IN THE TAX COURT OF SOUTH AFRICA

(SITTING IN CAPE TOWN)

Case No: 35/2019

In the matter between

CM **APPLICANT**

and

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

Coram: Rogers J

Heard: 30 August 2019

Delivered: 11 September 2019

J U D G M E N T

Rogers J

[1] The applicant, Ms [CM], seeks default judgment against the respondent, the Commission for the South African Revenue Service ("SARS"). The judgment she seeks is that the applicant's additional assessment for her 2014 tax year be altered by reducing the tax payable from R44 177 895,20 to nil. The applicant is represented in these proceedings by her father, Mr [GM]. SARS, which opposes the default judgment, is represented by counsel.

[2] A preliminary procedural question is whether SARS' papers opposing the application were timeously filed and, if not, whether the late filing should be condoned. Further procedural questions are whether the applicant should be permitted to rely on two supplementary replying affidavits and whether SARS should be permitted to rely on an affidavit (styled a 'duplicating' affidavit) in response to matter contained in the replying and supplementary replying papers.

[3] After hearing argument on these preliminary matters, I said that I would give my ruling on them as part of my judgment in due course but that for the time being both sides should argue the case on the assumption that the affidavits in question were properly before the court. I have decided that these affidavits should be allowed. It is convenient to give my reasons for this decision later.

[4] SARS' primary contention is that since it issued a notice of invalid objection, the applicant was not entitled to file a notice of appeal or to seek default judgment in consequence of SARS' failure to file a statement of grounds of assessment in terms of rule 31 of the rules contemplated in section 104(2) of the Tax Administration Act 28 of 2011 ('the rules' and 'the Act' respectively). Underlying this primary contention, which is procedural in nature, is SARS' substantive assertion that the assessment against which the applicant objected was an agreed assessment in terms of section 95(3) of the Act against which the applicant was not entitled to pursue an objection.

Background

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

[6] The applicant's tax return for her 2014 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 applicant paid.

[7] 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 applicant was represented first by A Incorporated Attorneys ('A') and then by Z Inc. In a letter dated 21 July 2015 SARS informed A that it could not consider an offer that did not comply with settlement provisions of Part F of Chapter 9 of the Act (sections 142-150).

[8] On 7 December 2015 Y Inc, which was by this time representing SARS, wrote to Z Inc (who had taken over from A), 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.

[9] On 18 December 2015, Z Inc sent a settlement proposal to Y Inc, the essence of which was (a) that, of the amount of R142,9 million, a sum of about R110,3 million be treated as taxable income; (b) that the balance be treated as a foreign donation not subject to tax; (c) that SARS not raise interest or penalties on the late payment of tax on the sum of R110,3 million; (d) and that the funds which the applicant'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 Z Inc to Y Inc.

[10] On 18 February 2016 Y Inc wrote to Z Inc stating that SARS had approved the settlement proposal. SARS had thus issued an agreed assessment in terms of section 95(3) of the Act. The amount payable was R44 175 675. Y Inc confirmed that no penalties or interest would be raised and that the money received by the applicant from her benefactor to settle the tax would not itself be subject to any tax. Once Y Inc had a letter from Z Inc 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 applicant 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 years will be final and conclusive. We propose that the representations on behalf of the taxpayer referred to above [ie those contained in Z Inc 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."

[11] 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 Z Inc emailed Y Inc attaching the applicant's 'Statement of Account: Assessed Tax' (form ITSA), asking, 'Is 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 applicant, namely R44 175 675. One may safely infer from these events that by 17 February 2017 both sides knew that the settlement was a 'done deal'.

[12] On 7 March 2016 Z Inc wrote to Y Inc confirming that Y Inc's letter of 18 February 2016 correctly recorded the settlement of the issues referred to therein. Z Inc 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.

[13] On 10 March 2016 Z Inc sent Y Inc 'proof of payment of the settlement consideration directly to your client'. The attached proof of payment shows that the sum was paid from a Z Inc account. On the same day the preservation order was discharged as against the applicant, and SARS and the applicant filed notices of withdrawal in the action.

The objection and subsequent developments

[14] In the light of these events, it comes as a matter of considerable surprise (to put it no higher) that 31 months later – on 10 September 2018 to be precise – the applicant lodged a notice of objection to the additional assessment of 17 February 2016. This set in motion the events leading to the present application by which the applicant seeks to reverse what her attorneys so plainly agreed on her behalf.

