REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

HELD AT CAPE TOWN, WESTERN CAPE

CASE NO: 2022/37

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED: YES / NO

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DATE SIGNATURE

In the matter of:

TAXPAYER N Appellant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

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J U D G M E N T

SLINGERS J:

[1] The appellant, Taxpayer N, is a private company, duly registered and incorporated in terms of the company laws of the Republic of South Africa. The respondent, the Commissioner for the South African Revenue Service, is the administrative head of the South African Revenue Services ("SARS") and is the official appointed to administer the Income Tax Act, Act 58 of 1962.

[2] On 25 August 2021, after conducting a verification into the appellant's PAYE affairs, the respondent issued it with internal revised notices of assessment in respect of its payroll taxes for each of the one-month periods from April 2019 until February 2021. The revised assessments resulted from a dispute pertaining to whether the appellant was entitled to claim Employment Tax Incentive ("ETI") allowances in terms of the Employment Tax Incentive Act, Act 26 of 2013 and resulted in the appellant's approximate total tax liability of R2 296 574.69, excluding interest and penalties. The amounts disallowed in respect of the disputed tax periods amounted to R873 605.86. The appellant disputed the revised assessments and objected thereto on 27 September 2021, which were disallowed by the respondent on 12 October 2021. The appellant appealed against the disputed assessments on 12 November 2021. The appellant elected not to refer the dispute to alternative dispute resolution proceedings in terms of rule 10(2)(*e*).[1] At that stage the respondent also did not elect to refer the dispute to alternative dispute resolution proceedings in terms of rule 13(2). Consequently, the respondent's rule 31 statement was due within 45 days from 12 November 2021, being the 15 February 2022.

[3] On 13 May 2022, the appellant delivered a notice in terms of rule 56(1)(*a*) to the respondent. This notice informed the respondent that it was afforded a period of 15 days from the date of the notice to remedy its failure to file the rule 31 statement.[2] The 15-day period expired on 3 June 2022. Further, that if the respondent failed to remedy its default, the applicant would apply to court for a final order in terms of section 129(2)(*b*) of the Tax Administration Act, 2011 (Act No. 28 of 2011) ("TAA") upholding the appellant's appeal against the assessments.

[4] On 4 July 2022, the respondent advised the appellant that it had referred the dispute to alternative dispute resolution proceedings. During the hearing it was conceded by the respondent's counsel, advocate N, that this referral was invalid.

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1 Any reference to r*ules* in this judgment is a reference to the rules promulgated under section 103 of the Tax Administration Act, 2011 (Act 28 of 2011), unless the contrary is indicated.

2 Day is defined in the rules as a business day as defined in the Act. Act 28 of 2011 defines business day as "…a day which is not a Saturday, Sunday or public holiday, and for purposes of determining the days or a period allowed for complying with the provisions of Chapter 9, excludes the days between 16 December of each year and 15 January of the following year, both days inclusive."

[5] As the respondent failed to remedy its default, as it was invited to do by the filing of the notice in terms of rule 56(1)(*a*), the appellant filed its application in terms of rule 56(1)(*b*) on 6 July 2022 and sought, *inter alia,* an order in the following terms:

> "1. That the appellant's appeal against the assessment issued by the respondent on 25 August 2021, being the assessments in respect of payroll taxes of the applicant for the periods **2019/04-2021/02** is upheld in terms of Rule 56(2)(*a*) of the Rules promulgated under section 103 of the Tax Administration Act, 28 of 2011, as read with section 129(2)(*b*) of the Administration Act, 28 of 2011.
>
> 2. The respondent is directed to issue reduced assessments to the applicant in respect of each of the assessments set aside in terms of paragraph 1 above in terms of section 93 of the Tax Administration Act, 28 of 2011." (sic)

[6] The respondent filed its rule 31 statement on 31 August 2022. Consequently, the alternative relief sought by the appellant was rendered incompetent.[3] The respondent filed its rule 31 statement 133 business days after 15 February 2022.

[7] The respondent, in opposing this application, sought condonation for the late filing of its rule 31 statement. In its written heads of argument, the appellant submitted that condonation should be refused as (i) there was no condonation application as provided for in terms of rule 57 and (ii) there was no merit in the condonation application as the respondent has failed to demonstrate good cause for its default to be condoned.

[8] At the hearing of the matter advocate S for the appellant informed the court that the appellant accepted that there need not be a formal application for condonation in terms of rule 57. Therefore, the issue of whether or not a formal condonation application was before the court need no longer be determined.

