

REPUBLIC OF SOUTH AFRICA



**IN THE TAX COURT OF SOUTH AFRICA
(HELD AT CAPE TOWN, WESTERN CAPE)**

CASE NO: IT 45935

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

23 March 2023
DATE

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SIGNATURE

In the matter between:

P TAXPAYER

Applicant

and

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

Respondent

J U D G M E N T

CLOETE J:**Introduction**

[1] This is an opposed interlocutory application in terms of uniform rule 30 in which the applicant (“taxpayer”) seeks to have a statement delivered by the respondent (“SARS”) in terms of tax court rule 31 set aside as an irregular step. In this judgment and unless otherwise indicated, the reference to a rule will be to those promulgated under section 103 of the Tax Administration Act (“TAA”).

[2] The parties share the view that at the heart of this application lies the proper interpretation of certain rules/sub-rules, in particular the interplay between rules 4, 52(1), 52(6) and 56. It is therefore only necessary to deal briefly with the relevant historical facts giving rise to this application.

[3] The taxpayer previously noted an appeal on 12 April 2019 against the disallowance by SARS of its objection in relation to its 2017 year of assessment. Following the termination of alternative dispute resolution – the parties agree that it failed, but differ as to the date of termination and at the instance of which party it was terminated – the taxpayer ultimately afforded SARS an extension to deliver its rule 31 statement by no later than 13 October 2021. SARS failed to deliver its statement by that date.

[4] On 3 March 2022 the taxpayer delivered a rule 56(1)(a) notice informing SARS of its intention to apply to the tax court for a final order under section 129(2) of the TAA “in the event that the Respondent fails to remedy the default within 15 days”. The parties agree that the rule 31 statement was subsequently delivered within that 15-day period. However the taxpayer has taken the view that, absent an accompanying application for condonation for “late filing”, this constituted an irregular step.

Relevant rules

[5] Rule 4 provides that:

“4. Extension of time periods—(1) Except where the extension of a period prescribed under the Act or these rules is otherwise regulated in Chapter 9 of the Act or these rules, a period may be extended by agreement between—

- (a) the parties;
- (b) a party or the parties and the clerk;
- (c) a party or the parties and the registrar.

(2) A request for an extension must be delivered to the other party before expiry of the period prescribed under these rules unless the parties agree that the request may be delivered after expiry of the period...”

[6] Rule 52 stipulates in relevant part that:

“52. Application provided for under rules—(1) A party who failed to obtain an extension of a period by agreement with the other party, the clerk or the registrar, as the case may be, under rule 4 may then apply to the tax court under this Part for an order, on good cause shown—

- (a) condoning the non-compliance with the period; and
- (b) extending the period for the further period that the tax court deems appropriate...

(6) A party who failed to deliver a statement as and when required under rule 31, 32 or 33, may apply to the tax court under this Part for an order condoning the failure to deliver the statement and the determination of a further period within which the statement may be delivered.”

[7] Lastly, rule 56 reads as follows:

“56. Application for default judgment in the event of non-compliance with rules—

(1) If a party has failed to comply with a period or obligation prescribed under these rules or an order by the tax court under this Part, the other party may—

- (a) deliver a notice to the defaulting party informing the party of the intention to apply to the tax court for a final order under section 129(2) of the Act in the event that the defaulting party fails to remedy the default within 15 days of delivery of the notice; and
- (b) if the defaulting party fails to remedy the default within the prescribed period, apply, on notice to the defaulting party, to the tax court for a final order under section 129(2).

(2) The tax court may, on hearing the application—

- (a) in the absence of good cause shown by the defaulting party for the default in issue make an order under section 129(2); or
- (b) make an order compelling the defaulting party to comply with the relevant requirement within such time as the court considers appropriate and, if the defaulting party fails to abide by the court's order by the due date, make an order under section 129(2) without further notice to the defaulting party.”

(Emphasis supplied.)

