REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

(HELD AT BLOEMFONTEIN)

Case No.: **IT 46151**

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

14/04/2025 **DATE** ..... **SIGNATURE**

In the matter between:

APPELLANT PKM **Appellant/Applicant**

and

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

J U D G M E N T

Van Zyl, J

[1] This is an interlocutory application wherein Appellant PKM (Pty) Ltd (the appellant) is seeking amendments to its statement of grounds of appeal filed in terms of Tax Court Rule (TCR) 32, together with condonation in respect thereof. In terms of the applicant`s Notice of Motion it is seeking relief in the following terms:

> "1. That the condonation for the late submission of amendments to Rule 32 Statement be granted in terms of section [*sic*] 50(4) of the Tax Court Rules.
>
> 2. That amendments to Rule 32 Statement of Appeal, be admitted and included in the dossier of discovered documents for the hearing of 10 – 11 March 2025, together with the original Rule 32 filed on 4 April 2023.
>
> 3. That the respondents (sic) pay costs in the event of opposition."

Background

[2] The main matter between the parties concerns the 2015 year of assessment in respect of which SARS issued an additional assessment on 20 September 2018. The appellant lodged an objection against the additional assessment, which was disallowed by the respondent. The appellant then proceeded to lodge a Notice of appeal and grounds of appeal on 14 September 2021.

[3] The matter was referred to Alternative Dispute Resolution where various concessions were made by the respondent. The remaining issue(s) was then referred to be heard as a tax appeal in accordance with the Tax Court Rules.

[4] The respondent filed its TCR 31 Statement of grounds of assessment and opposing appeal on 23 September 2022. The appellant subsequently filed its TCR 32 Statement of grounds of appeal ('TCR 32 Statement') on 5 April 2023 and the respondent's TCR 33 reply to statement of grounds of opposing appeal was filed on 4 May 2023.

[5] On 31 December 2024 e-mail correspondence was received by the respondent in which a request was made on behalf of the appellant in terms of TCR 35(1) that the parties agree that the TCR 32 Statement may be amended by the appellant. On 6 January 2025 the respondent responded, *inter alia,* that it does not agree to any amendment of the TCR 32 Statement. The said response is attached to the interlocutory application as annexure 'LMD1'. The appellant consequently filed the present interlocutory application in terms of TCR 35(2), read with TCR 52(7), and further read with TCR 57.

[6] The respondent duly and timeously delivered its Notice to oppose as provided for in TCR 60(*a*) read with the Notice of Motion, on 23 January 2025. Thereafter the respondent filed a Notice of intention to raise questions of law only, in terms of Uniform Rule (of the High

Court) 6(*d*)(iii). I will return to this aspect.

[7] In response thereto, the appellant filed a document titled "Replying Affidavit in terms of Tax Court Rules" on 25 February 2025.

[8] A pre-trial meeting, as required for purposes of the tax appeal, was held on 18 February 2025, during which the parties agreed, *inter alia,* to a separation of the present interlocutory application and the tax appeal, with the matters to proceed on 10 – 11 March 2025 and 22 – 23 April respectively.

Respondent`s Notice to file a notice of intention to raise questions of law:

[9] Further to delivery of a Notice of intention to oppose an application, TCR 60(*c*) provides that a respondent must within 15 days of notifying the applicant of the intention to oppose the application, deliver an answering affidavit, ***if any,*** together with the relevant annexures, to the applicant and the registrar. (My emphasis) TCR 60(*c*) does therefore not compel a respondent to deliver an answering affidavit albeit that the application is opposed.

[10] TCR 42 provides as follows:

> "If these Rules do not provide for a procedure in the tax court, 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."

[11] Uniform Rule 6 deals with applications in the High Court and Uniform Rule 6(*d*) determines as follows:

> "(*d*) Any person opposing the granting of an order sought in a notice of motion shall:
>
> (i) … ;
>
> (ii) within fifteen days of notifying the applicant of his intention to oppose the application, deliver his answering affidavit, if any, together with any relevant documents; and
>
> (iii) if he intends to raise any questions of law only he shall deliver notice of his intention to do so, within the time stated in the preceding sub-paragraph, setting forth such decision."

[12] In the present matter the respondent elected not to file an answering affidavit but instead filed a Notice of intention to raise questions of law within the stipulated time.

[13] The procedure so followed by the respondent was consequently due and proper.

The appellant's replying affidavit in terms of Rule 61:

[14] Uniform Rule 6(5)(*e*) provides as follows:

> "(*e*) Within 10 days of the service upon the respondent *of the affidavit and documents referred to in sub-paragraph (ii) of paragraph (d) of subrule (5)* the applicant may deliver a replying affidavit. The court may in its discretion permit the filing of further affidavits."

