REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO: 2013/2012

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
13 February 2014	**……**
DATE	SIGNATURE

In the matter between:

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

and

TAXPAYER — **RESPONDENT**

O R D E R

ROGERS, J:

This is an interlocutory application in a pending appeal before the Tax Court. The pending appeal concerns assessments issued with an effective date of 1 October 2004 in respect of 2004 the taxpayer's 1998 to 2002 years of assessment. The main issue in regard to those assessments is the proper application of section 11(*g*A) of the Income Tax Act to the affairs of the taxpayer.

The present interlocutory application has two prongs. The Commissioner seeks condonation of the late filing of a notice in terms of rule 14(1) of the rules governing the Tax Court's proceedings, rule 14(1) being the rule relating to the giving of notices calling for discovery; and the other aspect concerns the holding of a pretrial conference, which is regulated by rule 16.

It is unfortunate that the further conduct of this matter has had to be bedevilled by not only this interlocutory application, but by an earlier application, which the Commissioner withdrew, tendering costs, because of advice from counsel that that application was inadequate.

This case is characterised by conduct, both on the part of SARS and the taxpayer, in which the rules were not complied with, and in which neither side vigorously followed up these matters to keep the other party to the procedural timetable laid down in the rules. The timetable in the rules is a generous one; far longer periods are permitted for the filing of pleadings, by which I mean the statements in terms of rules 10 and 11, then applies in High Court proceedings under the Uniform Rules of Court. The period for responding to requests for discovery is also much longer. This perhaps takes into account that SARS is a busy governmental agency, and perhaps the rule makers intended it to have more time than applies to High Court litigation. Possibly also the rule maker bore in mind that many tax cases are complicated, and that more care and time might be needed.

Despite these generous time periods, one sees time and time again that neither SARS nor the taxpayers comply with them; they simply seem to go along in their own way. This is strongly to be discouraged. SARS, in particular, should take the lead and should display efficiency in the conduct of litigation. It should comply with time periods, and where it does not, it should promptly raise that matter in correspondence, providing reasons and seeking written agreements to extensions.

Having said that SARS should take the lead, taxpayers themselves should not allow matters to drift. If SARS does not comply with a requirement imposed by the rules, a taxpayer is entitled, in terms of rule 26, to bring an application to compel compliance with the Commissioner's obligations. That is the way in which a taxpayer prevents the prejudice which can otherwise arise from lengthy delays in the finalisation of tax disputes. I look with relatively little sympathy on a taxpayer who claims prejudice, without having at any time availed itself of the procedural right accorded by rule 26, particularly where one finds, as one does in the present case, that the taxpayer itself has displayed a significant degree of lethargy in the conduct of the tax appeal.

Turning to the facts of this specific case, the question was argued on the footing that good cause was required to be shown by the Commissioner for having been late in filing the rule 14 notice. It is the lateness of that rule 14 notice which, in turn, implicates rule 16, because rule 16 links the holding of a pre-trial conference to the 60-day period following the date on which parties have made discovery, at least in those cases where discovery notices have been served on them. Because the Commissioner's discovery notice in this case was late, a dispute subsequently arose as to whether it was competent for the Commissioner to arrange a pretrial conference in terms of rule 16.

Both parties, in their helpful written submissions, have provided a chronology of events. I propose very briefly to provide my own as a background to my reasons in this case. SARS's investigation into the tax affairs of the taxpayer, which gave rise to the assessment of 1 October 2004, occupied the period October 2001 to June 2003. As stated, the revised assessments which are now in dispute were issued on 1 October 2004, preceded by a letter of findings on 18 August 2004. The taxpayer filed its objection on 18 January 2005. This was pursuant to an extension which SARS had granted. This is the first of many occasions in which one side or the other did not stick to the time limits.

Following the objection, SARS on 16 March 2005 requested further information, which was supplied some four months later on the 27th of July 2005. On 16 August 2004, that is slightly less than a month after the further information had been supplied, SARS disallowed the objection.