The taxpayer's argument

[8] The taxpayer submits that there is a distinct difference in consequence between the failure to comply with the time period imposed for the delivery of a rule 31 statement (and similarly, a rule 32 or 33 statement) and any other failure to comply with a time period prescribed in the rules. As I understand it, the taxpayer advances three principal reasons for this submission.

[9] First, rule 52(6) is a stand alone provision dealing with the late filing of pleadings (as is the case here). It should not be confused with the more general rule 52(1), which deals with a party failing to comply with time lines under the rules generally, and expressly allows for a party to be late on account of an agreement reached to that effect with the other party. By contrast, rule 52(6) does not permit parties to agree to such an indulgence where the filing of pleadings is concerned. Rule 4(1) in any event has no application since SARS did not request a further extension before expiry of the "deadline" of 13 October 2021.

[10] Second, the plain language of rule 52(6) requires that a rule 31 statement must be accompanied by a condonation application if filed out of time in order to explain to the court why it is late, notwithstanding that a final section 129(2) order has been threatened by way of a rule 56(1)(a) notice, or that consent for late filing of the pleading has been given by the other party.

[11] Third, given that the tax court is a creature of statute, rule 52(6) must be read as requiring strict compliance, since otherwise – absent a condonation application – the 31 statement can never be properly before the court, and this will taint the entire proceedings with irregularity, particularly given that unlike civil litigation, it is SARS who is required to fire the first salvo in the form of a rule 31 statement, and not the taxpayer, for the appeal to proceed.

[12] The taxpayer also relies on IT25117 where SARS failed to deliver its rule 31 statement within the prescribed 45-day period and the applicant served a rule 56(1)(a) notice calling upon it to remedy its default. SARS then delivered its statement within the required 15-day period, but the taxpayer nonetheless applied for default judgment. It was in response to the application for default judgment that SARS applied to have it set aside as an irregular step in terms of uniform rule 30.

[13] From a reading of the judgment it appears that the taxpayer's argument in that matter was different from the one advanced before me. The taxpayer took the stance that because SARS did not invoke rule 4(2) – which is in peremptory terms, i.e. that a request for an extension must be delivered prior to expiry of “the period prescribed under these rules”, the rule 31 statement was not properly before the court. Accordingly, and understandably, the judgment focused on that issue, as is evident from the following:

“[16] Rule 4 is part and parcel of the procedure and conduct and hearing of appeals in the Tax Court...

[18] The legislation provides clear time periods for all the parties to be adhered to. The ordinary grammatical meaning of the final time limit of filing of [a] rule 31 [statement] is 45 days, in the event it is not met there is a clear provision in the form of rule 4 which provides perfect grammatical meaning as to time extension. Rule 4 is equally applicable to all the parties. Rule 56 must not be read in isolation unless the applicant being SARS is exempted from... compliance with rule 4(2)... What would be the purpose of rule 4(2)... if it is allowed to be superseded by other Rules. I do not read the law to mean that other rules are less important than others...”

[14] It also appears that, given the court's focus on rule 4(2), SARS' argument that its default was cured by compliance with the rule 56(1)(a) notice was not specifically dealt with. Accordingly it is my view that IT25117 does not assist the taxpayer (in any event, tax court judgments are not binding on other such courts and are at best of persuasive value only).

The argument for SARS

[15] SARS argues for a purposive, sensible and businesslike approach in accordance with the settled principles of interpretation in *Endumeni*. It submits that, similar to the provisions of uniform rule 26 (i.e. delivery of a notice of bar) the purpose of a rule 56(1)(a) notice is to afford a defaulting party an automatic extension of 15 days within which to remedy its default, thereby absolving that party of the necessity to apply for condonation as contemplated by rule 52(6) if it complies with the 15-day period. It is argued that an application for condonation is only required where the 45-day period in rule 31 has lapsed and the taxpayer has nonetheless failed to deliver a rule 56(1)(a) notice.

[16] SARS also correctly submits that IT25117 is distinguishable from the instant matter. SARS goes further and argues that it is also wrong, but it is not necessary, for the reasons already given, to consider this for present purposes.

