REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

(HELD AT MEGAWATT PARK, JOHANNESBURG)

CASE NO: 24720

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

27 May 2020 DATE — **L P SIGOGO** SIGNATURE

In the matter between:

MR D APPELLANT/APPLICANT

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE RESPONDENT

J U D G M E N T

SIGOGO AJ

INTRODUCTION

[1] After appealing against the disallowance of objection, the applicant instituted two applications against by the Commissioner for the South African Revenue Service ("the Commissioner") or ("SARS"), as follows:

[1.1] the first application brought on 13 August 2019, was an interlocutory application seeking an order directing that:[1]

[1.1.1] the respondent's decision on 14 March 2014, to impose additional tax in terms of section 76(1)(*b*) of the Income Tax Act, 58 of 1962, insofar as it pertains to the additional assessments issued for the tax years 2007 to 2011, is declared unlawful;

[1.1.2] the additional assessments issued by the respondent on 14 March 2014 for the years 2007 to 2011 are altered by removing all references to the imposition of additional tax;

[1.1.3] all references to the imposition of additional tax in relation to the additional assessments for the years 2007 to 2011 in the respondent's statement of grounds of assessment and opposing the appeal, dated 29/11/2019, are struck out;

[1.1.4] the decision by the respondent on 14 March 2014 that the three-year limitation imposed by section 99(1) of the TAA will not apply, is declared unlawful;

[1.1.5] the additional assessments issued by the respondent on 14 March 2014 for the years 2007 to 2009 are declared unlawful;

[1.1.6] the appellant's original assessments for the years 2007 to 2009 are declared final;

[1.1.7] all references to the additional assessments for the years 2007 to 2009 in the respondent's statement of grounds of assessment in opposing the appeal, dated 29 April 2019, are struck out.

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1 First application, notice of motion.

[1.2] the second application brought on 17 September 2019, was for default judgment, directing that:[2]

[1.2.1] the applicant's appeal, dated 26 February 2018, against the additional assessments for the 2007, 2008, 2009, 2009, 2010 and 2011 income tax years of assessment, dated 12 and 14 March is upheld; and

[1.2.2] the additional assessments for the 2007, 2008, 2009, 2010 and 2011 years of assessment, dated 12 and 14 April 2014 are altered and set aside to give effect to the appeal being upheld.

[2] Both applications emanate from the same set of facts and were accordingly heard simultaneously. I find it convenient to start with the application for default judgment.

THE FACTS

[3] The deponent to the founding affidavit in support of the application for default judgment was Mr K, employed as a professional assistant by the applicant's attorneys TT Attorneys, and allegedly responsible for giving effect to the applicant's instructions.

[4] The facts as summarised in Mr K's affidavit were *inter alia* as follows:[3]

"9.1 In March 2014, and following the completion of an audit into the tax affairs of the applicant, SARS issued a letter of audit findings and five additional income tax assessments, relating to the 2007, 2008, 2009, 2010 and 2011 years of assessment.

9.2 The letter of audit findings is attached as "WD1".

9.3 On 28 February 2018 the applicant appealed against the five additional assessments. The notice of appeal is attached as "WD2", without annexures, in order to avoid prolixity.

9.4 On 29 April 2019 SARS delivered its statement of grounds of assessment and opposing the appeal, ("the rule 31 statement"). The statement is attached as "WD3".

9.5 On 13 August 2019 SARS was given notice of applicant's two complaints relating to SARS' rule 31 statement. The applicant's notice is attached as "WD4".

9.6 The notice contains proof of the delivery thereof on SARS.

9.7 SARS was afforded 15 business days to remedy the cause of complaint but has failed to do so."

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2 Second application, notice of motion.

3 Founding affidavit, para 9.1 to 9.7.

[5] These facts are common cause, SARS having admitted same in its answering affidavit.[4]

[6] In terms of the finalisation of audit letter issued to the applicant, SARS raised additional assessments in respect of amounts received by the applicant in his bank accounts in the relevant years of assessments, but failed to declare as gross income in his tax returns.[5]

GROUNDS FOR SEEKING THE DEFAULT JUDGMENT

[7] The applicant relies on the provisions of Rule 56(1)(*b*)[6] and section 129 of the Tax Administration Act, 28 of 2011 ("TAA"), for the relief sought.[7] Rule 56 provides an innocent party with a remedy in the event that a defaulting party has failed to remedy the default within 15 days of being notified of the default.

[8] It provides 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)."