[15] In terms of rule 7(1)(*b*) a notice of objection must be delivered within 30 days after the date of the assessment. In terms of section 104(4) of the Act read with rule 7(3), a senior SARS official may extend the period for objection if reasonable grounds exist for the delay. Section 104(5)(*a*) states that an extension may not exceed 30 business days unless a senior SARS official is satisfied that exceptional circumstances exist to explain the delay.

[16] Reference was also made in argument to rule 4, which deals with the extension of time periods in general. In terms of subrule (2) a request for an extension must be delivered before expiry of the prescribed period unless the parties agree that the request may be delivered after such expiry. If this rule were applicable to the applicant's request for condonation, her request for an extension was for this reason alone invalid. However, subrule (1) states that rule 4 does not apply where the extension of of a time period is otherwise regulated in Chapter 9 of the Act or in the rules. Since section 104, which forms part of Chapter 9, regulates the granting of extensions for objecting, I shall assume that rule 4 is inapplicable.

[17] The applicant lodged her objection via her e-filing 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 [Act], in addition to the above three years have not passed from the alleged date."

The applicant'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'.

[18] Even more surprising than the lodging of the objection and the making of the above statements is that on 21 September 2018 SARS issued a letter that the late submission of the objection had been allowed (ie condoned) and that the dispute would now be processed. It is difficult to imagine that any SARS official acquainted with the facts or given a candid statement by the taxpayer would have made such a decision.

[19] In the circumstances, it is unremarkable that on 14 December 2018 SARS wrote to the applicant 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 applicant only became aware of the assessment on 7 September 2018; and (c) that the additional assessment was raised in terms of section 95(3) and was not subject to objection or appeal. SARS stated that although it was not obliged to do so, it was affording the applicant until 15 January 2019 to make representations on the matter.

[20] This letter was posted to the postal address given by the applicant in her notice of objection. It was also emailed to an email address for her which SARS had obtained from Y Inc. The email stated, incorrectly, that the attached letter was one withdrawing the condonation. On 19 December SARS emailed the applicant to correct this misdescription.

[21] On 20 February 2019 the applicant delivered a notice in terms of rule 56, putting SARS to terms for its failure to respond to her objection in accordance with the rules. She says that she did not receive SARS' letter and emails of 18 and 19 December 2018. She goes further – those documents were, she alleges, later fabrications.

[22] On 22 February 2019 SARS addressed a letter to the applicant stating that in terms of section 9 of the Act it was withdrawing its condonation of her late objection. The letter was posted and emailed to the same addresses as before. Once again the applicant says she did not receive it; and once again she accuses SARS of fabrication.

[23] On 25 February 2019 SARS issued, via the applicant's e-filing 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 section 95(3) and not subject to objection or appeal. Illogically, the notice stated – presumably because this was the standard format – that a new notice of objection could be submitted within 20 business days.

[24] On 4 March 2019, and in accordance with the applicant's request that SARS communicate henceforth with her father, Y Inc sent a letter to Mr [GM] at his email address. Y Inc 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 and appeal. Mr [GM] was asked to address all further correspondence to Y Inc. SARS' letters of 14 December 2018 and 22 February 2019 were attached to Y Inc's letter. According to the applicant and her father, this is when those letters came to their attention.

[25] On 5 March 2019 the applicant filed a notice of appeal against the additional assessment. In this notice she stated inter alia that SARS' reliance on section 95(3) was 'rejected' – there was no estimation but rather an additional assessment which the applicant had paid on the basis of 'pay now argue later'. Mr [GM] warned SARS to comply with time limits as no indulgence would be allowed.

[26] On 8 March 2019 SARS wrote to Mr [GM] advising that the notice of appeal did not comply with the Act or the rules and was invalid. A notice of appeal had to be preceded by an objection. The objection previously lodged by the applicant had been declared invalid. Furthermore the applicant had not used the right form for her notice of appeal. On 11 March 2019 Mr [GM] replied, disputing the invalidity of the notice of appeal. SARS responded by stating that if the applicant was aggrieved at SARS' decision she was at liberty to seek alternative relief in terms of rule 52(2)(*b*).

[27] On 15 May 2019 the applicant delivered a further notice in terms of rule 56, this time regarding SARS' 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 applicant would seek a default judgment and final order in terms of section 129(2) of the Act. According to SARS, it did not react to this notice because its position had been made clear.

