IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, MTHATHA **Case No. 3613/16**

Date heard: 24 October 2017

Date delivered: 23 January 2018

In the matter between:

FIKILE NTAYIYA **Applicant**

and

SOUTH AFRICAN REVENUE SERVICES **Respondent**

JUDGMENT

LAING AJ:

[1.] The Applicant is an attorney, practising as a sole practitioner under the name of Fikile Ntayiya & Associates in Mthatha. During the course of 2014, the Respondent assessed the Applicant's tax liability for the period of 2008 to 2013. Such assessment forms the subject of these proceedings.

[2.] The main relief sought by the Applicant is: (a.) that the assessment made by the Respondent's official, Ms Karin van Niekerk,[1] be reviewed and set aside; and (b.) that the annual financial statements for the period of 2008 to 2013, submitted by APAC Professional Accountants and Tax Specialists, be accepted as the correct annual financial statements.

[3.] At the outset, it is necessary to mention that the state of the papers in the present case was far from satisfactory. In *Louw and Others v Nel* [2011] 2 All SA 495 (SCA), the Supreme Court of Appeal remarked, with reference to motion proceedings, that the parties' affidavits constitute both their pleadings and their evidence.[2] Pleadings must be lucid, logical and intelligible. A litigant must plead his or her cause of action or defence with at least such clarity and precision as is reasonably necessary to alert his or her opponent to the case that must be met. A litigant who fails to do so may not afterwards advance a contention of law or fact where its determination may depend on evidence which his or her opponent has failed to place before the court because he or she was not sufficiently alerted to its relevance.[3]

[4.] Furthermore, tax disputes are often matters of some complexity where dates and figures play a key role in the determination of the outcome. Although the present case does not entail overly complex issues of tax administration, the court and indeed the litigants themselves would have benefitted from a more lucid, logical and intelligible approach to the drafting of the affidavits and a more careful and systematic approach to the narration of the underlying history and the calculation of the amounts in dispute. The parties' affidavits must tell a story. Generally, if the story is told in an uncomplicated manner and in a chronological sequence then the issues in dispute may be discerned without unnecessary difficulty, by both the court and the litigants. Similarly, where the facts averred in the affidavits are supported by the documents attached as evidence, questions of law and fact may be more readily determined.

Factual background

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[1] During the course of the litigation, it is apparent that Ms van Niekerk married and adopted the surname of her husband. Later affidavits describe her as Mrs van Straten. For the sake of avoiding confusion, her unmarried name will be used, as it appears in the Notice of Motion.

[2] At para 17, quoting from *National Director of Public Prosecutions v Phillips and Others* 2002 (1) BCLR 42 (W).

[3] *National Director of Public Prosecutions v Phillips and Others* 2002, op cit, para [36].

[5.] A summary of the underlying facts in the present matter follows, as best gleaned from the papers.

[6.] The Applicant's erstwhile tax advisors, MNG Business Consultants, previously prepared tax returns for the period of 2008 to 2013. The above advisors submitted such returns to the Respondent, together with annual financial statements for the years in question.[4] During the course of 2014,[5] Ms van Niekerk advised the Applicant that the annual financial statements were incorrect and gave him an opportunity to make the necessary amendments. MNG Business Consultants obliged accordingly on the Applicant's behalf.

[7.] Consequently, Ms van Niekerk audited the assessment of the Applicant's tax liability made by MNG Business Consultants. She explains that the Applicant had submitted nil tax returns for the period of 2008 to 2013 but had based these on MNG Business Consultants' original annual financial statements. After the firm's amendment thereof, Ms van Niekerk completed her audit and made the following adjustments:[6]

Tax year	**Adjustments**
2008	R 333,836
2009	R 1,088,745
2010	R 856,339
2011	R 551,382
2012	R 700,092
2013	R 625,164

[4] The annual financial statements are attached to the papers as 'FN 8' to 'FN 13'. They are sparse in terms of detail and do not reflect the date upon which they were prepared.

[5] The precise date is not evident from the record.

[6] The Applicant stipulates an amount of R 3,600,000 in his founding affidavit. The Respondent's adjustments, as apparent from the audit findings, indicate an amount of R 4,155,558. In either event, the amount is substantial.

