



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 211/2021

In the matter between:

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

APPELLANT

and

CANDICE-JEAN VAN DER MERWE

RESPONDENT

Neutral Citation: *Commissioner for the South African Revenue Service v Candice-Jean van der Merwe (211/2021) [2022] ZASCA 106 (30 June 2022)*

Coram: VAN DER MERWE, MOLEMELA and PLASKET JJA, MUSI and SALIE-HLOPHE AJJA

Heard: 17 May 2022

Delivered: 30 June 2022

Summary: Income tax – Application for default judgment in terms of rule 56 of the rules prescribed by the Tax Administration Act 28 of 2011 – application failed to meet jurisdictional requirements even on unopposed basis.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Ndita, Cloete and Mantame JJ, sitting as court of appeal):

- 1 The appeal succeeds with costs, including the costs occasioned by the employment of two counsel.
- 2 The order of the high court is set aside and replaced with the following:
'The appeal is dismissed with costs, including the costs of two counsel.'

JUDGMENT

Molemela JA (Van der Merwe and Plasket JJA and Musi and Salie-Hlophe AJJA concurring):

Introduction

[1] This is an appeal against the order and judgment of the majority of the full court of the Western Cape Division of the High Court, Cape Town, per Mantame J with Ndita J concurring and Cloete J dissenting (the high court), delivered on 30 October 2020, in terms of which it upheld an appeal against a judgment of the Tax Court, Cape Town, per Rogers J (the tax court). The respondent, Ms Candice-Jean van der Merwe (the taxpayer), had approached the tax court under rule 56(2) of the tax court rules seeking default judgment against the appellant, the Commissioner for the South African Revenue Service (SARS), based on SARS's alleged failure to file a statement disclosing its grounds for dismissing her objection to the additional income tax assessment raised by SARS in February 2016 concerning the 2014 year of assessment. In addition, the taxpayer sought an order reducing this assessment to nil and an order compelling SARS to repay the amount the taxpayer had paid on the assessment.

[2] A preliminary procedural question raised before the tax court was whether the opposing papers were timeously filed and, if not, whether the late filing should be condoned. Further procedural questions related to whether the taxpayer should be permitted to rely on two supplementary replying affidavits and whether SARS should be permitted to rely on an affidavit in response to a matter contained in the replying and supplementary replying papers.

[3] The tax court heard argument on the preliminary matters and stated that it would give its ruling on them as part of its judgment in due course. The tax court subsequently decided to allow the affidavits. It dismissed the application for default judgment on the basis that the jurisdictional requirements for an application in terms of rule 56(2) of the Tax Court Rules published in terms of s 103 of the Tax Administration Act 28 of 2011 (TAA)¹ (the rules) were not satisfied, insofar as the taxpayer's rule 56 application was not preceded by a valid objection and valid notice of appeal. It also ordered the taxpayer to pay the costs of the application on a punitive scale.

[4] The taxpayer approached the high court on appeal. The appeal was successful; the high court finding that its judgment was limited to the interlocutory applications, but dispositive of the appeal. In allowing that appeal, the high court found that the appeal ought to succeed, but omitted to replace the order of the tax court. I will return to this aspect.

[5] Aggrieved by the high court's decision, SARS approached this Court, which granted it special leave to appeal. The issue before us is whether the high court had correctly upheld the taxpayer's appeal. SARS seeks an order that the order granted by the high court be replaced with an order that the taxpayer's appeal from the tax court be dismissed with costs, including the costs of two counsel.

¹ Section 103 of the TAA empowers the Minister of Finance to, after consultation with the Minister of Justice and Constitutional Development, prescribe the rules governing the procedures to lodge an objection and appeal against an assessment or decision under Chapter 9 of the TAA. The rules envisaged in s 103 of the TAA were promulgated in GN 550, GG 37819, 11 July 2014.

[6] A preliminary point raised before the hearing of the appeal in this Court was an application in terms of which the taxpayer's father, Mr Gary Walter van der Merwe sought this Court's leave to allow him to represent the taxpayer during the appeal proceedings. That application was considered on the papers and dismissed prior to the hearing of the appeal. The reasons for that order follow later in this judgment.