On 19 August 2005 the taxpayer filed its notice of appeal, using Form ADR 2. In this form the taxpayer elected to have the dispute referred to Alternative Dispute Resolution, though it did not set out any grounds of appeal, as the rules required. The covering letter of this notice of appeal stated that the taxpayer was in the process of drafting grounds of appeal. The matter then drifted for the balance of 2005, presumably in expectation by SARS of receiving the grounds of appeal that should have accompanied the notice of appeal.

On the 25th of January 2006 SARS wrote to LDP, the firm of accountants then representing the taxpayer, noting that SARS had still not received the grounds of appeal and enquiring whether the taxpayer was persisting with its appeal. LDP replied on the same day, stating that it did still represent the taxpayer and that the taxpayer's grounds of appeal were those set out in the objection. So, it took from 19th of August 2004 to 25th of January 2006 for the taxpayer to tell SARS that it was not drafting separate grounds of appeal, but simply relied on the grounds set out in the objection.

Following that communication on the 25th of January 2006, SARS notified LDP on 3 March 2006 that SARS agreed that the notice of appeal was in order and contained a valid reference to ADR. LDP was advised that ADR correspondence would follow in due course from SARS's Pretoria office. No correspondence, in fact, followed, and a facilitator, it seems, was never appointed in terms of Schedule A to the rules. The precise reason for this is not entirely clear from the papers. At least on SARS's version, the explanation would appear to be that, in its mind, it regarded this appeal, and many others which raised a similar point under section 11(*g*A), to have been held indefinitely in abeyance, pending a decision in the so-called KFM Radio case, where it was expected this point would be dealt with.

The taxpayer, in the current interlocutory application, has denied that there was any arrangement to hold its tax appeal in abeyance, and a confirmatory affidavit in that regard by Advocate AB was filed. There may have been a misunderstanding between SARS and the taxpayer in this regard, though it is peculiar that, in the first half of 2010, after the KFM judgment was finally delivered in May 2009, the taxpayer's Mr VAN wrote to Mr AA at SARS, informing Mr AA that he understood that the KFM judgment had now been delivered. This appears to indicate that the taxpayer in the present case appreciated the significance of the KFM judgment.

However, I am prepared to assume in favour of the taxpayer that there was no understanding specifically relating to its appeal, but on the other hand I accept the bona fides of Mr AA, who says that it was his understanding that such an arrangement existed in this matter, as it did in many others. What is noteworthy is that, if no arrangement existed, neither party acted after 3 March 2006 in the way one would have expected. If there had been no arrangement to defer, one would have expected, on SARS's side, that a facilitator would have been appointed to handle the ADR process, and that the taxpayer, for its part, would have expressed an interest in the progress of the ADR. Yet no such thing happened for more than two and a half years. Neither party did anything.

Finally, on 6 November 2008, which is about two and a half years later, LDP, the same firm of accountants who was still acting for the taxpayer, wrote to SARS's Cape Town office, asking what had become of the appeal and stating that the taxpayer had received no further correspondence in respect of the appeal. The next day SARS in Cape Town – in the person of Ms Care – replied to LDP, advising her that the matter had been allocated to the head office in Pretoria, and in particular to Mr AA. Ms Care furnished Mr AA's telephone number and e-mail address. Unfortunately, the area code in the telephone number was incorrect, though I gather the e-mail address was correct.

At this point one might have expected that LDP would have taken the matter up with Mr AA in Pretoria. If that had happened in late 2008, Mr AA would no doubt have responded that the matter was being held in abeyance because of the pending KFM matter in which judgment had not yet been delivered. However, nothing further was done from the taxpayer's side after 7 November 2008.

On 11 May 2009 the KFM judgment was delivered, and in the event, it apparently did not address the section 11(*g*A) point and went off on some other aspect. It thus proved to be less helpful than everyone had expected.

