**REPUBLIC OF SOUTH AFRICA**

**IN THE TAX COURT OF SOUTH AFRICA**
**(HELD AT MEGAWATT PARK, JOHANNESBURG)**

Case No.: **IT 45791;**
**VAT 22288**

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

**15 July 2024** .....
DATE SIGNATURE

In the matter between:

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

and

**TAXPAYER C&C** **Respondent**

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# J U D G M E N T

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**This order was handed down electronically by circulation to the parties' legal representatives by email on 15 July 2024.**

**INGRID OPPERMAN, J**

**Introduction**

[1] This is an application by the taxpayer and the appellant in the main tax appeal, for default judgment against SARS under Tax Court rule[1] 56(1)(*b*) read with rule 56(2)(*a*). An application by SARS, brought in terms of Uniform rule 30 setting aside the rule 56(2)(*a*) notices, also serves before this court.

**Summary of the facts**

[2] On 15 January 2021 the taxpayer filed its notices of appeal against the corporate income tax and value-added tax (VAT) additional assessments raised by SARS. In terms of Tax Court rule 31, SARS had 45 days within which to file its rule 31 statements from the date of the taxpayer filing its notices of appeal being 19 March 2021 or, on a generous calculation based on 45 days from the date when SARS confirmed referral of the matter to the tax court, 15 July 2021. SARS filed its rule 31 statements for both corporate income tax and VAT on 27 December 2021, and without an extension having been requested and granted by agreement (rule 4) or by the Tax Court (rule 52(6)). The taxpayer, having requested that SARS apply for condonation for the late filing of its rule 31 statements and SARS having failed to do so, filed rule 56(1)(*a*) notices in respect of both corporate income tax and VAT on 15 March 2022. In such notices the taxpayer afforded SARS 15 days "to remove the cause of complaint by withdrawing its irregular and late Rule 31 Statement".

[3] SARS responded to the rule 56(1)(*a*) notices by filing Uniform rule 30 notices on 4 April 2022 on the basis that the taxpayer's rule 56(1)(*a*) notices are irregular and that the taxpayer withdraw its rule 56(1)(*a*) notices. SARS contended that such notices constituted irregular steps as envisaged in Uniform rule 30 in that they were delivered prematurely "…in circumstances where the appellant [taxpayer] failed to deliver the notice of bar, either under Uniform Rule 26 or Tax Court Rule 56". On 6 April 2022, SARS delivered conditional condonation applications for the late filing of the rule 31 statements which applications were dependant on the determination of SARS's notices in terms of Tax Court rule 42 read with Uniform rule 30.

[4] Due to the fact that SARS failed to comply with the rule 56(1)(*a*) notices, the taxpayer filed its rule 56(1)(*b*) applications for corporate income tax and VAT on 10 May 2022. SARS delivered its Uniform rule 30 applications on 13 May 2022.

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

[5] The applications in respect of corporate income tax and those in respect of VAT are almost identical and the parties agreed that they be dealt with as one. This court will thus deal with the corporate income tax applications and their results will have equal application to the VAT applications.

[6] The taxpayer's contention is that until SARS has filed an application for condonation for the late filing of the rule 31 statements, no valid rule 31 statements are before court and that the time period within which the taxpayer is to file its rule 32 statements in respect of corporate income tax and VAT has not commenced. Mr SC, representing the taxpayer, argued that the mere filing of the rule 31 statements does not automatically cure the default.

[7] Much reliance was place on the majority judgment of the full court of the Gauteng Division, Pretoria in *SARS v VM South Africa*[2] (*VM South Africa*). A judgment which was not dealt with in the heads of argument by either party and one which was uploaded onto Caselines the evening before the hearing. Mr SC argued that *VM South Africa* is on all fours with this matter, that this court is bound by it and that the *ratio* of such case is dispositive of the issues which fall for determination herein.

**What were the facts in VM South Africa and what did the majority hold?**

[8] SARS issued an additional assessment against the taxpayer whereafter the taxpayer timeously filed an appeal.

[9] SARS failed to file its rule 31 statement and the taxpayer filed a notice in terms of rule 56(1)(*a*) informing SARS to remedy its default within 15 days, failing which it would apply for default judgment against SARS dismissing the additional assessment.

[10] SARS then filed its rule 31 statement – one year later (as opposed to within 45 days). It failed to apply for condonation as contemplated under rule 52(6).

