IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: A322/2019

In the matter between:

CANDICE-JEAN VAN DER MERWE **Appellant**

and

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

JUDGMENT DELIVERED ON: 30 OCTOBER 2020

MANTAME; J

[1] I have had an opportunity to consider my colleague, Cloete J's judgment, and I find myself in respectful disagreement with her findings to the effect that the interlocutory applications relating to the appellant's applications for condonation and striking out are not appealable. For this reason, this judgment does not delve into the merits but is limited to the interlocutory applications which are, in the light of the view that I take dispositive of the appeal.

[2] The factual matrix underpinning the appeal is set out in my colleague's judgment, for the purpose of this judgment, I allude only to those germane to the determination of the interlocutory applications.

[3] The appellant challenged her income tax assessment issued by the South African Revenue Service ("SARS") on 17 February 2016 at the Tax Court. Due to the fact that the appellant had thirty (30) days or three (3) years to commence the objection or appeal process with SARS, if granted an extension by a senior SARS official, she had until 16 February 2019 to do so. The appellant contended that until she received the assessment, she was unable to follow the objection and/or appeal process. In order to resolve this uncertainty, the appellant commenced with an e-filing registration process and was successful on 3 September 2018. That was then that she was able to access her on-line profile and she downloaded her assessment.

[4] On 10 September 2018, the appellant after she applied for, and was granted an extension of time, lodged her objection with SARS. SARS failed to respond to the objection and the appellant instituted the appeal proceedings with the Tax Court.

The Tax Court Proceedings

[5] Pursuant to the appellant's instituting her appeal proceedings at the Tax Court, SARS failed to file a statement of its case. The appellant proceeded with default judgment proceedings on 6 June 2019. In response to the application for default judgment, SARS withdrew its earlier decision to extend the period for filing the objection. In withdrawing the extension period for filing the objection, SARS stated that that process rendered the appellant's appeal process meaningless and placed the appeal outside the jurisdiction of the Tax Court. SARS was of the view that the assessment in any event emanated from a settlement agreement that it concluded with the appellant and approved in a letter dated 18 February 2016. In such a situation, it was neither appealable nor objectionable.

[6] On 19 July 2019, SARS filed its opposing affidavit on several grounds, *inter alia,* that: (i) the application is an abuse of process; (ii) the additional assessment raised by SARS concerning the 2014 year of assessment ("the 2014 assessment") was an agreed assessment and is not subject to objection and appeal; (iii) the appellant did not make any attempt to file an objection for more than 30 months after the granting of the 2014 assessment; (iv) the appellant only attempted to file an objection in September 2018 and attempted to apply for condonation for the late filing thereof; (v) the appellants application for condonation was declined for a number of reasons, including the fact that she failed to make disclosure of the fact that the 2014 assessment was an agreed assessment with no right to object and that no exceptional circumstances existed; (vi) the appellant's request for condonation for the late filing of an objection against the 2014 assessment was not granted and therefore, there is no valid objection; (vii) the appellant was advised that the notice of appeal is invalid; (viii) there is no pending appeal against the additional assessment raised by SARS concerning the appellant regarding the 2014 assessment; (ix) there is no obligation on SARS to file a

statement of grounds of assessment and opposing appeal in terms of rule 31 of the rules promulgated in terms of section 103 of the Tax Administration Act 28 of 2011 ("the TAA").

[7] The matter was heard by the Tax Court on 30 August 2019 and a judgment dismissing the applicant's application for default judgment was delivered on 11 September 2019. The Tax Court accepted that appellant's application for default judgment was filed on 6 June 2019. In terms of the Tax Court Rules, SARS was supposed to deliver its answering affidavit by 12 July 2019. SARS delivered its affidavit on 19 July 2020, i.e. five business days later, after seeking an extension from the appellant which the latter refused. However, the correspondence that was handed up to court by agreement between the parties confirmed that the appellant did not object to SARS opposition, but such opposition should have been filed by 12 July 2020. After hearing Counsel's submissions from the bar, the Tax Court found that there was no undue delay on the part of SARS and the modest delay had not caused the appellant any material prejudice. The appellant objected to the matter being heard without SARS applying for condonation of the late filing of its opposing affidavit and in so doing relied in the principles governing condonation as restated in the judgment of Cloete J, in *S Company v Commission for the South African Revenue Service* [2017] ZATC 2. The Tax Court held that the facts in the S Company judgment were wholly distinguishable, in the sense that therein, SARS had failed for more than 6 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. According to the judgment, in *casu,* when the taxpayer applied for default judgment, SARS filed its opposing affidavit more than two weeks later, and only five business days before the hearing of the application for default judgment. The Tax Court therefore found that to the extent that opposing papers were filed out of time, the late filing was therefore condoned.

[8] With regard to the striking out application, the appellant contended that the Tax Court refused to hear it. It merely advised the parties to proceed to argue the matter as if all the affidavits were permitted and properly before court. Consequent to this error, the Tax Court had regard to the hearsay evidence that was unsupported by affidavits that was tendered by SARS in its answering affidavit. That resulted in great prejudice to the appellant. The portions of the answering affidavit are inadmissible insofar as the Tax Court relied on for the determination of issues in the default judgment application. In essence, the Tax Court should have granted the striking out order and further disregard the portions that were supposed to have been struck out. Notwithstanding, on consideration of the judgment, it does not appear that it was entertained at all.