Some four or five months later, in September 2009 according to Mr AA, his office received and became aware of the KFM judgment. I find it somewhat extraordinary, if a number of section 11(*g*A) matters were being held in abeyance pending the outcome of the KFM case as a test case, that Mr AA and his office in Pretoria should only have learned of the judgment after four to five months. However, in the history of this matter it seems that delays of four to five months are, regrettably, not unusual occurrences.

On the 14th of September 2009 LDP wrote to a Ms EB at SARS, referring to the previous e-mail of 7 November 2008 and asking Ms EB to follow up on the taxpayer's appeal, as she, namely the assistant at LDP, had been unable to reach Mr AA on the telephone number furnished in the e-mail of 7 November 2008. One may pause to wonder at this stage why, over a period of 10 months, LDP had apparently found it impossible to communicate with Mr AA by e-mail, as, indeed, they were communicating with Ms EB by e-mail, or why they did not just check with SARS what Mr AA's telephone number was. This does not reflect any keen endeavour on the part of the taxpayer to ensure that its appeal was brought to finality. Ms EB replied on the same day to LDP, stating that she would add this to an apparently lengthy to- do list, which, regrettably, Ms EB then did not follow up on, because LDP had to write again to her on 16 September, 30 September and,

finally, 19 November 2009 to ask for a progress report. This was simply ignored by SARS, which, of course, is completely unacceptable.

That takes one to November 2009. Thereafter, one has a customary drift of this matter for five or six months without anything happening, when, on the 18th of June 2010, slightly more than a year after the KFM judgment had been delivered, Mr VAN of the taxpayer writes to Mr AA, apparently now having his correct contact details, expressing his understanding that the KFM judgment had already been delivered. I just pause to mention that the papers do not explain in what context Mr VAN had become aware of the KFM judgment or its significance.

In response, we find somewhat quicker action than had characterised this matter hitherto, because a mere four days later, on the 22nd of June 2010, Mr AA replied to Mr VAN, explaining that unfortunately the KFM case did not address the section 11(*g*A) issue as had been hoped. He, Mr AA, apologised for the delay – this was the delay during which, on Mr AA's understanding, the matter had been held in abeyance, pending the KFM case – but said that the taxpayer's appeal would have to continue. He informed Mr VAN that the dates 23 to 27 August 2010 were available for the trial of the matter. That was a date about two months hence. He also attached SARS's rule 10 statement, its statement of the grounds of assessment. On the same day the taxpayer replied, stating that the writer, Mr VAN, was leaving overseas the next day, and that it would be necessary rather to seek an alternative trial date.

At that stage, therefore, SARS was displaying an attitude of progressing the matter with a relatively early trial date, but, because of the lateness of the suggestion, that did not suit the taxpayer.

On the next day, 23rd June 2010, SARS also wrote to LDP to keep them in the loop, attaching the rule 10 statement and requesting from them whether the dates 23 to 27 August 2010 would suit LDP.

About a month later, on the 22nd of July 2010, LDP replied to say that the taxpayer would be briefing Advocate SC that they would only be able to consult with him on 2 August 2010, and for that reason could not agree to the proposed August trial date. This seemed to bring on a further paralysis attack, so that one finds the next development being a letter from SARS to LDP on the 14th of July 2011, requesting the taxpayer to deliver its rule 10 statement within 14 days.

I pause to mention here that SARS had served its rule 10 statement on the 22nd of June 2010, so that the taxpayer's rule 11 statement had been due sometime in September 2010. SARS was thus writing nine or 10 months after the taxpayer's rule 11 statement should have been filed. So, we have the taxpayer, on the one side, being remiss in respect of its procedural obligations, and SARS, on the other hand, not taking steps in terms of rule 26 to hold the taxpayer to the rules.

On the 29th of July 2011 LDP replied to SARS, asking for an extension of time to file the rule 11 statement. They requested an extension to 5 September 2011. Thatwas reluctantly acceded to by SARS on the 3rd of August 2011, and so it was that on 5 September 2011, about a year after its due date, the rule 11 statement was served by the taxpayer under cover of a letter which indicated that they still wanted the matter to be referred to ADR.

