa, and any high court of appeal that may be established by an Act of Parliament to hear appeals from any court of a status similar to the High Court of South Africa;
- (d) the Magistrates' Courts; and
- (e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrates' Courts.'

Notably, the Tax Court is not listed in s 166 and it is not regarded as having status similar to the High Court or the Magistrates' Court listed in s 166.¹⁵

[45] The question then is whether the phrase 'including any other court established or recognised in terms of an Act of Parliament' in s 166(e) of the Constitution covers the Tax Court as well. The phrase refers to a court established or recognised in terms of an Act of Parliament. It does not apply to the Tax Court, which, in terms of s 116 of the TAA is established on an *ad hoc* basis by the President by Proclamation in the Gazette.

[46] A court contemplated in s 166(e) of the Constitution refers to a court that may be established or recognised only by Parliament itself through legislation. It cannot include a court established by executive through Proclamation. To find otherwise would undermine the efficacy of the separation of powers. Courts are created by the Constitution or by national legislation, not by the executive acting alone.

¹⁵ *A (Pty) Ltd and Other v Commissioner of South African Revenue Service* (VAT 304) [2005] ZATC 18).

[47] In conclusion, first, neither the TAA nor the Tax Court Rules require a taxpayer to be represented only by a legal practitioner in the Tax Court. A duly authorised lay person may represent a taxpayer in the Tax Court proceedings. Second, in any event, the Tax Court is not a court contemplated in s 166 of the Constitution. Third, the Davis Order could not provide a sufficient basis for the exclusion of Mr Van der Merwe at the tax appeal hearing.

The order

[48] In the result, the appeal is dismissed with costs.

Deputy President Zondi

Appearances

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