[9] In dismissing the appellant's appeal, the Tax Court found that the withdrawal of condonation for the late filing of the objection and the resultant non-compliance with the time period for lodging the objection was not the only issue on which SARS treated the objection as invalid. In addition, the assessment was not the one against which the applicant was entitled to object. If the appellant disputed the grounds on which SARS treated her objection as invalid, she was supposed to resolve the disputed invalidity of her objection by way of proceedings at the tax court in terms of rule 52(2)(*b*) and apply for an order that the objection is valid.

[10] The Tax Court further ruled that in order to obtain default judgment, the appellant must show that SARS was in default of an obligation to file rule 31 statement. In this instance, it was found that the right to pursue an appeal turns on whether the appellant filed a valid objection. In a situation where SARS withdrew its condonation to file an objection, that means there is no valid objection as it was filed out of time. In addition, the effect of the agreement of February 2016 is that the appellant was not entitled to object to the assessment.

[11] The appellant on her grounds of appeal states that it was not competent for the Tax Court to dismiss her application for default judgment, and consider SARS's answering affidavit which was filed outside of the prescribed time period without an application for condonation as the Tax Court is a creature of statute. Put differently, it was not competent for the Tax Court to proceed to hear and determine the default judgment application without SARS applying for condonation. According to the appellant it was remiss to grant condonation without it being sought by SARS.

[12] In addition, the Tax Court failed to deal with the appellant's application to strike out despite the appellant's protestations that it should be dealt with prior to the application for default judgment. For those reasons the Tax Court erred in its findings that the late affidavits should be allowed, without them being placed properly before it.

Before this Court

[13] The appeal from the decision of the Tax Court was heard before this Court on 30 July 2020. The appellant was, (as was the case before the Tax Court), represented by her father, Mr Gary Walter van der Merwe ("Mr Van der Merwe"), who is not a lawyer but has extensive litigation experience. Mr Van der Merwe was granted leave to represent the appellant.

[14] It was contended on behalf of the appellant that, *firstly*, SARS lacked *locus standi* to oppose the appellant's default judgment application since it failed (a) to comply with the statutory obligation to file its opposing papers timeously; and (b) to seek condonation for such failure. In the circumstances, so went the argument, the Tax Court summarily granted condonation without a formal application by SARS on reasonable grounds that showed good cause as required by the Tax Court Rules as to why it should be granted such condonation. According to the appellant, the Tax Court has no inherent power to condone such failure due to its status as a creature of statute. A formal application for condonation was warranted. In the absence thereof, the application for default judgment was supposed to have been heard on an unopposed basis. *Secondly*, with regard to the striking out application, the appellant alleges that certain paragraphs of SARS's answering affidavit constituted unmitigated hearsay evidence and that no confirmatory affidavits were filed by Gordon Hay, Angelique Herremans or Rael Gootkins. In addition, no confimatory affidavits were filed by SARS officials Elsie Modise, Anton Strydom, Lorna de Clercq, Fareed Khan, Poppy Masanabo, Shane Warries, Carol Nkumanda, Sarita Lubbe and Lorraine van Esch, notwithstanding the fact that SARS relied on information supplied by them. Furthermore, some of the paragraphs contained confidential tax payer's information supplied to SARS without prejudice to the appellant and was meant for discussion purposes. The appellant asserted that this was a glaring irregularity.

[15] SARS submitted that the failure by the Tax Court to entertain the interlocutory applications aforementioned or the rulings made with regard thereto is inconsequential as the rulings or orders made pursuant thereto are not appealable, and ought not to be considered as part of this appeal. SARS submitted that section 133(1) of the TAA regulates the right to appeal from a decision of the Tax Court and reads as follows:

> "(1) The taxpayer or SARS may in the manner provided for in this Act appeal against a decision of the tax court under sections 129 and 130."

[16] SARS contended that both the late filing of its answering affidavit and the appellant's striking out application are interlocutory matters as referred to in section 117(3) of the TAA. Furthermore, the ruling by the Tax Court to allow respondent's answering affidavit and the failure by the Tax Court to grant appellant's striking out application are not orders in terms of section 129 of TAA. In the circumstances, the rulings referred to by the appellant are not appealable.

Issues for determination

[17] As can be discerned from the aforegoing the issues for determination may be summarised as follows:

(a) Whether the rulings or orders made by the Tax Court in respect of the application for condonation and the striking out are appealable.

(b) Whether the granting of the condonation to SARS was, on the facts justified.

(c) Whether the failure to have the striking out application properly ventilated vitiated the proceedings.

[18] I now turn to consider each of these issues.

Are the interlocutory orders appealable?

[19] The Tax Court is a creature of the Tax Administration Act, thus its powers, scope, jurisdiction and issues of right of appeal against its decisions is defined by the same TAA. Section 117(3) that deals with the **jurisdiction of the Tax Court** and read as follows:

> "(3) The court may hear and decide an interlocutory application or an application in a procedural matter relating to a dispute under this Chapter as provided for in the 'rules'."