On 20 September 2011 SARS acknowledged receipt and said it would revert – I presume, revert regarding the proposed request that the matter still go to ADR. On 12 October 2011 SARS followed up in a further letter to LDP, expressing the view that the matter had progressed to a point beyond which the formal prescribed ADR process was applicable. SARS indicated that they were nevertheless willing, in principle, to engage in settlement if there was something realistic to talk about, and they asked the taxpayer to identify what issues they wanted referred to ADR and what issues were amenable to compromise or agreement.

On 20 October 2011 LDP replied, requesting an extension of time to respond on the basis that Advocate AB had left on study leave. They said in their letter that LDP and the taxpayer had no intention of delaying the matter.

Despite that expression of view, one then finds a period of about nine months in which nothing happens. LDP does not respond to SARS regarding its wish to pursue settlement or ADR. SARS does not grasp the nettle by communicating with the taxpayer and asking it what is going on. That happened, as I said, only some nine months later, on the 23rd of July 2012, when Mr AA writes to LDP, making a settlement offer. That was without prejudice, and its terms I do not know, but it seems that SARS had taken the initiative since nothing further had been heard from the taxpayer.

About a week later, on 1 August 2012, LDP reverted with a counteroffer, saying that if the counteroffer was declined the matter should be referred to the Tax Court. It is important, I think, now to take stock of the position that had been reached by this time.

Whatever delays had previously characterised the matter, a rule 10 and a rule 11 statement had been filed. The filing of the rule 11 statement rendered irrelevant the earlier pattern of delay on both sides, because there were now closed pleadings, a case which, in accordance with the rules, should progress to the Tax Court after discovery and trial conference proceedings and the like. The delay from 5 September 2011, when the taxpayer filed its rule 11 statement, to 1 August 2012, when LDP reverted with its counteroffer, saying that otherwise it wished to go to the Tax Court is explained by the fact that, in filing its rule 11 statement, the taxpayer had indicated its desire to go to ADR. SARS had asked what it had in mind on 12 October 2011. The taxpayer had promised, also in October 2011, to reply, but requested an extension of time, and then the trail went cold until SARS, itself, unilaterally, it seems, made a settlement offer in July 2012, resulting in a counteroffer on 1 August 2012.

That counteroffer was rejected by SARS on 20 August 2012, and, accordingly, at that stage, one would have expected, as indicated in LDP's letter of 1 August 2012, that the matter would now go to the Tax Court.

Mr SC, in his submissions on good cause relating to the late filing of the rule 14 notice, said that the delay from 5 September 2011 to 20 August 2012, which was the date when the rule 14 notice was served – it accompanied the rejection of LDP's counteroffer – had not been satisfactorily explained, and that there was no good cause. With that submission I disagree.

The Commissioner's counsel today, Mr Wet, submitted that when settlement discussions are being pursued, or a possible reference to ADR, it is not unusual for formal procedural steps to be held in abeyance. There was no express arrangement to that effect, and it would certainly have been better if such an arrangement had been specifically agreed, but since LDP was the party seeking time in October 2011 and then did nothing further for nine or 10 months, I do not think SARS can be criticised for holding the matter in abeyance while it awaited a response from LDP.

The good cause that is required does not have to be a good cause which shows that the defaulting litigant acted, in every respect, as soon and as promptly as it should have done, but merely that one can understand the reason why a particular procedural step was not taken. I can understand, in the light of the events from 5 September 2011 to 20 August 2012, why a rule 14 notice was not filed until that date.

That then brings us to 20 August 2012. There is now a rule 14 notice, which, in terms of the very generous rules, calls upon the recipient to make discovery under oath within 40 days – that is 40 business days – as defined in the rules. On 16 November 2012, presumably relatively shortly after that period had expired, SARS wrote to LDP, calling on the taxpayer to respond to the rule 14 notice by 23 November 2012, and stating that if discovery was not made the Commissioner would proceed with his case on the footing that there were no documents which the taxpayer intended to use at the trial.

