REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

(HELD AT SUNNINGHILL)

CASE NO.: 0078/2018

(1)	REPORTABLE: **YES** / NO
(2)	OF INTEREST TO OTHER JUDGES: **YES** / NO
(3)	REVISED.
5 June 2019	**……**
DATE	SIGNATURE

In the matter between:

THE TAXPAYER **APPLICANT**

and

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

J U D G M E N T

KEIGHTLEY, J:

INTRODUCTION

[1] This is an application by a taxpayer for default judgment against the respondent (SARS) under Tax Court rule (the Rules)[1] 56(1)(*b*) read with rule 56(2)(*a*). Rule 56 reads as follows:

> "(1) If a party has failed to comply with a period or obligation under the Rules….the other party may—
>
> (*a*) deliver a notice to the defaulting party informing the party of the intention to apply to the tax court for a final order under section 129(2) in the event that the defaulting party fails to remedy the default within 15 days of delivery of the notice; and
>
> (*b*) if the defaulting party fails to remedy the default within the prescribed period, apply, on notice to the defaulting party, to the tax court for a final order under section 129(2).
>
> (2) The tax court may, on hearing an application—
>
> (*a*) in the absence of good cause shown by the defaulting party for the default in issue make an order under section 129(2), or
>
> (*b*) make an order compelling the defaulting party to comply with the relevant requirement within such time as the court considers appropriate and if the defaulting party fails to abide by the courts order by the due date, make an order under section 129(2) without further notice to the defaulting party"

[2] Section 129(2) of the Act gives the court the power, in appeals against assessments or decisions by SARS, or in applications involving procedural matters under section 117(3), to either confirm the assessment or decision in question; to order its alteration; or to refer the assessment back to SARS for further examination or assessment.

[3] The applicant and SARS are currently in dispute on the issue of whether the applicant should be registered as a VAT vendor. The applicant has been registered as one for a number of years. In 2017 it applied to be deregistered, but SARS disallowed the application. The applicant lodged an objection against SARS's decision, which objection was disallowed. The applicant had no luck either with its appeal to the Tax Board, which dismissed the appeal on 25 July 2018. Undaunted, the applicant then filed a Notice of Referral of Appeal to the Tax Court for a *de novo* hearing under rule 29. The notice was delivered to SARS on 7 August 2018.

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[1] Promulgated under section 103 of the Tax Administration Act, Act 28 of 2011 (the Act).

[4] It is from this point onwards that the events become more relevant to the application for default judgment. Although SARS had 45 days within which to deliver its statement of assessment and objection to the appeal under rule 31(1) (the rule 31 statement), it is common cause that it failed to do so by the due date, being 11 October 2018. SARS's failure prompted a response from the applicant: its attorneys sent a letter to SARS giving notice that should SARS fail to deliver the rule 31 statement within 15 days (i.e. by 8 November 2018), their client would apply for an order under section 129(2) of the Act. It is common cause that the applicant was entitled to deliver this notice under rule 56(1)(*a*) of the Act.

[5] It is also common cause that SARS did not heed to the warning contained in the notice letter, and it did not file the rule 31 within 15-day period stated in the notice. Consequently, on 21 November 2018 the applicant delivered a notice to SARS of its application for default judgment under rule 56(1)(*b*). in the notice of motion the applicant applied for the following relief:

5.1. a final order under section 129(2) overturning SARS's decision to deregister the applicant as a VAT vendor; or

5.2. alternatively, an order directing SARS to deliver it rule 31 statement within a time period determined by the court.

[6] The application for default judgment seemed to spur SARS on to the extent, at least, that it filed its rule 31 statement on 27 November, a few days after the application was received. As far as for the default judgment is concerned, however, there was further delay on the part of SARS. It filed its notice of intention to oppose, along with its answering affidavit on 24 January 2019. This was not within the time periods set out in the notice of motion in the default judgment application. As I discuss shortly, the applicant takes issue with SARS on this score as well.