[8.] The above information appears in the audit findings that the Respondent sent to the Applicant on 17 September 2014.

[9.] Ms van Niekerk further explains that when she analysed the Applicant's bank statements, she discovered that the Applicant had not declared certain payments that he had received from the state. She added together the funds that were deposited into both the Applicant's business and private bank accounts and compared the total with what was reflected in the Applicant's annual financial statements. Upon comparison, it was clear that the Applicant had grossly understated his income. Ms van Niekerk deemed this to be tax evasion and imposed understatement penalties.

Tax year	**Adjustments**	**Penalties**[7]
2008	R 333,836	R 119,591
2009	R 1,088,745	R 561,342
2010	R 856,339	R 413,609
2011	R 551,382	R 225,353
2012	R 700,092	R 308,298
2013	R 625,164	R 256,148

[10.] The above information is evident from the Respondent's finalization of the audit, sent to the Respondent on 29 October 2014.

[11.] Subsequently, the Applicant delivered notices of objection in respect of the Respondent's assessment. This was done on 28 February 2015. The Applicant also produced evidence that he had understated his expenditure in relation to hiring costs, depreciation and telephone use.

[12.] On 24 April 2015, Ms van Niekerk sent an email to the Applicant. Much has been made of the email, which is repeated in full, below:

> Good day Mr Ntayiya

[7] The amounts have been rounded off to the nearest Rand.

A reconciliation has now been done iro income received via bank statements and income declared.

Please investigate urgently and inform me if you are not in agreement, as the objection needs to be finalised.

Thank you

Karin van Niekerk

Functional Specialist Audit

[13.] The email was accompanied by a table, reflecting the totals of the amounts in two accounts, the annual financial statements in Ms van Niekerk's possession,[8] and under-declared income. The totals are for the tax years in question, i.e. 2008 to 2013. Again, by reason of the weight that the Applicant has attached to the document, the table is repeated below:[9]

	Acc 62001541912	**Acc 53990062325**	**Total**	**AFS**	**Income under-declared**
2008	973,354	47,650	1,021,004	368,259	652,745
2009	907,011	65,432	972,444	419,716	552,728
2010	1,173,930	57,150	1,231,080	455,610	775,470
2011	1,362,691	154,900	1,517,591	520,611	996,980
2012	1,333,159	46,360	1,379,519	548,173	831,346
2013	1,073,266	51,973	1,125,239	596,825	528,414
					4,337,683

[14.] This resulted in MNG Business Consultant's submitting a revised set of annual financial statements on 4 June 2015.

[8] From the papers, it is understood that the annual financial statements in question are those that were originally submitted by MNG Business Consultants.

[9] As was done previously, the amounts involved have been rounded off to the nearest Rand.

[15.] The Respondent partially allowed the Applicant's objection on the basis of the revised set of annual financial statements.[10] This was communicated to the Applicant on 10 June 2015. In the same letter, the Respondent informed the Applicant that he had the right to appeal by completing and submitting the relevant form within 30 business days.

[16.] The history of the matter then becomes increasingly murky. From the contents of the affidavits and the information contained in the annexures thereto, it appears that MNG Business Consultants prepared another set of annual financial statements on 9 November 2015.[11] A few weeks later, the Applicant's new tax advisors, APAC Professional Accountants and Tax Specialists, prepared a further set of annual financial statements and submitted these to the Respondent together with a notice of appeal.[12] The Applicant avers that a tax collector, acting for the Respondent, deducted the sum of R 250,000 from his account over this time.

[17.] On 4 July 2016, the Respondent informed the Applicant that his appeal was late, it fell outside the prescribed time period.

[18.] Consequently, the Applicant applied for the reduction of the assessments made in respect of the tax years 2008 to 2013, as contemplated under section 93, read with section 99, of the Tax Administration Act 28 of 2011 ('the TAA').[13] The Respondent notified the Applicant on 15 August 2016 that the assessments would not be revised. In the event that the Applicant wished to pursue the matter further, he was advised to seek legal advice with regard to the remedies available.