The facts

[7] On 30 August 2013, SARS obtained an *ex parte* preservation order against the taxpayer's father, the taxpayer herself and a number of associated entities. The order was eventually confirmed and a *curator bonis* appointed. The preservation order was to apply pending the outcome of an action to be instituted by SARS to declare that the respondents therein were liable for the various tax debts which SARS assessed. That action was instituted, the taxpayer being one of the defendants. She defended the action and delivered a counterclaim.

[8] The taxpayer's tax return for the 2014 tax year reflected taxable income of R365 919. She also declared a receipt of R142 901 673 as a 'gift from her companion abroad'. In January 2015, SARS raised an original assessment in accordance with this return. The 'donation' was not subjected to tax. After rebates, tax credits and adjustments, the net amount payable was R13 807, which the taxpayer paid.

[9] In February 2015, SARS started a process of interrogating the tax return and the foreign 'donation'. Settlement was also explored. In the settlement communications the taxpayer was represented first by DP&A Incorporated Attorneys (DPA) and then by Werksmans Attorneys (Werksmans). In a letter dated 21 July 2015, SARS informed DPA that it could not consider an offer that did not comply with the settlement provisions of Part F of Chapter 9 of the TAA (ss 142-150).

[10] On 7 December 2015, MacRobert Attorneys (MR), which was by this time representing SARS, wrote to Werksmans (who had taken over from DPA),

enclosing a draft letter of audit findings. The view expressed in the draft findings was that the amount of some R142.9 million was not a gratuitous donation and was subject to income tax.

[11] On 18 December 2015, Werksmans sent a settlement proposal to MR, the essence of which was that: (a) of the R142.9 million, a sum of about R110.3 million be treated as taxable income; (b) the balance be treated as a foreign donation not subject to tax; (c) SARS not raise interest or penalties on the late payment of tax on the sum of R110.3 million; and (d) the funds which the taxpayer's foreign benefactor would pay to enable her to meet the tax on the sum of R110.3 million be recognised as a foreign donation not subject to tax. After a few inconsequential adjustments, a final version of this letter, dated 21 January 2016, was sent by Werksmans to MR.

[12] On 18 February 2016, MR wrote to Werksmans stating that SARS had approved the settlement proposal. The amount payable was R44 175 675. MR confirmed that no penalties or interest would be raised and that the money received by the taxpayer from her benefactor to enable her to meet the tax obligation would not in itself be subject to any tax. It was pointed out that once MR had received a letter from Werksmans confirming that they held the amount of R44 175 675 in trust and had irrevocable instructions to pay it to SARS in terms of the agreed assessment, SARS would apply for the discharge of the preservation order as against the taxpayer and would withdraw its action against her, she simultaneously withdrawing her counterclaim. The penultimate paragraphs of the letter read thus:

'10. We do draw to your attention that in terms of section 95(3) of the Tax Administration Act where SARS and a taxpayer [have] agreed in writing for an agreed assessment to be issued, such an assessment will not be subject to objection and appeal. Therefore the agreed assessment in terms of the 2013 and 2014 [tax] years will be final and conclusive. We propose that the representations on behalf of the taxpayer referred to above [ie those contained in Werksmans' letter of 21 January 2016], this letter and a letter by you in reply to this letter confirming that you have instructions on behalf [of your client] to agree to this, will serve as the written agreement for purposes of the said section.

11. Kindly confirm that this letter correctly records the settlement of the issues set out above, and if so, provide us with the written confirmation referred to above.'

[13] The additional assessment (form ITA34) was dated 17 February 2016 and accorded with the settlement communications summarised above. Its 'document number' was '23'. On the same day, Werksmans emailed MR attaching the taxpayer's 'Statement of Account: Assessed Tax' (form ITSA), asking, '[i]s this the assessment?'. The statement of account was not in fact the assessment, but did reflect the 2014 additional assessment, identified as document 23, among the transactions by which SARS arrived at the net amount payable by the taxpayer, namely R44 175 675.

