REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA
(HELD AT GAUTENG DIVISION, JOHANNESBURG)

Case No.: **IT 45997**

(1) REPORTABLE: YES / **NO**
(2) OF INTEREST TO OTHER JUDGES: YES / **NO**
(3) REVISED.

27 February 2024 .....
DATE SIGNATURE

In the matter between:

CZY (In liquidation) **Applicant**

and

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

J U D G M E N T

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 27 February 2024

INGRID OPPERMAN J

Introduction

[1] The Taxpayer has set down a tax appeal for hearing between 18 and 22 March 2024, in which it seeks an order that an additional income-tax assessment issued for the 2016 tax year (**"the additional assessment"**) be referred back to SARS for re-assessment on the grounds that: (a) the Taxpayer was entitled to include certain items of expenditure disregarded by SARS in the calculation of an allowance claimed by the Taxpayer in terms of section 24C of the Income Tax Act 58 of 1962 (**"ITA"**) for the 2016 year of assessment (**"the 24C Allowance"**); (b) there was no substantial understatement and therefore no basis to impose understatement penalties (**"USPs"**) in terms of sections 221 and 223 of the Tax Administration Act 28 of 2011 (**"the TAA"**); and (c) there was no basis to levy interest in terms of section 89*quat* of the ITA. (collectively **"the tax appeal"**).

[2] The Taxpayer delivered a notice in terms of rule 36(6) of the rules promulgated under section 103 of the TAA (**"the Tax Court Rules"**) on 4 August 2023 calling upon SARS to make further and better discovery (**"the rule 36(6) notice"**). The notice was not delivered within the period envisaged in rule 36(6) being within 10 days of the original discovery.

[3] This court is seized with the condonation application in which the Taxpayer seeks condonation for the late filing of its rule 36(6) notice.

Relevant factual matrix

[4] On 27 January 2023, the Taxpayer called upon SARS to make discovery in terms of rules 36(3) & (4) of the Tax Court Rules within 20 days thereof. SARS discovered on 17 February 2023 on which date the Taxpayer called for certain items so discovered. SARS complied on 1 March 2023.

[5] In terms of rule 36(6) of the Tax Court Rules the Taxpayer was obliged to deliver a notice in terms of rule 36(6) by no later than 15 March 2023, thereafter the consent of SARS was required to extend the period under rule 4 of the Tax Court Rules, or, upon the Taxpayer securing an order from this Court to extend the period subsequent to a successful application under rule 52 for condonation.

[6] The Taxpayer delivered the rule 36(6) notice on 4 August 2023, 96 days late without having sought SARS's agreement under rule 4 and did so without having approached the Court in terms of rule 52.

[7] On 21 August 2023, SARS delivered a notice in terms of rule 30 of the Uniform Rules of Court read with rule 42 of the Tax Court Rules in which it was recorded that the rule 36(6) Notice constituted an irregular step to the extent that it was delivered outside the prescribed period stipulated in rule 36(6) of the Tax Court Rules.

[8] On 8 September 2023, it was agreed that the irregular step proceedings would be held in abeyance pending the final determination of a condonation application.

[9] The Taxpayer applied for condonation on 29 September 2023, 134 days after the expiry of the 10-day period referred to in rule 36(6).

Crux of the opposition to the condonation application

[10] Mr O representing SARS in this application argued most strenuously that the Taxpayer's application for condonation is wholly inadequate and is lacking in the most fundamental of ways.

[11] He submitted that the Taxpayer had failed to adhere to the primary principle applicable to condonation applications in failing to provide a full explanation for a) all periods of delay and b) all instances of non-compliance with the Tax Court Rules. He also argued that the Taxpayer failed to provide a detailed and accurate account of the nature of the documentation it seeks and the relevance to the matter, has thus failed to show prospects of success and has also failed to show any prejudice should condonation not be granted.

Core of the Taxpayer's argument

[12] The Taxpayer contends that SARS failed to make full and complete discovery and is thus in default of its obligation under rule 36(4) to make discovery of all documents relating to the material issues arising from the grounds of assessment and the opposition to the appeal. It argues that SARS has obstructively refused to condone the late delivery of the rule 36(6) notice, although it cannot point to any prejudice it will suffer by its lateness and notwithstanding the fact that the primary obligation to make full and complete discovery was on SARS which it failed to do.

Discussion

[13] What is immediately apparent from the founding affidavit in the condonation application is that although the allegation is made that the documents sought are relevant, the facts underpinning the conclusion of "relevance" of the documents are absent. The replying affidavit repeatedly declared that the relevance of the documents sought is not a decision for this court to make.