[19.] The Applicant instituted the present proceedings on 11 October 2016.

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[10] The Respondent indicated, however, that the figures for salaries and wages remained the same as those contained in the original annual financial statements.

[11] The annual financial statements attached to the papers as annexures 'FN 16' to 'FN 21' indicate that they were prepared by MNG Business Consultants and are dated 9 November 2015.

[12] The annual financial statements in question are those attached to the papers as annexures 'FN 1' to 'FN 6'. They were issued by APAC Professional Accountants and Tax Specialists over the period of 28 November to 7 December 2015. The notice of appeal is not contained in the papers. However, the Respondent evidently received the notice of appeal on 18 December 2015, as apparent from the reference made thereto in the Respondent's letter to the Applicant, dated 4 July 2016.

[13] The application was done by APAC Professional Accountants and Tax Specialists, by letter. The date upon which this was done is unknown.

Issues for determination

[20.] The Respondent has raised two points *in limine*. Firstly, the Applicant has failed to comply with the provisions of sub-section 11(4) of the TAA inasmuch as he did not give the Commissioner at least one week's written notice of his intention to institute legal proceedings. Secondly, the Applicant has failed to comply with the provisions of sub-section 11(5) of the TAA inasmuch as he did not ensure that his application was served at the address specified by the Commissioner in terms of public notice to that effect.

[21.] The issues to be determined are as follows: (a.) whether the Respondent's points *in limine* succeed, which would dispose of the matter; (b.) whether the Applicant has made out a case for the review and setting aside of the assessment made by Ms van Niekerk; and (c.) whether the Applicant has made out a case for the acceptance of the correctness of the annual financial statements for 2008 to 2013, as prepared by APAC Professional Accountants and Tax Specialists.

The legal framework

[22.] The provisions of sub-sections 11(4) and (5) are repeated below:

> **11. Legal proceedings involving Commissioner**-(1) …
>
> (2) …
>
> (3) …
>
> (4) Unless the court otherwise directs, no legal proceedings may be instituted in the High Court against the Commissioner unless the applicant has given the Commissioner written notice of at least one week of the applicant's intention to institute the legal proceedings.
>
> (5) The notice or any process by which the legal proceedings referred to in subsection (4) are instituted, must be served at the address specified by the Commissioner by public notice.

[23.] Neither counsel could refer the court to case law that addressed the points *in limine* with direct reference to the applicable provisions of the TAA. Fortunately, there is useful academic commentary on the subject. With reference to sub-sections 11(4) and (5) of the TAA:

> [e]xperience has shown that most parties to a dispute would generally prefer resolution over litigation and it is, therefore, necessary to have these measures in place to avoid unnecessary and costly litigation. If SARS receives prior notice of an intended court application, it will ensure that the matter is brought to the attention of an appropriate senior official. The senior official can then use the prior notice period productively to investigate the merits of the intended application and, if appropriate, resolve the dispute before formal court proceedings. The compulsory prior notice is mitigated by the ability of a court on application by the intended applicant to waive formal compliance in extremely urgent cases. The prior notice requirement will ensure that resolution is sought timeously, which would lessen the burden on the court system. All legal processes must be served electronically by way of email, or facsimile and at the physical or electronic address of the regional office as stipulated in the public notice.[14]

[24.] Viewed in the above light, the applicable provisions are statutory mechanisms that are designed to encourage dispute resolution instead of litigation. The effective and efficient collection of tax may have significant implications for a taxpayer. This is all the more so where the taxpayer is an individual rather than a corporate entity. In the present case, the Respondent's imposition of understatement penalties on the Applicant is likely to have a devastating effect on his personal finances in the event that such penalties have a proper basis. Clearly, it would be in the interests of both parties to avoid protracted and expensive litigation where an alternative dispute resolution process is provided.

[25.] The requirement of prior notice under section 11(4) of the TAA is nothing unusual in relation to actions brought against organs of state or their functionaries. Case law corresponds with the academic commentary mentioned above. In *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC), the court said, at para 9, that the reason for the statutory requirement is that

> with its extensive activities and large staff which tends to shift… [an organ of state] needs the opportunity to investigate claims laid against it, to consider them responsibly and to decide, before

[14] Pugsley ES 'Tax Administration', in *LAWSA* (Volume 22(3), Second Edition), para 16.