[11] The taxpayer then applied for default judgment in terms of rule 56(1)(*b*). SARS filed a notice in terms of rule 30 and afforded the taxpayer an opportunity to withdraw the application for default judgment failing which it would apply to set aside the application for default judgment on the basis that it constituted an irregular procedure. The rule 30 application was enrolled for hearing before Mali J who dismissed SARS's application to set aside the default judgment.

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2 *SARS v VM South Africa*, Appeal Court Case A82/22, 17 August 2023.

[12] The issue which the full court held fell for determination before it was whether or not the word "default" as it appears in rule 56(1)(a) refers to the failure of SARS to file a statement in terms of rule 31 out of time without the taxpayer availing itself of the provisions of rule 4 (extension of time by agreement) or rule 52(6) (application for condonation by the court) or whether it refers to the filing of the rule 31 statement only.

[13] This question was definitively decided by the full court as follows:

> "[33] Rule 52(6) clearly requires an application for condonation from the tax court in the event that a party has failed to comply with Rule 31, 32 or 33. It follows therefore that **a statement in terms of rule 31 filed out of time without condonation of the tax court is not a statement envisaged in terms of rule 31, is invalid,** and cannot be used for the purpose for which it was intended in terms of the provisions of the rules for dispute resolution.
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> ……..
>
> [35] Having considered the effect of rule 31, rule 4 and rule 52 it is therefore clear that the rule maker envisaged a fair procedure which imposes obligations on both parties in terms of procedure, form and substance and which also enables a defaulting party to attempt to cure a default by agreement in terms of rule 4 or by way of an application for condonation in terms of rule 52 for purposes of curing the default, **failing which the innocent party may apply for default judgment in order to bring finality to the process**."
>
> (Emphasis provided)

[14] The contention that the non-compliance has been remedied simply because the rule 31 statement has been delivered is thus bad in law assuming and accepting that by virtue of the doctrine of *stare decicis*, I am bound by the majority decision in *VM South Africa*.

[15] By virtue of the very same principle, the rule 30 application brought by SARS falls to be dismissed. In such proceeding SARS contends that the failure to deliver a rule 31 statement within the time stated does not entail an automatic bar – *VM South Africa* has also put that argument to bed – no notice of bar, either under Uniform rule 26 or Tax Court rule 56, must be given. This latter argument too was dealt with along admittedly a different route, but the principle was squarely distilled when the full court had this to say about the obligation on the taxpayer to compel SARS to file a rule 31 statement:

> "[42] To argue that the Respondent should have compelled SARS to file a Notice in terms of rule 31 is, in my view, not correct. The obligation to file such a notice in the prescribed form within the prescribed time period squarely rest on SARS as is clear from the wording of rule 31 and if SARS fails to do so notwithstanding the fact that it is a statutory body with executive power, there is no obligation on the Respondent to step into the proverbial shoes of SARS and compel SARS to execute its statutory mandate namely to effectively collect tax."

**What is the ratio of the full court of this Division that this court is bound by?**

[16] A statement in terms of rule 31 filed out of time without condonation of the tax court or in the absence of agreement to do so, is invalid.

[17] Where a defaulting party has failed to cure the default, the other party may apply for default judgment.

[18] There is no obligation on the taxpayer to compel SARS to file its rule 31 statement.

**The ratio applied to the facts of this case**

[19] SARS's irregular step proceeding falls to be dismissed because there is no obligation on the taxpayer to compel SARS to file its rule 31 statement. It follows that the condonation application in respect of the late filing of the rule 30 application (which was filed 2 days late) falls to be dismissed on the basis that the rule 30 application has no prospects of success. That finding results in the condition attaching to the application for condonation falling away and this court is then obliged to consider such application prior to, or simultaneously with, the application brought by the taxpayer for default judgment in terms of rule 56(1).

**What to do about the fact that the condonation application was not enrolled for hearing before this court?**

[20] SARS suggested that the appropriate time to determine the condonation application would be at the hearing of the tax appeal. The taxpayer contended that it would be severely prejudiced if this procedure were adopted because it would be obliged to file its rule 32 statements, incur significant and unnecessary costs to prepare for and run the tax appeal in respect of a court process that is invalid and irregular from inception. In my view, it cannot be contended that it is in the interests of justice for millions of rands to be spent in preparing for a trial when the validity of a cornerstone of the process (the rule 31 statement), has not yet been determined. Thus, on this issue and by virtue of amongst other considerations the *ratio* in *VM South Africa*, I agree with the taxpayer.

