REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Case No.: **IT 45903**

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

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

(3) REVISED.

14 March 2024 .....
DATE SIGNATURE

In the matter between:

THE TRUST **Appellant**

and

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

J U D G M E N T O N C O S T S

VALLY J

Introduction

[1] On 3 October 2023 I issued the following order:

> "1 The additional assessments for the 2009, 2012 and 2013 tax years are confirmed.
>
> 2 Subject to 3 below, the appellant and The Attorneys are ordered and directed to pay the costs of the appeal, including the costs of two counsel on the attorney and client scale, jointly and severally, the one paying the other to be absolved.
>
> 3 The Attorneys are called upon, within 20 days of the date of this order, to show cause why, by the delivery of affidavit evidence, the order in 2 above should not become final, in which event such order shall be suspended in respect of The Attorneys, pending further determination by this court, and failing which such order shall become final."

[2] In compliance with the order The Attorneys filed an affidavit on 6 November 2023. Upon an invitation by myself, the respondent (Commissioner) filed a response to the affidavit. The Attorneys objected to my taking into account the contents of the affidavit on the basis that the order did not provide for the Commissioner to respond to its affidavit. However, it replied to the Commissioner's affidavit. The reply is obviously filed *ex abundante cautela,* without withdrawing its objection. Noting the objection and having regard to the order, it is my view that the response of the Commissioner should be ignored. Accordingly, this decision and the order that follows is based solely on the explanation furnished by The Attorneys. Prior to the drafting of this judgment, The Attorneys was offered an opportunity to make oral submissions. It declined the invitation stating "we believe that the papers were comprehensive".

Facts and Analysis

[3] According to The Attorneys, it had informed the Commissioner on 10 May and 17 June 2020 that the claims of the Commissioner against the appellant had, in terms of section 99(1)(*a*) of the Tax Administration Act 28 of 2011 (TAA), prescribed, and that the appellant had ceased to exist as from 2017. The Commissioner ignored the contents of the letters and decided to issue a finalisation of audit letter on 31 July 2020, containing assessments in respect of the 2009, 2012 and 2013 financial years. At this point it is necessary to note that whether the appellant exists or not is a controversial issue. This will be dealt with later. For the moment it bears mentioning that the reference to its non-existence in this judgment is merely a recognition of The Attorneys' contention and not an acceptance of a fact.

[4] As a result, it received instructions from a Mr William, a former trustee and former beneficiary of the appellant, to object to the assessments. The Attorneys does not reveal when it received the instruction, but does say that Mr William,

> "as a (former) trustee and a (former) beneficiary, and therefore a (former) representative [sic] taxpayer (prior to its termination), and accordingly had and still has an interest in these proceedings. William accordingly instructed The Attorneys to object to the additional assessments and paid all of The Attorneys' fees".

What The Attorneys does not explain is why it would accept instructions from Mr William on behalf of the appellant when, according to it, the appellant no longer exists, and Mr William is no longer a trustee of it.

[5] By accepting the instruction on behalf of the appellant The Attorneys replicated the very error it says the Commissioner made, i.e. treating the appellant as if it exists. It did not advise Mr William that, as the appellant no longer exists and as he is no longer a trustee of it, he cannot represent the appellant, and it (The Attorneys) could not accept instructions from him on behalf of the appellant. Instead, The Attorneys accepted the instruction and treated it as if it came, not from Mr William, but from the appellant.

[6] On 18 August 2020 The Attorneys filed a notice of objection[1] on behalf of the appellant. It says in its notice:

> "As you are aware, we act for The Trust (**'our client'**)."
>
> …
>
> We have been instructed by our client to object, as we hereby do, to the additional assessments …"

(Emphasis in original.)

[7] It is absolutely clear from the notice that The Attorneys claims to act for the appellant and not for anyone else.

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[1] The notice is in the form of a letter.

[8] The notice is detailed in its challenge to the assessments. It constitutes nine pages of single-spaced content presented in a very small font. The appellant raises six grounds of objection. All of the grounds deal with the merits of the case. And then in the penultimate paragraph under the heading, "Concluding Remarks", the following is said:

> "As has previously been advised to you, as all of **our client's** assets had been realised and all of its creditors and expenses paid, the trust was terminated on 31 May 2017 and is no longer in existence."