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

[29] The applicant did not withdraw her 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 [GM] followed on 29 July. On 9 August (which was a public holiday) supplementary replying affidavits by Mr [GM] and his daughter were emailed to Y Inc. SARS' 'duplicating affidavit' was delivered on 22 August 2019.

The 'late' opposing papers

[30] If the applicant's rule 56 application was duly delivered on 6 June 2019, the earliest date which the notice of motion could have specified for delivery of a notice of opposition was 10 days thereafter, ie 21 June 2019. (A 'day' is defined in the rules as meaning a 'business day' as defined in section 1 of the Act.) The applicant's notice of motion specified 20 June 2019 as the date. The notice of opposition was in fact delivered on 1 July 2019.

[31] If a notice of opposition had been delivered on 21 June 2019, the earliest date which the notice of motion could have specified for the delivery of answering papers was 12 July 2019. This was in fact the date specified. SARS served its answering papers on 19 July 2019 – a calendar week (five business days) late. During argument a letter was handed up by agreement from which it appeared that Mr [GM] told SARS that he had no objection to a late notice of opposition provided the answering papers were filed by the specified date.

[32] SARS' counsel argued that the rule 56 application was only properly served on 14 June 2019, which was the date on which the registrar 'issued' it and assigned a case number. I disagree. The rules do not require that an application be 'issued' by the registrar or that a case number be allocated before delivery. Rule 57 simply states that an application must be brought on notice of motion, be signed by the applicant or her representative, be supported by a founding affidavit, and be delivered to the registrar and the respondent.

[33] SARS' counsel submitted that, by virtue of rule 42(1), the Rules for the High Court must be applied. Rule 42(1) provides that if the tax court rules do not provide for a procedure in the tax court, the most appropriate rule under the Rules for the High Court may be used by a party or the tax court. I do not think one is dealing here with such a case. The tax court rules can operate adequately without requiring an application to be 'issued' by the registrar.

In any event, the High Court Rules do not require that an application be issued by the registrar. An application differs in this respect from a summons (*Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Pubikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 780C-E; *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd & others* 2013 (2) SA 204 (SCA) para 17).

[34] Although the application in the present case was only delivered to the registrar on 14 June 2019, it was delivered to SARS on 6 June 2019. In terms of rule 58(*b*) the prescribed period for notice of opposition is determined by the date of delivery to the respondent, not to the registrar. Although the applicant did not object to the late notice of opposition, this was on the basis that SARS should be no better off than if it had delivered its notice of opposition on the last permissible date, meaning that its opposing papers should have been filed by 12 July 2019.

[35] However, the provisions of the rules presuppose that one is dealing with an application which may permissibly be brought in terms of those rules. SARS in its opposing papers has placed this squarely in issue, contending that the objection and notice of appeal are invalid. The applicant'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 to which no time limits in terms of the rules strictly apply.

[36] Furthermore SARS' opposing papers were not significantly late. By the time she launched her rule 56 application, the applicant knew SARS' attitude to her purported appeal. It was not unreasonable for SARS, through its attorneys, to invite the applicant to withdraw the application. Once it became clear that she would not do so, there was no undue delay on SARS' part. The modest delay has not caused the applicant material prejudice.

[37] This case is wholly distinguishable from the judgment to which Mr [GM] referred me in argument, *S Company v Commission for the South African Revenue Service* [2017] ZATC 2. In that case SARS had failed for more than six months to file its grounds of assessment in terms of rule 31 in circumstances where there was no doubt about the validity of the taxpayer's notice of appeal. And when the taxpayer then applied for default judgment, SARS filed its opposing affidavit more than two weeks late and only five business days before the hearing of the application for default judgment.

[38] Accordingly, and to the extent that the opposing papers should have been delivered by 12 July 2019, I condone the late filing.

The other late affidavits

[39] SARS' counsel said that SARS did not object to the applicant's supplementary replying affidavits provided SARS' 'duplicating' affidavits were received. I did not understand Mr [GM] to contend with any vigour that the 'duplicating' papers were objectionable, and he did not seek time to reply to them. In most respects SARS was responding to new matter contained in the replying papers. I thus condone the late filing of these further papers to the extent necessary.

The notice of invalid objection

[40] SARS' counsel's primary argument is that, following the notice of invalid objection of 25 February 2019, the applicant could not pursue an appeal without establishing the validity of the objection. This she could have done by bringing an application to the tax court in terms of rule 52(2)(*b*) or a review application in the high court. What she could not do, SARS argued, was ignore the notice of invalid objection and proceed with a notice of appeal as if her objection had been disallowed on its merits.