(My emphasis)

[15] *In casu,* the respondent did not file an affidavit and documents referred to in Uniform Rule 6(5)(*d*)(ii) – it only filed the Notice of intention to raise questions of law referred to in Uniform Rule 6(5)(*d*)(iii). The appellant was consequently not entitled to have filed the replying affidavit in terms of TCR 62.

[16] The said replying affidavit filed by the appellant in the interlocutory application, is thus struck from the record and is considered to be *pro non scripto.*

The appellant`s TCR 34 Reply to respondent`s statement opposing appeal:

[17] On 23 January 2025 the appellant filed a document titled 'Rule 34 Reply to Respondent Statement Opposing Appeal'.

[18] It is not clear to me what this document entails, since TCR 34 does not make provision for the filing of such a document. Be that as it may, the said document was filed within the time period provided for the respondent to have filed its Notice of intention to oppose, which was indeed delivered on even date.

[19] Therefore, not only was it filed prematurely, but the Tax Court Rules do also not make provision for the filing of such a document. In the circumstances it is inadmissible and is struck from the record and is considered to be *pro non scripto.*

Application for condonation for the late filing of the interlocutory application:

[20] In terms of TCR 57(2) an application must be brought within the period prescribed in TCR 50(4). TCR 50(4) provides, *inter alia,* as follows:

> "(4) An application under this Part, unless the context otherwise indicates, must be brought *within 20 days after the date of the cause of the application* unless the parties agree to a longer period under rule 4(1) or the tax court otherwise directs under rule 52(1) …"

(My emphasis)

[21] TCR 52(1)(*a*) reads, *inter alia,* as follows:

> "52(1) A party who failed to obtain an extension of a period by agreement with the other

party, the clerk or the registrar, as the case may be, under rule 4 may apply to the tax court under this Part for an order, *on good cause shown*—

(*a*) condoning the non-compliance with the period; and …"

(My emphasis)

[22] The founding affidavit filed in support of the interlocutory application was deposed to by Mr LMD White, a tax consultant who also represented the appellant during the hearing of the interlocutory application. Mr White states, *inter alia,* in the founding affidavit dated 9 January 2025, as follows:

"4. **Nature of Application**

4.1 This is a Notice of Motion and application to the Tax Court in terms of Rule 52(7) of the Tax Court Rules, to admit Rule 35 Amendments to section 32 Statement of Appeal in the above matter. The amendments are not new evidence but clarification, corrections and deductions of what is already on record, as detailed herein, permitted in rule 32(2).

4.2 . . . I had been on record since 20 October 2019, marked LMD2 and as long as I am dealing with SARS I was a valid representative of the Appellant. I have since renewed The SARS Power of Attorney and obtained a further Power of Attorney for the Tax Court, marked LMD3(a and b).

5. **Application for Condonation** for the Late Filing of Amendments to Rule 32 Statement of Appeal, in terms of rule 50(4) of Tax Court, if applicable.

5.1 Application is hereby submitted for condonation for delay in bringing these Rule 35 Amendments of the Rule 32 Statement of Appeal filed of record around 4 April 2023.

5.2 The reasons for the late filing of the amendments are that;

5.2.1 The business and its bank account closed on 24 June 2019, and there was no one to attend to administrative matters after the closure. The business is not operating having suffered irreparable harm from 2019 onward owing to these disputed assessments.

5.2.2 The attorney who had been appointed resigned in 2023 due to unavailability of funds. There was no income to hire another attorney. I am appearing pro bono.

5.2.3 The assets of the business of the Appellant were auctioned by first mortgage lender, First National Bank, and the Appellant was paralyzed in that sense.

5.2.4 I have only been requested on 8 January 2025 to take this matter to bring closure to the case.

6. . . ."

[23] Further in the affidavit the deponent deals with the amendment of the TCR 32 statement.

[24] From the aforesaid it is evident that no explanation is given as to what the cause of the application was or what lead to the need for the application. According to the deponent he has been involved with the appellant since October 2019. There is no explanation why he could not have earlier filed the amendments to the TCR 32 statement, especially considering that the TCR 32 statement had already been filed on 5 April 2023 and the TCR 33 reply on 4 May 2023. If he has been requested on 8 January 2025 to 'take this matter', there is no explanation why he could not have been requested to do so at an earlier stage.