[9] Thus the default covered by the rule may relate to a failure to comply with:

[9.1] a period; or

[9.2] obligation prescribed under the Rules; or

[9.3] an order by the tax court.

[10] The applicant raises two causes of complaint in the founding affidavit in substantiation of its request for default judgment.

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4 Answering affidavit, para 14.2.

5 Letter of finalization of audit was attached as annexure "WD1" to the founding affidavit.

6 Rules Promulgated under section 103 of the Tax Administration Act, Prescribing the Procedures to be Followed in Lodging an Objection and Appeal against an Assessment or a Decision Subject to Objection and Appeal Referred to in section 104(2) of that Act, Procedures for Alternative Dispute Resolution, the Conduct and Hearing of Appeals, Application on Notice before a Tax Court and Transitional Rules.

7 Founding affidavit, para 9.8, 11 and 12.

The first complaint

[11] The first complaint is that the Commissioner, in his Rule 31 statement, allegedly failed to comply with the provisions of Rule 31(2)(*b*), that requires the Commissioner to set out, clearly and concisely, which of the facts or legal grounds in the notices of appeal are admitted and which of the facts or legal grounds are opposed.[8]

[12] Thus the first complaint challenges the manner in which the Commissioner answered to the allegations contained in paragraphs 3 to 7 ("the relevant paragraphs") of the notice of appeal filed by the applicant in terms of Rule 10.

[13] The relevant paragraphs fall under the heading introduction and they are provided as part of the background on the applicant's matter. In summary, the allegations in the relevant paragraphs are that previously the applicant befriended Mr X a high-level official at SARS and they shared business interests in real estates. It was alleged that prior to Mr X being employed by SARS, he and the applicant entered into several loan transactions and interests became due on these loans. After Mr X was employed by SARS he abused his position at SARS, and used his position to initiate a tax audit on both the applicant and his wife.

[14] It was alleged further that the applicant was not assessed in respect of all amounts lent to him by X, but was subjected to rigorous scrutiny in respect of other loans. In the applicant's notice of appeal, it is also highlighted that this background is significant to substantiate the contention that the audit on both the applicant and his wife was initiated with ulterior motives which include a high level SARS official being vexatious.

[15] In respect of the relevant paragraphs, SARS replied as follows:

> "AD PAR 3 - 7 – The contents of these paragraphs are noted."

[16] The thrust of the applicant's contention is that SARS is required to respond to his allegations in the relevant paragraphs by either admitting or denying these allegations.

[17] Strikingly, although SARS provided similar replies in respect of four (4) other paragraphs contained in the applicant's notice of appeal,[9] the applicant's challenge is only directed at the allegations he makes in paragraphs 3 – 7.

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8 Founding affidavit para 10.3.

9 SARS's Rule 31 Statement para 7.5 (iro para 15 to 17), para 7.7 (iro para 20 to 24), para 7.8 (iro para 25 to 28) and para 7.13 (iro para 47 to 53).

[18] SARS opposes the application and contends that the Statement filed in terms of Rule 31 complies with the relevant provisions. In the answering affidavit filed on behalf of SARS it is contended that the applicant's allegations of ulterior motives on the part of SARS when raising additional assessments is unknown, consequently SARS cannot deny or admit. Further that SARS has no knowledge of such allegation.[10]

[19] Rule 31(2)(*b*) provides that:

> "The statement of the grounds of opposing the appeal must set out a clear and concise statement of—
>
> (*b*) which of the facts or the legal grounds in the notice of appeal under rule 10 are admitted and which of those facts or legal grounds are opposed;"

[20] I disagree with the applicant's contentions that base on the above rule, when SARS to responds to the allegations in the applicant's notice of appeal it is confined to one of the three possible courses, namely, to either admit, or deny, or confess and avoid the allegations in the relevant paragraphs.

[21] To hold otherwise would be to impose undue restrictions on SARS when faced with allegations in the notice of appeal. A non-admission plea (in this case an answer to the allegations in the appellant's notice of appeal), setting out that material facts are not admitted is considered adequate in our law. The authors of LAWSA, confirm as much at paragraph 180.