[41] The usual steps in the process of an appeal to the tax court appear from sections 104-107 of the Act and rules 6-10. A taxpayer aggrieved by an assessment may ask SARS for reasons for the assessment. She must then lodge an objection within the prescribed time. If SARS accepts the objection as valid, SARS must rule on the merits of the objection by disallowing it or allowing it in whole or in part. A notice of its decision must be given to the taxpayer. After delivery of SARS' notice of disallowance or partial allowance, the taxpayer may file a notice of appeal within the prescribed time. If the notice of appeal is valid, SARS is obliged to file its statement of grounds of assessment and opposition to the appeal in terms of rule 31.

[42] In terms of rule 7(1), the right to deliver a notice of objection is confined to a taxpayer 'who may object to an assessment under section 104 of the Act'. This must be done within 30 days of the date of assessment. The reference in rule 7(1) to a taxpayer 'who may object' in essence mirrors section 104(3) which refers to a taxpayer 'entitled to object to an assessment'. There may be circumstances where a taxpayer is *not* entitled to object.

[43] A person entitled to object must lodge her objection in accordance with the requirements of rule 7(2). The prescribed form and information specified in rule 7(2) must be supplied and duly signed. The last of the requirements (rule 7(2)(*e*)) is that the objection be delivered 'within the 30 day period' stated in rule 7(1). Rule 7(3) repeats the entitlement of a taxpayer to apply for an extension under section 104(4), and it is necessarily implicit that in such a case the time limit contemplated by rule 7(2)(*e*) is the extended period granted by SARS.

[44] Rule 7(4) provides:

> "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 grounds for invalidity in the notice within 30 days of delivery of the invalid objection."

[45] Rule 7(5) states that a taxpayer who receives a notice of invalid objection 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).

[46] Rule 52(2)(*b*) provides that where an objection is treated by SARS as invalid under rule 7, the taxpayer may apply to the tax court under Part F of the rules (the part regulating applications to the tax court in general) 'for an order that the objection is valid'.

[47] If SARS on 22 February 2019 validly withdrew the condonation of the applicant's late lodging of the objection, the consequence was that the objection which the applicant lodged on 21 September 2018 was not lodged within the 30-day period required by rule 7(2)(*e*). This was a ground on which SARS could deliver a notice of invalid objection in terms of rule 7(4). On the other hand, and although nothing was made of it in argument, SARS did not deliver its notice of invalid objection within 30 days of the date on which the applicant lodged her objection, as rule 7(4) would usually require.

[48] The 30-day limit in rule 7(4) creates a logical conundrum in the present case. Since SARS only withdrew condonation on 22 February 2019, it could not (on account of non-compliance with the rule 7(2)(*e*) time limit) have issued a notice of invalid objection before 22 February 2019; but by that date 30 days from the date on which the objection was lodged had expired. If, however, SARS in principle had the statutory power to withdraw the condonation as and when it did, it must be necessarily implicit that it could, on the strength of such withdrawal, give a notice of invalid objection. For purposes of the 30-day limit specified in rule 7(4), the objection in the present case only became one which did not comply with rule 7(2)(*e*) as from 22 February 2019, and in my view SARS had 30 days from that date to issue a notice of invalid objection

[49] The alleged withdrawal of condonation, and resultant non-compliance with the time period for lodging the objection, was not the only ground on which SARS treated the objection as invalid. More fundamentally, SARS contends that the assessment was not one against which the applicant was entitled to object. In my opinion, this is not a ground of invalidity contemplated in rule 7(4), ie a ground of validity relating to the matters of form and time set out in rule 7(2). SARS' more fundamental contention is that the applicant was not, in relation to the contentious assessment, a 'taxpayer who may object' as contemplated by rule 7(1) and

section 104(3). Even if the applicant had lodged an objection within 30 days of the additional assessment of 17 February 2016, SARS would have regarded her objection as invalid. And the applicant would then not have had the right to file a new notice of objection in terms of rule 7(5).

[50] Accordingly, while SARS might permissibly have treated the objection as invalid because the applicant (on SARS' view) was not entitled to object to the assessment, a notice to that effect would not be a notice as contemplated in rule 7(4). Could the applicant then have applied to the tax court in terms of rule 52(2)(*b*) for an order that her objection was valid? This turns on whether SARS, in condemning the objection as invalid on the fundamental basis that the applicant was not a taxpayer entitled to object to the assessment, was treating the objection 'as invalid under rule 7' as contemplated in rule 52(2)(*b*).

