REPUBLIC OF SOUTH AFRICA

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

Case No.: **VAT 22425**

(1) REPORTABLE: YES / **NO**

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

(3) REVISED.

6 August 2024
DATE

SIGNATURE

In the matter between:

TAXPAYER Y (PTY) LTD **Appellant**

and

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

J U D G M E N T

This judgment has been handed down remotely and shall be circulated to the parties/ by way of email / uploading on Case Lines. The date for hand-down is deemed to be 6 August 2024.

BAM, J

A. Introduction

[1] This judgment addresses two interlocutory applications. They are, the application brought by the appellant, Taxpayer Y, in terms of rule 30(2) of the Uniform Rules, read with rule 42(1)[1] of the Tax Court Rules (rules), and the Application for Condonation brought by the respondent, the Commissioner for South African Revenue Service, CSARS.

[2] What gave rise to the two applications was SARS's delivery of copious amounts of documents, consisting of 27 000 pages of discoveries and over 300 pages of expert summaries, on the eve of the appeal hearing scheduled to commence on 6 May 2024. Taxpayer Y complained that the late delivery of the mass of documents had disrupted its preparations for the appeal. In response to each of the records filed out of time, Taxpayer Y issued a Uniform Rule 30 notice[2] claiming that SARS's conduct constituted irregular steps and invited SARS to remove the cause of the irregularity. Taxpayer Y refused to entertain SARS's requests to withdraw its rule 30 notices.

[3] SARS's records were filed between 9 and 23 April. The last day on which the parties had to file their expert summaries was 4 April. On 24 April, SARS filed its notice of application for condonation. The application was similarly met with a rule 30(1) notice, with Taxpayer Y complaining that it too constituted an irregular step. On 3 May, Taxpayer Y launched the present application in terms of rule 30(2) on urgent basis, citing the looming appeal hearing as basis for urgency. Both applications were heard in the same proceedings.

B. Background

[4] The two applications arise against the background of a contested appeal lodged by Taxpayer Y against additional VAT assessments raised by SARS for the period commencing from January 2019 to June 2020. The assessments were confirmed by way of a letter dated 29 March 2021, wherein SARS advised Taxpayer Y that it had disallowed its VAT refunds, amounting to about R2.9 billion, in respect of supplies made to Taxpayer Y by three entities,

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1 The Rule reads: "Procedures not covered by Act and rules

(1) If these rules do not provide for a procedure in the tax court, then the most appropriate rule under the Rules for the High Court made in accordance with the Rules Board for Courts of Law Act and to the extent consistent with the Act and these rules, may be utilised by a party or the tax court.'"

2 30 Irregular Proceedings

(1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.

(2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if—

(*a*) the applicant has not himself taken a further step in the cause with knowledge of the irregularity;

(*b*) the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days;

identified as, North-One(Pty) Ltd, Company-Two Technical CC, and Company-Three Metals (Pty) Ltd, during the period mentioned at the start of this paragraph.

[5] The grounds upon which SARS relies in refusing the refunds are set out in the pleadings. For purposes of this background, they may be summarised as: SARS alleged that the tax invoices issued by the three suppliers do not comply with section 20(4)(*e*)[3] of the VAT Act; that the input tax claims of the vendors in Taxpayer Y's supply chain were based on initial fictitious invoices which falsely described the supplies as standard rated,[4] whereas the supplies consisted mainly of zero-rated Krugerrand gold coins. SARS further alleged that Taxpayer Y participated in a scheme as envisaged in section 73 of the VAT Act. On this basis too, SARS concluded that Taxpayer Y is not entitled to the refund.

C. Taxpayer Y's Rule 30 (2) application and the case for prejudice

[6] At the heart of Taxpayer Y's case is the issue of prejudice. Taxpayer Y argues that unless the court removes the cause of irregularity, meaning, disallow the expert summaries and the discoveries, it stands to suffer irremediable harm. Taxpayer Y complains that the move by SARS to deliver the mass of records, on the eve of the appeal hearing, was calculated and is part of the gamesmanship tactics adopted by SARS in furtherance of its case in this appeal.