(Emphasis added.)

[9] By this averment the Commissioner is simply being informed by The Attorneys that the appellant does not exist. At the same time, the appellant objects to the assessments on substantive grounds. The Commissioner was now presented with an inherently contradictory stance: an appellant which does not exist objects to an assessment on substantive grounds, one of which was that the Commissioner's claim against the appellant had prescribed. Thus, having received the objection from the appellant, and not from Mr William, the Commissioner was legally obliged to attend to it. As a result, a wide-ranging dispute was generated, when instead it could have either been prevented by not objecting to the assessments, or been restricted to the narrow issue of the non-existence of the appellant.

[10] Operating within the legal process set in motion by the filing of the objection by The Attorneys, the Commissioner, on 12 April 2021, disallowed the objection. The Commissioner furnished a thirty-page single spaced document printed in small font, specifying his detailed reasons for the disallowance. The document canvasses both the facts and the law as comprehensively as one could expect from an administrator carrying out his constitutional duties. With reference to his understanding of the facts, the Commissioner explains why, in his view, none of the claims are prescribed.

[11] Having received the disallowance, The Attorneys:

> "advised [Mr] William, to lodge an appeal against the additional assessments, on the basis, *inter alia*, **that the above-cited appellant no longer existed and that the respondent's claim had, in any event, prescribed. The Attorneys anticipated** that the respondent would act sensibly and withdraw its prescribed claim as reflected in the assessments against a non-existent trust, and **advised its client** to attempt to resolve the matter through the alternative dispute resolution (ADR) process … ".

(Emphasis added.)

[12] The averment on behalf of The Attorneys raises a number of issues:

a. Firstly, The Attorneys says it advised Mr William to lodge an appeal. But then, as we will see, the appeal is not instituted by Mr William acting in his own name.

b. Secondly, it advised him to not only raise the issue of the non-existence of the appellant, but went further and advised him to challenge the merits of the assessments, resulting in the dispute remaining a wide-ranging one.

c. Thirdly, it says that it "anticipated" that the Commissioner would withdraw "its prescribed claim against a non-existent trust", but the Commissioner furnished it with detailed reasons why he does not accept that the claim is prescribed. Given that the "non-existent trust" is the one that registered the objection, it is understandable that the Commissioner operated on the basis that "the trust" does exist and dealt with the substance of its objection. Thus, The Attorneys' "anticipation" that the Commissioner would withdraw the assessment cannot be said to be reasonable.

[13] Mr William gave the instructions sought from him immediately. The instructions are given on behalf of the appellant. This raised another issue, that of whether Mr William was appropriately qualified to bring the application on behalf of a non-existent entity which he (as an ex-trustee) no longer has any involvement in. In any event, on the same day The Attorneys lodged the appeal on behalf of the appellant. It also asked that the ADR process be initiated. An ADR proceeding was held on 30 June 2021. The Attorneys represented the appellant at the ADR meeting. The matter remained unresolved. The facilitator issued a report of non-resolution on 6 July 2021.

[14] The next day, 7 July 2021, The Attorneys sent a letter to the Commissioner stating once again that it acts for the appellant and that the appellant "wishes that the matter proceed to be heard in the Tax Court".

[15] Nothing occurred until 15 December 2021 when The Attorneys sent an employee of the Commissioner an email reminding him that the Commissioner's rule 31 statement was due on 2 September 2021. On 17 December 2021 the employee responded stating that the Commissioner will revert on 10 January 2022 regarding his rule 31 statement.

[16] Despite the promise of 17 December 2021, the Commissioner by 31 March 2022 had not filed his rule 31 statement. This prompted The Attorneys to send an email to the employee informing him that he failed to honour his promise of 17 December. In the same email The Attorneys states:

> "**Our client** will be happy to launch an application to tax court for default judgment if that's what it takes to get the matter resolved."

(Bold added.)