[51] Although the rule-maker, in framing rule 52(2)(*b*), probably had notices of invalidity in terms of rule 7(4) in mind, the requirement (for a valid objection) that the taxpayer be a person entitled to object is one appearing in rule 7 itself. In ordinary parlance, SARS has indeed, on this ground, treated the applicant's objection 'as invalid under rule 7'. I cannot believe that the rule-maker would have intended in such a case that a taxpayer who disagreed with SARS' stance would have to apply to the high court rather than to the tax court for an order determining the validity of the objection. Such a view would be even more unattractive in a case such as the present where an objection has been treated as invalid both in terms of rule 7(4) read with rule 7(2)(*e*) and in terms of rule 7(1).

[52] I thus accept SARS' submission that the applicant's remedy, if she disputed the grounds on which SARS treated her objection as invalid, was to have the tax court resolve the disputed validity of her objection by way of proceedings in terms of rule 52(2)(*b*). The rules, read with the Act, make a determination on the merits of an objection (by way of disallowance or partial or complete allowance) a jurisdictional prerequisite for lodging a notice of appeal. If SARS declines to rule on the merits of an objection because it regards the objection as invalid, the stage of allowance or disallowance cannot be reached without resolving the disputed validity of the objection. Rule 52(2)(*b*) is the means by which this should be done.

[53] I should mention that SARS' notice of invalid objection dated 25 February 2019 referred only to the fact that by virtue of section 95(3) the additional assessment was not one which was subject to objection or appeal. The notice did not record that the objection was also invalid because, with the withdrawal of condonation, the objection was out of time. SARS did, however, give notice of reliance on both grounds by way of Y Inc's letter of 4 March 2019.

[54] Mr [GM] submitted that the notice of 25 February 2019, though styled a notice of invalid objection, was in truth a notice of disallowance because it ruled on the substance of the matter. That is incorrect. The notice said nothing about whether the tax of R44,2 million had been correctly assessed. SARS' assertion was that the assessment was invalid because section 95(3) precluded a challenge.

Validity of appeal

[55] If I am wrong that the applicant was required to follow the rule 52(2)(*b*) procedure, I am still satisfied that the application must fail. In order to obtain default judgment, the applicant must show that SARS was in default of an obligation to file a rule 31 statement. That depends on whether she was entitled to deliver a notice of appeal. On the assumption that SARS' decision to treat her objection as invalid could be viewed as a constructive disallowance of the purported objection, the right to pursue the appeal turns on whether she filed a valid objection.

[56] SARS says, for two reasons, that there is no valid objection. First, because condonation was withdrawn, the objection was filed out of time. Second, the effect of the agreement of February 2016 is that the applicant was not entitled to object to the assessment.

[57] As to the first of these reasons, the applicant contends, on the basis of the *functus officio* principle, that SARS was not entitled to withdraw condonation. However, section 9 of the Act (as amended by s 22 of Act 13 of 2017) provides as follows:

> (1) A decision made by a SARS official or a notice to a specific person issued by SARS under a tax Act, excluding a decision given effect to in an assessment or a notice of assessment that is subject to objection and appeal, may in the discretion of a SARS official described in paragraphs (*a*), (*b*) or (*c*) or at the request of the relevant person, be withdrawn or amended by—
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> (*a*) the SARS official;
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> (*b*) a SARS official to whom the SARS official reports; or
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> (*c*) a senior SARS official.
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> (2) If all the material facts were known to the SARS official at the time the decision was made, a decision or notice referred to in subsection (1) may not be withdrawn or amended with retrospective effect, after three years from the later of the—
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> (*a*) date of the written notice of that decision; or
>
> (*b*) date of assessment of the notice of assessment giving effect to the decision (if applicable).
>
> (3) A decision made by a SARS official or a notice to a specific person issued by SARS under a tax Act is regarded as made by a SARS official authorised to do so or duly issued by SARS, until proven to the contrary.