[7] Taxpayer Y complains about the irrelevance of Jaklb's and de Anne's summaries and the documents underpinning the summaries. It claims that the filing of these records is an assault to Taxpayer Y's right to just administrative action.

[8] According to Taxpayer Y, SARS's intentional conduct of ambushing Taxpayer Y with the mass of documents, on the eve of the appeal, threatened Taxpayer Y's right to a fair hearing.

[9] As a result of the late filing, the commencement and finalisation of the appeal will be delayed, says Taxpayer Y. Meanwhile Taxpayer Y has to contend with a precarious financial position, manifested by the decline in its cashflow and sales, all of which is a consequence of SARS's withholding about R2.9 billion worth of refunds.

[10] SARS's conduct, concludes Taxpayer Y, demonstrates a public entity with no regard for the higher duty placed on public entities to respect the law and tread respectfully when dealing with rights.[5]

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3 In that they do not contain a full and proper description of the goods.

4 Such as second-hand jewellery and scrap gold.

5 *MEC for Health, Eastern Cape and Another* v *Kirland Investments (Pty) Ltd* [2014] ZACC 6, paragraph 82.

The applicability of Rule 30 in these proceedings

[11] The parties put considerable store in arguments advancing the question whether rule 30 is applicable to address SARS's late filing of the records; whether the rule applies to cases of 'omission' as opposed to positive steps; and whether there are other suitable remedies within the Tax Court rules to provide relief to Taxpayer Y. I am not prepared to express any view on these issues, nor do I consider it efficient to do so.

[12] The parties accept that the success of the condonation application will result in the failure of the rule 30 application. I now turn to consider the merits of the application.

D. The application for Condonation

SARS's case

[13] SARS outlines the focus of its case as follows: (i) to set aside the rule 30 notices; (ii) to the extent necessary, seek condonation for the late filing of the summaries and the discovery; and (iii) to a limited extent, demonstrate that Taxpayer Y has not complied with all of its rule 36 obligations.

[14] In setting out its case for condonation SARS provided a detailed chronology of the events that took place during March and April, including the correspondence exchanged between the parties. In essence, SARS notes that in order to minimise delay, it had on 20 March 2024, written to Taxpayer Y asking for a non-binding synopsis of the expert evidence Taxpayer Y intended to lead. That request was flatly refused by Taxpayer Y in its letter of 26 March 2024.

[15] SARS thereafter concentrates on the key aspects of the evidence covered in its expert summaries, underscoring the relevance of the evidence in refuting the conclusions reached by Taxpayer Y's expert witnesses. SARS points out that Taxpayer Y's expert summaries which were filed on the last day by which expert summaries had to be filed, raised new issues. On that basis, SARS had no chance of filing its reports on time.

[16] Finally, SARS traverses the historical events dealing with discovery, tabulating by date and number of pages of the additional discoveries made by each party. SARS makes claims that Taxpayer Y had not complied with all its discovery obligations. This point is refuted by Taxpayer Y.

[17] SARS also questions whether its discoveries can realistically be said to be out of time. Finally, SARS touches briefly, on the content of the discovered documents and mentions the alleged implication of Taxpayer Y's *de facto* shareholder in transactions concerning the purchasing of Krugerrand coins and the measures to which Taxpayer Y went to disguise those purchases.

Taxpayer Y's opposition

[18] Taxpayer Y opposes SARS's condonation on the basis that it is woefully inadequate and deliberately vague. The application according to Taxpayer Y fails to provide a *bona fide* and plausible explanation for the delay. Taxpayer Y says that it had challenged SARS to be candid with this court however, SARS simply refrained from doing so, preferring to obfuscate its non-compliance with the rules.

[19] Just as it did when arguing the rule 30(2) application, Taxpayer Y canvasses the issue of relevance of Jaklb's and de Anne summaries and the discoveries underpinning the two reports and asserts that the belated summaries and discoveries are irrelevant to the issues in dispute and did not inform SARS's decision to issue the assessment.

[20] The point is made that SARS did not have sufficient information when it drew the conclusion that Taxpayer Y's supply lines comprised gold bars emanating from smelted Krugerrand gold coins.