**Is default judgment appropriate?**

[21] Rule 56 provides:

> "**56 Application for default judgment in the event of non- compliance with rules**
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> (1) If a party has failed to comply with a period or obligation prescribed under these rules or an order by the tax court under this Part, 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) of the Act 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 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.'

[22] It is common cause that SARS did not file its rule 31 statement within the 45 day period it was obliged to do so and that it neither obtained agreement from the taxpayer to file it late nor that it filed a condonation application at the time that it filed its rule 31 statement.

[23] The consequence of this (and again applying the *ratio* of *VM South Africa)* is that the rule 31 statement is invalid.

[24] I interpose to mention that I am doubtful about the correctness of this invalidity finding of the majority of the full court but am precluded from differing from it by virtue of the *stare decicis* rule. In my view though, not much turns on it in this case because of the provisions of rule 56(2). It should be remembered that in *VM South Africa* the default judgment application did not serve before the court whereas in this case it does.

[25] *VM South Africa* suggests that life can be blown back into the rule 31 statement in the event of the court granting condonation. In the case under consideration a condonation application was filed but not enrolled for hearing before this court as SARS argued that it is neither convenient nor desirable "for an application seeking condonation to be dealt with separately from the main matter, in this case the tax appeal to which it relates". As already found, I do not agree that such an approach is appropriate (or indeed competent) in this case.

[26] Rule 56(2) affords this court a discretionary power to grant default judgment or not. The court "may" grant default judgment "in the absence of good cause". It seems to me that to some extent, the considerations and relevant factors in deciding whether good cause exists and whether condonation should be granted for the late filing of the rule 31 statement, are inextricably intertwined. Good cause would include the nature and extent of the delay in filing the rule 31 statement, the prejudice caused by the delay, the explanation for the delay and the

question of the merits of the matter. I agree with the dicta of Keightley J (as she then was) in *Taxpayer v CSARS,*[3] where she held at [28] that:

> "… 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.
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> 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 periods 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."

[27] The full court in *VM South Africa* did not deal with the discretion to be exercised nor with the content of the concept "good cause". That being so, this court is at liberty and indeed obliged, unless persuaded that it is clearly wrong, to follow a court of the same standing, which I intend doing in my interpretation of the weight to be attached to the content of the "invalid" rule 31 statement: In the court file is a document which purports to be a rule 31 statement together with an application for condonation for the late filing of such statement. These two documents indicate a *prima facie* intention of SARS to oppose the appeal.

[28] Rule 56(2) empowers this court, and section 129(2)(d) authorises this court, to make an appropriate order in a procedural matter. In my view, it would be appropriate to postpone the default judgment application to enable SARS (and the taxpayer should it want to persist with the default judgment application) to set both the application for default judgment and the condonation application down to be heard simultaneously. I am fortified in this approach by the comments of the full court in *VM South Africa* at [41], where the following was held:

> "SARS cannot be prejudiced by the dismissal of the rule 30 application as SARS is entitled to show good cause for its delay to comply with its statutory duties, including its failure to apply for condonation in terms of rule 52(6), at the hearing of the application for default judgment in terms of the provisions of rule 56(2) and the Court may then make an order in terms of rule 56(2)(*b*)."

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[3] *Taxpayer v C:SARS* Unreported case number 0078/2018 (5 June 2019).

[29] The quoted portion contains a thinly veiled suggestion (if not a thinly veiled invitation) that condonation could still be sought.

**The relief sought by the taxpayer at the hearing**

[30] The relief sought by the taxpayer at the hearing was couched in the following terms:

> "1. The applications by [the taxpayer] in terms of rule 56(1)(*b*) read with section 129 of the Tax Administration Act 28 of 2011 under case numbers IT 45791 and VAT 22288 are granted.
>
> 2. It is declared that SARS's statements of grounds of assessment delivered in terms of rule 31 in respect of corporate income tax ('CIT') and value-added tax ('VAT') dated 27 December 2021 (jointly referred to as the 'rule 31 statements'), were delivered out of time.
>
> 3. The rule 31 statements are set aside.
>
> 4. The CIT and VAT additional assessments raised by SARS dated 28 September 2018 and 15 November 2018 respectively are set aside.
>
> 5. SARS is to pay the costs of the applications including the costs of preparing for and arguing the postponement applications under the above case numbers on 28 August 2023 on an attorney-client scale, such costs to include the costs of two counsel."