[22] The court in *Standard Bank Factors Ltd v Furncor Agencies (Pty) Ltd and Others* 1985 (3) SA 410 (C), dealt with a similar objection and found that a non-admission of allegations as a constituting a sufficient response (plea), to the plaintiff's allegations. It was held that:

> "The technical adequacy of defendant's "non-admission" of the relevant allegations is therefore difficult to challenge. Plaintiff is left under no illusions as to what it is it must prove and I do not see how it can be "embarrassed" by such a plea. The mere fact that a plaintiff is somewhat unexpectedly required to prove allegations in his declaration which he assumed, or hoped, would be admitted in the plea is not the kind of "embarrassment" of which he is entitled to complain by way of exception."

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[10] Answering affidavit, para 13.1 to 13.4.

[23] Although the Statements in terms of Rules 31 and 32 serve the purpose of defining the issues between taxpayers and SARS, so as to enable the other party (and the court) to know what case has to be met; these statements are not pleadings. One of the distinguishing factors is that whereas, in terms of Uniform Rule 18 every pleading must be signed by counsel and the attorney,[11] this is not a requirement in respect of the statements contemplated in Rules 31 and 32.

The second complaint

[24] The second complaint of the applicant is that SARS's Rule 31 statement includes a ground that constitutes a novation. In this regard, it is alleged that:

> "10.6 In paragraph 4.2 and 4.3 of the Rule 31 Statement the allegation is made, for the first time, that the fact that the full amount of tax chargeable was not assessed originally was due to misrepresentations made by the applicant.
>
> 10.7 This allegation was not contained in the finalisation of audit letter issued by SARS, dated 14 March 2014. The finalisation of the audit letter merely contained the allegation that 'the limitation for issuance of assessment in terms of section 99 of the Tax Administration Act will not apply due to negligent misrepresentation of amounts received and not declared to SARS."

[25] The applicant alleges that based on the above, a novation has occurred in respect of the factual and legal basis for reopening of the assessment in respect of the 2007 to 2009 years of assessment.

[26] The applicant's argument of novation lacks any merit and must fail. The distinction sought to be made regarding the basis for re-opening assessment set out in the finalisation of audit letter, as being "negligent misrepresentation" and in the statement filed in terms of Rule 31 as being "misrepresentations", is artificial.

[27] Recently, the Supreme Court of Appeal dealt with SARS's entitlement to re-open assessments in the matter of *Africa Cash and Carry (Pty) Ltd v Commissioner, South African Revenue Service*.[12] The court found that the question whether an alteration of an assessment is competent must, be answered in the light of the facts and circumstances of each case. Further that this should be dictated by considerations of fairness, with due observance of the *audi alteram partem* principle.

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[11] *Ex parte Vally: In re Bhoolay v Netherlands Insurance Co of SA Ltd and Another* 1972 (1) SA 184 (W) at p 185G-H and Fortune v Fortune 1996 (2) SA 550 (C).

[12] 2020 (2) SA 19 (SCA) at p39, para 51 of the judgment.

[28] In my view the above dictum confirms the existing the legal position as reiterated in previous dicta such as in the matter of *Secretary for Inland Revenue v Trow*.[13] The court dismissed SARS's appeal in the Trow matter because it found that the evidence before the Special Court did not establish Secretarial satisfaction in regard to the question whether the non-assessment was due to the taxpayer's non-disclosure of material facts in his income tax return. The dispute regarding this issue is yet to be determined by the Tax Court.

[29] In *Natal Estates Ltd v Secretary for Inland Revenue*,[14] concerning the provisions of section 79 of the Income Tax Act, 58 of 1962. The court held, per Holmes JA, at p 207F-G that:

> "A convenient time and place for indicating the Secretarial satisfaction would be in the additional assessment itself, or in a covering letter; or in the notice which the respondent is required by sec. 81(4) to send to the taxpayer, if the latter's objection to the assessment is disallowed. And it should state the particular conduct of the taxpayer to which it relates, i.e., whether fraud or misrepresentation or non-disclosure of material facts."

[30] Further at p 208C-D that:

> "the Secretary's 'satisfaction' is a substantive and far-reaching determination, which should be communicated to the taxpayer, if not before, then at the very latest at, the hearing in the Special Court."

[31] Based on the above, SARS's communication to the taxpayer in its statement filed in terms of Rule 31, regarding the basis for re-opening the assessment cannot be said to constitute a novation of facts set out in SARS finalisation of audit letter. What is apparent in both these communications is that SARS relies on alleged misrepresentation committed by the applicant to re-open the assessments. As pointed out above, evidence is yet to be led before the Tax Court in this regard.

[32] As regards the question whether such representation was intentional or negligent, it does not alter SARS basis of alleged misrepresentation, entitling SARS to re-open the assessments. The issue whether misrepresentation was intentional or negligent may affect the determination of the appropriate sanction to be imposed on the applicant.