> getting embroiled in litigation at public expense, whether it ought to accept, reject or endeavour to settle them.

[26.] Possibly the closest analogous provisions in other legislation are those contained in sub-section 3(1) of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002. These provide that no legal proceedings for the recovery of debt may be instituted against an organ of state unless the creditor has given written notice of his or her intention to do so, within six months of the date on which the debt became due. Under sub-section 3(4)(a), where a creditor has failed to give written notice and the organ of state has not consented in writing to the institution of legal proceedings, the creditor may apply to court for condonation of such failure. The circumstances where a court may grant such application are listed in sub-section 3(4)(b).

[27.] The TAA does not contain any similar condonation provisions. Nevertheless, sub-section 11(4) can be interpreted to mean that a court may direct that legal proceedings be instituted in the absence of prior notice. This presupposes that the applicant has made application to court for such an order and that he or she has motivated why no prior notice is necessary. The question arises as to whether, conversely, a court may issue directions in the absence of prior notice but after legal proceedings have already been instituted. In effect, this would amount to a decision on an application for condonation of the applicant's non-compliance with a statutory requirement.

[28.] The text in sub-section 11(4) of the TAA provides no ready answer to the above. The prohibition against the institution of legal proceedings in the absence of prior notice is qualified by the clause, 'unless the court otherwise directs'. The text provides no assistance in relation to the circumstances under which a court may exercise such discretion and begs the question whether an order can be made after the commencement of litigation.

[29.] The *contra fiscum* principle applies in the event of an ambiguity in a tax statute. In other words, the ambiguous provision must be interpreted in favour of the taxpayer.[15] Nevertheless, the true intention of the legislature is of paramount importance and remains

[15] Clegg D and Stretch R *Income Tax in South Africa* (LexisNexis, August 2017), para 2.3.

decisive. The scope and purpose of the legislation must be considered, together with the context in which the words and phrases are used.[16]

[30.] The preamble to the TAA does not shed light on how to deal with the subject, save to indicate that the TAA provides authority to act in legal proceedings. Under section 2, the purpose of the TAA is the effective and efficient collection of tax by aligning the administration of the applicable legislation, prescribing the rights and obligations of taxpayers, prescribing the powers and duties of tax administrators, and generally giving effect to the objects and purposes of tax administration. Overall, the TAA itself does not offer much insight into the manner in which sub-section 11(4) ought to be interpreted and applied.

[31.] Returning to the text itself, a narrow interpretation suggests that a court may issue directions only in circumstances where the applicant seeks to avoid the requirement of prior notice, in anticipation of the institution of legal proceedings. For example, an order would need to be obtained where the applicant intends to bring an urgent application against the Commissioner. A wide interpretation suggests that directions may be issued by the court at any stage, even after legal proceedings have been instituted. The latter hinges on the meaning of 'otherwise directs'. The dictionary meaning of 'otherwise', used as an adverb, is '**1** in different circumstances; or else. **2** in other respects. **3** in a different way. ▪ alternatively.'[17] If the past tense of 'direct' had been used then a wide interpretation would be more difficult to justify, i.e. 'unless the court has otherwise directed' would support a narrow interpretation, requiring an application to court prior to the institution of legal proceedings. However, the use of the term in its present tense permits the wider interpretation discussed.

[32.] Mindful of the above and the relevance of the *contra fiscum* principle, this court is prepared to give a wide interpretation to the provisions of section 11(4). Directions may indeed be issued in the absence of prior notice and after the institution of legal proceedings.

[33.] Notwithstanding the above, the court must still be satisfied that a proper basis exists upon which to condone non-compliance and to grant an appropriate order. The Constitutional Court has held that the standard for considering an application for condonation is the interests

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[16] *Glen Anil Development Corporation Ltd v Secretary for Inland Revenue* [1975] 4 All SA 620 (A), at 626; *Standard General Insurance Co Ltd v Commissioner for Customs and Excise* 2005 (2) SA 166 (SCA). See, too, *CSARS v Airworld CC and Another* [2008] JOL 21130 (SCA), at [10].