[17] It still did not dawn on The Attorneys that it was claiming to act for a non-existent client, and that it was seeking the wide-ranging dispute to be resolved through adjudication in this court. It robustly and fervently continued along this path. On 29 April 2022 an attorney representing the Commissioner wrote to The Attorneys asking for its consent to the Commissioner filing his rule 31 statement on 20 May 2022. The Attorneys responded by saying, "[t]hat is fine, but this must be the last extension". The Attorneys was, thus, still determined to have the wide-ranging appeal by its non-existent client ventilated in this court.

[18] The Commissioner filed his rule 31 statement on 20 May 2022. The statement merely repeats what is said in the letter dismissing the objection. This is normal practice in this court. The Attorneys, thus, could not have been surprised by the contents of the rule 31 statement. The appellant was required to respond by way of a rule 32 statement by 12 August 2022. On 3 August 2022 the attorney for the Commissioner sent an email to The Attorneys asking when she could expect the rule 32 statement. No response to the email was received. On 12 August 2022 the attorney followed up with another email asking when the rule 32 statement could be expected. The Attorneys responded on the same day saying that it is not ignoring the email and that a response would be forthcoming on 15 August 2022. It honoured its commitment by sending a detailed letter on 15 August 2022. The contents of the letter reveal that it has finally dawned on The Attorneys that it has been seeking a wide-ranging appeal on behalf of a non-existent client all along. The contents of the letter evidencing this are:

> "2. On receipt of your client's Rule 31 statement, [which was on 20 May 2022] we instructed counsel to prepare a draft Rule 32 statement …
>
> …
>
> 5 Our counsel raised the legal problem of how one can file a Rule 32 statement on behalf of a non-existent taxpayer/person, and recommended that a High Court application be brought requesting an order declaring that the Trust was no longer a "person" for income tax purposes after its termination on 31 May 2017 and that it could therefore not be subject to the additional assessments made by SARS on 31 July 2020 in respect of the 2009, 2012 and 2013 years of assessment.
>
> …
>
> 8 I do not propose to argue the point in this letter, but rather to raise the problem that, with respect **both parties** are faced with a real difficulty in that there is no taxpayer in existence in this matter, and indeed there was no taxpayer in existence when the additional assessments for the 2009, 2012 and 2013 years of assessment were made by SARS on 31 July 2020 more than three years after the termination of the trust.
>
> 9 **I** suggest that in the circumstances the prudent course of action would be for **an interested person in relation to the erstwhile trust** to approach the High Court for an order declaring that The Trust no longer existed when the additional assessments were made on 31 July 2020.

10 Clearly SARS would be free to oppose such an application, and we would welcome such opposition in the interests of resolving the problem and in the interests of the administration of justice.

11 I respectfully suggest that this would be in the interests of both parties as there is a serious danger that the Tax Court would decline to hear the matter in the absence of an appellant."

(Bold added.)

[19] The contents of the letter give rise to the following concerns:

a. The Attorneys do not identify who the "we" is that they make reference to, and so it is not clear if that includes the appellant, which is non-existent;

b. It is only on counsel's advice that The Attorneys came to recognise that it cannot prosecute the appeal on behalf of the appellant. This is something they as reasonable attorneys ought to have realised from the very beginning. In other words, having been alerted by counsel of the conundrum they created for themselves, they ought to have immediately come to realise that they acted wrongly by accepting instructions from Mr William on behalf of the appellant to lodge a wide-ranging objection and appeal;

c. Having been informed by counsel that it has been presenting itself as a representative of a non-existent entity all along, The Attorneys did not withdraw from the matter, withdraw the objection and the appeal which it lodged, and address the harm it caused to the Commissioner by its conduct. Rather, it proposes that an application be brought to the High Court. The proposal itself is problematic. It says to the Commissioner that the application should be brought by "an interested person in relation to the erstwhile trust". Why such a proposal would be made to the Commissioner is not clear. He is not being asked to bring the application. Since it is proposed that an (unidentified) "interested person" bring the application, it should be addressed to that person. The next paragraph, too, is peculiar. It says that the Commissioner would be free to oppose the application "and we would welcome such opposition" from the Commissioner, thus indicating that the application would be brought, though it does not say by whom it would be brought and by when would it be brought;

d. The Attorneys goes on to advise the Commissioner that there is a risk that this court would not entertain the appeal – which it instituted – as there is no appellant. It seems to be completely oblivious to the fact that this problem is caused by itself. The Attorneys having now adopted the stance that an appellant

is “absent” in this matter, says nothing about the fact that the matter has already been placed, by its actions, before this court.

