REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

(HELD IN JOHANNESBURG)

Case No.: **VAT 22504**

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

07/03/2025 **DATE** ..... **SIGNATURE**

In the matter between:

THE COMMISSIONER FOR THE SOUTH REVENUE SERVICE **APPLICANT**

and

TAXPAYER BLW **RESPONDENT**

J U D G M E N T

MALI J

[1] This matter involves two applications pertaining to the discovery of documents; and better and further discovery of documents. Both applications are opposed.

[2] The applicant is the Commissioner for the South African Revenue Service (SARS), a government agent responsible for the collection and enforcement of tax laws within the Republic of South Africa. The respondent, Taxpayer BLW CC (BLW) is the bonded warehouse exporting liquor products and registered as such in terms of the Customs and Excise Act 91 of 1964 (Customs Act) and is also registered as vendor in terms of the Value Added Tax 89, of 1991 (VAT) with SARS.

[3] The parties are embroiled in litigation in this court. In the main tax appeal, the respondent (BLW) is the appellant, and the applicant (SARS) is the respondent. They will be referred to as SARS and BLW respectively. The issue in the main appeal is whether BLW's foreign customers during the relevant tax periods qualify for VAT at the rate of zero per cent.

[4] SARS's contention is that BLW does not comply with the prescribed requirement applicable to zero rated supplies. BLW's contention is that it is compliant as it conducts direct exports. Nevertheless, the crux of this application is that BLW on its own version states that it engages transport agents to export goods.

[5] The key question in the main appeal lies in the word "exported". "Exported" is defined in section 1(1) of the VAT Act –

> "in relation to any movable goods supplied by any vendor under a sale or instalment credit agreement means—
>
> (*a*) consigned or delivered by the vendor to the recipient at an address in an export country as evidenced by documentary proof acceptable to the Commissioner."

[6] After the exchange of pleadings in terms of the Tax Court Rules, in particular rule 31 statement, grounds of assessment by SARS; rule 32 statement, grounds of appeal by BLW and finally rule 33 in reply to rule 32 by SARS, the discovery process commenced. SARS issued notice in terms of rule 35(12) of the Uniform Rule of Court (Uniform Rules) calling

upon BLW to produce copies for inspection and to permit copies to be made for the following, as inferred and referred to in BLW's rule 32 statement:

"1. **AD PARAGRAPH 15**

1.1. Sale Agreements in terms of which the appellant supplied and exported goods to its foreign customers at the VAT rate of zero percent during the relevant tax periods.

1.2. Credit agreements in terms of which the appellant supplied and exported goods to its foreign customers at the VAT rate of zero percent during the relevant tax periods.

1.3. Delivery notes and/or documents confirming delivery and receipt of goods by foreign customers at foreign addresses.

2. **AD PARAGRAPH 23.2**

2.1. Orders, including purchase orders, that were placed by the appellant's customers during the relevant tax periods.

2.2. Orders, including purchase orders, that were approved by the appellant during the relevant tax periods.

2.3. Tax invoices that were issued by the appellant to its customers during the relevant tax periods.

3. **AD PARAGRAPH 23.3**

3.1. Bank Statements reflecting payments that were received by the appellant through electronic payments from its customers.

3.2. Tax invoices and receipts that were issued by the appellant to its customers recording cash payments received.

3.3. Credit agreements in terms of which the appellant supplied goods to its customers on 31-day notice.

4. **AD PARAGRAPH 23.5**

The Customs and export documentation that were prepared by the appellant and relating to the sales that form the subject of this appeal.

5. **AD PARAGRAPH 23.6**

5.1. Agreements and/ or contracts between the appellant's customers and their transport contractors for collection of goods from the appellant's SOS to the border.

5.2. Contracts and/ or agreements of agency between the appellant and the transport contractors for removal of goods from the SOS.

5.3. Contracts, agreements and/ or documents appointing the transport contractors of appellant's customers as licensed removers under the agency of the appellant.

5.4. The contractor's licenses authorising them to act as licensed removers in bond (under the agency of the appellant).

6. **AD PARAGRAPH 23.7**

6.1. Agreements and/ contracts appointing and / or hiring representatives to accompany and supervise the transport vehicles to the border on the appellant's behalf.

6.2. Applications that were made by the appellant for export under Customs supervision.

7. **AD PARAGRAPH 23.8**

7.1 Applications that were made by the appellant at border posts for export under Customs supervision.

7.2. Export documents that were issued pursuant to applications that were made by the appellant.

7.3. Export documents recording customs seal and number after the resealing of goods.

8. **AD PARAGRAPH 24**

Delivery notes and/ or documents confirming delivery and receipt of goods by foreign customers at foreign addresses.