[17] Stevenson A and Waite M *Concise Oxford English Dictionary* (12th edition, Oxford University Press, 2011) 1014.

of justice.[18] This was the standard adopted by the Supreme Court of Appeal in relation to a condonation application brought under sub-section 3(4)(a) of Act 40 of 2002, in *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd* [2010] 3 All SA 537 (SCA), where Majiedt AJA remarked, at [35], that

> [i]n general terms, the interests of justice play an important role in condonation applications. An applicant for condonation is required to set out fully the explanation for the delay; the explanation must cover the entire period of the delay and must be reasonable.

[34.] The courts have also applied the test of whether there is good cause.[19] The meaning of the expression was considered in *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A), where Schreiner observed, at 352H-353A, that

> [t]he meaning of 'good cause' in the present sub-rule, like that of the practically synonymous expression 'sufficient cause' which was considered by this Court in *Cairn's Executors v Gaarn* 1912 AD 181, should not lightly be made the subject of further definition. For to do so may inconveniently interfere with the application of the provision to cases not at present in contemplation. There are many decisions in which the same or similar expressions have been applied in the granting or refusal of different kinds of procedural relief. It is enough for present purposes to say that the defendant must at least furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about, and to assess his conduct and motives.

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[18] In *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as amicus curiae)* [2008] JOL 21187 (CC), the court said, at [20], that

> … [w]hether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.

See, too, *Turnbull-Jackson v Hibiscus Coast Municipality and Others (Ethekwini Municipality as amicus curiae)* 2014 (11) BCLR 1310 (CC), at [23].

[19] *Mzizi v S* [2009] 3 All SA 246 (SCA), at [9]. Here, the SCA dealt with an application for condonation of late filing of an application for leave to appeal against conviction and sentence. Jafta JA remarked that good cause has two requirements: (a.) the applicant must furnish a satisfactory and acceptable explanation for the delay; and (b.) he or she must show that there are reasonable prospects of success on the merits of the appeal.

[35.] The above observation was made with reference to rule 46(5) of the Magistrates' Courts Rules. It was cited with approval in *Madinda v Minister of Safety and Security* [2008] 3 All SA 143 (SCA), dealing with a condonation application brought in terms of sub-section 3(4)(a) of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002. Heher JA held, at [10], that

> '[g]ood cause' looks at all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. In any given factual complex, it may be that only some of many such possible factors become relevant. These may include prospects of success in the proposed action, the reasons for the delay, the sufficiency of the explanation offered, the bona fides of the applicant, and any contribution by other persons or parties to the delay and the applicant's responsibility therefore.

[36.] The apparent distinction between the standard or test applied with regard to condonation applications is of no consequence for purposes of the present matter.[20] There is considerable overlap between the underlying sets of principles involved.

[37.] The above discussion has focused primarily on the provisions of sub-section 11(4). In terms of sub-section 11(5), an applicant must serve prior notice or process at the address specified by the Commissioner in a public notice. The requirement is unambiguous and must be understood as having been inserted to encourage the parties to follow a dispute resolution process. It permits the Respondent an opportunity to investigate, consider, and decide how to deal with any claim brought against it by ensuring that the claim is brought to the attention of a provincial or regional office, which, presumably, would be in a better position to contact the applicant and propose an alternative to litigation.[21] *Ex facie* the text, there is no express authority for the court to exercise any discretion where an applicant has failed to serve notice or process at the address specified by the Commissioner. At the least, it would be expected of an applicant that a condonation application be brought in the event of non-compliance.

Application of the law to the facts

[20] In other words, the courts have applied either the standard of the interests of justice or the test of good cause, depending on the legislative context of the matter in question.

[21] See *Mohomi v Minister of Defence* 1997, para 9, mentioned above.

[38.] Returning to the facts of the present matter, it is common cause that the Applicant failed to comply with either sub-section 11(4) or (5). The explanation for his default is remarkably scant. In his reply to the Respondent's first point *in limine*, the Applicant refers to the final paragraph of the Respondent's letter, dated 15 August 2015, which reads as follows:

> [s]hould you wish to pursue this matter further, you should seek legal advice with regards to legal remedies available, which may include a Review Application to the High Court.