[14] On 7 March 2016, Werksmans wrote to MR confirming that MR's letter of 18 February 2016 correctly recorded the settlement of the issues referred to therein. Werksmans confirmed that they held sufficient funds in trust to pay SARS R44 175 675 and irrevocable instructions to pay same to SARS on discharge of the preservation order. They confirmed that the parties would file notices to withdraw their claims and counterclaims in the action.

[15] On 10 March 2016, Werksmans sent MR 'proof of payment of the settlement consideration'. The attached proof of payment showed that the sum was paid from a Werksmans's account. On the same day, the preservation order was discharged against the taxpayer and SARS and the taxpayer filed notices of withdrawal in the action.

[16] On 10 September 2018, the taxpayer lodged a notice of objection to the additional assessment of 17 February 2016 together with an application condoning the late filing of the objection. This set in motion the events leading to the application for default judgment that served before the tax court, in terms of which the taxpayer sought to reverse what her attorneys had plainly agreed on her behalf. The taxpayer lodged her objection via her electronic filing (SARS eFiling) profile. She had not obtained an extension of time prior to doing so. In the objection itself she gave the following as the reasons for her late submission:

'The additional assessment to tax that was raised by SARS was not provided to the taxpayer and was for the first time ever seen when same was accessed and printed on the taxpayer's e-filing profile, the additional assessment was allegedly raised on [17 February 2016] but not provided to the taxpayer for objection as provided for in the TAA, in addition to the above three years have not passed from the alleged date.'

The taxpayer's ground for challenging the additional assessment on its merits was that tax was imposed on non-taxable income and paid on the basis of the 'pay now, argue later rule'.

[17] On 21 September 2018, SARS granted the condonation sought by the taxpayer. On 14 December 2018, however, SARS wrote to the taxpayer informing her that the decision to allow the late submission was 'under review' for various reasons. These included: (a) that no exceptional circumstances existed to allow an extension of more than 30 days; (b) that SARS disputed that the taxpayer only became aware of the assessment on 7 September 2018; and (c) that the additional assessment was raised in terms of s 95(3) and was not subject to objection or appeal. SARS stated that although it was not obliged to do so, it was offering the taxpayer until 15 January 2019 to make representations on the matter.

[18] This letter was posted to the postal address given by the taxpayer in her notice of objection. It was also emailed to an email address for her, which SARS had obtained from MR. She later denied having received the letter and accused SARS of having fabricated it after the event. The email stated, incorrectly, that the attached letter was one withdrawing the condonation. On 19 December 2018, SARS emailed the taxpayer to correct that misdescription. On 20 February 2019, the taxpayer delivered a notice in terms of rule 56, putting SARS on terms for its failure to respond to her objection in accordance with the rules.

[19] On 22 February 2019, SARS addressed a letter to the taxpayer stating that in terms of s 9 of the TAA it was withdrawing its condonation for her late objection. The letter was posted and emailed to the same email address as

before. Once again, the taxpayer says she did not receive it; and once again, she accused SARS of fabrication.

[20] On 25 February 2019, SARS issued, via the taxpayer's SARS eFiling profile, a 'notice of invalid objection'. The notice stated that her objection did not comply with the rules, because the assessment in question was an agreed assessment raised in terms of s 95(3) and not subject to objection or appeal.

[21] On 4 March 2019, and in accordance with the taxpayer's request that SARS communicate henceforth with her father, MR sent a letter to Mr van der Merwe per his email address. MR stated that there was no valid objection, as condonation had been withdrawn and that the assessment in question was, in any event, not subject to objection or appeal. Mr van der Merwe was asked to address all further correspondence to MR. SARS's letters of 14 December 2018 and 22 February 2019 were attached to MR's letter. According to the taxpayer and her father, this was when those letters came to their attention.

[22] On 5 March 2019, the taxpayer caused a notice of appeal to be filed. In the notice of appeal, the taxpayer asserted that SARS's reliance on s 95(3) was rejected. She inter alia asserted that 'there was no estimation of assessment raised, but rather an additional assessment on which the tax was paid on the basis of pay now, argue later'.