In response LDP on behalf of the taxpayer commenced a procedural line of attack which Mr Wet, in his submissions, has characterised as obstructive. On the 20th of November 2012 LDP wrote to SARS, in effect asking why the taxpayer was obliged to make discovery, given that the rule 14 notice had been served way beyond 20 days after delivery of the rule 11 statement. That 20 days is set in rule 14(1) as the date by which either party may seek discovery from the other. SARS responded the next day, setting out its position, and also informing the taxpayer that SARS itself intended to make and file discovery, despite the fact that it had not been requested to do so. SARS followed up with a discovery affidavit some four months later, on the 6th of March 2013.

In the meanwhile, the taxpayer was still evidently adopting the position that it was free to disregard the rule 14 notice, because it had not been served within, it said, 60 days, but I think the correct position was 20 days, from the filing of the rule 11 statement.

SARS took this up again on 18 June 2013 in a letter to LDP, saying that, due to lack of communication, SARS did not know if LDP still represented the taxpayer and whether, despite the absence of discovery, LDP did still intend to represent the taxpayer. SARS also said that they wished to schedule a pretrial conference, which had been done for 9 July 2013. SARS was now displaying an interest in moving the matter on.

On 26 June 2013 LDP replied, confirming that they still acted for the taxpayer but saying that SARS had not been entitled to arrange a pretrial conference without seeking condonation, which the taxpayer would oppose. The letter was non - specific as to the form of condonation required, but in the event, it emerged that the taxpayer had in mind that a rule 16 conference could not be convened until 60 days after discovery had been made pursuant to discovery notices, but that, because the Commissioner's discovery notice was late, there first had to be condonation for that before the time period for scheduling a pretrial conference could be triggered. On the 28th of June 2013 SARS replied, stating its understanding that the taxpayer was now refusing to attend a pretrial conference. SARS noted that because the taxpayer apparently did not intend to file a

discovery affidavit, it would proceed to insist on a pretrial conference and would bring an application to compel in that regard in terms of rule 26(5).

On 8 July 2013 LDP wrote to SARS, holding its previous line and saying that SARS could not permissibly arrange a rule 16 conference unless authorised by Court, following condonation. This led to SARS, in July 2013, issuing an application to compel the taxpayer to attend the pretrial conference.

An opposing affidavit was filed on 6 September 2013 which made clear that which had apparently not been clear to SARS before, namely that the basis of the taxpayer's contention was that the pretrial conference had to be arranged within 60 days of the close of pleadings, and that a conference could thus not be organised, given that that period had expired, and also that there was, as yet, no condonation for a late rule 14 notice, which might itself thereafter trigger a right to convene a pretrial conference.

SARS took legal advice from counsel, who advised that the application to compel attendance at the pretrial conference was misconceived, and then on 26 September 2013 SARS launched the present application, in which it now specifically seeks condonation, and, pursuant to such condonation, the authority to convene a pretrial conference. The matter has been opposed and argued before me.

I think it will be clear from what I have said that there has been material and lamentable delay on both sides, but that the filing of the rule 14 notice on 20 August 2012 is something for which an explanation has been provided, despite the fact that such filing was more than 20 days after the filing of the rule 11 statement.

Sincethe 20th of August 2012 SARS has been relatively prompt in following up on the further progress of the matter and attempting to insist on obtaining a reply to discovery. SARS has also attempted to bring the matter to a head by arranging a pretrial conference. In response to all of these efforts, the delay from the taxpayer has been a tactical one, which relies on procedural objections.