[20] The attorney for the Commissioner responded tersely in a letter on 29 August 2022. He reminded The Attorneys that an appeal initiated by The Attorneys’ notice of appeal was already instituted in this court. As the Commissioner was desirous of finalising the matter, he has decided to apply for default judgment, and that any High Court litigation that may be instituted would be dealt with “at the appropriate time”. Accompanying the letter was a notice in terms of rule 56(1)(*a*) of this court’s rules informing the appellant that the Commissioner intends to apply for default judgment should it not purge its default within 15 days of delivery of the notice.

[21] On 5 September 2022 The Attorneys responded to the letter from the Commissioner’s attorney. It stated that the appellant is non-existent, making it necessary to “now… face [this] fact”. The Attorneys recorded that “[t]he notices of objections and appeal were only lodged in the hope that the matter could be disposed of, *inter alia,* on the basis that the original assessments had ‘prescribed’ ”. It informed the Commissioner that if he persisted in seeking default judgment, same would be opposed on the basis that, despite the filing of the notices of objection and appeal, the Commissioner was aware of the non-existence of the appellant and that the non-existence “will be tendered as good cause for the alleged ‘default’, due to impossibility of performance”.

[22] The contents of The Attorneys’ letter are highly problematic, like so much of its explanations, contentions and assertions that went before. Firstly, it says that it is “now” necessary to “face” the fact of the non-existence of the appellant, but does not explain why it had not, from the onset, simply informed the Commissioner that the assessments were of no value in the light of the non-existence of the appellant. Secondly, it says that the objection and the appeal were only filed “in the hope” that the matter could be disposed of on the basis that the claims had prescribed, but the prescription issue is irrelevant if the appellant is non-existent. Thirdly, it is not true that the objection and appeal only focussed on the issue of prescription of the claims raised in the assessments. On the contrary, they are detailed in their factual and legal challenges to the assessments. Fourthly, The Attorneys does not accept that the appellant is in default of the provisions of the rules of this court by failing to file its rule 32 statement – it refers to an “alleged default” – when this fact should be uncontroversial.

[23] Two days later The Attorneys sent a second letter in response to the Commissioner’s attorney, the substance of which is captured in two assertions: (i) sub-rule 56(1)(*a*) is premised on the existence of “a party” before court; and (ii) there is “neither ‘a party’ nor a ‘defaulting party’ to which” the sub-rule could apply as “The Trust ceased to exist on 31 May 2017”.

[24] The Commissioner launched his application for default judgment in terms of rule 56 on 13 October 2022. The Commissioner's application is premised on the facts outlined above. The deponent to the affidavit filed in support of the application categorically states that the Commissioner does not accept "the allegation that" the appellant ceased to exist. He goes on to point out that, regardless of what The Attorneys says in its letters after the rule 32 statement was due, The Attorneys always claimed to be representing the appellant. He emphasises that The Attorneys has been coy to reveal who instructed it to bring the appeal on behalf of the appellant. Crucially, the Commissioner asked that the costs of the application be borne by both the appellant and The Attorneys on a joint and several basis, and on a punitive scale. The application was served on The Attorneys. The Attorneys was made aware that it was now drawn into the litigation. The Attorneys did not file any affidavit opposing the relief sought against it.

[25] On 1 November 2022 The Attorneys filed a notice of intention to oppose the application for default judgment.

[26] Mr William filed an affidavit styled "Answering Affidavit" on 21 November 2022. The affidavit was not filed by The Attorneys. Mr William claims that the affidavit is deposed "as an 'interested person' in relation to the affairs of the" appellant. He therefore did not file an opposing affidavit on behalf of the appellant. He reveals that he was a beneficiary of the appellant as well as one of its trustees.