[23] On 8 March 2019, SARS responded to the notice of appeal and advised that the objection that had previously been submitted had been declared invalid. Accordingly, the appeal was also invalid as it did not comply with the TAA read with the rules. A notice of appeal had to be preceded by an objection. On the taxpayer's own version, it is clear that by 8 March SARS had: (i) withdrawn the condonation for the taxpayer's late filing of the objection; (ii) invalidated the objection; and (iii) advised the taxpayer that the notice of appeal is invalid. On 11 March 2019, Mr van der Merwe replied, disputing the invalidity of the notice of appeal. SARS responded by stating that if the taxpayer was aggrieved at SARS's decision, she was at liberty to seek relief in terms of rule 52(2)(b).

[24] On 15 May 2019, the taxpayer delivered a further notice in terms of rule 56, this time regarding SARS's alleged failure to respond to her notice of appeal by delivering its grounds of assessment in terms of rule 31. SARS was informed that if it failed to remedy its default within 15 days, the taxpayer would seek a default judgment and final order in terms of s 129(2) of the TAA.

[25] On 6 June 2019, the taxpayer delivered her application for default judgment. SARS delivered a notice of opposition on 1 July 2019. On 10 July 2019, MR wrote to the taxpayer, care of her father, to say that in SARS's view there was no basis in fact or law for the application; that the assessment in question was issued by agreement in terms of s 95(3); and that SARS's view of the application was that it was 'cynical, vexatious and an abuse of the court procedures'. The taxpayer was invited to withdraw it by 15 July 2019, failing which SARS would file an answering affidavit and request a punitive costs order.

[26] The taxpayer did not withdraw the application. Instead on 15 July 2019, she delivered a notice requesting the registrar to issue a hearing date. On 19 July, SARS delivered its opposing papers. A replying affidavit by Mr van der Merwe followed on 29 July 2019. On 9 August 2019 (which was a public holiday), supplementary replying affidavits by Mr van der Merwe and the taxpayer were emailed to MR. SARS's 'duplicating affidavit' was delivered on 22 August 2019. This forms the background of this appeal.

Discussion

[27] Of importance in arriving at a decision in this matter is a consideration of the nature of the application before the high court. SARS's primary contention was that since it had issued a notice of invalid objection and therefore did not determine the objection, the taxpayer was not entitled to file a notice of appeal, nor to seek default judgment in consequence of SARS's failure to file a statement of grounds of assessment in terms of rule 31. It was on that basis that SARS contended that the jurisdictional requirements of the rule on which the application was hinged (rule 52) were not satisfied.

[28] It is necessary to consider the provisions of the TAA and the relevant rules. In doing so, one must bear in mind the following approach to the process of interpretation:

‘ . . . Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The “inevitable point of departure is the language of the provision itself”, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’²

[29] With that approach in mind, I turn now to the various provisions of the TAA and the rules. The raising of assessments is regulated by ss 91 to 100 of the TAA. Section 95(3) of the TAA reads:

‘If the taxpayer is unable to submit an accurate return, a senior SARS official may *agree in writing* with the taxpayer as to the amount of tax chargeable and issue an assessment accordingly, *which assessment is not subject to objection or appeal.*’
(Emphasis added.)

[30] SARS contended that the assessment against which the taxpayer objected was an agreed assessment in terms of s 95(3) of the TAA, which was

² *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA); [2012] 2 All SA 262 (SCA) para 18.

'not subject to objection or appeal'. This contention was largely based on correspondence exchanged between SARS's attorneys and those of the taxpayer. It is clear from that correspondence that litigation pertaining to the preservation order resulted in settlement negotiations which culminated in an agreed income tax assessment being raised. In terms of that agreement, a portion of the 'donation', which the taxpayer received from her overseas benefactor, was assessed for tax and thereafter paid by the taxpayer to SARS, apparently with funds from a further 'donation' received from her benefactor. This is how the dispute pertaining to the additional assessment was settled.