[9] Therefore, the court was merely required to determine whether good cause was established not to grant the appellant the default judgment it sought.

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[3] The alternative relief sought an order that the respondent be directed to deliver its rule 31 with 10 (ten) dates of being ordered to do so, alternatively within such further period as the court may consider appropriate. Further, in the event that the respondent failed to deliver its statement of grounds of assessment and opposing appeal, as directed, that the appellant be granted leave to approach the court on the same papers, duly supplemented if necessary, for an order in terms of section 129(2) of the TAA for its appeal against the aforementioned assessments to be upheld.

[10] Rule 56(2) provides that:

> "The tax court may, on hearing the 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 court's order by the due date, make an order under section 129(2) without further notice to the defaulting party."

[11] There is no exhaustive definition of what constitutes *good cause.*[4] In *Premier, Western Cape v Lakay*[5] the court stated that:

> "The minimum requirement is that the applicant for condonation must furnish an explanation of the default sufficiently full to enable the court to understand how it really came about, and to assess his/her conduct and motives: *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352H-353A, quoted in the context of the 2002 Act in Madinda's case. Beyond that, each case must depend on its own facts. As Innes CJ said in *Cohen Brothers v Samuels* 1906 TS 221 at 224 (in the context of an application for leave to prosecute a lapsed appeal, but the remarks are equally appropriate to s3(4)(*b*)(ii) of the 2002 Act):
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> > 'In the nature of things it is hardly possible, and certainly undesirable, for the Court to attempt to [define good cause]. No general rule which the wit of man could devise would be likely to cover all the varying circumstances which may arise in application of this nature. We can only deal with each application on its merits, and decide in each case whether good case has been shown.' "

[12] The appellant argued that the respondent failed to meet this minimum requirement as it's explanation for the delay was insufficient, was incomplete, failed to cover the entire period of delay and was not reasonable. The appellant submitted that on this basis alone the respondent failed to show good cause why default judgment should not be granted in its favour. The appellant submitted that given the lengthy period of delay and the insufficiency of the explanation therefore, the court need not consider other aspects of good cause such as prospects of success. In support of this contention the appellant relied upon the decision of *Van Wyk v Unitas Hospital and Another*

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4 *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at par 11.

5 2012 (2) SA 1 (SCA) at para 17.

(Open Democratic Device Centre as Amicus Curiae)[6]*("Van Wyk v Unitas"),* more particularly paragraph 33 thereof which it quoted as:

> "The applicant has submitted that her application for leave to appeal bears prospects of success. Prospects of success pale into insignificance where, as here, there is an inordinate delay coupled with the absence of a reasonable explanation for the delay."

[13] However, paragraph 33 reads further as:

> "...And the issue is moot. There is now a growing trend for litigants in this court to disregard time limits without seeking condonation. Last term alone, in eight out of ten matters, litigants did not comply with the time limits or the directions setting out the time limits. In some cases litigants either did not apply for condonation at all or if they did, they put up flimsy explanations. This non-compliance with the time limits or the rules of court resulted in one matter being postponed and the other being struck from the roll. This is undesirable. This practice must be stopped in its tracks."

(My emphasis.)

[14] The court in *Van Wyk v Unitas* also reiterated that the standard for considering a condonation application is the interests of justice. The facts and circumstances of each case would determine whether it would be in the interests of justice to grant condonation. Factors relevant to this enquiry would include the nature of the relief sought, the extent and cause of the delay, the effect of the delay on administration of justice and other litigants, if any, the reasonableness of the explanation of the delay, the importance of the issue to be raised and the prospects of success.[7]

[15] Therefore, it is clear that the court in *Van Wyk v Unitas* considered the merits of the matter when determining whether good cause was established, in addition to the period of delay and the explanation for it. It may be that the court did not attach much weight to the prospects of success, but this does not mean that it wasn't considered when determining whether good cause was established.

[16] Consequently, *Van Wyk v Unitas* is not authority for the submission that only the degree of the delay and the sufficiency or insufficiency of the explanation for such delay may be considered when determining whether good cause was established or not.

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6 2008 (2) (SA 472 (CC).

7 Ibid, para 20.

[17] In *Competition Commission of South Africa v Pickfords Removals SA (Pty) Ltd*[8] it was stated that courts have a wide discretion in determining *good cause*, with the overriding consideration being the interests of justice which is considered on the facts of each case. The court identified the following relevant factors to be considered:

(i) the extent and cause of the delay;

(ii) the effect of the delay on the administration of justice and other litigants;

(iii) the reasonableness of the explanation for the delay;

(iv) the issues to be raised; and

(v) the prospects of success.