9. **AD PARAGRAPH 25**

9.1. Contracts and / agreements of agency between the appellant and the transport contractors for removal of goods from the SOS.

9.2. Contracts, agreements and/ or documents appointing the transport contractors of appellant's customers as licensed removers under agency of the appellant.

9.3. The contractor's licences authorising them to act as licensed removers in bond (under the agency of the appellant).

9.4. Agreement between SARS and the appellant to suspend the requirement for transporters to be licensed as ROG's.

10. **AD PARAGRAPH 37**

Custom Export documentation in terms of which the appellant exported goods from the Republic and recording the appellant as the exporter.

11. **AD PARAGRAPH 74.3.3**

11.1. Contracts and/ or agreements of agency between the appellant and the transport contractors for removal of goods from the SOS.

11.2. Contracts, agreements and/ or documents appointing the transport contractors of appellant's customers as licensed removers under the agency of the appellant.

11.3. The contractor's licenses authorising them to act as licensed removers in bond (under the agency of the appellant).

12. **AD PARAGRAPHS 77.2 AND 87**

12.1. Applications that were made by the appellant at border posts for export under Customs supervision.

12.2. Export documents that were issued pursuant to applications that were made by the appellant.

12.3. Customs Export documentation in terms of which the appellant exported goods from the Republic and under Customs supervision.

12.4. Delivery notes and / or documents confirming delivery and receipt of goods by foreign customers at foreign addresses.

TAKE FURTHER NOTICE THAT the documents and records referred to above relate to all the documents and records in respect of all the sales and supplies that were zero rated by the appellant in the relevant years of assessment and which form the subject of this appeal."

[7] In the aforesaid notice BLW was afforded a period of 10 days in terms of the notice to comply. On 11 January 2024 SARS sent an email to BLW requesting a response to the notice. On 13 January 2024 BLW without complaining and without strictly waiting for 29 January 2024, it alleges to be the due date sent an email to the respondent. In the email it is stated, *"I noted that the discovered documents which I submitted to you contains a set of export documents for only one export transaction."* BLW then provided additional export documents for all the export transactions during August 2019 and invited SARS to indicate if it requires all the export documents for each tax periods in dispute.

[8] On 22 January 2023 SARS issued these applications, viz **application in terms of Rule 30A(2) of the Uniform Rules read with Rule 42(1) of the Tax Court Rules** and application in terms of **Rule 35(7) Read with Rule42(1) of the Tax Court Rules (Better Discovery).**

[9] BLW deals with both applications in the same answering affidavit. I first deal with the application in terms of rule 30A(2) read with rule 42(1) of the Tax Court Rules. The relevant parts of the notice of motion read:

> "1 Ordering the appellant to comply with the respondent 's notice in terms of Rule 35(12) of the Uniform Rules, by not later than 23 January 2024 at 10.00 or such time as the court may deem fit.
>
> 2 Ordering the appellant to pay the costs of this application, in the event that it opposes this application."

[10] Rule 42(1) of the Tax Court Rules provides as follows:

> "Procedures not covered by the Tax Administration Act 28 of 2011 (TAA) and Tax Court rules that, 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."

Rule 30A(2) provides as follows:

> "(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, or with an order or direction made in a judicial case management process referred to in rule 37A, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order—
>
> (*a*) that such rule, notice, request, order or direction be complied with; or
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> (*b*) that the claim or defence be struck out.
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> (2) Where a party fails to comply within the period of 10 days contemplated in subrule (1), application may on notice be made to the court and the court may make such order thereon as it deems fit."

[11] BLW submits, that the rule 30A(2) application is flawed and premature; because the Uniform Rules of Court may only be utilised where the Tax Court Rules does not provide a remedy in the event of default. BLW further submits it had already responded to SARS's notices. SARS's contention is that the complaint about the application being premature is an afterthought. This is because BLW has already responded to SARS notices, although according to BLW it was supposed to act after 29 January 2024.

[12] I fully agree with SARS, whatever was supposed to be premature was interrupted by BLW's own actions and response on 13 January 2024. To reiterate, BLW had discovered some of the documents without complaining about inspection. BLW even alerted SARS that it did not discover document pertaining to other export transactions. BLW has timeously and

fully complied with the SARS' notices, notwithstanding the allegation that the procedure adopted by the applicant was irregular and non-compliant with Tax Court Rules.