[21] What SARS actually seeks to do with its condonation, Taxpayer Y argues, is sneak in under the guise of a tax appeal, the results of an audit investigation conducted after the assessment was issued, which is in contempt of the court order that put SARS on terms to complete its audit on 11 December 2020.

[22] Taxpayer Y emphasises prejudice which it says encompasses the disruption of its preparation for the appeal, the curtailment of its rights to a fair hearing and the irreversible financial prejudice as a consequence of SARS's dilatory conduct and the domino effect of the delay.

E. Legal Principles

[23] It is trite that the standard for considering an application for condonation is the interests of justice.[6] Interests of justice, according to the *Brummer* v *Gorfil Brothers Investments (Pty) Ltd and Others* must be determined –

> "… by reference to all relevant factors including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect."[7]

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6 *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae*) [2007] ZACC 24; 2008 (2) SA 472 (CC) at para 20; *Nair v Telkom SOC Ltd and Others* (JR59/2020) [2021] ZALCJHB 449 (7 December 2021), paragraph 11.

7 (CCT45/99) [2000] ZACC 3; 2000 (5) BCLR 465; 2000 (2) SA 837 (CC) (30 March 2000), paragraph 6.

[24] It is also settled law that as soon as a litigant recognises that it has not complied with the rules, it must bring the application for condonation as soon as possible.[8]

[25] In *Valor IT v Premier, North West Province and Others*, the court, having concluded that the application for condonation lodged by the government respondents was inadequate and unsatisfactory, reasoned:

> "In these circumstances, one would have expected a full and thorough explanation for the delay. That was not to be. Instead, the provincial government gave an explanation for its delay in filing its answering affidavit, and later, for its delay in filing its reply in the counter-application. That only accounts for the period between the service of the founding papers and the filing of the answering affidavit and reply in the counter-application respectively. In order to understand why the provincial government delayed for more than four years before it challenged what was a patently unlawful contract, one has to trawl through the papers and draw inferences from the facts found there. That is far from satisfactory, but is necessary if the interests of justice are to prevail."[9]

[26] The court found the application for condonation in *Member of the Executive Council for Health and Social Development of the Gauteng Provincial Government v Motubatse & Another* to be inadequate and the delays were said to be excessive. In the interests of justice, it nonetheless granted condonation as captured in this paragraph: [I hasten to mention that the pressing issue in this case was a discrete point of law.]

> "[11] With regard to the explanations for the delays on behalf of the MEC, there is no doubt that they are far from satisfactory. They are excessive, and the explanations therefor are woefully inadequate. The ignorance of the rules and procedures of this Court for failing to timeously file the record and the heads of argument, is no excuse. Counsel for the MEC was hard-pressed to concede that the non-compliance with the rules of Court were excessive, and the explanations for non-compliance were inadequate. This is indicative of a disturbing pattern regard being had to the instances in the high which led to her defence being struck out. Ordinarily, on these facts, that would be the end of the matter.
>
> [12] It is trite that good prospects on the merits may compensate for poor explanation for the delay."[10]

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8 *Rennie v Kamby Farms (Pty) Ltd (*406/84) [1988] ZASCA 171; [1989] 2 All SA 155 (A) (1 December 1988), paragraph 16; *Napier v Tsaperas* (225/94) [1995] ZASCA 1; [1995] 2 All SA 262 (A) (23 February 1995), paragraph 16.

9 (Case no 322/19) [2020] ZASCA 62 (9 June 2020), paragraph 33.

10 (182/2021) [2023] ZASCA 162 (30 November 2023).

F. Discussion

[27] SARS's case for condonation is far from perfect. This much is plain from its papers. For example, other than stating that it had written to Taxpayer Y requesting a non-binding synopsis on 20 March 2024, which was refused, the chronology in the founding affidavit provides no insight into what caused the delay, and no attempt has been made to explain any specific period.

[28] There is no explanation as to why SARS's application for condonation was brought only on 24 April when it knew as early as 4 April, or even earlier, that its own summaries were going to be late. This is not all, when addressing the question of prejudice to Taxpayer Y, SARS boldly claimed that Taxpayer Y must make a case that its experts were taken by surprise. In SARS's view, there were no surprises and thus, no prejudice, because Taxpayer Y had always known what SARS's case was, that is, the supply lines to Taxpayer Y consisted mainly of Krugerrand gold coins. I deal with the issue of prejudice later in this judgment.