[31] The letters sent on behalf of SARS make it pertinently clear that the pending litigation would only be withdrawn on certain conditions, which included payment of the money on a full understanding that the provisions of s 95(3) would be applicable. The taxpayer's attorney expressly agreed to all the conditions and also mentioned that the payment was made irrevocably. In short, the settlement agreement provided that s 95(3) would apply to the agreed assessment.

[32] Under these circumstances, the taxpayer's assertion (in the notice of appeal) that the amount was paid on a 'pay now, argue later' basis is simply untrue. To boot, despite the payment of such a substantial amount – in excess of R44 million – a period of two years passed without any further enquiries being directed at SARS regarding the matter.

[33] On the conspectus of all the relevant facts, the inference is irresistible that the taxpayer paid the agreed amount within the contemplation of s 95(3) and not on the basis of the 'pay now, argue later' principle, as alleged in the taxpayer's notice of appeal. Notably, the respondent's papers were quite terse on this aspect and did not disclose any facts pertaining to the correspondence on the basis of which SARS alleged that the dispute had been settled.

[34] Once it is accepted, as it must, that the provisions of s 95(3) are applicable, it follows that the respondent's additional assessment cannot be the subject of an objection or appeal. In terms of s 104(1) of the TAA, a taxpayer

who is aggrieved by an assessment made in respect of the taxpayer may object to the assessment. Insofar as the respondent purports to have lodged an objection to the additional assessment, the provisions of s 106 of the TAA are significant. It reads, in relevant part:

(1) SARS must consider a *valid objection* in the manner and within the period prescribed under this Act and the “rules”.

(2) SARS may disallow the objection or allow it either in whole or in part.

(3) If the objection is allowed either in whole or in part, the assessment or “decision” must be altered accordingly.

(4) SARS *must, by notice*, inform the taxpayer objecting or the taxpayer’s representative of the decision referred to in subsection (2), unless the objection is stayed under subsection (6) in which case notice of this must be given in accordance with the “rules”.

(5) The notice *must* state the basis for the decision *and a summary of the procedures for appeal.*’ (Emphasis added).

Based on the provisions of subsec (1), there can be no doubt that SARS was correct in asserting that the taxpayer’s objection was invalid. In this regard, it is important to bear in mind the provisions of rule 7(4),³ which empowers SARS to regard an objection that does not comply with the requirements of subrule (2) as invalid. This, in substance, was what SARS conveyed to the taxpayer in terms of the notice of invalid objection.

³ Rule 7 of the Tax Court Rules reads:

7. Objection against assessment

(1) A taxpayer *who may object to an assessment under section 104 of the Act*, must deliver a notice of objection within 30 days after-

(a) delivery of a notice under rule 6(4) or the reasons requested under rule 6; or

(b) where the taxpayer has not requested reasons, the date of assessment.

...

(4) Where a taxpayer delivers an objection that does not comply with the requirements of subrule (2), SARS may regard the objection as invalid and must notify the taxpayer accordingly and state the ground for invalidity in the notice within 30 days of delivery of the invalid objection, if-

(a) the taxpayer used a SARS electronic filing service for the objection and has an electronic filing page;

(b) the taxpayer has specified an address required under subrule (2)(c); or

(c) SARS is in possession of the current address of the taxpayer.

(5) A taxpayer who receives a notice of invalidity may within 20 days of delivery of the notice submit a new objection without having to apply to SARS for an extension under section 104(4).

(6) If the taxpayer fails to submit a new objection or submits a new objection which fails to comply with the requirements of subrule (2) within the 20 day period, the taxpayer may thereafter only submit a new and valid objection together with an application to SARS for an extension of the period for objection under section 104(4).’ (My emphasis.)

[35] Section 107(1) of the TAA describes the circumstances under which a taxpayer may file a notice of appeal. It reads:

‘After delivery of the notice of the decision referred to in section 106(4), a taxpayer objecting to an assessment or “decision” may appeal against the assessment or “decision” to the tax board or tax court in the manner, under the terms and within the period prescribed in this Act and the “rules”.’