[58] Mr [GM] argued that SARS could only invoke section 9 if so requested by a taxpayer; in other words, that the power could only be exercised for the benefit of a taxpayer. He referred me to the explanatory memoranda which accompanied the bills which became Act 13 of 2017 (the principal Act) and Act 13 of 2017 (the amending Act) and to a document which served before the Standing Committee on Finance when the first of these bills served before that committee. I should mention, in this regard, that insofar as section 9 of the Act is concerned, the amendments made by Act 13 of 2017 were cosmetic in nature. The elements of the section were rearranged but the wording remained the same. There was one minor change of substance, which I shall mention later.

[59] To the extent that explanatory memoranda and parliamentary material may permissibly be consulted in the interpretation of statutes, their use is directed at ascertaining the mischief which the statutory provision intended to address, on the basis that this knowledge may assist in resolving ambiguous language (cf *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 562C-563A; *S v Makwanyane & another* 1995 (3) SA 391 (CC) paras 13-15; *S v Pedro* 2015 (1) SACR 41 (WCC) paras 62-66). Material of this kind may not be used to contradict the clear language of the statute.

[60] Section 9 is not capable of being interpreted in the way for which Mr [GM] contends. Subsection (1) expressly states that a decision may be withdrawn or amended either at SARS' discretion (ie *mero motu*) or at the request of a taxpayer. The three-year restriction in subsection (2) was clearly enacted for the benefit of taxpayers, and necessarily implicit therein is that the power to withdraw or amend decisions may be exercised adversely to the taxpayer.

[61] In any event, the parliamentary materials do not support Mr [GM]'s argument. The memorandum which accompanied the original bill stated that the power to withdraw or amend decisions in clause 9 was largely similar to current law (contained in the now repealed section 3(2) of the Income Tax Act 58 of 1962), 'except that it is clarified that a taxpayer may request such withdrawal or amendment'. In other words, clause 9 was not confined to cases where SARS *mero motu* wished to withdraw or amend a decision. The memorandum continued (emphasis in the original):

> 'In the case of withdrawals or amendments adverse to the taxpayer, procedural fairness is implicit. SARS may not withdraw or amend a decision with retrospective effect more than three years after the date of the written notice of the decision or the date of the assessment giving effect to the decision *if* all the material facts were known.'

This confirms that the lawmaker intended to confer a power which might be exercised adversely to the taxpayer. SARS' power to withdraw or vary a decision, as conferred by section 3(2) of Act 58 of 1962, was always recognised as one which SARS could exercise *mero motu* in a way adverse to the taxpayer, as is illustrated by cases such as *Commissioner,*

South African Revenue Service v Dunblane (Transkei) (Pty) Ltd 2002 (1) SA 38 (SCA) and *Rane Investments Trust v Commission, South African Revenue Service* 2003 (6) SA 332 (SCA). This power was retained in section 9 of Act 28 of 2011 with the insertion of an additional right on the part of an affected person to request the withdrawal or variation of a decision.

[62] The document that served before the Standing Committee of Finance simply made the point that a decision might affect not only the taxpayer but other persons as well, so that the right to request SARS to withdraw or amend a decision should not be confined to the 'taxpayer', as the bill at that time stated. The result was that, insofar as requests were concerned, the word 'taxpayer' was substituted with the expression 'the relevant person'.

[63] The only change of substance when section 9 was amended by s 22 of Act 13 of 2017 was the insertion of the words 'that is subject to objection and appeal' in subsection (1). The explanatory memorandum which accompanied the bill merely stated that there might be cases where a decision given effect to in a notice of assessment was not subject to objection and appeal and that in such cases it was desirable to give the taxpayer the right to request withdrawal or amendment in terms of section 9 before following external remedies such as lodging a complaint with the tax ombud or instituting review proceedings in the high court.

[64] SARS' decision to grant condonation was not a decision to which it thereafter gave effect in an assessment or notice of assessment. It was thus a decision which SARS could in principle withdraw or amend *mero motu*. The three-year limit in section 9(2) is inapplicable – the condonation decision was made only a few months before its withdrawal. The applicant did not allege that the withdrawal decision was not made by a competent SARS official, and by virtue of section 9(3) it is presumed, unless the contrary is proved, that the official was duly authorised.

[65] That the withdrawal decision was justified on its merits scarcely requires comment. As I have said, the explanation offered by the applicant for her late submission was not candid. In the absence of further disclosure, her explanation would have conveyed to an official unacquainted with the history that the applicant had only recently become aware of the additional assessment. That was not the truth. Mr [GM] conceded in argument that it was not his or the applicant's contention that they had not been aware of the assessment in February 2016, only that the applicant had not actually received the it.