[29] I now consider the factors relevant to the question whether condonation is to be granted. Regrettably, because of the manner in which SARS's application is fashioned, this court has to trawl through the affidavits, as best as it can, to draw inferences, an approach that is not satisfactory at all, but must be done if the interests of justice are to prevail. [See the remarks of the court in *Valor IT v Premier, North West Province and Others,* paragraph 25 of this judgment.]

(i) The extent of the delay

[30] The summaries of the various experts were filed as follows: Mr Johan Jaklb's[11] summary was filed on 9 April 2024, with a further summary on 23 April. Professor WHK's summary was filed on 15 April, while Professor Wales's and Dr Robb's summaries were filed on 16 April. Ms de Anne's summary was filed on 17 April and the supplementary discovery affidavits was filed on 16 and 23 April.

[31] Upon perusal of the summaries, it is clear that they were filed immediately upon completion. It is plain from the content of each of the reports, that the experts and the auditors address the issues raised by Taxpayer Y's experts, which suggests that the experts could only have been instructed after 4 April. One is also not dealing with an egregious delay. These reports were delayed by between 4 and 18 days. On this basis, the court is inclined to condone the delay.

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[11] The two witnesses Mr Jaklb and Ms de Anne are employees of SARS. They conducted certain audits and analysed various discovered documents. Although they are factual witnesses, SARS adopted the view that their summaries will be of assistance to the court in elucidating the discovered documents.

[32] The extent of delay in this case cannot even be remotely compared to the delay in *Member of the Executive Council for Health of the Gauteng Provincial Government v M. M and Another;*[12] on which Taxpayer Y relies to oppose condonation. In that case, condonation was sought to allow an expert report that was not only delayed by more than three years, without any cogent reason, but to support a defence of Public Health that had not even been pleaded by the MEC. The court refused condonation for these and a number of other reasons, which find no application to the present case.

[33] In my view, the two cases are incomparable. I will revert to this case when considering the question of prejudice.

(ii) Explanation for the delay

[34] The explanation provided by SARS for the delay, in addition to the request for a non-binding synopsis that was refused, is that Taxpayer Y had raised new issues, which SARS had a duty to refute. Needless to say, it was only upon reading the reports that SARS identified the new issues. Although it is not clear when exactly each of the witnesses were requested to provide their summaries, it could not have been earlier than 4 April.

[35] Taxpayer Y's take to this issue is that the rules do not provide for staggered notices and the issues are crystalised in the pleadings. As such, each party must decide independently of the other what expert evidence it intends to lead. It is true that the rules do not provide for staggered summaries and that the issues are outlined in the pleadings. However, a degree of co-operation between the parties is necessary if delays are to be avoided. Unless the parties co-operate with one another, it is likely that this appeal will drag on indefinitely.

(iii) Prejudice to Taxpayer Y

[36] The prejudice complained of by Taxpayer Y may be placed under the following three broad categories: i) Financial Prejudice; ii) The assault on Taxpayer Y's right to just administrative action; and iii) The negative effect to Taxpayer Y's right to a fair hearing. I now discuss the three in turn and set out SARS's response.

a) Financial Prejudice

[37] Taxpayer Y complains that the delay in the commencement of the appeal means that the finalisation of the appeal will be delayed. Meanwhile Taxpayer Y, as a result of SARS's withholding of the refunds, has to contend with a precarious financial position. SARS submits that it is the plaintiff in the appeal. Therefore, whatever delays are experienced hurt SARS, not the other way round. In addition, SARS submits that it cannot refund Taxpayer Y as the refunds

[12] (26457/2020) [2024] ZAGPPHC 373 (18 April 2024).

were unlawfully claimed. As is clear from the contentions made by the parties, this is a matter for the court entertaining the appeal.

b) The alleged assault to Taxpayer Y's right to just administrative action

[38] To the extent that this complaint was raised to highlight the prejudice to Taxpayer Y, in the event the irregular steps were not removed, it is not necessary to address as it depends on the outcome of the condonation application.

c) The threat to Taxpayer Y's right to a fair hearing

[39] It is to SARS's disruption of Taxpayer Y's preparations for the appeal that I now turn to, which Taxpayer Y complains interfered with its constitutional right to a fair hearing. There is no question that the filing of the mass of documents on the eve of the hearing, without warning, must have sent Taxpayer Y's appeal preparations into a topsy turvy.

