REPUBLIC OF SOUTH AFRICA

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

Case No.: **IT 46098**

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

04 December 2024
DATE

SIGNATURE

In the matter between:

EB TAXPAYER **Appellant**

and

COMMISSIONER OF SOUTH AFRICAN REVENUE SERVICE **Respondent**

J U D G M E N T

KEKANA AJ

Introduction

[1] Before me is an application for default judgment launched by EB Taxpayer (the applicant) based on the premise that the respondent, the Commissioner of South African Revenue Services ("SARS") failed to comply with rule 31(1)(*b*) of the Tax Court Rules in that it failed to deliver its Statement of grounds of assessment and opposing an appeal envisaged in rule 31 of the Tax Court Rules ("the rule 31 statement") timeously. The applicant seeks an order in terms of rule 56(2)(a) of the Tax Court Rules that, in the absence of good cause shown by the respondent, the Court should make an order under section 129(2)(*b*) of the Tax Administration Act. That the respondent be ordered to alter the (disputed) assessments in respect of income taxes for the periods 2017 to 2020. In retort SARS is opposing the default application and has also brought an application seeking condonation of its late filing of the rule 31 statement.

Background

[2] During September 2022 the parties exchanged correspondence whereby they scheduled a virtual meeting to be held on 15 September 2022. It is alleged by the respondent that it was during this virtual meeting that the parties agreed (verbal agreement) to suspend the court process and pursue settlement negotiations with the aim of resolving the tax appeal without the intervention of the Court. And it was for this reason, the respondent contends, that it did not file the rule 31 statement. According to the respondent, as of 15 September 2022, it still had 32 business days of the extended 45 business days contemplated by rule 31(1)(*b*) of the Tax Court Rules left to deliver its rule 31 statement on 31 October 2022.

Issues

[3] The crisp issue of whether the parties agreed to suspend the litigation process to pursue settlement negotiations. Subservient to this crisp issue is whether the applicant has met the jurisdictional requirements for a default judgment in terms of rule 56 and whether the respondent has shown good cause as envisaged in rule 56(2).

Submissions and contentions

[4] The applicant argues that there was no agreement to suspend litigation,[1] that it is entitled to judgment by default under rule 56 of the Rules due to the failure on the part of the respondent to deliver its rule 31 statement of grounds of assessment and opposing appeal within the 45-day period provided for in rule 31(1). The applicant further contends that

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[1] Paragraph 1.5.2 of the Applicant's Heads of Argument.

negotiations regardless of how advanced they are do not suspend time periods. That the respondent only delivered its rule 31 statement after the applicant launched its rule 56 application, that the respondent did not immediately apply for condonation for the late filing of its statement as it is required to do under rule 52(6). Also, that the respondent has not shown good cause as envisaged by rule 56(2)(*a*).[2]

[5] The respondent in retort contents that on 15 September 2022, during a virtual MS Teams meeting held between SARS, represented by Ms Mashaba, and the applicant, represented by Mr. Lawns and Mr. Van Stanley, parties reached an agreement to suspend litigation with the aim to pursue settlement negotiations.[3] That the agreement to pend litigation and pursue settlement constitutes consent as envisaged by rule 4 of the Tax Court Rules for the extension of the time to deliver the rule 31 statement until such time as settlement negotiations is terminated. The respondent alleges that it was not obliged to seek condonation because it says there was an agreement to stay the time periods pending negotiations – thus affording it until 22 May 2023 to deliver its rule 31 statement. The respondent contends that it was not in default and that the rule 56 application was premature and lacks the jurisdictional requirements since default is a peremptory requirement for the launch of a rule 56 application. Also, that in case it is found to be in default it opposes the application for a default judgment as it has shown good cause as envisaged in rule 56(2)(*a*). The respondent has also filed an application seeking condonation for the late filing of its rule 31 statement.

Legal principles and analysis

[6] Rule 56(1) of the Tax Court Rules states that:

> "(*a*) 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 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)."

[7] At issue before me is whether there was an agreement to suspend the litigation process which will render rule 4(4) of the Tax Court Rules applicable if answered in affirmative. Rule 4 of the Tax Court Rules deals with the extension of time periods agreed to by the parties. Consequently, if rule 4(4) is found to be applicable, it would mean also that the rule 56

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2 Paragraph 1.4.6 of the Applicant's Heads of Argument.
3 Paragraph 7 of the Respondent's Head of Argument.

application by the applicant was premature, and the contention that the respondent did not comply with the rule 56 notice cannot be entertained as it automatically falls away. If it is found that there was no agreement to suspend litigation process, the respondent would be found to be in default, in which case the respondent will have to show good cause as envisaged by rule 56(2)(*a*). In terms of rule 4(4)*:*

> "If a period is extended or shortened under this rule by an agreement between the parties or a final order pursuant to an application under Part F, the period within which a further step of the proceedings under these rules must be taken commences on the day that the extended or shortened period ends."

