REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Case No.: **IT 77034**

(1) REPORTABLE: YES / NO

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

(3) REVISED.

13 January 2026
DATE

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SIGNATURE

In the matter between:

MUK (PROPRIETARY) LIMITED **APPELLANT**

and

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

J U D G M E N T

This judgment has been handed down remotely and shall be circulated to the parties by way of email / uploading on Caselines. The date of hand down shall be deemed to be 13 January 2026.

Bam J

Introduction

[1] This is an application to strike out certain passages in the respondent's rule 31 statement, (statement) on the basis that they are wholly scandalous, vexatious, and/or irrelevant. The application is brought by the appellant in terms of Uniform Rule 23(2)(*b*) read with the Tax Court Rule (Rule) 42(1)[1] and is opposed by the respondent mainly, on the basis that the founding affidavit makes no case for striking out the identified passages/paragraphs.

[2] In terms of its notice of motion, the appellant seeks the following relief:

(1) That the late filing of its notice in terms of rule 23(2) (a) of the Uniform Rules read with rule 42(1) be condoned.

(2) That the following averments be struck out on the basis that they are scandalous, vexatious, and/or irrelevant:

2.1 Paragraph 345.9 in its entirety, which reads:

> "Alternatively, MUK's omission to account for the notional arm's length income constitutes a willful default, in which case there is no 5-year time bar to SARS raising an additional assessment."

2.2 Paragraph 353 in its entirety, which reads,

> "In the event that the court finds that the raising of the additional assessment does constitute a 'change of profits', it is the Commissioner's submission that it was entitled to do so because of the willful default of MUK to account for the notional arm's length consideration at the time when the transactions were effected."

2.3 The words "managed or" where they appear in paragraph 37 of the rule 31 statement.

[3] It is convenient to first introduce the parties and thereafter set a sketch of the background facts.

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

Parties

[4] Appellant is MUK, a private company duly incorporated and registered in terms of South African laws, with its principal place of business situated at Office xxx, one Boulevard, Johannesburg, Gauteng.

[5] The respondent is the Commissioner for the South African Revenue Service. Their address is situated at *Lehae La* SARS, 299 Bronkhorst Street, Nieuw Muckleneuk, Pretoria, Gauteng. The Commissioner is charged with, amongst others, the enforcement of the Income Tax Act.[2]

Background

[6] The present application arises against the background of an appeal which seeks to challenge the additional assessments made by the Commissioner in January 2020, following a transfer pricing analysis. The words transfer pricing are conversational words which refer to the more technical Base erosion and profit shifting (BEPS). The OECD Guidelines[3] define domestic tax base erosion and profit shifting (BEPS) as tax planning strategies used by multinational entities in exploiting loopholes in tax rules to artificially shift profits to low or no-tax locations to avoid paying tax.

[7] As to how the additional assessments arose, the following is relevant: On 24 March 2017, the Commissioner initiated an Income Tax audit of the appellant, in respect of 2011-2013 years of assessment. Arising from the audit, the Commissioner issued a Letter of audit findings, LOF, asserting that the provisions of section 31(2) were applicable to four transactions in which various non-resident entities connected to the appellant did not earn an arms' length return. In its notice of appeal, the appellant raised, *inter alia*, two points in *limine*. For present purposes, only the second point in *limine* is relevant. In that point, appellant asserted that the additional assessments were unlawful in terms of Article 9(3) of the Convention Between the Republic of South Africa and the Swiss Confederation for the Avoidance of Double Taxation with respect to Taxes on Income, 2009, (DTA). The present application attacks certain passages contained in the respondent's statement.

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2 Act 51 of 1968.

3 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, 2017, https://www.oecd.org/content/dam/oecd/en/publications/reports/2017/07/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-2017_g1g71100/tpg-2017-en.pdf : accessed on 27 December 2025.

Condonation

[8] I digress to consider the issue of condonation. The appellant seeks condonation for the late filing of its notice in terms of rule 23(2)(*a*). The appellant has set out the reasons for the delay in issuing the notice in terms of rule 23(2)(*a*). I am of the view that it is in the interests of justice to grant condonation to the applicant.

[9] The next issue to consider is whether the respondent's answering affidavit is properly before this court. The answering affidavit was due on 6 February 2025, but it was delivered on 24 June 2025. As the appellant points out, the respondent says nothing about condonation in its answering affidavit, much less setting out its reasons for the delay. On this basis, the appellant urged me to treat the answering affidavit as *pro non scripto.* The appellant further says it was prejudiced by SARS's delay.