[40] Were it only the late filing coupled with contrition directed at failing to comply with the rules of this court, things would be different. Instead, SARS stood firm in its claims, as illustrated in its affidavits in both applications, and even during argument, making claims that the delay in filing large amounts of records, on the eve of the hearing, cannot on its own bring about prejudice.

[41] To its credit, SARS later reconsidered its position. In response to questions from the bench it conceded that Taxpayer Y required time to consider the documents. SARS further conceded that it was reasonable to accept that Taxpayer Y could not have been able to prepare for the hearing while also considering the lately filed records.

[42] Taxpayer Y argued very strongly with reference to *Member of the Executive Council for Health of the Gauteng Provincial Government v M.M,*[13] urging this court to follow the *ratio decidendi* of that case and refuse condonation, based on what Taxpayer Y said are similarities in the two cases. It is indeed correct that the doctrine of judicial precedent requires of this court to follow the decisions of coordinate and higher courts in the judicial hierarchy[14] where circumstances are suited to do so, as an intrinsic feature of the rule of law. But the two cases are distinguishable.

[43] In addition to what I had already said about the MEC's case, the extent of the delay and the haphazard fashion in which the defence conducted its case, the underlying facts point to a case that was poorly and laggardly conducted from the start. For example, on the eve of the hearing, the MEC, for the first time, delivered about 21 expert reports, including the economist's report that was meant to support the defence of Public Health, that was never

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13 Footnote 12 *supra.*

14 *Turnbull-Jackson v Hibiscus Coast Municipality and Others* [2014] ZACC 24, paragraph 55.

pleaded. The latter report, comprising of 688 pages, relied on documents that had not been discovered. There was absolutely no explanation provided as to why the expert reports were delivered for the first time on the eve of the hearing. Agreements reached during pre-trial conferences were shunned with no cogent reasons provided. The list goes on.

[44] Importantly, when considering prejudice, the court pointed to a child who had suffered a brain insult during birth, who required a variety of immediate medical interventions to alleviate her suffering and that of the parents.

[45] None of these considerations apply to the present case. The parties have been exchanging expert reports since early 2023. That is why either side could readily identify the new issues raised by the other. The issues are somewhat crisp, compared to the case conducted by the MEC.

[46] In the present case, the court is dealing with a commercial interest and contestation whether there is any legal validity to the denial of the appellant's, (Taxpayer Y's) refund claims. While I accept that commercial interest is important, I am confident that the two cases are distinguishable.

(iv) Complex nature of the case and the attendant investigations

[47] It can be inferred from the affidavits filed in the two applications that this is a complex case characterised by wide-ranging investigations involving multiple entities. In simple terms, this is no run-of-the-mill tax appeal. To appreciate the complexity, one only has to read this extract from *Taxpayer Y Resources (Pty) Ltd v Commissioner for the South African Revenue Services,* by Fisher J:

> "[70] The pleaded defence of the taxpayer is a simple denial that it was a part of any scheme or had knowledge of the source of the gold supplied to it.
>
> [71] Proof of the section 73 scheme entails that SARS must prove whether the jurisdictional requirements of section 73 have been met. …
>
> [73] The genesis and maintenance of the enterprise is central to the pleaded case. SARS alleges that the existence of the enterprise, if established, is discernible from the supplies of gold to the taxpayer over time.
>
> [74] Not only is it the case of SARS that the enterprise in issue was born of the scheme but it also contends that it has supported a continuum which is relevant to the pleaded case and which is not confined only to the period raised in the assessment.
>
> [75] It may be that SARS is entitled only to relief confined to the assessed period for the purposes of the appeal. The taxpayer is, however, mistaken in its submission that documentary evidence relating to the engendering of the enterprise from its beginning to the present is not relevant.