[8] It is common cause that there were numerous correspondence between the respondent and the applicant which resulted in both parties agreeing to have a MS Teams meeting. This meeting took place on 15 September 2022, what is not clear is what transpired during the meeting particularly whether the parties agreed to suspend litigation, an aspect disputed by the applicant. The determination of this aspect is so important in that if it is found that there was an agreement to suspend it will then mean that the respondent is correct in its contention that the filing of the rule 56 application by the applicant lacks the jurisdictional requirements and is premature.

[9] What is important to me is the correspondence *ex facie* this Teams meeting. There is evidence of an email sent on 13 October 2022 by Mr Van Stanley in reply to Ms Mashaba confirming that they are busy drafting the settlement proposal for her to consider and they will send it through shortly.

[10] Another email was sent on 3 February 2023 by Mr Lawns in reply to Ms Mashaba who also promised that the settlement proposal will be sent shortly.

[11] On the crisp issue, being that of whether there was an agreement to suspend the court process or not, both the applicant and the respondent claim the application of the *Plascon-Evans* rule[4] favours their version. In summary the rule is as follows:

> "… it allows the courts, in certain circumstances, to make a determination on disputes of fact in application proceedings without having to hear oral evidence and on the respondent's written version of events."

[12] Having heard both parties' versions placed before me without having to make any credibility findings, I can conclude at this stage that despite any other issues discussed during the meeting of 15 September 2022, using the *Plascon- Evans* principle as submitted by both parties I was able to deduce that two things took place during the meeting. There was a commitment by the applicant to provide a settlement proposal. This conclusion is reached

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4 *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-635.

based on all correspondence immediately after the aforesaid meeting, also the continued commitment by the applicant himself[5] and his representatives on both occasions to send the settlement proposal.[6] Subservient to the preceding conclusion I can also conclude that there was an agreement to suspend the court process. This conclusion is reached based on the conduct of the applicant and his representatives.

[13] The behavior of the respondent after the meeting of 15 September 2022 and all correspondence thereafter shows that there was a commitment from the applicant to provide the respondent with a settlement proposal. That commitment was demonstrated by emails and calls made by the respondent to both the applicant in person and to his representatives. As of the day of the hearing of this matter the promised settlement proposal has not been sent to the respondent as per the commitment made during the MS Teams meeting held on 15 September 2022. The applicant did not even attempt on papers nor during the hearing to provide an explanation as to why the settlement proposal was never forwarded.

[14] The conduct of the taxpayer through his representatives who are fully aware of the implications of a court process was of people who knew that there was no risk of litigation. They were aware that the respondent was not going to file a rule 31 statement. After the meeting held on 15 September 2022, the taxpayer and his representatives did nothing not even to present a draft settlement or place a written offer which they can claim was rejected by the respondent. In essence they did not do what would be expected of legal representatives acting in the best interests of their client would do, which was to ensure the mitigation of any potential litigation risk their client may be exposed to. I find this posture to be the one that could only be taken by a party which is aware that there was an agreement to suspend the court process and as such there was no litigation risk towards their client.

[15] I agree with the submission by the respondent that if the applicant was truly of the impression that SARS's rule 31 statement was due on 31 October 2022, the filing of the rule 56 notice on 31 March 2023, is out of time and not in accordance with rule 50(4).[7] The rule 56 application by the applicant should have been brought 20 days thereafter (31 October 2022). With no explanation provided by the applicant for this alleged delay the conclusion is strong that it is because the applicant was aware that there was an agreement to suspend litigation.

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5 An email sent on 2 February 2022.

6 Two emails sent by Mr Van Stanley (13 October 2022) and another email sent by Mr Sellner (3 February 2023).

7 Paragraph 105 of the Respondent's Heads of Argument.

[16] According to the applicant, the last day for the respondent to file a rule 31 statement was 3 May 2023[8] and a just one day immediately thereafter it launched a rule 56 application. To me this is not the behavior of someone who was given multiple opportunities and numerous reminders to present a settlement proposal and still failed to do so but was able to prepare and filed a rule 56 application just hours immediately after 3 May, the date on which the applicant regarded as the respondent's last day to file a rule 31 statement. It would appear to me that the applicant knew exactly what it was doing all this time as it was replying to the respondent's emails that it had no intention of submitting the settlement proposal. The applicant used negotiation as a front to move time and that once the said time lapsed rushed to launch a rule 56 application. It would appear to me that instead of drafting the settlement proposal, the applicant was busy drafting a rule 56 application which was ready hours immediately after 3 May 2023.