It is trite that the general rule is that an interim order is not appealable unless it is such as to "dispose of any issue or any portion of the issue in the main action or suit" or it "irreparably anticipates or precludes some of the relief which would or might be given at the hearing". *(*See *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A) at 870). The jurisprudence emanating from both the Supreme Court of Appeal and the Constitutional Court demonstrates that the overriding factor when considering whether an interim order is appealable appears to be that interim orders are appealable if the interests of justice are best served in allowing the appeal. For example, in *Philani-Ma-Africa and Others v Mailula and Others* 2010 (2) SA 573 (SCA)*,* the court held that the interests of justice were paramount in deciding whether interim orders were appealable, with each case being considered in light of its own facts. Similarly, in *City of Tshwane Metropolitan Municipality v Afriforum* 2016 (6) SA 279 (CC) at para [40] Mogoeng CJ stated that 'the common-law test for appeallability has since been denuded of its somewhat inflexible nature. Unsurprisingly so because the common law is not on par with but subservient to the supreme law that prescribes the interests of justice as the only requirement to be met for the grant of leave to appeal'.

The court further stated:

> "Unlike before [referring to Zweni (supra)] appeallability no longer depends largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application. All this is now subsumed under the constitutional interests of justice standard. The overarching role of interests of justice has relativized the final effect of the order or the disposition of the substantial portion of what is pending before the review court, in determining appeallability."

[20] Both during argument, and in the heads of argument SARS heavily relied on *Martin Fraser Wingate-Pearse v Commissioner, SARS* 2017 (1) SA 542 (SCA) for the submission that the interlocutory orders in question are not appealable. SARS's reliance on *Wingate-Pearce* is, in my view, misplaced because in the matter at hand, at no stage did the appellant seek to appeal an interlocutory order in that no such order was issued. The orders were instead issued when the final judgment was delivered. Besides, the facts in *Wingate-Pearce*, are clearly distinguishable from the facts in *casu*. In Wingate-Pearce the Tax Court permitted argument to proceed on a point in *limine* on the question on onus and burden of proof and later delivered its judgment on the limited issues, no order or ruling was made on the merits. The Court then granted leave to appeal against the aforesaid interlocutory orders to the Supreme Court of Appeal. Thus, after examining the enabling legislation the Court held that the interlocutory orders were not appealable but the right of appeal against them must then arise after the Tax Court had pronounced on the merits. Unlike Wingate-Pearce, in the present appeal, the orders pertaining to the interlocutory applications were given in the process of the final judgment.

[21] Even if I may be wrong on this score, the question whether an interlocutory order is appealable must be answered by having regard to the interests of justice. I am of the firm view that it would be a travesty of justice if the correctness of the interlocutory orders, which form part of the final judgment was precluded from being considered on the appeal and after the merits have been decided as contended by SARS. This view is bolstered by the fact that Rule 49(4) of the Uniform Rules of Court no longer requires an appellant to provide the detailed grounds of appeal in its notice of appeal. In other words, even if the appellant had not raised the issue of the interlocutory orders, it would still be open to this court to consider and determine the procedural aspects of the manner in which the preliminary points were dealt with. In my view, that goes to the heart of the interests of justice.

Was the granting of condonation to SARS justified?

[22] The circumstances under which the condonation occurred are uncontroverted and may be summarised thus:

22.1 SARS sought an agreement with the appellant, as contemplated in the Tax Court Rules, to extend the period allowed for filing of the notice of opposition and opposing papers;

22.2 the appellant did not agree to the extension of time for the filing of the opposing papers sought by SARS, but agreed that the opposing papers must be filed not later than 12 July 2019;

22.3 After SARS had become aware of its default it undertook in correspondence to file a condonation application but failed to do so. In fact, SARS requested condonation from the bar but was nonetheless granted condonation;

22.4 Consequently, SARS did not show the requisite good cause for condonation, specifically in failing to tender evidence on affidavit about the reasons for its non-compliance and/or advancing submissions about the legal principles involved.

[23] In considering whether condonation was rightly granted it is well to remind oneself of the jurisdictional facts that must be met, namely, that for the exercise of a court's discretion to grant condonation, good cause and a reasonable and acceptable explanation for the default must be present. Stated differently, there must be an explanation for the delay which took place after SARS had learnt of the appellant's refusal to agree to an extension of time. This is so because the proper context for the granting of the condonation is premised on the explanation proffered by SARS. Absent such an explanation, there is no basis for the court to exercise its discretion in favour of a litigant who did not deem it fit to do the bare minimum to convince the court to grant it an indulgence. In my view, it matters not that SARS's default was calculated as five business days, the fact of the matter is that there must be a basis for the court to exercise its discretion. My view is fortified by what was said by Hefer JA in *Uitenhage Transitional Local Council v SA Revenue Services* [2004] (1) SA 292 (SCA) at 297 I-J, Hefer JA to the following effect:

> "One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out."

[24] That said, the law is that the condonation must be applied for as soon as the party concerned realises that it is required. Therefore, the Commissioner, having realised that he had not complied with the rules of court with regard to filing of the answering affidavit, ought to have applied for condonation without delay. In *Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (A), at 449 G-H), the court refused to grant an order to condone the failure by the appellant, (Commissioner) to lodge within the period prescribed by Rules of Court 6(5) the record of an appeal which had been noted where there was no allegation that the appellant and his officials were unaware of the Rule which required records to be lodged within three months after judgment, nor was a satisfactory explanation given of 'a misunderstanding' between the appellant and his attorney, nor was an explanation of the long delay which had

taken place after the appellant had received a letter from the respondent's attorney refusing to agree to an extension of time. In other words, there was no sufficient cause to grant the indulgence. The court refused the condonation application made by the appellant from the bar.