[66] The applicant would not have paid the tax on 10 March 2016 had she been unaware of the assessment. Her attorneys' invoice of 17 March 2016 included, in between its attendances on 12 and 18 February 2016, the following items: 'taking receipt of assessment; advising client, confirming that proposal had been accepted'. If she was for any reason unhappy about the assessment, and paid the tax on the ''pay now argue later' rule, she should

have asked her attorneys or SARS for a copy of the assessment. Instead she did nothing for 31 months.

[67] SARS officials do not have an unfettered statutory power to extend the period for objecting to an assessment. For there to be any extension at all, the official must be satisfied that reasonable grounds exist for the delay. For there to be an extension of more than 30 days, the official must be satisfied that the delay is attributable to 'exceptional circumstances'. In this case the applicant was seeking an extension of about 30 months. There were no reasonable grounds for the delay and certainly no exceptional circumstances. Even if the terse explanation offered by the applicant for the delay in her objection could at face value have sufficed to satisfy an official that exceptional circumstances existed (and I do not believe that to be so), the explanation was not candid. The satisfaction contemplated in sections 104(4) and 104(5)(*a*) is a state of mind formed with reference to the true facts. This was a classic blunder which SARS was entitled to correct by way of the section 9 power.

[68] In conclusion on this aspect, there was no justification for the applicant and her father to allege that SARS' letters and emails of 14 December 2018, 19 December 2018 and 22 February 2019 were later fabrications. I am prepared to accept that they did not come to the attention of the applicant or her father. In SARS' defence, the letters were sent by registered mail to the postal address the applicant gave in her objection for delivery of notices and to an email address which SARS got from Y Inc. The email address which Y Inc gave SARS was the one Z Inc had given Y Inc when notifying the latter of the termination of their mandate in April 2016.

[69] Even if SARS' decision to withdraw condonation only came to the applicant's notice in early March 2019, the decision was still a valid decision. There is no merit in Mr [GM]'s argument that events had in the meanwhile moved on to a point where withdrawal of condonation was no longer permissible.

[70] I thus conclude that condonation was validly withdrawn, from which it follows that there was no valid objection for SARS to disallow or for the applicant to pursue by way of a notice of appeal. In the circumstances it is unnecessary to deal with SARS' contention that the applicant was in any event not entitled to object to the assessment of 17 February 2016.

Conclusion

[71] The application must thus be dismissed. In terms of rule 50(5)(*a*) the tax court may, in motion proceedings, make an order as to costs that it thinks fit. In my view the applicant must pay SARS' costs. The employment of two counsel was a reasonable precaution, having regard to the large amount at stake and the serious allegations made against SARS and its attorneys.

[72] SARS asked for a punitive costs order. The applicant was warned that such an order would be sought if she did not withdraw the application. I agree with SARS' characterisation of the application as a whole as being insupportable and an abuse of process. Furthermore, the applicant has made unsubstantiated allegations of serious misconduct against SARS officials and the attorney at Y Inc having the conduct of the case. I do not intend to catalogue all such allegations. I have already mentioned the unfounded assertion that SARS fabricated documents.

[73] In her late supplementary affidavit the applicant alleged that the Z Inc letter dated 21 January 2016 which SARS attached to its answering affidavit supported her contention of the 'manipulation' by SARS of documents to create a 'paper trail'. The true version of the letter, she says, was dated 18 December 2015 (she attaches it) yet SARS annexed a version which 'is now suddenly dated 21 January 2016':

> "[T]his accords with my suspicion that the documentation is being manipulated by SARS to sustain a defence and create a sequence of events, as an afterthought, for its spurious conduct of assessing my funds I received from a foreign donor, as taxable in the first place."

This was one of the matters SARS addressed in its 'duplicating' affidavit. SARS said it received both letters. SARS attached Z Inc' invoice (which the applicant had furnished to SARS previously for unrelated purposes), which confirmed that Z Inc had written both letters. A careful reading of the two documents shows that some changes of wording took place and in one instance details were inserted which had been left blank in the earlier letter.

[74] In argument Mr [GM] conceded that his suspicions (and those of his daughter) in relation to the letters of 18 December 2015 and 21 January 2016 were wrong but he did not withdraw any other imputations. In the circumstances I believe a punitive costs order is warranted.

[75] I make the following order:

The application is dismissed with costs, including the costs of two counsel, such costs to be paid on the attorney and client scale.

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O L Rogers
Judge of the High Court
Western Cape Division