It is clear that it is only after delivery of the notice of a decision that a taxpayer may appeal against the assessment.

[36] Notably, s 107(3) of the TAA stipulates that a notice of appeal ‘that does not satisfy the requirements for subsection (1) is not valid’. An undeniable fact discernible from all the provisions mentioned above is that the right to pursue an appeal to the tax board or the tax court depends on whether a *valid* objection was filed and decided upon in terms of s 106.

[37] As stated before, the respondent’s application for default judgment was predicated on rule 56. However, the stumbling block for the taxpayer was that she failed to show that, notwithstanding SARS’s notification about the taxpayer’s invalid objection, she was entitled to lodge an appeal. To reiterate, an appeal must be preceded by a valid objection and a decision thereon. In the absence of any one of those, there can be no appeal. The taxpayer simply did not meet the jurisdictional requirements that warranted the consideration of an application, which presupposes compliance with all the prerequisites.

[38] It is clear from the provisions of rule 57⁴ that an applicant who files an application is required to support his or her application with an affidavit that contains the facts upon which the applicant relies for relief. Although the taxpayer deposed to the affidavit at a stage when SARS had already asserted that the taxpayer’s objection was invalid on account of the assessment and

⁴ Rule 57 of the Tax Court Rules reads:

‘57. 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 be supported by a founding affidavit that contains the facts upon which the applicant relies for relief.’

payment being agreed upon as envisaged by the provisions of s 95(3) of the TAA, the taxpayer's affidavit curiously failed to address this material issue. There was simply no allusion to the correspondence which recorded the agreement that formed the basis of the payment made by the taxpayer, nor to the circumstances that led to SARS asserting that the assessment was agreed upon pursuant to the settlement of a dispute.

[39] A court considering an application for default judgment is duty bound to determine whether a proper case has been made out on the papers. The tax court remarked as follows:

' . . . [T]he provisions of the rules presuppose that one is dealing with an application which may permissibly be brought in terms of those rules. . . The [taxpayer's] rule 56 application is only a proper application under that rule if it was preceded by a valid objection and valid notice of appeal. If not, one is dealing with a wholly irregular application . . .'⁵

I agree. In the same vein, the tax court was correct in finding that in order to obtain default judgment, the taxpayer had to show that SARS was indeed in default of an obligation to file a rule 31 statement.

[40] It is clear from the provisions of rule 31 that SARS's obligation to file its statement of grounds of assessment would only arise from a valid notice of appeal. It is plain that the taxpayer's rule 56 application was premised on the incorrect legal conclusion that SARS was under an obligation to file a notice in terms of rule 31, but failed to do so. It was an ill-fated application, because the taxpayer failed to show that she was entitled to deliver a notice of appeal. Rule 52(2)(b) of the Tax Court Rules affords a taxpayer the right to apply to the tax court for an order that an objection is valid, where SARS treated the objection as invalid. That is the course the taxpayer should have followed.

[41] In the founding affidavit the taxpayer sought to circumvent these difficulties by contending that the notice of invalid objection was a constructive disallowance of the objection as envisaged in s 106(2) of the TAA. It did the

⁵ Paragraph 35 of the tax court judgment.

opposite, however, because the notice expressly stated that 'the agreed assessments [were] not subject to a Notice of Objection or a Notice of Appeal'. It is thus clear that the notice of invalid objection could not have been construed as a disallowance of the objection on the merits within the meaning of s 106(2) of the TAA. This means that the notice of appeal was invalid for want of compliance with s 107(4) of the TAA.

[42] The upshot of what is set out in the preceding paragraph is that even without considering the contents of the answering affidavit, the tax court was entitled to find, on an unopposed basis, that the jurisdictional requirements for the lodging of an appeal had not been satisfied, and to refuse to grant the order sought. It is of no moment that the tax court proceeded to consider whether or not to condone the late filing of the answering affidavit, because its decision to grant condonation does not detract from the fact that even on an unopposed basis, the taxpayer failed to make out a proper case for the relief sought. In the same vein, the criticism directed at the tax court for not making a ruling regarding the application to strike out certain averments from the answering affidavit is unfounded.