[27] He says that he was advised by the attorney that, notwithstanding the non-existence of the appellant, the objection was lodged in the hope that "the dispute would be resolved" on the basis that the claims had prescribed. There is no confirmatory affidavit from the attorney. In any event, this is merely a repeat of what has been said by The Attorneys in its letter of 5 September 2022, and for the reasons set out above, the contention is without merit. Mr William adds that once the objection was disallowed an appeal with a new ground was raised, being the non-existence of the appellant. This too is a repeat of what was said in the letter of 5 September, and as explained above, it is of no assistance to the appellant, as the appeal raised numerous factual and legal issues relating to the assessments. He avers that the Commissioner's rejection of the claim that the appellant ceased to exist is simply "a tactical denial". He has no direct evidence to suggest that the Commissioner challenges the factual claim made in the notice of appeal for "tactical" reasons. Once it was challenged, the dispute, which concerns facts, would have had to be ventilated at the hearing had the appellant filed its rule 32 statement and allowed the matter to run its course. Mr William refers to the proposal made by The Attorneys that "an interested person" bring an application in the High Court seeking declaratory relief, and says that the Commissioner rejected this proposal. This averment flies in the face of the contents of the Commissioner's letter which says that such an application will be dealt with as and when such an application is brought. It is not for the

Commissioner to bring the application, and so there was nothing for the Commissioner to accept or reject in the proposal. The rest of his averments are legal argument about the effects of the trust no longer existing.

[28] It is of importance to note that Mr William did not seek to intervene as a party to the dispute. He simply filed an affidavit, which constitutes no more than evidence. The evidence, brought by "an interested person", albeit one that was a beneficiary of the appellant as well as one of its trustees, does not alter the fact that the parties before court were the appellant and the Commissioner.

[29] On 25 January 2023 the Commissioner filed a notice in terms of rule 42, read with rule 35(11) of the Uniform Rules of Court, calling upon The Attorneys to discover:

> "Copies of all documents provided to [it] in compliance with the provisions of the Financial Intelligence Centre Act 2001, in respect of the representation by The Attorneys in dealing with the South African Revenue Service in relation to the [appellant].
>
> …
>
> All invoices rendered by The Attorneys and documentary proof of payment to The Attorneys, from 1 August 2022 to present, in respect of such representation."

[30] The Attorneys did not respond to the notice. No reasons were ever proffered by The Attorneys as to why it failed to attend to the rule 42 notice. The Attorneys, it must be remembered, has now been made a party to the litigation.

[31] The matter was called on 3 October 2023. At the hearing Mr Noah SC and Mr Dane placed themselves on record for the Commissioner. Mr Seun SC registered his presence. He was asked which party he represented, to which he replied "I suppose I act for an interested person" who he said was Mr William. It was pointed out to him that Mr William was not a party, but rather was, at best, a witness. Mr Noah objected to him being granted audience as he did not represent any party to the proceedings. Mr Seun was asked if it was appropriate to grant him audience as a representative of a witness. He was unable for provide any convincing reasons to grant him audience on behalf of a non-party to the matter. A ruling was made denying him audience as a representative of Mr William.

[32] It was then noted that there was no appearance for the appellant. In the result, the matter was dealt with as an unopposed application for default judgment. Having already read the papers, and after hearing Mr Noah, the order referred to in [1] above was granted. The Attorneys could have opposed the relief sought against it and filed an answering affidavit to that effect, but elected not to do so. In the absence of any opposition from it, the relief sought against it should ordinarily be granted. However, the Commissioner asked that The Attorneys

be given an opportunity to file an affidavit, which is why order 2 (quoted in [1] above) was made.

[33] The affidavit filed by The Attorneys repeats what is contained in the letter of 5 September 2022, and in the affidavit of Mr William. The issues raised therein have already been dealt with above. However, The Attorneys raises certain concerns with the order.

[34] It complains that Mr William was not accepted as a representative of the appellant. The complaint is strange. Mr William never once claimed to represent the appellant. According to Mr William he was a trustee of the appellant, but as it no longer exists he is no longer one. Thus, he cannot claim to represent a non-existent entity. He deposed to the affidavit as, in his words, an "interested person".[2] The conundrum he found himself in was created by himself and by The Attorneys, which continued to present itself as a representative of the appellant, while at the same time claiming that the appellant does not exist.