APPLICANT'S CASE

[7] Although the applicant filed a replying affidavit in the default judgment application, it has elected not to respond to the rule 31 statement as it is entitled to do under rule 32. If the applicant had filed its rule 32 statement (or if it does not so in the future, in the event that default judgment is refused), SARS would be entitled to file a response, and the appeal would then be set down for hearing in the normal course. The applicant has made an election instead to proceed with its default judgment application. It does not advance the case that it couldn't file its rule 32 statement, or that it has been prejudiced in any other way by SARS's delay in filing its rule31 notice. Mr Wise, for the applicant conceded in his oral submissions that the applicant did not deal with the issue of prejudice at all in its application for default judgment.

However, for the reasons I discuss later, he submitted this issue is irrelevant to the applicant's case.

[8] The essence of the applicant's case is that it is procedurally entitled to judgement by default under rule 56. It relies on the common cause fact that SARS did not deliver its rule 31 statement within the time frames provided in the rule, nor did it comply with the notice given under rule 56(1)(*a*). SARS only filed its rule 31 statement after it received the notice of motion in the default judgment application. Moreover, SARS did not apply for condonation for the late filing of its statement. Critically for the applicant's case, it says that SARS did not give an explanation for its failure to comply with these time limits in its answering affidavit. I should add that the absence of an explanation by SARS is common cause.

[9] Based on these facts, the applicant contends that in the absence of an explanation, SARS has failed to establish good cause for purposes of avoiding default judgment under rule 56(2)(*a*). Consequently, its rule 31 statement is not properly before court, and it follows axiomatically, submits the applicant, that default judgment must follow.

[10] It is apparent from this explanation that the applicant's case is purely technical. Mr Wise readily accepted that this was the case when I engaged with him during oral arguments. The applicant's stance is that for purposes of rule 56(2), good cause requires no more and no less than an acceptable explanation by the defaulting party for its delay. In the absence of this, the applicant is entitled to default judgment being entered to in its favour. It is the applicant's case that other factors, such as the nature of the delay, the balance of prejudice between the parties, and the merit of the appeal or the opposition to the appeal, are not relevant: if there is no explanation for a delay default judgment must follow. It was on the basis of this approach that the applicant did not deal with these factors in its founding and replying affidavit.

SARS RESPONSE

[11] In its answering affidavits, SARS dealt with the applicant's objection to the decision to refuse its request for deregistration, and explained the basis for its refusal decision. It pointed out that the decision was upheld by the ruling of the Tax Board, indicating that it had good prospects of opposing the appeal. It also pointed out that SARS had now filed its rule 31 statement, and that the applicant had until 1 March 2019 to file its rule 32 statement of grounds of appeal. SARS submitted that it would not be in the interest of justice to grant default judgment: in the first place, because SARS's decision was vindicated by the Tax Board (implying good prospects of success in opposing the appeal), and in the second place, because the appeal process was now on track.

[12] A supporting affidavit was also filed by Mr Telz, a Legal Consultant employed by SARS, who dealt with the applicant's appeal. The gist of Mr Telz's affidavit was that when the application for default judgment was received, SARS prioritised the filing of the rule 31 statement. Mr Telz implies that this was because prayer 2 of the notice of motion was for an order directing SARS to deliver its rule 31 statement. SARS obtained all of the relevant documents, including the Tax Board ruling from the clerk of the Tax Board. Head office personnel also had to be briefed on the background and merits of the appeal. While this delayed dealing with the appeal, SARS managed to file its rule 31 statement withing 5 days of receipt of the notice of motion in the default judgment application. Mr Telz repeated the submission that, in light of this, it would not be in the interest of justice to grant an order by default.

[13] In response to the legal submissions made by the applicant, Mr Sands, for SARS, submitted that the applicant's case was legally flawed. He pointed out that the well-established case law on good cause recognises a number of factors that must be considered by the court. These include the nature and extent of the delay, the prejudice to the other party caused by the delay, the explanation for the delay, the question of the merits of the matter and whether the defaulting party has a *bona fide* intention to defend the matter if it is permitted to avoid default judgment. He submitted that the merits of the main matter are relevant to this enquiry and cannot be ignored. All of these factors are relevant to an enquiry into good cause for purposes of rule 56, and for this reason SARS submitted that there was no merit in the approached adopted by the applicant: the mere fact of an absent of an explanation was not in itself sufficient to conclude that good cause was absent and that default judgments should be granted.