[25] For all these reasons, I therefore hold that in *casu,* there was no basis for exercising the discretion in favour of granting SARS condonation without it explaining its default.

[26] I proceed to consider the striking out application.

The striking out application

[27] It will be recalled that the appellant lamented the fact that the Tax Court failed to entertain the striking out application. She contends that the failure on the part of the Tax Court to adjudicate on the striking out proceedings caused her to suffer prejudice. It is indeed so that the key consideration in striking out proceedings is that of prejudice. (See *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T).)

[28] On consideration of this appeal, it appears that before determining whether the Tax Court was justified in arriving at its conclusion on the merits, this court should examine whether the proceedings were conducted in a fair, transparent and in the interests of justice, so as not to jeopardize and or prejudice the appellant. In my judgment, the application for the striking out ought to have been fully ventilated. In this instance, there is no indication that the striking out application was heard at all notwithstanding the fact that the decision on the merits entailed having regard to the very affidavits assailed in the striking out application. The inevitable result is that the interests of justice, fairness, and transparency were compromised. This is so regardless of the fact that the dismissal of the striking out application was, or might have been justified, on the merits.

[29] It then follows that the irregularity that was committed by the Tax Court vitiated the proceedings in their entirety. To simply, conclude that an interlocutory application is not appealable, without considering the process that was undertaken to arrive at such a decision, is in my view, somewhat superficial.

[30] In my view, the dismissal of an application for default judgment based on the evidence from an answering affidavit that was not properly placed before Court, and an application to strike out that was not heard by the Tax Court potentially prejudiced the appellant, to the extent that due process or procedure was disregarded. It then follows that final judgment was not arrived at in a fair, transparent and just manner.

Conclusion

[31] I have in this judgment held that in this matter, the jurisdictional facts for the granting of condonation to SARS were not met and condonation should not have been granted to SARS without same being sought. Likewise, I have held that the failure on the part of the Tax Court to consider and determine the striking out application prejudiced the appellant. It follows that the appellant's appeal must succeed.

Order

[32] In the result, I would uphold the appeal and issue the following order.

32.1 The appeal succeeds;

32.2 The respondent is ordered to pay costs.

MANTAME; J

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I agree and it is so ordered.

NDITA; J

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IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: A322/2019
Tax Court Case no: 35/2019

In the matter between:

CANDICE VAN DER MERWE Appellant

v

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

Coram: Justice T C Ndita, Justice J I Cloete *et* Justice B P Mantame
Heard: 30 July 2020; supplementary notes delivered on 3 and 7 August 2020

DISSENTING JUDGMENT DATED 30 OCTOBER 2020

CLOETE J:

Introduction

[1] This is an appeal in terms of s 133(1) of the Tax Administration Act ("TAA")[1] against the decision of the Tax Court handed down on 11 September 2019 dismissing the appellant's application for default judgment against the respondent with costs on the attorney and client scale.

[1] Act 28 of 2011.

[2] The grounds of appeal are that the Tax Court erred in:

2.1 Condoning the late filing of the respondent's answering affidavit and having regard to its contents in deciding the matter in the absence of any agreement or application for condonation;

2.2 Declining to hear argument by the appellant in relation to the striking out of portions of the answering affidavit containing inadmissible hearsay evidence and having regard thereto;

2.3 Accepting the respondent's substantive assertion, which underlay its primary procedural contention, that the appellant sought to object against an agreed assessment in terms of s 95(3) of the TAA, which assessment was not susceptible to objection and appeal;

2.4 Finding, by virtue of the provisions of s 9 of the TAA, that the respondent was entitled to withdraw its condonation of the late lodging of the appellant's objection against the assessment concerned;

2.5 Finding that the appellant's remedy, if she disputed the grounds upon which the respondent treated her objection as invalid, was to have the tax court resolve this by way of the procedure prescribed in rule 52(2)(*b*) of the tax court rules;[2]

2.6 Rejecting the appellant's contention that the respondent's notice of 25 February 2019, although styled a notice of invalid objection, was in truth a notice of disallowance of the objection; and

2.7 The punitive costs order.

[3] The grounds set out in paragraphs 2.5 and 2.6 above were not contained in the notice of appeal but were fully canvassed in argument. The parties were thus requested to provide supplementary notes on whether, given the provisions of s 134(2)(*b*) of the TAA, these grounds could properly be entertained on appeal. Supplementary notes were duly provided.

[4] The parties were *ad idem* that these grounds could be entertained, briefly for the following reasons. Although s 134(2)(*b*) of the TAA stipulates, as a mandatory requirement, that a notice of appeal must state 'the grounds of the intended appeal, indicating the findings of fact and rulings of law to be appealed against', s 138(4) thereof prescribes that a notice of appeal 'must be in accordance with the requirements in the rules of the relevant higher court'.

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2 The rules promulgated in terms of s 103 of the Tax Administration Act.

[5] Prior to its amendment by GN R472 of 12 July 2017, rule 49(4) of the uniform rules of court basically followed the wording in s 134(2)(*b*) of the TAA. However it now reads as follows:

> 'Every notice of appeal and cross-appeal shall state –
>
> (a) what part of the judgment or order is appealed against; and
>
> (b) the particular respect in which the variation of the judgment or order is sought.'