[31] It follows from all that has been said herein that the relief sought in prayers 1, 3 and 4 will be postponed *sine die* to be heard with the condonation application. The declarator sought in paragraph 2 will be granted. The setting aside of the rule 31 statements can only be done if condonation is not granted and/or "good cause" as contemplated in rule 56(2)(*b*) is found not to exist which enquiry, in my view, overlaps. As things stand, the rule 31 statements are invalid but condonable. If they were nullities, they would not be capable of resuscitation.

**Costs**

[32] A comparison between what ought to have happened with what actually happened, will shed light on what costs orders would be appropriate.

[33] SARS ought to have sought agreement to file its rule 31 statement out of time in terms of rule 4 prior to the expiry of the 45 day period contemplated in rule 31, which in this case would have been, on a generous interpretation, 15 July 2021. Having not done so, it ought to have filed a condonation application together with the rule 31 statement.[4]

[34] It filed its rule 31 statement on 27 December 2021. On 31 January 2022, the taxpayer wrote to SARS stating that the rule 31 statements were filed late and that a condonation application should be brought within 10 days i.e. by 14 February 2022, failing which the taxpayer would approach the court for appropriate relief. On 1 March 2022 the taxpayer again wrote to SARS demanding that it apply for condonation by 4 March 2022 failing which the taxpayer would bring an application to strike out the rule 31 statements. On 4 March 2022, SARS wrote to the taxpayer stating that it did not believe condonation was necessary, but to avoid interlocutory skirmishes, they would bring a formal condonation application in due course. On 15 March 2022, the taxpayer filed its rule 56(1)(*a*) notices. On 4 April 2022, instead of applying for condonation as they undertook to do, SARS delivered rule 30 notices, 2 days late for which they sought condonation before this court and which condonation application was filed on the same day. On 6 April 2022, SARS delivered a conditional condonation application for the late filing of the rule 31 statement. The condition being a finding in SARS's favour that a notice of bar was required which was not filed and that the filing of the rule 31 statement was therefore not out of time.

[35] SARS ought not to have brought the rule 30 applications at all as the grounds relied upon are the same as those raised in opposition to the rule 56 applications. SARS ought to have filed a condonation application.

[36] Be that as it may, *VM South Africa* was delivered on 17 August 2023. After that judgment, SARS ought to have withdrawn the rule 30 application and ought to have set down the condonation application with the rule 56(1)(*a*). This did not occur.

[37] Prior to 17 August 2023 (the delivery of *VM South Africa*), there was arguably a discernible rational basis to proceed on the route chosen by SARS. Thereafter, there was not. Significant and unnecessary costs have been incurred by virtue of these unnecessary interlocutory applications. SARS has a constitutional obligation to collect revenue and to do so efficiently and effectively.

[38] Although SARS initially sought punitive costs against the taxpayer, it did not persist with this at the hearing. The taxpayer, however, persisted with its prayers for punitive costs.

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[4] This is so as the full court in *VM South Africa* held that a rule 31 statement filed without a condonation application is invalid.

[39] The taxpayer has been successful and in my view and having regard to the facts set out herein, the taxpayer should, in respect of the dismissal of the rule 30 application, be entitled to costs on the party/party scale up and until 30 September 2023 (allowing SARS some time to consider the judgment handed down on 17 August 2023) and from 30 September 2023, costs as between attorney and client. This costs order is equally applicable to the condonation application attached to the rule 30 application. I intend ordering such costs in respect of the wasted costs occasioned by the postponement of the rule 56 application as well.

**Costs of the postponement application on 28 August 2023**

[40] The interlocutory applications serving before this court were previously enrolled for hearing on 28 and 29 August 2023. The taxpayer applied for a postponement of the applications by way of a substantive application which it launched on 24 July 2023 and which postponement application was opposed by SARS but granted by Tshombe AJ who reserved the costs for determination by this court. She provided written reasons in which she recorded the facts upon which the decision of this court in respect of such costs, is based.