[39.] The Applicant avers that he interpreted the contents to mean that the Respondent had consented to his proceeding with litigation, without further ado. Furthermore, he baldly states that no prejudice would be suffered by the Respondent as a result of the Applicant's failure to have given prior notice.

[40.] Not by any stretch of imagination can the letter be interpreted in the manner contended by the Applicant. The Respondent's letter merely urges the Applicant to obtain legal advice on the options available to him, which may (or may not) include review proceedings, nothing more. In no way could it be construed as a waiver of the Applicant's obligation to give prior notice, not that the Respondent was authorised to do so in any event. The Applicant's explanation is simply not adequate. Before instituting legal proceedings against the Respondent, it was incumbent upon the Applicant to have consulted the applicable legislative framework and to have satisfied himself that he had met any procedural requirements that were stipulated. That the Applicant, as an attorney, failed to do so is surprising. A prescribed procedure cannot be ignored or wished away. It is there for a reason and if a litigant so wishes then he or she is entitled to challenge it. Until it is declared unlawful or repealed, the procedure must be given effect.[22]

[41.] In relation to the Applicant's averment to the effect that the Respondent would have suffered no prejudice as a result of non-compliance, the court is unable to agree. Prior notice to the Respondent would have permitted the Respondent an opportunity to have investigated

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[22] That is not to say, of course, that a court may not issue appropriate directions and allow a party to proceed, notwithstanding non-compliance with a procedural requirement, but this will depend on the legislative context involved and the nature and extent of the authority available to a court.

and considered the matter further and to have decided how best to resolve the dispute. This never happened and the Respondent finds itself embroiled, at the expense of the public, in litigation that may have been possible to avoid. The prejudice caused is plain to see.

[42.] To the Applicant's second point *in limine*, the Applicant replies that he was unaware of the specified address. Nevertheless, he had used the Respondent's principal address in Pretoria and the Respondent, in any event, had received the application and had been able to respond. The Applicant further alleges that no prejudice was suffered.

[43.] Again, the court is unable to agree. To imply that it was immaterial whether the Respondent received the application in Pretoria or at its provincial office in Port Elizabeth is to miss the point entirely. The procedural requirement is there to permit the Respondent a proper opportunity to deal with the matter and to allow the possibility of a dispute resolution process to be explored, thereby mitigating against the delay and expense of litigation. Service on the Respondent's provincial office, where its officials are more conveniently placed to deal with an applicant located within their jurisdiction, would have facilitated such a scenario. The failure on the part of the Applicant to have done so can only be to the prejudice of the Respondent.

[44.] In his heads of argument, Applicant's counsel submits that the points *in limine* have been overtaken by events because this matter previously came before the court. On such occasion, directions were given to the effect that, *inter alia*, the Applicant supplements his founding affidavit and annexes thereto the annual financial statements prepared by MNG Business Consultants.

[45.] The above argument cannot be accepted. At the time that the matter previously went before court, it was clearly deemed unripe for argument. No finding was made with regard to the points *in limine*.

[46.] Counsel for the Respondent argued that the Applicant has not made application for condonation of his non-compliance with sub-sections 11(4) and (5) of the TAA. The court is inclined to agree. Certainly, the Applicant has not filed a formal application, accompanied by a substantive explanation for his default. In *Saloojee and Another, NNO v Minister of Community Development* [1965] 1 All SA 521 (A),[23] it was held that application for condonation must be made without delay when a litigant realises that he or she has not

[23] At 525.

complied with a rule of court.[24] The closest that the Applicant comes to doing so is a reference to his intention to do so with regard to non-compliance with sub-section 11(4) and a terse indication that he does so under reply in relation to sub-section 11(5).[25]

[47.] Assuming that the Applicant has indeed made proper application for condonation, about which this court is not persuaded, the Applicant would need to demonstrate that there were prospects of success in the application. This requires further comment.