[10] While I agree that the rules governing court proceedings cannot be disregarded, courts, as was said in *Eke* v *Parsons*, should not be detained by the rules –

> "to a point where they are hamstrung in the performance of the core function of dispensing justice. Put differently, rules should not be observed for their own sake. Where the interests of justice so dictate, courts may depart from a strict observance of the rules".[4]

[11] I have reflected on the circumstances of this case, and I am satisfied that the interests of justice will be better served with allowing the respondent's answering affidavit. Therefore, in the exercise of my discretion, I grant condonation to the respondent for the late filing of their affidavit.

Applicable legal principles

[12] Rule 23(2) of the Uniform Rules reads:

> "Where any pleading contains averments which are scandalous, vexatious, or irrelevant, the opposite party may, within the period allowed for filing any subsequent pleading, apply for the striking out of the aforesaid matter ... Provided that —
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> (*a*) the party intending to make an application to strike out shall, by notice delivered within 10 days of receipt of the pleading, afford the party delivering the pleading an opportunity to remove the cause of complaint within 15 days of delivery of the notice of intention to strike out; and

[4] (CCT214/14) [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) (29 September 2015), paragraph 39.

(*b*) the court shall not grant the application unless it is satisfied that the applicant will be prejudiced in the conduct of any claim or defence if the application is not granted."

Scandalous, vexatious or irrelevant

[13] The concepts of scandalous, vexatious and irrelevant were pronounced upon by the Constitutional Court in *Helen Suzman Foundation* v *President of the Republic of South Africa and Othe*rs; *Glenister v President of the Republic of South Africa and Others*, where the court said:

" 'Scandalous' allegations are those which may or may not be relevant but which are so worded as to be abusive or defamatory; a "vexatious" matter refers to allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy; and "irrelevant" allegations do not apply to the matter in hand and do not contribute one way or the other to a decision of that matter. The test for determining relevance is whether the evidence objected to is relevant to an issue in the litigation."[5]

[14] Article 9 deals with Associated Enterprises and it reads:

"**Associated Enterprises**

1. Where

a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or

b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State, and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly."

[15] Article 9 mirrors the Authoritative Statement of the arm's length principle which reads:

"[Where] conditions are made or imposed between the two [associated] enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to

[5] (CCT 07/14, CCT 09/14) [2014] ZACC 32; 2015 (1) BCLR 1 (CC); 2015 (2) SA 1 (CC) (27 November 2014), paragraph 27.

> one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly."

Application

[16] In its founding affidavit, the appellant states that the new allegation [referring to the allegation of willful default] in respondent's statement falls foul of rule 31(3) because it constitutes a new ground of assessment or basis for the partial disallowance of the objection and it constitutes a novation of the whole of the factual and legal basis of the disputed assessments, alternatively, it requires the issue of a revised assessment. The appellant concludes that the allegation of "willful default", where contained in the respondent's statement is not allowable as it is scandalous, vexatious, and/or irrelevant. In the circumstances, the appellant applies for striking out of paragraphs 345.9 and 353 in their entirety.

[17] Similarly, in respect of the words 'managed or', as they appear in paragraph 37 of the statement. The appellant states that the allegation falls foul of rule 31(3) because it constitutes a new ground of assessment or basis for the partial disallowance of the objection and it constitutes a novation of the whole of the factual and legal basis of the disputed assessments, alternatively, it requires the issue of a revised assessment. The appellant concludes that the allegation is not allowable as it is vexatious and/or irrelevant. In the circumstances, the appellant applies for striking out of the words, managed or' where they appear in paragraph 37 of the respondent's statement.

[18] In its Heads of Argument, the appellant narrows the basis of its complaint to the irrelevance. In this regard, the appellant submits that the allegations are not allowable because they are impermissible and are therefore irrelevant. I start this analysis with the allegation of 'willful default'. I will shortly set out to the extent necessary, the basis of the Commissioner's additional assessment or grounds of the additional assessment. To evaluate the relevance or otherwise of the allegation, one must refer to the second point in *limine* taken by the appellant in its Notice of Appeal. The point made is that the additional assessments are unlawful based on the time limit imposed by Article 9 (3). Article 9(3) reads:

> "A Contracting State shall not change the profits of an enterprise in the circumstances referred to in paragraph 1 after the expiry of the time limits provided in its domestic law and, in any case, after five years from the end of the year in which the profits which would be subject to such change would have accrued to that enterprise. This paragraph shall not apply in the case of fraud or willful default."