[6] Uniform rule 49(4) currently mirrors the wording of rule 7(3)(*a*) and (*b*) of the Supreme Court of Appeal rules. In *Leeuw v First National Bank Limited*[3] the Supreme Court of Appeal found as follows:[4]

> 'In this court it is not required that grounds of appeal be stated in the notice of appeal. The nature of the proceedings is such that this court is entitled to make findings in relation to "any matter flowing fairly from the record". The parties in their written and oral arguments have dealt with all the issues relevant to the appeal and the appellant has not pointed to anything that has been overlooked…'

[7] Accordingly uniform rule 49(4) no longer requires an appellant to provide detailed grounds in her notice of appeal. In any event, it is evident from the notice of appeal that the appellant appeals against *'the whole of the decision'* of the Tax Court, and counsel for the respondent submitted during the hearing that, for the sake of finality, this court should proceed to deal with the merits of these grounds as well.

The appellant's case on the founding papers before the Tax Court

[8] In her notice of motion the appellant sought the following:

8.1 Default judgment in terms of rule 56 of the tax court rules read with s 129(2) of the TAA;

8.2 That the respondent be ordered to alter to nil her additional assessment raised on 17 February 2016[5] in respect of the 2014 tax period;

8.3 That the respondent be ordered to refund her the sum of R44 177 895.20 plus interest paid *'on the basis of the pay now argue later rule'* in respect of that additional assessment on 10 March 2016; and

8.4 Attorney and own client costs.

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3 2010 (3) SA 410 (SCA).

4 At para [5].

5 The reference to *'*2017*'* is a patent error.

[9] The founding affidavit (unsupported by any affidavit from the appellant herself) was deposed to by Mr Gary Van der Merwe, her father, who has represented her throughout, in terms of a special power of attorney executed by her on 28 February 2019 in relation to her tax affairs for the tax periods 2014 to 2020. For convenience I will refer to him as 'Van der Merwe'.

[10] In essence Van der Merwe claimed that the sum paid to the respondent pursuant to the additional assessment was 'without prejudice of her rights to object to the assessment after payment, and followed after consultation with me and on my advice, which was based on my understanding of the so-called "pay now argue later" rule'. Van der Merwe did not suggest that his *'understanding'* and *'advice'* were ever conveyed to the respondent or that any agreement to this effect was reached with the respondent at any time prior to or after payment being made. On his own version, therefore, the basis on which payment was purportedly made was nothing other than a unilateral, unexpressed intention.

[11] The final paragraph of the additional assessment provides that if the appellant was aggrieved by the assessment she could lodge a notice of objection within 30 days, and that:

> 'NOTE: Your obligation to pay any amount due is not suspended by any objection or appeal. However, SARS will consider a motivated application for the suspension of payment pending the finalisation of an objection or appeal as stipulated in the Tax Administration Act.'[6]

[12] Van der Merwe also claimed that it was only after the appellant's e-Filing registration, over 2 ½ years later on 3 September 2018, that for the first time she 'received and considered' a copy of the additional assessment, when it was accessed and printed from her e-Filing profile. This, he maintained, was the sole reason why a notice of objection was not lodged timeously, and the notice itself contained a request for condonation of late filing.

[13] The objection recorded in the notice reads as follows:

> 'Please note that additional assessment Tax has been assessed and raised in the amount of R44 135 638 to non-taxable income, the amount of additional assessment Tax has been paid on the basis of the pay now argue later rule…'

[14] It appears that the notice of objection was submitted to the respondent on about 10 September 2018. On 21 September 2018 the respondent wrote to the appellant informing her that 'the late submission has been allowed and your dispute, case number 291082230, will now be processed'.

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6 Record, p143.

[15] This, according to Van der Merwe, meant that the notice of objection was 'accepted, validated' and had to be dealt with by the respondent within 60 court days as prescribed in the TAA.

[16] The respondent did not respond within 60 court days. On 20 February 2019 the appellant delivered a notice in terms of tax court rule 56, placing the respondent on notice to remedy its "default" within 15 days, failing which she would apply for default judgment.

[17] On 25 February 2019 the respondent delivered a notice of invalid objection[7] in which it informed the appellant that, since the additional assessment raised was an agreed assessment in terms of s 95(3) of the TAA, it was not subject to objection or appeal.

[18] As a matter of logic the content of the notice of invalid objection was a direct response to the appellant's assertion, communicated to the respondent (on Van der Merwe's version) for the first time in her notice of objection, that she had paid the amount raised under the additional assessment on a 'pay now argue later' basis.

[19] Undeterred, the appellant proceeded to lodge a notice of appeal with the respondent on 5 March 2019. The standard form notice of appeal, which is a pro forma document generated by the respondent, informs the taxpayer concerned under the heading 'Grounds of appeal' to indicate 'which of the grounds specified in your objection you are still relying on'. After making the serious allegation of fraud on the part of the respondent, the appellant repeated the substance of her notice of objection which the respondent had already declared invalid.

[20] Van der Merwe, having seemingly decided that the filing of a notice of appeal was the correct approach, relied on tax court rule 31(1) which stipulates that the respondent must deliver to an appellant a statement of grounds of assessment and opposing the appeal within 45 days of delivery of a notice of appeal.

[21] The respondent failed to do so and on 15 May 2019 the appellant delivered her application for default judgment in terms of tax court rule 56, affording the respondent the required 15-day period in which to remedy its default. The respondent failed to do so and on 6 June 2019 the appellant launched her application for default judgment together with the additional relief to which I have already referred. The respondent delivered a notice of opposition on 1 July 2019.