[14] It is correct that this court is not called upon to make a definitive finding on each and every document sought in the rule 36(6) notice. This court must decide whether it should condone the late filing of the rule 36(6) notice which will result in SARS being obliged to respond to such notice. If the documents are not relevant to the issues in dispute, what is sought to be achieved? This feeds into the "prospects of success" requirement in condonation applications which an applicant for condonation is obliged to address.

[15] When confronted with this inadequacy in the papers, Mr N SC, representing the Taxpayer, explained that the irregular step notice received in terms of rule 30 of the Uniform Rules of Court, focused exclusively on the non-compliance with the 10-day period and that relevance of the documents requested, was never placed in issue. He therefore contended that the Taxpayer was not obliged to address relevance in any detail in the founding affidavit.

[16] I cannot accept that the scope of the Taxpayer's condonation application is dictated to by the content of the rule 30 of the Uniform Rules of Court objection. The Taxpayer requested SARS to keep the rule 30 proceedings in abeyance pending an application for condonation which would regularise its rule 36(6) notice. The Taxpayer was thus obliged to bring an application for condonation which would enable this Court to have regard to all the factors that ought properly to be considered by it to exercise its discretion. There never was any concession in respect of "relevance" nor was there an agreement between the Taxpayer and SARS and relevance ought thus to have been dealt with in its founding papers in this application for condonation.

[17] Instead, the Taxpayer stated a conclusion of law in its founding affidavit by averring:

> "21 The documents sought in terms of the rule 36(6) notice:
>
> 21.1 are highly relevant to the determination of the appeal;"

[18] This approach was persisted with in the replying affidavit:

> "19 This application is one for condonation and not one to compel compliance with the Notice, hence there is no need for the Appellant to explain why each document listed in the Notice is relevant to the issues in dispute and why each such document accordingly stands to be discovered."

[19] The approach to the question of condonation was succinctly set out in *Melane v Santam Insurance Co. Limited* [1] where Justice Holmes stated the following:

> "In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, **save of course that if there are no prospects of success there would be no point in granting condonation.** Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked."

(Emphasis provided)

[20] The prospects of success in this case are whether, but for the lateness of the request, a court would, on a *prima facie* basis, have compelled SARS to provide a response to the rule 36(6) notice. That being so I need to be satisfied, not that all the documents are relevant and ought to have been discovered from the outset but rather, that there is a prospect, at a *prima facie* level, that the Taxpayer is entitled to the documents sought and that a court will in the fullness of time, compel SARS to produce such documents or some of them.

[21] SARS has denied that every single document sought is relevant. That being so, in my view, I need find only that one single document (or category of document) is potentially relevant (as discussed before i.e. on a *prima facie* basis) in order to conclude that the Taxpayer has prospects of success.

Prospects of success

[22] I will now consider the relevance of the documents sought in paragraph 1 of the rule 36(6) notice which reads:

> "1. All records in relation to the decision to impose understatement penalties on the Appellant (including all correspondence, reports, internal memoranda, directives, policy documents, minutes of meetings, recommendations and other documents, that served before the committee of the Respondent pertaining to the aforementioned decision)."

[1] 1962 (4) SA 531 (A) at 532 C – D.

[23] Although the criticisms levelled against the lack of averments in the founding affidavit has merit, the Taxpayer is saved by the fact that relevance is determined objectively with reference to the issues as distilled form the pleadings.

[24] In the finalisation of audit letter which is included in the Dossier made available to both the Taxpayer and the court, SARS records "**It is my view** that the transgression constitutes that of a 'substantial understatement' and it is a 'standard case'." [the opinion]

[25] Both the concepts "substantial understatement" and "understatement" are defined in section 221 of the TAA:

> **" 'substantial understatement'** means a case where the prejudice to SARS or the *fiscus* exceeds the greater of five per cent of the amount of 'tax' properly chargeable or refundable under a tax Act for the relevant tax period, or R1 000 000;"
>
> **" 'understatement'** means any prejudice to SARS or the *fiscus* as a result of—
>
> (*a*) failure to submit a return required under a tax Act or by the Commissioner;
> (*b*) an omission from a return;
> (*c*) an incorrect statement in a return;
> (*d*) if no return is required, the failure to pay the correct amount of 'tax'; or
> (*e*) an 'impermissible avoidance arrangement'."