GOOD CAUSE IN THE CONTEXT OF RULE 56(2)(*a*)

[14] Neither counsel was able to point me to any judgment that have considered the meaning of, and requirements for establishing "good cause" under rule 56(2)(*a*). there is no reason to think that it has a meaning material different from that drawn from the ample authorities dealing with good cause under the common law, and other fields of law. As Mr Sands submitted, it is trite that good cause at common law requires the consideration of a number of factors. A sufficient explanation for the default is one of them. There is no doubt that it is an important factor and, depending on the relevant facts, it may be the deciding factor as to whether good cause has been established or not. However, our courts have consistently shied away from laying down fixed requirements for determining good cause precisely because the enquiry is always case-specific.

[15] Mr Wise could not point me into any authority that directly supported his submission that under rule 56(2)(*a*), the only criterion for determining good cause is whether the defaulting party has given an explanation for the default. This does not surprise me, as the proposition goes against the well-established legal principles laid down in respect of good cause in other contexts. In my view the submission is unsustainable.

[16] There is another important element to the meaning of good cause in rule 56(2)(*a*). these relate to the importance of not losing sight of the particular context within which the issue of good cause is raised here.

[17] It is now trite that in interpreting statutes or rules language, context and purpose all play an equal part. Tax administration has an important constitutional objective. SARS is an organ of state[2] and it tasked with the efficient and effective collection of revenue.[3] By doing so, SARS makes a critical contribution to achieving the constitutional project.[4] Without the proper and effective collection of revenue by SARS, national, provincial and municipal government cannot fulfil their constitutional obligations. This is particularly important in our constitutional dispensation which requires the state to take reasonable measures to advance, among other things, the socio-economic well-being of citizens.

[18] It follows, in my view, that in determining whether good cause exists under rule 56(2)(*a*), an important factor will be the extent to which the grant of default judgement against SARS, because of its delay in filing a rule 31 statement, will impact negatively on SARS's constitutional obligations. This is not to suggest that the taxpayer's interest have less importance. But it does mean that a court under rule 56(2)(*a*) in my view will have to engage in the process of weighing up the taxpayer's interest with the constitutional imperative that SARS should not be unduly restrained from being permitted to fulfil its function in collecting revenue.

[19] The applicant's avowedly technical approach to good cause in rule 56(2)(*a*) leaves no room for these fundamentally important considerations. On the applicant's approach, good cause is determined solely by the question of whether SARS, as the defaulting party, has provided an explanation for it delay in filing its rule 31 statement. Essentially, on the applicant's interpretation, "good cause" means "good explanation for delay" and no more. Clearly, that interpretation is inconsistent with the underlying constitutional obligations on SARS to collect revenue. Courts are enjoined to interpret legislation in accordance with the bill of rights and the constitution. It follows that the applicant's interpretation cannot be given judicial sanction.

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2 Section 2 of the South African Revenue Services Act 34 of 1997 (the SARS Act).
3 Section 3 of the SARS Act.
4 See Chapter 10 of the Constitution: Finance.

[20] There are further problems with the applicant's approach. Its premise is that if the rule 31 statement is filed out of time with no explanation, the court must treat the rule 31 statement as nullity. It should have no regard to it. Where there answering affidavit is also filed out of time with no explanation it must follow the same fate. Consequently, default judgment should be granted against SARS as matter of course.

[21] This approach ignores the clearly discretionary power of the court to grant default judgment or not under rule 56(2)(*a*). The court "may" grant default judgment "in the absence of good cause". There is nothing wrong in this wording, or anywhere else in the Rules, to suggest that the court is bound to do so. Indeed, if one looks at rule 56(2)(*b*), a court may, instead of granting default judgment, direct the defaulting party to make good its default within a set time frame. This option is expressly not dependant on the existence of good cause, which to some extent undermines the applicant's thesis that good cause is so critical that the court is bound to grant default judgment if it is not established.