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13 1981 (4) SA 821 (A) at p825F-826B.

14 Natal Estates Ltd v Secretary for Inland Revenue 1975 (4) SA 177 (A) at p 207F-G.

[33] As restated in the Africa Cash and Carry matter, it is the function of this court to adjudicate on this matter and it has the power to exercise its own, original discretion of making a decision on facts which may not have been considered by the Commissioner, and may evaluate SARS basis for reopening the assessments and the imposition of understatement penalty.[15]

THE INTERLOCUTORY APPLICATION

[34] The interlocutory application arises from the same facts as with the application for default judgment. The applicant, Mr D, deposed to an affidavit in support of this application, in the main contending that:

> "9. I am advised that:
>
> 9.1 at the time that the additional assessments above were issued, the provision of the ITA on which SARS relied (to impose the additional tax) had already been repealed;
>
> 9.2 the additional tax of 60% was imposed without lawful basis;
>
> 9.3 this had been pointed out to SARS in, among others, the objection and notice of appeal launched on my behalf;"

[35] Furthermore, the applicant states as follows:

> "10. The above letter of 14 March 2014 further contains the following finding in relation to the financial year 2007:
>
> 'We have noted that the 2007 assessment has prescribed. However, the limitation for issuance of assessment in terms of section 99 of the Tax Administration Act will not apply due to the negligent misrepresentation of amounts received and not declared to SARS.' "
>
> (My own emphasis)

[36] Moreover, it was contended that:

> "17.3 SARS made a positive finding of negligent misrepresentation, which finding was part of the basis why SARS reached the conclusion that the three-year prescription period does not apply;
>
> 17.4 This conclusion is wrong in law;
>
> 17.5 The subsequent protestation by SARS that the reference to the misrepresentation being 'negligent' was 'inadvertent', is of no consequence;"

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[15] See *CIR v Da Costa* 1985 (3) SA 768 (A) at 774H to 775A.

[37] As regards the first complaint by the applicant, SARS admits that:[16]

> "Additional tax of 60% was imposed pursuant to the provisions of section 76(1)(*a*) of the Income Tax Act No 58 of 1962 (the ITA). Section 76(1)(*a*) of the ITA remained in force until 1 October 2012 when the provisions of the Tax Administration Act No 28 of 2011 (the TAA) commenced."

[38] Further, that:[17]

> "The relevant provisions contained in section 222 of the TAA and note the provisions of section 76(1)(*a*) of the ITA ought to have been relied upon for purposes of imposing penalties in respect of the various instances of under-declaration in the relevant tax years (2007-2011). Notwithstanding reliance on the incorrect penalty regime (s76(1)(*a*) of the ITA) instead of the current penalty regime (s222 of the TAA), the facts established during the audit, also lend themselves to be dealt with pursuant to the provisions of the current penalty regime. The jurisdictional facts required for the imposition of USP (s222 of the TAA) are present."

[39] SARS's response to these allegations was that at the time of raising additional assessments, the basis for re-opening assessments was disclosed as "negligent misrepresentation instead of plain misrepresentation as alluded to in the said provisions (s99(2)(*a*)(ii)). The error was subsequently communicated in a letter of 12 July 2016 prior to the applicant filing its Notice of Objection".[18]

[40] The applicant, in reply, *inter alia*, contends that, if SARS accepts that it made a mistake, it ought to withdraw the assessments.[19] It was further contended that the applicant would suffer serious prejudice should SARS be permitted to alter the reasons for its decision (to open an otherwise prescribed assessments) after the fact.[20]

[41] In my view the interlocutory application raises the same issues as were raised in the application for default judgment, the only difference being the nature of the relief sought. Therefore, the interlocutory application stands to suffer the same fate as the application for default judgment, for exactly the same reasons.

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16 Founding affidavit para 6.
17 Answering affidavit para 9.
18 Answering affidavit para 12.
19 Replying affidavit para 9.2.
20 Founding Affidavit para 11.2.

ORDER

[42] Accordingly, I make the following order:

[42.1] The application for default judgment brought by the applicant on 17 September 2020, is dismissed.

[42.2] The interlocutory application brought by the applicant on 13 August 2020, is dismissed.

[42.3] No order as to cost.

L SIGOGO
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION

Date of hearing: 11 December 2019
Date of judgment: 27 May 2020

Judgment electronically delivered per email