[18] The court rejected the proposition that lateness is the only factor to be considered when determining if good cause is established.

[19] In *Madinda*[9] the court found that *good cause* looks at all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. It may include prospects of success, the reasons for the delay, the sufficiency of the explanation offered, the bona fides of the applicant, and any contribution by other person or parties to the delay and the applicant's responsibility therefor.

[20] That same court rejected the argument that "no matter how strong an applicant's case on the merits that consideration cannot be causally tied to the reasons for the delay". Put differently, that the merits can be considered only if and when the court has been satisfied with the explanation for the delay and has to exercise its discretion in respect of condonation. The court stated that " 'Good cause for the delay' is not simply a mechanical matter of cause and effect. ... Strong merits may mitigate fault; no merits may render mitigation pointless. ... consideration of prospects could be entirely excluded from the equation on the ground that failure to satisfy the court of the existence of good cause precluded the court from exercising its discretion to condone. That would require an unbalanced approach to the two elements and could hardly favour the interests of justice."

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8 2021 (3) SA 1 (CC).

9 2008 (4) 312 (SCA) at paras 10 and 12.

[21] In *Ingosstrakh v Global Aviation Investments (Pty) Ltd and Others*[10] the court reaffirmed that the concept of "good cause" entailed a consideration of:

(i) a reasonable and acceptable explanation for the default;

(ii) a demonstration that a party is acting *bona fide*; and that

(iii) such party has a *bona fide* defence which prima facie has some prospect of success.

[22] I turn now to consider whether good cause has been established which may justify the refusal to grant default judgment in the appellant's favour.

[23] During the hearing of the matter respondent's legal representative admitted that there was no adequate explanation for the period of January to July of the delay in furnishing the rule 31 statement and that the respondent's communication with the appellant was not what it was supposed to be. It seems as if this matter simply slipped through the cracks, and that it was only after the notice was delivered in terms of rule 56(1)(*a*) and the matter reached head office on 6 July 2022 that it received the necessary attention.

[24] On 7 July 2022, the matter was allocated to a Mr J. On 8 July 2022 Mr J contacted the appellants' representative to request an extension to file the rule 31 statement and opposing papers. This request was based on the fact that Mr J did not have any documentation with regards to the merits of the appeal and he needed time to collate all the documents, consult and take proper instructions before he could draft the opposing papers and rule 31 statement. The appellant granted Mr J an extension to 25 August 2022 to file opposing papers. No such extension was granted in respect of the rule 31 statement. On 19 August 2022 Mr J requested a further extension in order that he could comply with internal governance processes and was granted an extension to 2 September 2022. The opposing papers, with the rule 31 statement was filed on 31 August 2022.

[25] The respondent's legal representative was correct to concede that there was no adequate explanation for the period from January 2022 to July 2022 pertaining to the delay in filing the rule 31 statement.

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[10] 2021 (6) SA 352 (SCA).

[26] The delay of 133 days is calculated from 15 February 2022. However, the appellant only delivered its notice in terms of rule 56(1)(*a*) on 13 May 2022. Prior to the delivery of the rule 56(1)(*a*) notice, the appellant would not have been in a position to apply for default judgment under section 129(2) of the TAA. As the 15-day period provided for in rule 56(1)(*a*) expired on 3 June 2022, the appellant was only entitled to move for an order in terms of section 129(2) thereafter.

[27] In opposing the application, the respondent states that:

> "25.3 The Respondent specifically pleads that there are disputes of fact with regards to whether the students qualify as "employees" for purposes of ETI Act. The Court cannot therefore make a finding regarding the merits based on the papers currently before this court. …
>
> 25.5 The Respondent submits that it would be in the interests of justice to allow him to present evidence that the alleged "employees" were also employed by another employer during the same tax periods on which this appeal is based.
>
> 25.6 The Respondent can therefore successfully assail the Appellant's grounds of appeal, as well as the grounds of objection, on the merits. …"

[28] In response to the above, the appellant simply stated that:

> "I reiterate that the dispute on the merits of the tax dispute between the appellant and SARS are irrelevant for the purposes of the application of the present application. SARS' persistent reliance on a dispute of fact on the merits of the tax dispute is misplaced – there is no factual dispute in respect of the present application."