[17] In addition SARS takes issue with the taxpayer's stance that it is precluded from providing consent to an extension outside the 45-day period prescribed in rule 31. On SARS' interpretation rules 52(1) and (6) should be read together, and it was therefore open to the taxpayer to provide such consent.

Discussion

[18] Having considered the parties' respective arguments I am of the view that the interpretation advanced by the taxpayer is unduly strained. I say so for the following reasons.

[19] The rules promulgated under section 103 of the TAA pertain specifically to "the procedures to lodge an objection and appeal against an assessment or decision under Chapter 9 of the Act, the procedures for alternative dispute resolution and the conduct and hearing of appeals before a Tax Board or Tax Court".

[20] Rule 4(1) explicitly states that "(e)xccept where the extension of a period prescribed under the Act or these rules is otherwise regulated in Chapter 9 of... these rules, a period may be extended by agreement..." (emphasis supplied). Both rule 52(6) and rule 56 fall into the category of those which "otherwise regulate" the extension of a prescribed period. Rule 52(6) is not, as the taxpayer argues, peremptory. On its plain wording it states no more than that a party who failed to deliver a statement as and when required under rule 31, 32 or 33 may apply to the tax court for condonation and the determination of a further period within which the statement may be delivered.

[21] To my mind, as a matter of logic, rule 52(6) applies where a party is in default, the other party has done nothing about it, and the defaulting party wishes the case to proceed. By contrast, it is where the innocent party wishes to do something about the default that rule 56 comes into play. Rule 56(1) gives the innocent party the option to deliver a rule 56(1)(a) notice informing the defaulting party of its intention to apply for a final section 129(2) order in the event that the defaulting party fails to remedy the default within 15 days. It is thus only if the defaulting party nonetheless fails to remedy the default within the 15-day period that the innocent party is entitled to apply to the tax court for a final order.

[22] Rule 56(2) supports this interpretation. This rule makes clear that it is only when the tax court hears the application for a final order that it must consider whether or not condonation should be granted. Put differently, if the defaulting party remedies the default within the 15-day period referred to in rule 56(1)(a), then the statement in question is properly before the tax court and there is nothing for it to consider. It is only where the defaulting party nonetheless remains in default and the innocent party applies for a final order that the tax court will be in a position to consider whether or not the defaulting party has made out a proper case for condonation.

[23] Accepting the taxpayer's interpretation renders rule 56(1)(a) superfluous. It also means that the defaulting party would be obliged to deliver an application for condonation merely to satisfy the innocent party, and not the tax court. I do not believe that this could have been the intention of the rule maker, particularly given that condonation is a matter for the court, and not a party, to decide. I thus agree with SARS' interpretation, albeit not for all the same reasons. It thus follows that the taxpayer's rule 30 application falls to be dismissed.

[24] As far as costs are concerned each party initially sought punitive costs against the other. While the taxpayer persisted in this stance, SARS was willing to accept a costs order on the ordinary scale. Although I have found the interpretation advanced by the taxpayer is wrong, by the same token I cannot find that it acted *male fides* and the same applies to SARS. It also seems to me that this application is one of those where it would be appropriate to order that costs follow the result of the appeal should the court seized with the appeal deem it fit to grant a costs order.

[25] For the sake of clarity, it is my view that SARS' compliance with the taxpayer's rule 56(1)(a) notice had the effect that its rule 31 statement is properly before the court. However the effect of the order that follows is that the 45-day period prescribed in rule 32(1) for the taxpayer to deliver its statement of grounds of appeal will only commence upon the registrar of the tax court formally notifying the parties of this order in accordance with section 131 of the TAA (notwithstanding the earlier delivery of this judgment).

[26] The following order is made:

1. The application in terms of rule 30 of the uniform rules of court is dismissed; and
2. The costs of this application shall be costs in the cause of the appeal.

J I CLOETE

Court: Justice J I Cloete

Heard: 6 March 2023

Delivered electronically: 23 March 2023

For the applicant: Dr A J Marais and Adv P S Bothma
Instructed by: Ashman Attorneys Inc

For the respondent: Adv C Naudé and Adv A Craucamp
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