[13] On the merits, the submission made on behalf of BLW is that SARS cannot apply Uniform Rule 30A as rule 56(1) of the Tax Court Rules provides for procedure in the event of non-compliance. Rule 56(1) of the Tax Court Rules pertains to the application for default judgment in the event of non- compliance with the rules. Rule 56(1) provides as follows:

> "**Application for default judgment in the event of non-compliance with rules**—(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
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> (*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)."

[14] It is not in dispute that BLW was active, it partly complied with rule 35 notice, without raising the issue of a 10-day notice or 15-day notice in terms of rule 56 of the Tax Court Rules. It is also not in dispute that on 15 January 2024 BLW filed a supplementary affidavit. SARS was at all material times made to believe that the parties were on the same page.

[15] BLW's further argument is that even if the court is satisfied that rule 30A(2) is applicable, SARS failed to comply with the notice thereto, also that rule 56 of the Tax Court Rules provides for a prior notice. It is trite that rule 30A provides a mechanism for addressing non-compliance with procedural requirements in legal proceedings, offering a structured approach for seeking court intervention to enforce compliance or penalize non-compliance.

[16] BLW further referred the court to *CSARS* v *Virgin Mobile South Africa (Pty) Limited*[1]. The reference is misplaced, Virgin Mobile dealt with default judgment which arose from SARS's failure to act, akin to not filing a defence at all. To be specific SARS omitted to file rule 31 statement despite numerous interventions by the taxpayer and when it decided to do so failed to apply rule 4(2) of the Tax Court Rules.

[17] BLW also submits that one of the flaws of this application is that rule 35(12) is purposed to produce certain documents for inspection. Again, BLW did not complain about

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1 (A82/22; IT25117) [2023] ZAGPPHC 685.

inspection and neither invited SARS to its warehouse to inspect documents its disclosed on 13 January 2024. It is further submitted that the application envisaged by SARS is not provided for in the Tax Court Rules, because the parties are not in the same position as *"normal litigants"* in terms of the Uniform Rules of Court in the High Court proceedings.

[18] In advancing the above argument BLW submits that SARS should have requested further documents in terms of Tax Court rule 10(4) pursuant to the notice of appeal. Rule 10(4) provides that:

> "If the taxpayer in the notice of appeal relies on a ground not raised in the objection under rule 7, SARS may require a taxpayer within 15 days after delivery of the notice of appeal to produce the substantiating documents necessary to decide on the further progress of the appeal."

[19] The above submission by BLW misses the point, SARS's case is not about BLW having raised the grounds which it did not raise in the objection. SARS's case is crisp, it seeks documents referred to in BLW's rule 32 statement as supposed from BLW's explanation.

[20] BLW further submits that failure by SARS to require BLW to deliver the necessary substantiating documents should be evidence that SARS is already in possession of all documents relevant to its decision to adversely assess the taxpayer. It is further submitted that SARS is in a fishing expedition and wants to create a new dispute.

[21] Judging from the clear basis for requesting the documents SARS does not seem to desire to create a new dispute and or re-audit. SARS would not have known about the documents inferred to in the rule 32 statement at the assessment stage. It is common cause that the matter is in the litigation stage. BLW's version as to how it conducts exports as explained at rule 32 stage triggered this application. BLW submits that it conducts export by having the foreign –

> "customers to engage and pay for transport contractor to physically collect the goods from Limpopo Duty Free' Storage (SOS) and transport same to the border…The removal from the SOS and the transportation occurred under the agency of the appellant as Removal of Goods (ROG) were also licensed removers in bond and under the direct supervision of the appellant until such time as the goods would be exported under Customs supervision".[2]

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[2] Para 11,5 Founding affidavit.

[22] In addition, for example, BLW refers to transport contractors, but it does not want to disclose documents appointing those transport contractors. BLW further refers to cash payments, but it does not want to be asked about receipts for same. The list is endless.

[23] "Further… no party who had taken any further steps in the cause with knowledge of the irregularity or impropriety relied on should be allowed to make an application in terms of the Rule..."[3] It is evident that in the correspondence of 13 January 2024, BLW stated on their own that there were outstanding documents. BLW knew the stage of process, that it was after the delivery of the notice of appeal. It did not complain, the change of heart is a clear abuse of process.

[24] The complaints by BLW are defeated by its actions, when it discovered the documents without any qualms and without calling for the issuance of notice. In the present application the dictum that "the Rules are made for the Court, the Court is not made for the Rules" finds resonance.