[29] The respondent claims that during its verification process, the appellant was unable to show that a clear employer and employee relationship existed between the parties and that the purported employees did not meet the hours worked criteria since they were full time students. In some cases, the purported employees would not meet the hours worked criteria as they also worked for other employees during the same period for which the ETI deductions were claimed by the appellant. It is the respondent's case that the alleged employees did not work for the appellant but they were merely receiving accredited education in the form of study courses through an accredited learning institution.

[30] It is not disputed on the papers before me that the respondent, on more than one occasion, requested the appellant to submit documentation and information with regards to whether the appellant's employees qualified for purposes of section 1 read with section 6 of the ETI act to enable the appellant to claim the disputed ETI allowances and that the respondent failed and/or refused to furnish same.

[31] As the respondent's counsel argued during the hearing, the assessments in issue relate to self- assessments in terms whereof the employer claims allowances. Therefore, the appellant, as the employer should be in possession of the requested documentation and information and be in a position to furnish the respondent with same.

[32] The provisions of rule 7(2)(*b*)(iii) also obliged the appellant to file the documents required to substantiate the grounds of objection that the taxpayer has not previously delivered to SARS for purposes of the disputed assessment.

[33] Notwithstanding the respondent's requests directed to the appellant and the provisions of rule 7(2)(*b*)(iii), no explanation for the appellant's failure / refusal to furnish the requested documentation and information has been furnished.

[34] The ETI was enacted as a mechanism to encourage job creation and to address the unemployment rate and to encourage the growth of the labour market, especially in relation to young job seekers. The tax allowances act as an incentive for employers to participate in the scheme provided for in the ETI act.

[35] If the respondent's grounds of assessment and grounds for opposing the appellant's appeal are upheld, it would show that the appellant fraudulently claimed allowanced in terms of the ETI, to which it was not entitled. As the appellant elected not to meaningfully engage with the merits of the matter, the respondent's grounds of assessment and for opposing the appeal stand largely undisputed, at this stage.

[36] In respect of prejudice, the only prejudice which the appellant would suffer if default judgement was not granted in its favour would be the delay to have its appeal against the respondent's assessment timeously finalised. Should default judgement be granted, the doors of the court would be closed to the respondent and it would be deprived of the opportunity to test the veracity of the appellant's assessment claims.

[37] As stated above, the overriding consideration when determining good cause is the interests of justice. The interests of justice do not only relate to what is in the interests of the parties but also what, in the opinion of the court, is in the public interests.[11] As a result of the ETI's objectives and the nature of the respondent's grounds for opposing the appellant's appeal, it

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[11] *National Police Service Union and Others v Minister of Safety and Security and Others* 2000 (4) SA 1110 (CC).

would be in the public interest for the matter to be fully ventilated and for the veracity and/or lawfulness of the ETI allowances claimed by the appellant to be determined.

[38] After considering:

(i) the duration of the delay by the respondent to file its rule 31 statement;

(ii) the explanation for the delay;

(iii) when the appellant would have been able to apply for default judgment in terms of section of the TAA;

(iv) the respondent's prospects of success (the merits of the matter);

(v) the prejudice each party would suffer; and

(vi) the public interest

I am of the view that the respondent has shown good cause why default judgment should not be granted.

[39] In the event that default judgment is not granted, both parties requested that the rule 31 statement delivered by the respondent be ordered to stand as at the date of judgment, which would allow the appellant's appeal to be finalised.

[40] In its heads of argument as well as during oral argument, the respondent submitted that it should be liable for the costs on a party-party scale. The appellant submitted that the appropriate scale of costs would be on an attorney and client scale.

[41] As stated above, the respondent admitted, correctly so, that it had no adequate explanation for the delay from January to July 2022 for failing to file its rule 31 statement. Furthermore, it admitted that it failed to properly communicate with the appellant pertaining to this matter and the delay in filing its rule 31 statement. This matter received no real attention, until after the appellant delivered the notice in terms of rule 56(2).

[42] If the only consideration I had to consider was the reasonableness of the explanation for the delay in filing the rule 31 statement, the appellant would have been successful with its application. The reasons for and basis on which the respondent sought to refer the matter to ADR is simply incomprehensible.

[43] Therefore, as a result of the manner in which the respondent dealt with this matter, more particularly during the period January to July 2022, I am of the view that the appropriate costs order should be on an attorney client scale.

[44] In the circumstances, I make the following order:

(i) the application is dismissed;

(ii) the respondent's rule 31 statement will stand as from date of this judgment being 23 February 2023; and

(iii) the respondent shall bear the costs of this application on an attorney-client scale.

Slingers, J

23/2/2023