[22] In its written heads of argument the applicant relied on a decision of the tax court in the Western Cape, ITC 0122, 80 SATC 159, a judgment of the learned Cloete. J. In that case, after a number of extensive delays, SARS sought condonation for the late filing of its answering affidavit in a default judgment application by a taxpayer. The rule 31 statement had also been filed late, and there was no application for condonation in respect of it.

[23] The relevant part of the judgment deals with the application for condonation for the late filing of the answering affidavit, which the court ultimately refused.[5] In doing so, the court had regard to the ordinary factors applicable at common law for the grant of condonation. It noted that there had been a delay of 5 months in filing the rule 31 statement by SARS, and that SARS had failed to meet a number of deadline extensions granted to it by the taxpayer. The rule 31 statement in that case was only eventually delivered a month after the application for default judgment was delivered. The court expressed the dissatisfaction in various respects with SARS's attempted explanations for the delays. It considered the question of prejudice to the taxpayer, and it also considered whether SARS had established that it had a *bona fide* case in the appeal.

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[5] ITC 0122 deals directly with the question of condonation. However, the judgment does not indicate what the procedural basis was for its treatment of the condonation application. The Tax Rules do not have the equivalent of the general condonation provision established under Rule 27 of the Uniform Rules Court.

[24] The applicant relies, in particular, on the *dictum* of the court at paragraph 34, where the learned judge states as follows:

> "However, SARS has a further, more fundamental, difficulty. This is that there is no application before the court for condonation for late filing of its rule 31 statement. The only application is for condonation for late filing of the answering affidavit. Even were it to be granted it would not cure the fundamental difficulty. *The fact of the matter is that the rule 31 is not properly before the court*. it was delivered months out of time and at the very least more than a month after the deadline of 7 August stipulated in the rule 56(1) notice,"

(My emphasis)

[25] Further, at paragraph 19, the court stated that: "Simply serving that statement on the taxpayer and filing it in the court file did not automatically remedy its non-compliance … ."

[26] I do not quibble with the latter statement by the learned Judge. It must be so that when a rule 31 statement is delivered late, it remains "defective" insofar as it was delivered out of time. However, in my view, this does not lead to the conclusion that unless an explanation for the delay in filing the statement is given, it must be treated as nullity, and default judgment must be granted. Indeed, I am not at all sure that this Is what the learned Judge meant in the *dictum* I highlighted earlier. If, however, she meant to reach this legal conclusion, then I respectively disagree.

[27] In my view, where the very complaint that the default judgment application aimed at is the earlier failure by SARS to file a rule 31 statement timeously, the fact that the statement <u>was</u> indeed subsequently filed <u>must</u> be a factor of material relevant to the court in determining whether good cause exists, and whether default judgment would be appropriate in the circumstances.

[28] The notion that a court should treat the rule 31 statement as non-existent in these circumstances, in my view, is antithetical to the court's duty to give proper consideration to the default judgment application. The same holds true for a notice of intention to oppose and answering affidavit filed out of time. At the very least, the filing of all three of these documents indicates a *prima facie* intention of SARS to oppose the appeal, notwithstanding failure to comply with the time limits laid down. They will also be relevant to the question of the merits of the appeal and of SARS's opposition thereto, which are factors to consider for purposes of determining good cause. The rule does not envisage that the court should exercise its powers in a sterile environment from which these documents have been artificially removed simply on the basis that they were filed out of time without an explanation for the delay. On the contrary, where these documents have been filed, they will be relevant to the proper exercise of the court's powers, and the court should have regard to them.

[29] In summary, then, I find no merit in the applicant's submission that the absence of an explanation by SARS for failing to file its rule 31 statement within the time period prescribed is determinative of the application for default judgment. I find that the court has a discretion under rule 56(2)(*a*) as to whether to grant default judgment or not. That discretion must be judicially exercised, taking into account all factors that may be relevant to the issue of whether there is good cause to permit the appeal process to continue despite the default by SARS in filing its rule 31 statement timeously. These factors will be dependent on the facts of each case. They include where relevant, but are not restricted to, a consideration of any explanation for the delay provided by SARS.