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7 Record, p160.

[22] On 15 July 2019 the appellant enrolled the default judgment application due to the respondent's failure to deliver its answering affidavit within the 15-day period prescribed in tax court rule 60(*c*).

Whether the appellant was entitled to default judgment on her own case

[23] Given the appellant's grounds of appeal in relation to condonation and the like, it is convenient to first consider whether, had the respondent not delivered an answering affidavit (which it did on about 19 July 2019) she would have been entitled to default judgment on the averments made by Van der Merwe.

[24] Tax court rule 7(2) sets out the procedure which a taxpayer must follow when lodging an objection. It appears to be common cause that the appellant complied with the sub-rule. In turn, rule 7(4) provides that where a taxpayer delivers an objection that is non-compliant, the respondent may regard it as invalid, must notify the taxpayer accordingly and state the ground for invalidity. In terms of rule 7(5) the taxpayer is granted the opportunity to submit a new objection within 20 days. Rule 52(2)(*b*) stipulates that a taxpayer or appellant may apply to a tax court, if an objection is treated as invalid under rule 7, for an order that the objection is valid.

[25] Underpinning rule 7 is sub-rule (1) which makes clear that the rule applies only to a taxpayer 'who may object to an assessment under section 104' of the TAA. Section 104(1) states that a taxpayer who is aggrieved by an assessment may object, and s 104(2) lists the decisions that may be objected to and appealed against in the same manner as an assessment. The only such decision relevant for present purposes is s 104(2)(*c*) which is 'any other decision that may be objected to or appealed against under a tax Act'.

[26] The respondent's notice of invalid objection expressly stated that, in its view, the objection was invalid because the additional assessment raised was an agreed one in terms of s 95(3) of the TAA, which provides that:

> '(3) 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.'

[27] The question then is whether the appellant adopted the correct procedure by instead lodging a notice of appeal. For purposes of answering this question it is not necessary to determine whether the respondent was correct in its reliance on s 95(3) since that is an issue of substance, not procedure. Having regard to the established principles of interpretation[8] it is

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8 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

my view that she did not, something which the Tax Court would in any event have been bound to consider even if the default judgment application was unopposed.

[28] In the recent decision of *Signature Real Estate (Pty) Ltd v Charles Edwards Properties and Others*[9] the Supreme Court of Appeal, dealing with a particular section of the Estate Agency Affairs Act 112 of 1976, held as follows:

> '[17] The provisions of s 34A are clearly peremptory. But even peremptory provisions must yield to two interpretive imperatives. First, the injunction of s 39(2) of the Constitution, which enjoins courts, when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights. ... Therefore, an application of the section that promotes, rather than impedes, the exercise of that right, is to be preferred. Second, due regard must be had to the purpose of the statute, more specifically, whether adopting a strict or literal interpretation of its provisions is consistent with what the Act seeks to achieve.'

[my emphasis]

[29] One of the main objects of the TAA is to provide for the effective and efficient collection of tax. Another is to align the administrative provisions of tax Acts and consolidate those provisions into one piece of legislation to the extent practically possible. The TAA, supplemented by the tax court rules, gives the regulatory framework to achieve *inter alia* these objectives. This is supported by s 2 of the TAA which sets out its purpose.

[30] Accordingly, interpretation of the relevant sections of the TAA and tax court rules requires a court to have due regard to their objects and purpose. The required interpretive exercise would be defeated by adopting an overly strict, technical approach, which is the one for which the appellant contends.

[31] Her argument is as follows. In its heads of argument filed for purposes of the appeal the respondent accepted that, in terms of tax court rule 9, it was obliged to deal with the objection within 60 court days.

[32] This, she submits, is consistent with her assertion that the respondent dealt with the notice of objection by engaging with the merits of its stated position towards her challenge. No issues were raised about any defect pertaining to the form of the objection or the information (or lack thereof) contained therein, nor the procedure followed in lodging it. Instead the response pertained squarely to the nature of the underlying assessment challenged by the appellant and its legal effect.

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9 (415/2019) [2020] ZASCA 63 (10 June 2020).

[33] She accordingly contends that in substance, if not 'exactly' in form, the notice constitutes a disallowance of the objection on its merits as contemplated in rule 9(1) read with ss 106(1) to 106(5) of the TAA. She submits that the consequence was that s 107 (read with rule 10) was activated, which opened the door for the appellant to proceed with her tax appeal.

[34] The appellant overlooks that the starting point of s 106 of the TAA is its application only to a *valid objection* in terms of s 106(1). The provisions of s 107 (dealing with an appeal against assessment or decision) are only triggered after delivery of a notice of decision referred to in s 106, in particular s 106(4).

[35] She also overlooks that the respondent's submission in its heads of argument is irrelevant for purposes of assessing the appellant's case on an unopposed basis. She herself did not specifically rely on rule 9 in her founding affidavit. All that she stated in paragraph 7.13 was that the objection had to be dealt with by the respondent 'within the mandatory period of 60 court days as prescribed in the TA Act'. Neither the tax court, nor this court, are bound by the respective parties' interpretations of a matter of law or procedure.

[36] More fundamentally however the reason given by the respondent in the notice of invalid objection was that the invalidity lay in an attempt to object against an agreed assessment. The respondent's position was therefore that the foundation of the objection was not 'any other decision that may be objected to… under a tax Act' as contemplated in s 104(2)(*c*).