[17] The applicant wishes to use an email sent on 30 August 2022 to cement its argument that the respondent's request for extension was up till 31 October 2022.[9] This is a position worth frowning upon as it cannot rely on the email sent on 30 August 2022 as a tool to determine what transpired at the meeting held 15 days thereafter. The email of 30 August 2022 is no significance in the determination of what transpired on the meeting held on 15 September 2022.

[18] Having found that there was an agreement to suspend litigation, what follows *ipso facto* is that rule 4(4) of the Tax Court Rules was applicable. With rule 4(4) being applicable, I conclude that the respondent was not in default. Consequently, the filing of the rule 56 application by the applicant lacked the jurisdictional requirement and was premature. Having found that there was an agreement to suspend court proceedings, that the respondent was not in default and that the filing of rule 56 by the applicant was premature, it is irrelevant to entertain any delays related to rule 56 notice.

[19] After having found that the respondent was not in default, having to show good cause as required by rule 56(2)(*a*) becomes moot. Any expression thereto will just be in orbiter. Assuming the Court would have found the respondent to be in default. The respondent will be expected to show good cause in order to survive a rule 56(1) application. Rule 56(2)(*a*) provides that:

> "The tax court may, on hearing the application - in the absence of good cause shown by the defaulting party for the default in issue make an order under section 129(2)."

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8 Paragraph 2.17 of the Applicant's Head of Argument.

9 Paragraph 3.9.1 of the Applicant's Head of Argument.

[20] Absent good cause the Court can make an order under section 129(2). The respondent lists some challenges that delayed the filing of the rule 31 statement. It is my view that I cannot deal with the challenges faced by the respondent including the adherence to internal processes and turn a blind eye on the conduct of the applicant, as though the applicant did not contribute to this delay. I am of the view that if from the beginning the applicant made it clear that it is not going to deliver the settlement proposal as agreed at the meeting of 15 September, whether there was an agreement to suspend litigation or not, the respondent would have ensured adherence to internal processes at a much earlier date than it did, but for the continued impression that the proposal is forthcoming and that the applicant does not wish to go for litigation, the respondent remained hopeful justifiably so, that this matter will be settled through negotiations. There is a strong conclusion had it not been because of this continued impression from the applicant, the respondent would have behaved differently, this was seen immediately after the receipt of the rule 56 notice from the applicant.

[21] I will now deal with the condonation application brought by the respondent. Rule 52(6) provides that:

> "A party who failed to deliver a statement as and when required under rule 31, 32 or 33, may apply to the tax court under this Part for an order condoning the failure to deliver the statement and the determination of a further period within which the statement may be delivered."

[22] As regard the condonation application made by the respondent, for it to succeed it must, *inter alia*, be able to explain the delay, address the potential prejudice of the parties and deal with the prospects of success in the tax appeal.

[23] There was no way the respondent could bypass this peremptory internal governance process. It could not be tabled before the Pleading Review Panel (PRP) unless approved by her supervisor. Consequently, it could not be served and filed with the Court unless approved by the PRP. The PRP dealt with the Rule 31statement on 3 May 2023 and made comments thereon that needed to be attended to by Ms Mashaba. She was supposed to send back the revised version of the rule 31 statement to the PRP but had to file the rule 31 statement without the approval of the PRP. To say it was ready by 26 April 2023 will amount to nothing but a complete misinformation. Approval by the PRP is an internal control mechanism which is there for a reason including but not limited to ensuring good governance, from which there is no permissible derogation. I am satisfied that the respondent has provided reasonable and sufficient explanation for the delay.[10]

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[10] *The Taxpayer v The Commissioner for the South African Revenue Service* (Case no. 0078/2018) [2019] ZATC 17 (5 June 2019).

[24] I am of the view that the respondent was able to thoroughly explain the delay in the filing of its rule 31 statement. While the applicant wanted to advance an argument of a contradiction between the statement made by Ms Mashaba to that of her supervisor, Mr Andy, I find no contradiction in that after the supervisor had approved the draft of the rule 31 statement on 26 April 2023 it still could not be served and filed. Meaning it was not ready to be served and filed with the court. The draft had to be tabled before the PRP, an internal forum that still had to go through it, comment on it and advise on its correctness or readiness for filing with the Court.

[25] The applicant argues against the condonation application by the respondent in that it says the delay was unreasonable,[11] but what I cannot ignore is the contribution by the applicant into this so called "unreasonable delay". The applicant's contribution is dealt with thoroughly in paragraphs 12, 13,14, 15 and 16 above and I will not repeat those findings here.