DOES GOOD CAUSE EXIST IN THE PRESENT CASE?

[30] In the present case I find the following factors persuasive in determining whether good cause exists and whether default judgment should be granted or not:

30.1. Unlike in the circumstances that existed in ITC 0122, there has not been an inordinate delay by SARS causing demonstrable prejudice to the appellant. Of course, SARS may be criticised for being dilatory. It should, as judge Cloete J noted, take the lead in ensuring that time periods are complied with. However, in this case, the rule 31 statement was filed some 32 days late (as opposed to some 5 months in ITC 0122). It seems that once the application for default judgment was instituted, SARS jumped on the matter and complied within a space of a week. Given the alternative to the applicant's main prayer for relief was an order directing SARS to file its rule 31 statement, It seems to me that SARS's response was reasonable, at least once the chips were down and it faced a default judgment application.

30.2. This is an important feature of the present case: it means that although the applicant is entitled to be annoyed by and critical of SARS's dilatory conduct, on its own admission, it has not been materially prejudiced thereby in processing its appeal. It has known since November 2018 what SARS's case is and has had ample opportunity to formulate its response under rule 32. There is no reason why, if default judgment is refused, the appeal process should not proceed without further delay.

30.3. Against the absence of any prejudice on the part of the applicant, I must also weigh possible prejudice to the *fiscus* if default judgment is granted in this case. SARS sets out clearly in its rule 31 statement, and its answering affidavit why it made its decision to refuse deregistration. Unlike the situation in the ITC 0122, there are no complicating factors that SARS has failed to deal with

in providing the basis for the opposing appeal.[6] The question simply one involving the interpretation of the relevant provisions of the VAT Act. The applicant has failed to put up a case in respect of the merits for purposes of the application of default judgment. Consequently, at this stage there is nothing to indicate anything other than SARS has, at the very least, reasonable prospects of succeeding in the opposing appeal. In my view, in these circumstances it would be contrary to the interests of the *fiscus,* and hence of the public interest to decide the matter in favour of applicant on a default basis.

30.4. Finally, it seems to me that the applicant has taken an overly technical approach in this matter by pressing ahead with its default Judgment application despite SARS having filed its rule 31 statement months ago. Without demonstrating any prejudice to its ability to prosecute the appeal, it insisted on holding firm to its default judgment process. This does not count in the applicant's favour. It demonstrates an unwillingness on the applicant's part to get the heart of its substantive dispute with SARS, and instead to involve the parties in procedural skirmishes. In *Olgar v Minister of Safety and Security & Another*,[7] the High Court made an observation that rings true of the applicant's approach in this present case, albeit that it involved Uniform Rules of Court governing the taxation of costs. The court remarked that:

> "It is in any event difficult to understand why the first respondent should have been so reluctant to condone the late filing of the notice. First respondent is not prejudiced thereby… . it would surely have been in the interests of both parties to have dealt with the merits of the taxation as opposed to indulging in attritional litigation."

30.5. It cannot be in the interest of justice to lend support to the similarly technical approach adopted by the applicant in the present matter by granting default judgment in its favour. In my view, on balance, SARS's absence of an explanation for its delay in filing its rule 31 statement pales into insignificance.

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6 In that judgement the court criticised SARS for failing to deal with the findings of the SCA in a previous case involving a party that, in the courts view, called for a response from SARS in opposing the taxpayer's appeal. This was one of the reasons why the court refused condonation: it found that SARS had not shown that it had reasonable prospects in opposing the appeal.

7 2012(4) SA 127 (ECG).

[31] All of these factors together in my view constitute good cause for the purpose of rule 56(2)(*a*). The interests of justice require that the appeal process should not go ahead, and SARS should be permitted to continue to oppose it. At the end of the day, substantive justice between the parties must be served. This can only be done through an appeal process. The application for default judgment must be refused.

COSTS

[32] As far as costs are concerned, both parties submitted that costs should follow the cause.

[33] In the result, I make the following order:

1. The applicant's application for default judgment under rule 56 is dismissed with costs.

Date heard : 18 April 2019

Date of judgment : 05 June 2019