[48.] The Applicant seeks the review and setting aside of the assessment made by Ms van Niekerk. This has been done in terms of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). However, as Respondent's counsel correctly pointed out, the Applicant has not explicitly stated the grounds of review upon which he seeks to rely, as listed in sub-section 6(2) of PAJA. It is not for the court to sift the Applicant's submissions and make a determination on which of the review grounds the Applicant seems to rely. These must be stated clearly and must be supported by the facts.

[49.] From the papers, it appears to the court that the Applicant alleges that Ms van Niekerk's assessment was flawed as a result of errors in the manner in which MNG Business Consultants prepared the annual financial statements, upon which documents Ms van Niekerk based her assessment. This is later elaborated upon by the Applicant to the effect that he alleges that Ms van Niekerk was the cause of the errors by reason of her having directed MNG Business Consultants to amend the documents in accordance with the table that accompanied her email of 24 April 2015.[26] The Applicant alleges that Ms van Niekerk's workings were incorrect.

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[24] This was followed in *Wanga Maguga v Minister of Police*, Case No. EL 9803/2014 (unreported), where Bloem J stated, at [22], that

> … [o]nce an applicant has knowledge of his non-compliance, he needs to ascertain without delay from his opponent whether the latter is agreeable to condone the non-compliance… If the non-compliance cannot be condoned by his opponent or the opponent can, but refuses to, condone such non-compliance, the applicant must without delay make an application to court for the condonation of his non-compliance.

At the time of argument, counsel for the Respondent brought to the court's attention that the above matter was on appeal. Be that as it may, the underlying principle is derived from *Saloojee* [1965] and remains applicable in the present matter.

[25] See sub-paragraphs 4.2 and 5.1 of the Applicant's relying affidavit, at 49-50 of the papers.

[50.] In answer, the Respondent explains how Ms van Niekerk conducted her assessment. Importantly, it was based on the information provided to her by the Applicant's tax advisors. To that effect, the Applicant had submitted nil returns for the tax years of 2008 to 2013, which state of affairs was evidently supported in part by an affidavit wherein the Applicant had stated on 4 April 2012 that he had not generated income for the tax years of 2008 to 2011.[27] However, when Ms van Niekerk audited the above information, discrepancies were discovered in relation to income received, as opposed to income declared, and she imposed understatement penalties. The Applicant lodged an objection, a revised set of annual financial statements and further information. The Respondent partially allowed the objection. Interestingly, the revised set of annual financial statements indicated that the Applicant had indeed generated an income, contrary to the picture that he had presented previously. With regard to the Applicant's application for a reduced assessment under sub-section 93(1)(d) or (e) of the TAA, the Respondent denies that there was any basis upon which to do so.

[51.] Furthermore, Ms van Niekerk refutes the allegation that she ever instructed the Applicant to prepare and submit annual financial statements in accordance with her table. The email of 24 April 2015 informed the Applicant that a reconciliation had been conducted with regard to income received, as reflected in his bank statements, and income declared. No expenses were depicted in the accompanying table. The email in question had merely invited the Applicant to investigate and say whether he was in agreement with the reconciliation.

[52.] In application proceedings, if disputes of fact have arisen in the affidavits then the principles in *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A) must be applied. To that effect, a final order may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.[28] It may happen that the respondent's denial of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact. To the extent that a court is satisfied with the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and

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[26] The Applicant refers to the table as a 'worksheet'. Strictly speaking, this was a correct description of the document if the contents of the covering email are considered. The table was no more than a depiction of the reconciliation carried out in respect of income received as opposed to income declared.

[27] The Respondent has attached the affidavit to its papers and the Applicant has never refuted its existence or contents. However, its context and purposes are unclear.

[28] At 368.

include this fact among those upon which it determines whether the applicant is entitled to the final relief which he or she seeks. There are exceptions to the above, which include the situation where the allegations or denials of the respondent are so far-fetched or clearly untenable that the court is justified in merely rejecting them on the papers.[29]

[53.] Mindful of the above, the allegation made by the Applicant that Ms van Niekerk directed MNG Business Consultants to amend the annual financial statements in accordance with the table or the manner prescribed by her is simply untenable. The evidence does not support this. The contents of the email of 24 April 2015 and the accompanying table are what they purport to be: an invitation to the Applicant to comment on Ms van Niekerk's reconciliation of the income declared by the Applicant with the income reflected in his bank accounts. It cannot be said that the email constituted an instruction given by Ms van Niekerk to compile the Applicant's annual financial statements in a certain way and to contain the information supplied.