[19] Responding to this challenge, the respondent alleged that the time limit does not apply due to the appellant's willful default. Whether the court entertaining the appeal agrees with the respondent or not is not the issue for now. However, were the court to agree with the respondent, that would mark the end of the appellant's point in *limine* as a defence to the Commissioner's additional assessment. Bearing in mind that an irrelevant allegation is one that does not contribute one way or the other to a decision of the issue at hand, the appellant's contention that the allegation is irrelevant is unsustainable and must fail. The allegation is relevant.

Managed or controlled

[20] The relevant paragraph in the respondent's statement reads:

> "RMI, being a connected person in relation to AMT and KT, managed or controlled MUK. Therefore, MUK is a connected person in relation to AMT and KT in accordance with the provisions of paragraph (d)(vA)(*aa*) of the connected person definition, because of the following:-
>
> 37.1 The phrase 'any person' is not explicitly defined in the connected person definition, however, it is defined in Interpretation Note 67 (IN67) to the ITA.
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> 37.2 In terms of paragraph 3.5.3 of IN67, a person includes 'any company incorporated or registered as such under any law'.
>
> 37.3 Upon an analysis of the Shareholder and Subscription Agreement and the Technical Services Agreement, RMI had de facto control over MUK.
>
> 38. MUK is therefore a connected person to RMI, AMT, and KT."

[21] The respondent correctly argues that the allegation or the words 'managed or' as included in paragraph 37 are relevant on the basis that in the event the court entertaining the appeal agrees with it, the connection contended for by the Commissioner, which is at the heart of their grounds of assessment, would be upheld.

[22] There is another reason why the appellant's complaint of irrelevance against the words 'managed or' lacks merit. The attack lacks merit because it makes a mockery of our settled rules of interpretation as set out in *Natal Joint Municipal Pension Fund* v *Endumeni Municipality*[6]. In this regard, when interpreting any document, the language used is to be understood in the context in which it is used, having regard to the purpose, all of which constitutes the unitary exercise of interpretation.

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6 *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012), paragraph 18.

[23] In *Daniels* v *Scribante and Another*, it was said that:

> "The emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous. Recently, in *Thoroughbred Breeders' Association v Price Waterhouse*, the SCA has reminded us that:
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> > 'The days are long past when blinkered peering at an isolated provision in a statute was thought to be the only legitimate technique in interpreting it if it seemed on the face of it to have a readily discernible meaning.' "[7]

[24] In paragraph 17 of this judgment, I set out the paragraph/s in which the words 'managed or' appear in the respondent's statement, to provide context. The words are taken directly from paragraph(*d*)(vA) of the definition of connected person. It is plain from reading the paragraph that the point being made is about control. On these bases, the appellant's application cannot succeed.

Bases/grounds of the Commissioner's additional assessment

[25] Quite apart from the fact that alleged conflict with rule 31(3) is irrelevant and is not the test on whether the targeted passage/s must be struck out, it is necessary to point out that the bases or grounds on which the Commissioner relies for the additional assessments are and always have been the connection or association between the appellant and the foreign entities, ie, RMI, AMT, and KT, which resulted in the foreign entities earning profits they would not have earned, had the entities been operating at arm's length.

Respondent's application to strike out

[26] Along with their answering affidavit, SARS filed a notice to strike out various paragraphs of the appellant's affidavit, on the basis that almost the entire founding affidavit contains legal argument. Notwithstanding the complaint of prejudice raised by SARS, I am satisfied that SARS has been able to respond to the appellant's founding affidavit. On this basis, I can find no reason to exercise my discretion in favor of the appellant. The application lacks merit.

Delay in handing down the judgment

[27] This judgment was delayed on account of my sudden illness. Regrettably, the period for convalescing was much longer than originally estimated.

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[7] (CCT50/16) [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) (11 May 2017), paragraph 28; *CSARS v Marshall NO* (816/2015) [2016] ZASCA 158 (3 October 2016), paragraph 24; *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* (470/2020) [2021] ZASCA 99 (09 July 2021), paragraph 25.

Order

1. The application to strike out various passages in the Respondent's rule 31 statement is dismissed with costs, including the costs of two counsels.

BAM J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA, GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing: **24 July 2025**

Date of Judgment: **13 January 2026**