[25] As already mentioned earlier, TCR 52(1)(*a*) determines that condonation can be granted '*on good cause shown'.* The requirements for '*good cause'* are trite. In *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476 - 477 they are set out as follows:

> "(*a*) He (the applicant) must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the court should not come to his assistance.
>
> (*b*) His application must be *bona fide* and not made with the intention of merely delaying plaintiff's claim.
>
> (*c*) He must show that he has a *bona fide* defence to plaintiff's claim. It is sufficient if he makes out a *prima facie* defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour."

See also *Silber v Ozen Wholesalers (Pty) LTD* 1954 (2) SA 345 (A) at 352G & 353A.

[26] In an application for condonation an applicant should explain, comprehensively, the reasons for his delay and/or his failure to adhere to and comply with the prescribed time limits with which he was obliged to comply. This obligation also entails an obligation to explain each period of delay. In *High Tech Transformers (Pty) Ltd v Lombard* (2012) 33 ILJ 919 (LC) the importance of a reasonable and acceptable explanation for a delay was accentuated at para 25 of the judgment:

> "[25] . . . Condonation is not merely for the asking as was duly pointed out by the court in *NUMSA & another v Hillside Aluminium* [2005] 6 BLLR 601 (LC):
>
> > '[12] Additionally, there should be an acceptable explanation tendered in respect of each period of delay. Condonation is not there simply for the asking. Applications for condonation are not a mere formality. The onus rests on the applicant to satisfy the court of the existence of good cause and this requires a full, acceptable and ultimately reasonable

> explanation. … Nevertheless, to do justice to the aims of the legislation, parties seeking condonation for non-compliance are obliged to set out full explanations for each and every delay throughout the process. …' "

[27] An applicant should also show that he has reasonable prospects of success in the process for which he seeks condonation to proceed with.

[28] In *PAF v SCF* 2022(6) SA 162 (SCA) para 21 the Supreme Court of Appeal held as follows:

> "[21] A court considering a condonation application exercises a discretion in the true sense, upon consideration of all the circumstances of each case. In *Aurecon South Africa (Pty) Ltd v Cape Town City* 2016 (2) SA 199 (SCA) ([2016] 1 All SA 313; [2015] ZASCA 209) para 17 it was held that the relevant factors in that enquiry generally include the nature of the relief sought; the extent and cause of the delay; its effect on the administration of justice and other litigants; the reasonableness of the explanation for the delay, which must cover the whole period of delay; the importance of the issue to be raised; and the prospects of success. The onus is on the applicant to satisfy the court that condonation should be granted."

[29] I shall also accept that good prospects of success on the merits can serve to scrutinize the explanation tendered for the delay somewhat less strictly. In *Melane v Santam Insurance* 1962 (4) SA 531 (A) at 532 E-F this principle is stated as follows:

> "What is needed is an objective *conspectus* of all the facts. Thus, a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked."

[30] The majority of the reasons provided by the appellant are bald statements without any corroboration or support thereof and without explanations. The appellant failed to explain each period of delay and only made general, vague allegations. More importantly, the statements show no relevance as to why those circumstances prevented the appellant from having filed the interlocutory application earlier. There is no explanation as to what brought about the change which all of a sudden enabled the appellant to have filed its interlocutory application. If the appellant was able to request Mr White on 8 January 2025 for assistance in the matter, it is to be accepted, in the absence of an explanation to the contrary, that the appellant could also have done so at an earlier stage.

[31] As evident from the authority referred to earlier, the second 'leg' of 'good cause' is reasonable prospects of success with the appellant`s proposed amendment of the TCR 32 Statement. The appellant completely failed to address and provide any detail regarding the merits of the appellant`s case.

[32] For the aforesaid reasons, the appellant, in my view, failed to make out a case for condonation and the application for condonation therefore stands to be dismissed.

Prayer 2 of the Notice of Motion and the contents of the founding affidavit

[33] For the sake of completeness, should it be found that I erred in my aforesaid finding, I also deal with prayer 2 of the Notice of Motion and the contents of the founding affidavit.

[34] TCR 57(1) determines as follows in respect of a Notice of Motion and founding affidavit:

> "(1) Every application must be brought on notice of motion which must *set out in full the order sought*, be signed by the applicant or the applicant`s representative and must be supported by a *founding affidavit that contains the facts upon which the applicant relies for relief*."

(My emphasis)

[35] As set out earlier in the judgment, the second prayer sought in the Notice of Motion reads as follows:

> "that amendments to Rule 32 Statement of Appeal, be admitted and included in the dossier of discovered documents for the hearing of 10 – 11 March 2015, together with the original Rule 32 filed on 4 April 2023."