Given the history of the matter, which I have been at pains to set out at some length, it surprises me that the taxpayer should have adopted the stance it did. For better or for worse, and despite all the earlier delays, it chose to file a rule 11 statement on 5 September 2011, indicating that the matter was proceeding. The delays for holding the matter in abeyance while the KFM case was decided, whether that was or was not the result of an understanding between the parties, is neither here nor there, because by the 5th of September 2011 there had been a rule 10 statement and

then a rule 11 statement. What should have happened thereafter was discovery, which was not requested for a period of nearly 9 months because of the taxpayer's expression of interest in going to ADR, SARS's attempt to clarify what might be suitable for compromise, the taxpayer's failure to respond, and then, during July and August 2012, an offer and counteroffer.

That is the point from which I assess the matter, going forward. I find that there was good cause for SARS only delivering its rule 14 notice on 20 August 2012. The taxpayer has consistently since then refused to respond, taking the view that condonation was required. This, in turn, has bedevilled the holding of a pretrial conference.

The taxpayer's attitude strikes me as unduly technical, an attitude which does not pay sufficient regard to the history of delays on both sides in the matter, and, in particular, the reasons for delay after 5 September 2011. I am also puzzled by the taxpayer's stance, because, at the end of the day, there are currently revised assessments, the taxpayer's 1998 to 2002 years of assessment, which stand, and which the Court is not empowered by statute to set aside unless the Court finds them to be wrong, pursuant to an appeal process. The taxpayer should be wanting this matter to come before the Tax Court on the pleadings that have been filed. Instead, it is delaying the matter, but to what end? Delaying the matter does not bring the matter before the Tax Court; it stops the matter coming before the Tax Court, and it is only when the matter comes before the Tax Court that the revised assessments can be set aside if shown to be wrong.

The taxpayer apparently feels very strongly that the revised assessments are wrong; it rates its prospects of success highly. SARS, naturally, has a different view. I have not been able to go into the merits of the matter. There appears at this stage to be a bona fide dispute, but the simple point is that this matter has to come before the Tax Court if the assessments are to be set aside. It can only come to the Tax Court, it seems to me, if there is discovery and if the parties follow an efficient procedure to ensure that the issues are narrowed and that the trial starts before the Tax Court at a time when everybody is ready to proceed. How can one have a case without discovery or without a pretrial conference? These matters should have been sorted out. It follows that I would, in essence, grant the application.

As to the question of the costs of this application, I was told that the costs of the previous aborted application were tendered by the Commissioner. In regard to the costs of the present case, Mr SC submitted that, if I were against him on the merits, the opposition was nevertheless not unreasonable, and that, for this reason, SARS should pay the taxpayer's costs. The authorities dealing with costs in such circumstances do not uniformly hold that reasonable opposition is a ground for causing a successful party, who nevertheless gets condonation, to pay the

unsuccessful party's costs. Be that as it may, I do not think, in this case, that the opposition was reasonable.

I have branded the taxpayer's attitude since November 2012 as being one of undue technicality. The taxpayer itself could have compelled SARS to comply with its procedural requirements earlier if the taxpayer had a desire to expedite the matter. I am jaundiced in regard to the proposition that, from August 2012 onwards, the taxpayer had any desire to have this matter expedited. It should have been clear that, with the pleadings having closed, this matter needed to come to court; and sensible arrangements should have been made in regard to discovery and the holding of a pretrial conference. SARS bungled once, apparently, in the first interlocutory application, and it has borne the consequences by having to tender costs. I do not think SARS should have to bear any costs in relation to the second application, which should have not been necessary.

The order I grant, is therefore the following – I am slightly modifying the wording of paragraph 1 of the notice of motion.

1. The applicant's late serving of its rule 14(1) notice, served on 20 August 2012, is condoned in terms of rule 26(4).

2. The respondent shall, within 40 days of this order, make discovery under oath and allow for the production and inspection of documents, all in accordance with rule 14.

3. The applicant shall, within 60 days after the filing of the respondent's discovery, as aforesaid, arrange a pretrial conference in terms of rule 16(1)(*a*).

4. The respondent shall bear the applicant's costs of this interlocutory application.

ROGERS, J