> [76] The case as pleaded encompasses the taxpayer's entire supply line as opposed to merely the three suppliers singled out in the assessment. Put differently, the very existence of the enterprise is alleged to be based on the supply of gold in the form of smelted Krugerrand; the entire supply source is thus relevant to the dispute.
>
> [77] The taxpayer's attempt to confine the discovery to the assessed period and the named suppliers fails to acknowledge the central allegation to the effect that the enterprise was brought into existence to take advantage of the 2017 amendment to the law and only exists because of the entire illegitimate supply chain."[15]

[48] A quick perusal of de Anne's and Jaklb's summaries demonstrates the complexity of the work that had to be undertaken, ie, the need to interrogate a multitude of documents, bank statements of a large number of enterprises, and the act of joining the numerous pieces together to reach what may be described as *prima facie* logically defensible deductions. These considerations in my view clearly support the conclusions of complexity.

(v) The effect of the delay on the administration of justice

[49] I am mindful that SARS did not bring its application for condonation at the earliest possible date. But, as I had said in relation to the delay in filing the expert reports, the delay is insignificant. Overall, the effect of the delay on the administration of justice is not pronounced.

G. Conclusion

[50] It is based on the immediately preceding discussion that I conclude that in the interests of justice, condonation must be granted to SARS. On the question of costs, SARS's conduct was unproductive, and this is independent of any prior issues or disagreements the parties may have had with one another. SARS could have easily conceded that Taxpayer Y required time to consider the documents. It did not do so. It boldly came to court to argue an indefensible case. SARS must pay Taxpayer Y's costs on an attorney client scale.

H. ORDER

1. SARS's failure to seek an extension of the periods provided for in rule 37 before the expiry period thereof, in respect of the reports of the following expert witnesses: Prof WHK, Prof Wales, Dr Robb, Mr Jaklb, and Ms de Anne, is condoned.

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[15] (VAT22425) [2024] ZAGPJHC 43 (16 January 2024), paragraphs 70-77.

2. SARS's late filing of the following experts' reports is condoned and the period for filing is hereby extended to the dates indicated herein below:

   2.1 The supplementary reports of Mr Jaklb, in respect of North-One and Company-Two Technical, in terms of rule 37(*b*), is extended until the date of actual service of the said report namely, 9 April 2024 and the cash flow analysis of Mad Nuggets supply line is extended until the date of actual service of the said report, namely, 23 April 2024.

   2.2 The period for filing the summary/report of Dr Robb in terms of rule 37(*b*) be extended until the date of actual service of the said report, namely, 10 April 2024.

   2.3 The period of filing the supplementary summary of Prof WHK in terms of rule 37(*b*) is extended until the date of actual service of the said report, namely, 15 April 2024.

   2.4 The period for filing the supplementary summary/report of Prof Wales in terms of rule 37(*b*) is extended until the date of actual service of the said report, namely, 16 April 2024.

3. Taxpayer Y's rule 30 notices, attached to the Notice of Motion are set aside, namely, the notice in respect of Mr Jaklb; Dr Robb; Prof WHK; Prof Wales; Ms de Anne; and the rule 30 notice in respect of Jaklb's audit report filed on 23 April 2024.

4. Any non-compliance with rule 4(2) of the Tax Court Rules is condoned.

5. Any default or non-compliance on the part of the Applicant concerning its discovery of 16 April 2024 and 23 April 2024, is condoned.

6. SARS must pay Taxpayer Y's costs of opposition of this application as well as wasted costs occasioned by the appeal not commencing on 6 May to 14 June 2024, on attorney client scale, including the costs of two counsel.

7. The tax appeal is postponed to a date suitably arranged between the parties' legal representatives, having regard to their reasonable availability.

8. Leave is granted to Taxpayer Y to approach the Judge President or the Deputy Judge President for the allocation of a date for the resumption of the tax appeal on an expedited basis.

N.N BAM, J
JUDGE OF THE HIGH COURT,
JOHANNESBURG

Date of Hearing: 04 – 06 June 2024
Date of Judgment: 06 August 2024