[26] As regard the issue of potential prejudice, with the applicant having accepted that he failed to declare the additional taxable income in his income tax returns I see no further prejudice but instead prejudice to be suffered by SARS outweighs any prejudice suffered by the applicant. The applicant cannot now present itself as an innocent victim and claim prejudice on the monthly interests generated and to be generated should the respondent be granted condonation when it was given multiple opportunities to settle but failed to utilize those opportunities.

[27] The respondent must also show that it has prospects of success in the tax appeal. I am of the view that SARS (the respondent) if given the opportunity it will be able to present and prove its case as regard the penalties it seeks to impose. The imposition of penalties is a straightforward issue. The formula and the computation thereof are clearly designed in the Act.[12] The respondent was able to deal with contentions raised by the applicant to which I 'am convinced that there are prospects of success in that it was able to show what triggered the imposition of penalties justify the existence of gross negligence. It is trite that the taxpayer is responsible for its tax affairs and must ensure that it declares all its income and it is tax compliant. Had SARS not contacted the taxpayer, the aforesaid income would not have been declared.

[28] For the applicant to succeed in its argument that a wrong advice was provided by its tax expert in the furtherance of what may constitute "reasonable grounds", the applicant must prove, inter alia, that the tax practitioner is registered, there was full disclosure of all information about its finances to the tax expert and this has to be shown by the disclosure of

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11 Paragraph 4.7 of the Applicant's Heads of Argument.
12 Tax Administration Act 28 of 2011 (as amended).

all correspondences between the two (the applicant and the tax expert). Absent this evidence the taxpayer cannot succeed in his attempt of using reliance on the advice of the tax expert.

[29] Subservient to the above, for the advice to qualify in what would constitute "reasonable grounds" more is required. It is not enough to say the accountants were in possession of the information but rather the taxpayer must be able to show that it took the said tax position because the tax expert was specifically engaged, and an expert opinion was given on the tax implications of that specific income. It is necessary that the taxpayer demonstrates that advice was sought, and the advice was provided hence the tax position taken.

[30] An umbrella approach that since they are the auditors of the same company from which the income is received, and they had this information cannot be sustained, giving advice means the rendering of a specific professional services and the professional must be aware that he or she is providing professional advice, and that the advice will be relied on by the taxpayer. This involves an active process which the professional should be aware thereof and the advice must be formally expressed or pronounced as such for the applicant to succeed in relying on it in the pursuance of proving a case of what constitute "reasonable grounds".

[31] In this case there was no evidence that the accountants were engaged on the specific income again there was no evidence that professional advice was provided as regards the specific income, consequently I find it so idiosyncratic that the taxpayer could claim to have relied on advice from the tax expert when no advice was sourced and no advice was provided. I find that the respondent has prospects of success on the matter.

[32] Assuming, though not correct that 3 May 2023 was the due date for the respondent to file the rule 31 statement, I find that it will not be in the interests of justice to use a delay of few days to deny the respondent of its application for condonation considering its constitutional obligations [also taking into account the multiple and voluminous matters of a similar nature the respondent deals with on a daily basis].[13]

[33] I agree with the remark by Majiedt AJA (as he then was), in the case of the *CJ Rance (Pty) Ltd* [14] at [35] that:

> "…[i]n general terms, the interest of justice play an important role in condonation applications. An applicant for condonation is required to set out fully the explanation for the delay; the explanation must cover the entire period of the delay and must be reasonable."

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13 *The Taxpayer v The Commissioner for the South African Revenue Service* (Case no. 0078/2018) [2019] ZATC 17 (5 June 2019).

14 *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd* [2010] 3 All SA 537 (SCA).

[34] Having been able to explain the delay, I' am of view that good cause has been shown.[15] The delay, if any was largely contributed to and caused as result of the conduct of the applicant.

Conclusion

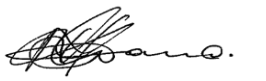
[35] Having found that there was no default on the part of the applicant, that the applicant's rule 56 application was premature, it is concluded that the application for default judgment cannot succeed. The respondent having shown good cause the application for condonation is successful.

[36] In the circumstances the following order is made:

36.1 That application for default judgment by the applicant is struck off, each party to pay its own costs.

36.2 That the condonation application brought by the respondent for the late filing of its rule 31 statement of grounds of assessment is granted.

36.3 Costs for the respondent's condonation application to be costs in the tax appeal.



ND Kekana
Acting Judge of High Court

[15] *Cairn's Executors v Gaarn* 1912 AD 181.