[25] Taking into totality the arguments and the reference to "normal litigants", whilst one understands that the Tax Court does not operate as the High Court, but for few exceptions. Some being that the judgments are binding between the litigants and that the Tax Court acts as a court of revision by hearing the evidence, thus getting into SARS's shoes. Rules of evidence apply the same with those of the High Court. Furthermore, there is no legal basis to refer to the litigants in the Tax Court as abnormal. Rule 42(1) of the Tax Court should be seen as an equaliser, in the absence of adequate provisions. The scheme of the rules correctly envisaged the gaps in the rules.

[26] The second application is in terms of rule 35(7) read with rule 42(1) of the Tax Court Rules. The notice of motion partly reads:

> "1. Ordering the appellant to comply with the respondent's notice in terms of Rule 36(6) of the Tax Court Rules, read with Rule 35(3) of the Uniform Rules, by not later than 23 January 2023 at 10:00
>
> 2. Ordering the appellant to make the documents listed under Rule 35(3) notice available for inspection by not later than 23 January 2023 at 10:00 or such time as the court may deem fit."

[27] Rule 35(7) of the Uniform Rules reads:

> "If any party fails to give discovery as aforesaid or, having been served with a notice under subrule (6), omits to give notice of a time for inspection as aforesaid or fails to give inspection

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[3] Boland Construction Co (Pty) Ltd Lewin 1977 (2) SA 506 (C).

as required by that subrule, the party desiring discovery or inspection may apply to a court, which may order compliance with this rule and, failing such compliance, may dismiss the claim or strike out the defence."

[28] Rule 35(3) of the Uniform Rules reads:

"If any party believes that there are, in addition to documents or tape recordings disclosed as aforesaid, other documents (including copies thereof) or tape recordings which may be relevant to any matter in question in the possession of any party thereto, the former may give notice to the latter requiring him to make the same available for inspection in accordance with subrule (6), or to state an oath within ten days that such documents are not in his possession, in which event he shall state their whereabouts, if known to him."

[29] Rule 36(6) of the Tax Court Rules reads:

"(2) SARS may, within 10 days after delivery of the statement under rule 32 deliver a notice of discovery requesting the appellant to make discovery on oath **of any document material to a ground of appeal in the statement under rule 32 and not set out in the grounds of assessment, to the extent such document is required by SARS to formulate its grounds of reply under rule 33**."

[30] SARS's case is that it is apparent from BLW's admissions and its rule 32 statement that it has not discovered certain documents. The inference is drawn from BLW's mode of doing business as submitted in the rule 32 statement.

[31] In essence SARS seeks discovery or further and better discovery, which is not provided for in the Tax Court Rules. Rule 36 of the Tax Court Rules specifically caters for discovery of documents in the Tax Court. Rule 36(7) reads:

"A document not disclosed pursuant to a notice of discovery may not, unless the tax court in the interest of justice otherwise directs, be used for any purpose at the appeal by the party who failed to make disclosure, but the other party may use such document."

[32] Section 36(7) carries a limitation to the extent that the documents not so disclosed cannot be utilised in the hearing by the other party without the tax court directing otherwise. SARS could not have used documents it did not have or known about in the grounds of assessment. But now that they are referred to by BLW during the process of appeal, SARS cannot be prohibited to call upon those documents.

[33] It is prudent for any party to be proactive once it foresees the problems beset by the application of section 36(7). Waiting to launch the application during the trial stage would be unbecoming of a fair trial. SARS opted to fashion this application in terms of rule 36 read

with rule 37 of the Uniform Rules of Court to ameliorate the problems brought about by rule 36. This is exactly the purpose of rule 42(1) of the Tax Court Rules.

[34] BLW also criticizes SARS for instituting two almost identical interlocutory applications for similar relief in respect of the same documents. BLW submits that it is an abuse of process. I do not agree with this contention. Both applications are self-explanatory, they serve different purposes. Rule 30A as anchored by rule 35(12) and rule 42 of Tax Court Rules deals with discovery and inspection whereas rule 35(7) anchored by rule 36, deals with **further and better** discovery. Rule 36(7) of the Tax Court Rules is inadequate, hence deferral to rule 42(1) of the Tax Court Rules for the smooth preparation of the trial.

[35] In conclusion, SARS is successful in making the case for discovery and for further and better discovery. In the result the following order is granted:

ORDER

1. The respondent is ordered to discover the documents in the lists of outstanding documents attached to the respective applications as annexure A.

2. The respondent is further ordered to pay the costs of this application, including the costs of two counsel.

N.P. MALI
JUDGE OF THE HIGH COURT

Date of hearing:	17 and 18 October 2024
Date of judgment:	25 February 2025
Final heads filed on	25 October 2024