[54.] However, the fundamental difficulty that the court has with the application is that the errors upon which Ms van Niekerk's assessment is allegedly based are far from clear. The Applicant has averred that certain income received in his bank accounts should not have been treated as such because it was later paid out to counsel. But the precise details of such income, including the dates upon which it was received and how much it comprised, together with what portion was actually paid out to counsel and when, and ultimately how this information ought to have been interpreted and applied by Ms van Niekerk in arriving at her assessment, are not explained. The details of what accounting or legal principles were applicable in the determination of the assessment and how Ms van Niekerk allegedly infringed these are also not explained.

[55.] In the circumstances, the Applicant has failed to provide a factual and legal basis upon which to convince the court that there is a prospect of success with regard to his application for the review and setting aside of Ms van Niekerk's assessment.

[56.] The Applicant also seeks an order that the annual financial statements for the tax years of 2008 to 2013, submitted by APAC Professional Accountants and Tax Specialists, be accepted as correct. However, the weaknesses that undermine the application for review and setting aside of Ms van Niekerk's assessment extend to the remainder of the application. The

[29] Ibid.

Applicant has failed to establish a factual and legal basis upon which to assert that the annual financial statements are a true and accurate indication of the assets and liabilities, income and expenses, and other factors commonly used to describe the Applicant's financial situation for the tax years in question.

[57.] The question of why the final set of annual financial statements submitted by APAC Professional Accountants and Tax Specialists must be accepted over the sets produced by MNG Business Consultants has not been adequately addressed, if at all. Moreover, it is not for the court to attempt to make sense of the copies attached to the papers in the complete absence of a detailed and comprehensive explanation for how the documents were compiled, in what ways they are similar to earlier sets, in what ways they differ and why that would be important in relation to the broader issues of this dispute.

[58.] There is nothing to persuade the court that there is a prospect of success in relation to an application for an order that the annual financial statements in question be accepted as correct.

Relief sought

[59.] To the extent that the Applicant has indeed made application for condonation of his non-compliance with sub-sections 11(4) and (5) of the TAA, he has failed to demonstrate a factual or legal basis for why an order to that effect should be granted. On the application of either the standard of interests of justice or the test of good cause, the Applicant falls far short of what is required.[30] In the circumstances, the Respondent's points *in limine* must be upheld. The Applicant is not entitled to the relief requested.

[60.] In the circumstances, the application does not succeed. There were no particular submissions made in relation to the award of costs, which must follow in accordance with the outcome.

[61.] Whereas the Applicant has not expressly contemplated relief that entails the possible referral of the matter to an alternative dispute resolution process, it was apparent during

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[30] See the discussion in relation to *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd* [2010] and *Madinda v Minister of Safety and Security* [2008], above.

argument that this option had not been properly investigated. The process underpins the provisions of sub-sections 11(4) and (5) of the TAA, as already discussed. Without intending to make any pronouncement upon whether or not an alternative dispute resolution process is still available to the Applicable, it would be in the interests of both parties to investigate such possibility by considering the dispute settlement provisions contained in Part F of Chapter 9 of the TAA, read with the rules promulgated under section 103, prescribing the procedures for alternative dispute resolution.[31]

Order

[62.] The following order is made:

(a.) the application is dismissed; and

(b.) the Applicant is ordered to pay the costs of the application.

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JGA Laing

Acting Judge of the High Court

Appearances:

For the Applicant: Adv SG Poswa, instructed by Zilwa Attorneys, Office Suite 452, 4th Floor, Development House, York Road, Mthatha

For the Respondent: Adv SX Mapoma, instructed by the State Attorney, Broadcast House, 94 Sisson Street, Fort Gale, Mthatha

[31] The rules in question were published under GN 550 of 14 July 2014, in terms of *Government Gazette* No. 37819.