[37] On a strict, literal interpretation of the relevant statutory provisions and rules, this gives rise to a *lacuna.* What is a taxpayer to do when confronted with a notice of invalid objection of this nature? To my mind the answer is to be found in the reasoning and conclusion of the Tax Court at paragraphs [49] to [51] of its judgment:

> '[49] 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*).
>
> [50] 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).
>
> [51] 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.'

[38] The above interpretation aligns itself with the approach set out in *Signature Real Estate*. It promotes the TAA's objects of the effective and efficient collection of tax and results in cohesion of the TAA's administrative provisions and the tax court rules. Moreover, it potentially avoids both the taxpayer and the fiscus from having to embark on costly litigation, and puts paid to any dispute about fulfilment of a jurisdictional prerequisite for the lodging of a notice of appeal. Finally, it does not in any way restrict an appellant's right in terms of s 34 of the Constitution to have her dispute resolved in a fair public hearing.

[39] My conclusion is accordingly that the appellant adopted the wrong procedure in pursuing an appeal process instead of making application to a tax court in terms of rule 52(2)(*b*). The Tax Court would therefore have been entitled, even on an unopposed basis, to refuse default judgment. However, if I am wrong, it is necessary to deal with the remaining grounds of appeal.

Condonation and striking out

[40] It is clear from the Tax Court's judgment that its "condonation" for the late filing of the answering affidavit rested on two grounds. The first was that compliance with the time limits prescribed in the tax court rules presupposes that the application in issue is one which may permissibly be brought in terms thereof. If not, the application is irregular and the time limits do not strictly apply. The second was what the Tax Court referred to as a modest delay of 5 business/court days.[10] The appellant has only focussed on the second in this appeal.

[10] Paras [35] and [36] of the judgment.

[41] Section 133(1) of the TAA regulates the right to appeal from a decision of a tax court and reads as follows:

> '(1) The taxpayer or SARS may in the manner provided for in this Act appeal against a decision of the tax court under sections 129 and 130.'

[my emphasis]

[42] Section 130 of the TAA deals with orders for costs and therefore has no application in the instant matter. Section 129 deals with decisions by a tax court. It contains no reference to a ruling or decision in relation to an interlocutory matter.

[43] Condonation for the "late" filing of the respondent's answering affidavit and the appellant's striking out application are both interlocutory matters referred to in s 117(3) of the TAA:

> '(3) The [tax] court may hear and decide an interlocutory application or an application in a procedural matter relating to a dispute under this Chapter as provided for in the "rules".'

[44] In *Wingate-Pearse v Commissioner, South African Revenue Service*[11] the Supreme Court of Appeal considered the appealability of interlocutory orders made by the tax court on onus and the duty to begin. Its reasoning is set out at paragraphs [5] to [16] and it concluded that they are not appealable in terms of the TAA. At paragraph [6] the Court stated:

> 'The tax court is constituted in terms of the Administration Act [i.e. the TAA]. As such, the scope of its jurisdiction, its powers and the ambit of any right of appeal from its decisions are defined in the Administration Act. It is therefore to its provisions that we must look to determine whether the tax court's ruling on the onus and the duty to begin to lead evidence was appealable, and not to the statutory provisions that ordinarily govern appeals to this court. That is clear from the provisions of s 2(3) of the Superior Courts Act 10 of 2013.' [12]

[45] And at paragraph [16]:

> '…In any event it would not have been appealable if the conventional criteria for identifying decisions that are subject to an appeal were applied. The reason is that such decisions must be final decisions incapable of being altered during the course of the proceedings. If the judge may alter a decision, it lacks the necessary requirement of finality and cannot dispose of any issue in the case…'

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11 2017 (1) SA 542 (SCA).

12 Section 2(3) reads as follows:

> 'The provisions of this Act relating to Superior Courts other than the Constitutional Court, the Supreme Court of Appeal or the High Court of South Africa, are complementary to any specific legislation pertaining to such Courts, but in the event of a conflict between this Act and such legislation, such legislation must prevail.'

[46] On my understanding of *Wingate-Pearse* the fact that the Tax Court did not ultimately alter its interlocutory rulings does not change their character; and the appellant's reliance on *S Company v Commissioner for the South African Revenue Service*[13] is misplaced. In that matter the court sat as a tax court, not as a court of appeal in terms of s 133(1) of the TAA.

Acceptance by the Tax Court of the respondent's substantive assertion that the appellant sought to object against an agreed assessment in terms of s 95(3) of the TAA

[47] The facts that emerged in the respondent's answering affidavit, summarised at paragraphs [5] to [14] of the Tax Court's judgment, demonstrate the startling degree to which the appellant failed to disclose the events preceding the issue by the respondent of the additional assessment. Indeed, the extent of the material non-disclosure can only lead to one reasonable conclusion, namely that the appellant approached the tax court for default judgment in the utmost bad faith. For convenience, and given that the Tax Court's judgment is not reported, these paragraphs are set out hereunder:

> '[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 D P & A Incorporated Attorneys ('DPA') and then by Werksmans Inc ("Werksmans"). In a letter dated 21 July 2015 SARS informed DPA that it could not consider an offer that did not comply with settlement provisions of Part F of Chapter 9 of the Act (ss 142-150).
>
> [8] On 7 December 2015 MacRobert Inc ("MRI"), 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.

[13] (IT0122/2017) [2017] ZATC 2 (17 October 2017).