[43] Regrettably, the high court did not engage with the tax court's finding that a proper case was not made out on the basis of non-compliance with the provisions of the TAA. This Court could have benefitted from its opinion on the merits of the matter. Equally regrettable is its finding that the tax court's failure to make a ruling on the application to strike out vitiated the proceedings, and that the final judgment was 'not arrived at in a fair, transparent and just manner', as it is not borne out by the facts. As mentioned before, its order was also incomplete insofar as it stated that the appeal was successful but failed to set aside the order of the tax court. However, nothing turns on these shortcomings, because as shown above, the order of the high court falls to be set aside.

[44] What remains now is to provide reasons why Mr van der Merwe's application for leave to represent the taxpayer in this Court was dismissed. The taxpayer's father, Mr van der Merwe, represented the taxpayer before the tax court and also before the high court. Mr van der Merwe prepared a substantive

application asking for leave to represent the taxpayer in the appeal before this Court. The application was refused a week before the hearing of the appeal. On the date of the hearing of the appeal, the taxpayer was legally represented by counsel.

[45] In terms of the common law, it is not permissible for a lay person to represent a natural person in a court of law. This common-law position now finds support in s 25 of the Legal Practice Act 28 of 2014, which provides in relevant part that:

‘(1) Any person who has been admitted and enrolled to practise as a legal practitioner in terms of this Act, is entitled to practise throughout the Republic, unless his or her name has been ordered to be struck off the Roll or he or she is subject to an order suspending him or her from practising.

(2) A legal practitioner, whether practising as an advocate or an attorney, has the right to appear on behalf of any person in any court in the Republic or before any board, tribunal or similar institution, subject to subsections (3) and (4) or any other law.’

[46] It follows that there is no discretion to allow a lay person to represent a natural person in a court of law. In *Shapiro & De Meyer Inc v Schellauf (Shapiro)*,⁶ this Court accordingly held that the respondent’s wife was not entitled to appear and argue the appeal on behalf of the respondent. There is no justification for this Court to depart from its established practice, which is in accordance with the common law. The pitfalls of a natural person being represented by a person who is not a legal practitioner are obvious. The clearest example that comes to mind is that the rules of this Court would not oblige such a lay representative to file a power of attorney. This could cause a party to subsequently deny the authority of the representative, to the detriment of the administration of justice. These are the reasons why this Court refused to grant Mr van der Merwe leave to represent the taxpayer.

Ruling

⁶ *Shapiro & De Meyer Inc v Schellauf* [2001] ZASCA 131 (SCA) para 10.

[47] To sum up on the main issue in this appeal, the application in the tax court was premature, because SARS was not in default as envisaged in rule 56(1). Therefore, the jurisdictional requirements for an application in terms of rule 56(2) were not satisfied. In my view, the tax court's finding that the taxpayer's rule 56 application was not preceded by a valid objection and valid notice of appeal is unassailable. As correctly stated in the dissenting judgment per Cloete J, the tax court was entitled to make that finding even on an unopposed basis.

[48] For all the reasons set out in the foregoing paragraphs, I am of the view that the order of the tax court was correct. Thus, the majority judgment of the high court came to the wrong conclusion. It upheld the appeal when it should have dismissed it. It follows that SARS's appeal against the order of the high court must succeed.

Order

[49] In the result, the following order is made:

- 1 The appeal succeeds with costs, including the costs occasioned by the employment of two counsel.
- 2 The order of the high court is set aside and replaced with the following:
'The appeal is dismissed with costs, including the costs of two counsel.'

M B MOLEMELA
JUDGE OF APPEAL

Appearances

For appellant: H G A Snyman SC (with C Naudé)

Instructed by: MacRobert Attorneys, Pretoria
Lovius Block Incorporated, Bloemfontein

For respondent: P Tredoux

Instructed by: Webbers Attorneys, Bloemfontein