[35] The Attorneys' next complaint is that the court did not engage with the disputed issue of whether the appellant existed or not, and made an order against the appellant without first determining this issue. If The Attorneys wanted to have this issue determined, then it should have ensured that a rule 32 statement was filed and the issue be explicitly identified as one requiring determination. The conundrum of a non-existent party filing a rule 32 statement could have been overcome by Mr William seeking to intervene in his personal capacity, and filing the rule 32 statement in his own name. The application for intervention would have been dealt with as part of, and not separate from, the main appeal.

[36] The Attorneys submits that the granting of the default judgment contradicted the ruling denying Mr Seun audience. It claims that Mr Seun indicated that the question of who he represents is "a vexed question to be decided by the court", and thus it was necessary to first determine whether the appellant existed or not. If it was found that the appellant existed then he would have represented the appellant. The logic is, in my view, flawed. Firstly, it is not for a court to tell counsel who counsel represents. Counsel is to represent a party that is before court. Mr Seun was asked to clarify which party he represents and he specifically said that he supposes that he represents Mr William. But Mr William was not a party before court. Mr William chose not to intervene and become a party to the proceedings. He simply filed an affidavit as "an interested person". The denial of audience to Mr Seun was based on that fact and not on any other fact, such as the existence or non-existence of the appellant. If Mr Seun was clear that he represented the appellant, he would have been granted the necessary audience. But he specifically denied holding instructions on behalf of the appellant, which was the party before court. Secondly, the default judgment was issued because the appellant was

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2 The quotation marks are in the original.

in default of the rules of the court, particularly rule 32, which was necessary for it to prosecute the very appeal it instituted and demanded all along that it be finalised. It even threatened to have it finalised by itself taking an order against the Commissioner for his failure to file his rule 31 statement timeously. If the appellant wanted the issue of its non-existence determined it should have filed its rule 32 statement and have the appeal determined on this narrow point. In my view, there is nothing inherently illogical in the appellant saying that it ceased to exist at the time the assessments were made, but that since the Commissioner refused to accept this as a fact, it would have to prove that it did not exist at that time. But even if The Attorneys and the appellant do not believe that this approach is logically possible, then Mr William, who issued instructions to The Attorneys from the inception, should have been advised to intervene in order to take the point of the non-existence of the appellant.

[37] The Attorneys was responsible for this matter proceeding beyond the issuance of the assessments by the Commissioner. By its own version, it accepted instructions to act for a non-existent entity. And it proceeded to robustly and fervently represent this non-existent party. It only demurred at the very last moment, when the rule 32 statement was to be filed. And, it did so after insisting that the Commissioner delivers his rule 31 statement. It knew, or at least ought to have known, that once the rule 31 statement was delivered, it would become imperative that its (non-existent) client would have to deliver its rule 32 statement. In fact, by its version it intended to deliver the said statement and had briefed counsel, Mr Seun, to draft the statement. That Mr Seun's involvement resulted in the rule 32 statement not being delivered is a problem for the appellant and The Attorneys, and it is a problem caused by them. They should both bear the consequences.

[38] In other words, The Attorneys on behalf of the appellant set in motion the legal process, which culminated in paragraph 1 of the order I issued on 3 October 2023. It fully partook in that legal process as a representative of the appellant, notwithstanding that in its account the appellant "ceased to exist" before it was accepted as a client. The Attorneys' conduct – claiming to represent a non-existent client and pursuing the wide-ranging appeal – caused the Commissioner to incur legal costs. Mr William, on the other hand, with the full knowledge of The Attorneys, avoided any involvement in a personal capacity. He specifically avoided entering the arena. No costs order can be granted against him.

[39] The purpose of a costs order is to indemnify a party for the expense they have been put through by "having been unjustly compelled either to institute or defend litigation, as the case may be".[3]

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3 *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 485.

[40] Finally, the fact that paragraph 1 of the order effectively recognises that the appellant exists despite the contention to the contrary is of no moment to the issue concerning The Attorneys' liability for costs. That order has been made as a result of the default of the appellant to file its rule 32 statement. The Attorneys' liability arises from its conduct which culminated in the matter being called in this court.

Order

[41] Accordingly, the following order is made:

a. Paragraph 2 of the order issued on 3 October 2023 is made final.

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Vally J

Judge: Tax Court, Johannesburg