[26] It would seem that the Taxpayer would be entitled to know which facts underpin the opinion expressed in the finalisation to audit letter in order to test whether the alleged prejudice was caused as alleged or at all. Also, the Taxpayer seems to be entitled to investigate the nature of the prejudice alleged: ie whether it is "an omission from a return" or whether it is "an incorrect statement in a return".

[27] SARS defines one of the disputes in the appeal in its rule 31 statement (which is a pleading) as follows:

> "18.3 Whether SARS is correct in imposing an Understatement Penalty of 10% on the Appellant in relation to the reduction of the allowance referred to herein."

[28] Also alleged in the rule 31 statement:

> **"UNDERSTATEMENT PENALTY**
>
> 26. SARS has imposed an Understatement Penalty (USP) of 10% in terms of section 223 of the TAA in relation to the Appellant's under declaration of income and in relation to the Appellant's conduct.
>
> 27. SARS has **categorised** the Appellant's conduct to be that of a standard case of substantial understatement.

28. SARS bears the burden of proving **only the facts** upon which the imposition of the penalty was based."

(Emphasis provided)

[29] The facts underpinning the USP are disputed. How is the Taxpayer to test the "**categorisation"** and the correctness or completeness of "**the facts"** considered by SARS in making the decision, one asks if the documents sought are not provided. SARS argues that because it only bears the burden of "factually proving that the prejudice to the *fiscus* exceeds R1mil", the documents do not relate to the issues in appeal. In my view, arriving at the point of concluding that the prejudice to the fiscus exceeds R1 million, requires the unpacking of the entire thought process and the Taxpayer is, on the face of it, entitled to the building blocks of such decision.

[30] In SARS's heads of argument, it alleged that the granting or not of a remission is not in dispute nor is whether the Taxpayer had committed a *bona fide* and inadvertent error which led to the understatement and which would entitle it to a remission. These arguments in my view do not detract from the fact that the Taxpayer is entitled to the documents sought to test the correctness of the decision reached.

[31] In respect of this first category of documents, I am thus satisfied, on a *prima facie* basis, that they are relevant and that, as Justice Holmes put it, there would be a "point" to granting condonation as there appears to be some prospect of success in respect of at least this category of document.

[32] I now move on to the other factors a court should have regard to in exercising its discretion in granting condonation.

Explanation for the delay

[33] The discovered documents were extensive, comprising approximately 1500 pages and, in addition, were characterised by specialised content, which was unique to the construction industry. This situation necessitated an exhaustive and careful examination of the documents by the Taxpayer's counsel and legal team, a task that I accept, required a deep dive into highly technical material. In this regard, this process did not simply entail the perusal of documents; it demanded a critical, informed analysis to discern the relevance and implications of the material within the context of the broader dispute.

[34] To undertake this task, it would have been reasonable to engage with representatives of the Taxpayer directly, to gain insights, clarifications, and instructions that only they could provide. Such interaction would have been required for the Taxpayer's legal team to fully grasp the nuances and technicalities of the discovered documents, ensuring a comprehensive and informed analysis.

[35] During argument, much emphasis was placed on the fact that the legal representatives have been dealing with the Taxpayer's liquidators who are outsiders to such companies' affairs in the sense that they have no involvement in the factual matters leading to the dispute. I was urged to accept that the liquidators in turn, were forced and required to find people previously employed at the Taxpayer who could assist. This, so the argument ran, obviously further delayed the analysis of the existing discovery. I accept that this is so and that this state of affairs would have contributed to the delay, but in my view, not unreasonably so.

[36] Following this review process, which was both time-consuming and resource-intensive, it became apparent to the Taxpayer's counsel that the discovery made by SARS was not adequate. This determination, however, could only be arrived at after a detailed analysis of the documents.

[37] The timeline for completing this analysis extended over several months. In this regard, after an initial review and subsequent detailed analysis, a meeting took place between the Taxpayer and counsel on 5 June 2023. Following the aforementioned meeting, the review process needed to be finalised enabling the legal team to definitively assess the necessity for further and better discovery from SARS.

[38] Once the need for further and better discovery had been made, the initial draft Notice was prepared by the Taxpayer's attorneys and provided to counsel on 27 July 2023, whereafter it was settled and delivered to SARS on 4 August 2023.

[39] Mr N argued that the determination as to whether further and better discovery was required was unavoidably dictated by the voluminous and technical nature of the documents which could not be completed within the period prescribed in terms of the Tax Court Rules. The exercise required a depth of analysis that extended beyond a standard cursory review of the discovered documents. This complexity necessitated the time taken to arrive at a conclusive decision regarding the need for additional discovery. This decision was not taken lightly but was the result of a careful, methodical assessment of the discovered documents. Mr N rejected the suggestion that this process resulted in an unreasonable delay, particularly when considering that the instructions are taken from the liquidators of the Taxpayer, who do not have access to all historical information.