[9] On 18 December 2015 Werksmans sent a settlement proposal to MRI, 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 Werksmans to MRI.

[10] On 18 February 2016 MRI wrote to Werksmans stating that SARS had approved the settlement proposal. SARS had thus issued an agreed assessment in terms of s 95(3) of the Act. The amount payable was R44 175 675. MRI 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 MRI had 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 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 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."

[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 Werksmans emailed MRI 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 [this should be 2016] both sides knew that the settlement was a "done deal".'

[48] The appellant's attack is confined to purely technical grounds. First, she submits that the additional assessment should not be regarded as agreed because in terms of s 95(3) of the TAA it is a requirement that the issue of such an assessment must be preceded by an *inability* to submit an accurate return, which was not the case in the instant matter.

Second, she contends that because a senior SARS official did not agree with her personally in writing as to the amount of tax chargeable before issuing the additional assessment it falls foul of the provisions of s 95(3).

[49] The artificiality of this argument is demonstrated by the following submission in the notice of appeal:

> 'The Learned Judge erred in having regard, in coming to his finding, to the subjective description of the assessment by the Respondent's attorney, in later correspondence generated with the Appellant's attorney after the assessment had already been raised, as being a section 95(3) assessment, in circumstances where the objective requirements as provided for in the subsection itself were not satisfied.'

[50] It bears repeating that this was not the case made out in the appellant's founding papers. While it is open to a party to argue any point of law, this does not mean that it can be based on an entirely different case not before a court. The appellant has only herself to blame for electing to withhold material facts from the tax court.

[51] In any event the Tax Court made no specific finding on whether or not the additional assessment was one issued in terms of s 95(3), presumably because the application before it was about procedural and not substantive issues. This is evident from the following paragraphs of the judgment:

> '[53] Mr Van der Merwe submitted that the notice of 25 February 2019, although 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 s 95(3) precluded a challenge. …
>
> [55] 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…
>
> [69] 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.'

[52] To the extent however that it may nonetheless be permissible for us to deal with this issue, I am persuaded that to succumb to the appellant's argument would be to place a contrived matter of form over substance. She does not suggest that her attorney was not authorised to conclude the settlement on her behalf with the respondent's attorney. The settlement is recorded in writing by way of an exchange of correspondence. Not a murmur was made that she was paying the agreed amount on a *'pay now argue later'* basis and, as I

have already said, Van der Merwe does not claim to have ever communicated his 'advice' and 'understanding' to anyone other than the appellant.

[53] All that she says on this score (in her confirmatory affidavit filed for the first time in reply) is that her attorney was not authorised to 'conclude written agreements' on her behalf as the taxpayer. It is telling that she does not claim that he was not authorised to settle the matter on her behalf.

The Tax Court's finding that the respondent was entitled to withdraw condonation of the late lodging of the objection

[54] What the appellant also failed to disclose in the founding papers was that the respondent withdrew its condonation of the late filing of her objection on 22 February 2019, prior to issuing the notice of objection on 25 February 2019. As is apparent from the papers, this is because it realised its blunder.

[55] In the Tax Court the appellant advanced two arguments. The first was that, on the basis of the *functus officio* principle, the respondent was not entitled to withdraw condonation. This was swiftly and rightly rejected by the Tax Court on the plain wording of s 9 of the TAA, which is 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… or at the request of the relevant person, be withdrawn or amended by—
>
> (*a*) the SARS official;
>
> (*b*) a SARS official to whom the SARS official reports; or
>
> (*c*) a senior SARS official.
>
> (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—
>
> (*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.'

[56] The second was that the respondent could only invoke s 9 if requested by the taxpayer or put differently, only for the benefit of the taxpayer. This too was correctly rejected by the Tax Court for the reasons set out in paragraphs [57] to [63] of its judgment. In a nutshell, it found that neither the wording of s 9 nor the parliamentary materials relied upon by the appellant supported such an interpretation. I agree with that reasoning and no purpose would be served in repeating it. The Tax Court's conclusion on this issue was as follows:

> '[63] '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 s 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 s 9(3) it is presumed, unless the contrary is proved, that the official was duly authorised.'

[57] The appellant maintains that the Tax Court's interpretation is also inconsistent with her rights under s 33 of the Constitution (to administrative action that is lawful, reasonable and procedurally fair) and s 34 thereof (her fair trial rights). However nothing precluded her from invoking the remedies available to her in order to pursue these rights after the respondent withdrew condonation. She chose not to do so, instead opting to ignore such withdrawal and to withhold this material fact in her founding papers. Any resultant hardship can hardly be laid at the doors of the respondent or the Tax Court.

[58] The appellant's only other attack on appeal flowed from her contention that her notice of appeal was lodged in response to a decision to disallow her objection on its merits. It is essentially a repetition of the same arguments advanced in relation to tax court rules 7 and 52(2)(*b*) with which I have already dealt.

Conclusion

[59] The Tax Court was correct in granting a punitive costs order. Before us the respondent submitted that the same is warranted in respect of the appeal on the basis that it was merely a further step by the appellant to abuse the court's process. Were it not for the issue pertaining to tax court rule 52(2)(*b*) such an order would be justified. I do not believe however, given that issue, that such an order would be appropriate.

[60] **I would thus propose the following order:**

> **'The appeal is dismissed with costs on the party and party scale including the costs of two counsel.'**

_____

J I CLOETE