[36] This prayer is the main prayer of the relief sought by the appellant in the interlocutory application. However, it is trite that the Notice of Motion, in an instance such as this, should set out which parts of the rule 32 statement the appellant seeks to amend and in what ways, which parts thereof it seeks to supplement and which parts thereof it seeks to substitute, since that will constitute the order. It should provide the particulars of the amendments to the rule 32 statement that are being sought. Not only is this not set out in the relevant prayer, but same is also not even evident from a reading of the founding affidavit as such. It is not for the tax court to unravel what the actual order is which the appellant is seeking. It is therefore impossible to grant an order in terms of the prayer as it stands, even read together with the contents of the founding affidavit.

[37] It is furthermore not clear in what way the required 'amendments' can be requested to be included in the 'dossier of discovered' documents, since TCR 40 which provides for the contents of the dossier, does not make provision for 'discovered' documents.

[38] In addition, the founding affidavit is replete with factual averments that are alleged to have occurred prior to the deponent having had any contact with the appellant and/or which cannot be accepted to fall within the personal knowledge of the deponent. The application is not supported by a confirmatory affidavit of the public officer of the appellant. In the

circumstances great parts of the founding affidavit constitute inadmissible hearsay evidence.

[39] The appellant consequently also failed to make out a proper case for the granting of prayer 2 of the Notice of Motion.

The nature/contents of the grounds of appeal the appellant is attempting to introduce:

[40] For the sake of completeness, I also deal with the last-mentioned aspect, although I have already found that the appellant`s interlocutory application cannot succeed for more than one reason.

[41] TCR 32(2) and (3) determine as follows in respect of the statement of grounds of appeal:

> "(2) The statement must set out a *clear and concise statement* of—
>
> (*a*) the grounds upon which he appellant appeals;
>
> (*b*) which of the legal facts or the legal grounds in the statement under rule 31 are admitted and which of those facts or legal grounds are opposed; and
>
> (*c*) the material facts and the legal grounds upon which the appellant relies for the appeal and opposing the facts or legal grounds in the statement under rule 31.
>
> (3) The appellant may include in the statement a new ground of appeal unless it constitutes a ground of objection against a part or amount of the disputed assessment not objected to under rule 7.'

(My emphasis)

[42] The proposed amendments do not comply with TCR 32(2). In fact, to allow the amendments will render the TCR 32 Statement excipiable. It is settled in our law that an amendment which would render a pleading excipiable ought not to be allowed. See *Tengwa v Metrorail* 2002 (1) SA t39 at 746 F - G.

[43] In addition, with some of the proposed amendments the appellant is seeking to withdraw admissions made in the original TCR 32 Statement. This is impermissible in the absence of any explanation for the withdrawal thereof to indicate the *bona fides* of the appellant ad the absence of prejudice for the respondent. Examples of such withdrawal of admissions appear in paragraphs 8, 18 and 19 of the founding affidavit. In *Bellairs v Hodnett* 1978 (1) SA 1109 (A) the following is stated at 1150 G-H:

> "But, as it has frequently been stated, an amendment cannot be had merely for the asking. This is equally, if not especially, true of a proposed amendment which involves the withdrawal of an admission. In such cases the Court will generally require to have before it a satisfactory explanation of the circumstances in which the admission was made and the reasons for now seeking to withdraw it."

[44] Furthermore, the entire paragraph 7 of the founding affidavit speaks to the 2007, 2008 and 2009 years of assessment, which years of assessment are not the subject matter of the current tax appeal, which is the 2015 tax year. From a reading of the said paragraph 7, in conjunction with the rest of the founding affidavit, it appears that part of the amendments sought effectively constitutes appeals against the additional assessments issued for the 2007, 2008 and 2009 years of assessment. Accordingly, the amendments the applicant is seeking in this regard are in contravention of TCR 32(3).

[45] The aforesaid constitute further reasons why the appellant failed to make out a proper case for the granting of prayer 2 of the Notice of Motion.

Conclusion

[46] On the basis of the aforesaid conclusions, individually, alternatively cumulatively, the interlocutory application cannot be granted.

Costs

[47] There is no reason why the costs of the interlocutory application should not follow its outcome and the appellant is therefore to pay the costs.

[48] In terms of the respondent`s Notice of intention to raise questions of law the respondent sought costs on an attorney and own client scale. However, this request was not repeated in its heads of argument nor in argument itself. In my view and in the exercise of my discretion there is no justification for a special costs order.

Order:

[49] The following order is made:

1. The application for condonation is dismissed, with costs.

C. VAN ZYL, J

Coram: Van Zyl, J
Heard: 10 March 2025
Delivered: 14 April 2025