[40] In my view, the Taxpayer's account of the discovery process and the explanation behind the timing of the delivery of the rule 36(6) notice demonstrates that the delay was not unreasonable and was justified in the circumstances.

[41] I hold the view that the analysis could have been completed somewhat sooner, but given the volume of documents, the complexity of issues and the fact that instructions had to be obtained from the liquidators, it could not have been made within the very strict and short time period of 10 days. I agree with Mr N's submission that with the best will in the world, the Taxpayer could never have responsibly approached the matter and delivered the rule 36(6) Notice within the very short period envisaged in rule 36(6). Thus, the Taxpayer was always going to be out of time.

Bona fides

[42] The delivery of the rule 36(6) notice was affected over eight months prior to the hearing of the tax appeal. This undermines any notion that the rule 36(6) notice was issued as a tactic to delay the hearing.

[43] Condonation is not there for the asking but had SARS simply condoned the late filing and had they filed their response in which they object to the documents on the basis of relevance, the substance of the matter could have been dealt with at this hearing. This application for condonation has taken 6 months to come to Court.

[44] I was urged by the Taxpayer to not only grant condonation but to also compel SARS to produce the documents sought. Whilst I will not accept this invitation, for reasons to be dealt with shortly, the request goes against any suggestion that the Taxpayer wants to delay matters. It points to the Taxpayer wanting to advance the hearing and wanting to get the matter ready for hearing.

[45] On the facts before me I cannot conclude that the Taxpayer is not bona fide – it is not insignificant that this application is brought by the liquidators of the Taxpayer who represent a body of creditors all wanting the affairs of the estate wound up as soon as possible.

[46] There is no factual basis to conclude that the Taxpayer intentionally flouted the Tax Court Rules. The rule 36(6) notice appears to have been issued in good faith and motivated at obtaining clarity as to the basis upon which SARS issued the additional assessment so that it can properly prepare for the tax appeal.

Interests of Justice

[47] The factors relevant to the granting of condonation are interrelated and none of them are individually decisive. The fundamental consideration is whether it would be in the interests of justice to grant condonation to an applicant[2].

[48] It is manifestly in the interests of justice that relevant documents be produced. SARS could point to no tangible prejudice were it obliged to respond to the rule 36(6) notice which the condonation currently sought is aimed at ensuring. If relevance is the issue, it can be raised. There can be no prejudice to SARS.

Moving beyond the scope of this application

[49] As mentioned, I was urged to compel the production of the documents sought but have indicated that I would decline to accept such invitation. I do so for many reasons not least of which is that the Taxpayer repeatedly contended that relevance was not in issue in this application. SARS has indicated that it may invoke confidentiality in respect of some of the documents. Although I found Mr N's submissions on the relevant provision persuasive, this is not the case SARS came to meet. It came to meet a condonation application, and to shift the goal posts to production of documents during the hearing is, in my view, unjust.

[50] Which brings me to costs.

Costs

[51] It is the duty of organs of State to put all relevant material before a Court so that the Court is fully assisted in coming to a decision. It is contrary to the interests of justice to allow SARS to thwart the truth-finding function of the Court by avoiding the making of full and complete discovery.

[52] If one of the categories of documents sought in the rule 36(6) notice, is found to be relevant to the issues in dispute in the Tax appeal, then SARS ought to have discovered such documents from the outset and the Taxpayer should, in my view, be entitled to the costs of this condonation application.

[53] This will only be revealed once the issue of relevance is properly ventilated which is once a response to the rule 36(6) notice is delivered.

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[2] See also *Bernert v Absa Bank Limited* 2011 (3) SA 92 (CC) at [14] where Ngcobo J stated that none of the well-established factors relevant to a condonation enquiry are decisive – the enquiry is "*one of weighing each against the other and determining what the interests of justice dictate*".

[54] I thus intend reserving the costs.

Order

[55] I accordingly grant the following order:

a. The late delivery of the Applicant's notice in terms of rule 36(6) of the Rules promulgated under section 103 of the Tax Administration Act 28 of 2011 is condoned.

b. Costs are reserved.

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I OPPERMAN
Judge of the High Court
Gauteng Division, Johannesburg

Date of hearing: 14 February 2024

Date of judgment: 27 February 2024