[41] During October 2022, counsel for the taxpayer had suggested the dates of 28 and 29 August 2023 for the hearing of the interlocutory applications. SARS's legal team indicated their availability and added that they were of the view that one day for the hearing of all the applications would suffice. Counsel for the taxpayer had made a mistake about his availability for the 28th of August 2023 which he realised in July 2023 when he started with his preparations for the hearing. The taxpayer's legal team immediately engaged SARS and relying on SARS's previous indications that the applications could be argued in one day, proposed that the applications be heard on 29 August 2023, even proposing that the court be requested to start an hour earlier and finish an hour later than usual. This was rejected and counsel for SARS had by this time reconsidered the time estimate of one day and no longer thought that a day would be sufficient. SARS urged the taxpayer to brief another senior counsel to appear on both 28 and 29 August 2023. The taxpayer stated in the founding affidavit in support of the application for a postponement that it held positive prospects of success in the main tax dispute which was almost R1,5 billion and that it was in the interests of justice for the counsel who had been steeped in the matter for many years to represent it at all stages of the dispute. It is for these reasons that the taxpayer on 24 July 2023 launched a substantive application for the postponement of the hearing.

[42] After receipt of the application for the postponement and on 28 July 2023, SARS proposed that the interlocutories be heard on 29 August 2023 subject to the taxpayer tendering collapse fee costs for 28 August 2023. This tender was sought a month before the hearing and without attaching a collapse fee agreement with counsel. Counsel who argued

the opposition to the postponement on behalf of SARS (not SARS Counsel or, to the best of my knowledge, any of the other counsel involved in this hearing) conceded in court that there was no collapse fee agreement with SARS.

[43] It is clear that the postponement was not caused by the mistake counsel for the taxpayer had made. The postponement could have been avoided if the taxpayer's proposal to utilise the 29th of August 2023 had been accepted on 7 July 2023 when the taxpayer made it. SARS came back to the same proposal on 28 July 2023 but attached a condition which was not relevant at all because no collapse fee agreement had been concluded between counsel and SARS.

[44] SARS's conduct is inexplicable. Its opposition to the postponement was unreasonable but its refusal to agree to argue the matter on the 29th of August 2023 unless a collapse fee for the 28th of August 2023 was tendered, unconscionable under circumstances where no collapse fee agreement existed.

[45] SARS was quite vocal in the papers which served before this court that the taxpayer's primary objective is to delay the adjudication of the tax appeal. The conduct described in respect of the hearing of the 28th and 29th of August 2023 points to the opposite. The taxpayer sought to remove every obstacle even suggesting that the court be approached to start an hour earlier and adjourn an hour later.

[46] The issue of costs is within this court's discretion. Having regard to all that has been said herein, SARS in my view should pay the costs occasioned by the postponement as between attorney and client.

**Order**

[47] I therefore grant the following order:

1. It is declared that SARS's statements of grounds of assessment delivered in terms of rule 31 in respect of corporate income tax (CIT) and value-added tax (VAT) dated 27 December 2021 (jointly referred to as the "rule 31 statements"), were delivered out of time.
2. The following relief sought in the notice of motion dated 10 May 2022 and amended in the draft order uploaded onto Caselines at 001-179, is postponed *sine die* and is to be heard simultaneously with SARS application for condonation for the late filing of the rule 31 statements:
    2.1. "The applications by [the taxpayer] in terms of rule 56(1)(*b*) read with section 129 of the Tax Administration Act 28 of 2011 under case numbers IT 45791 and VAT 22288 are granted;

2.2. The rule 31 statements are set aside.

2.3. The CIT and VAT additional assessments raised by SARS dated 28 September 2018 and 15 November 2018 respectively are set aside."

3. The rule 30 CIT and VAT condonation applications as well as the rule 30 CIT and VAT applications are dismissed with costs on the party/party scale, scale C, up until 30 September 2023 and thereafter as between attorney and client to include the costs of two counsel where so employed.

4. SARS is to pay the costs of the application for a postponement including the costs of preparing for and arguing the postponement application under the above case numbers on 28 August 2023 as between attorney and client such costs to include the costs of two counsel where so employed.

5. SARS is to pay the wasted costs occasioned by the postponement of the hearing of the relief ringfenced in paragraph 2 of this order on the party/party scale, scale C, up until 30 September 2023 and thereafter as between attorney and client, such costs to include the costs of two counsel where so employed.

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**I Opperman**

**Judge of the High Court**

**Gauteng Division, Johannesburg**

Date of hearing: 12 February 2024

Date of judgment: 15 July 2024