Republic of South Africa

IN THE TAX COURT OF SOUTH AFRICA

(HELD AT THE WESTERN CAPE DIVISION: CAPE TOWN)

Case No: IT 0122/2017

S COMPANY Applicant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

Court: Judge J I Cloete
Heard: 9 October 2017
Delivered: 17 October 2017

JUDGMENT

CLOETE J:

Introduction

[1] This matter involves two applications. The first is that of the taxpayer's for default judgment in terms of rule 56 of the Tax Court Rules (*'the rules'*)[1]. The second is SARS' application for condonation for late filing of its answering affidavit in opposition to the default judgment application.

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[1] Contained in GN 550, GG 37819 of 11 July 2014 promulgated under s 103 of the Tax Administration Act 28 of 2011. In this judgment all references to the rules are to these rules unless otherwise indicated.

[2] SARS also raised a point *in limine*, namely that the Tax Court sitting in Cape Town lacked jurisdiction to hear the taxpayer's application. After argument the point *in limine* was dismissed with costs. The reasons for that order follow later in this judgment.

Background

[3] SARS assessed the taxpayer on 2 November 2015 in respect of the tax periods 2005 to 2010 and on 3 November 2015 in respect of the tax periods 2011 and 2012.[2] The taxpayer requested reasons for those assessments in a letter dated 1 December 2015 and SARS replied thereto by letter dated 15 December 2015.[3]

[4] After receipt of SARS' letter the taxpayer brought an application in terms of rule 6(1) to compel SARS to provide "adequate" reasons to enable it to formulate its objection to the 2005 to 2012 assessments, as well as reasons for SARS' withdrawal of an earlier decision contained in a letter dated 4 May 2007 which impacted directly on certain aspects of the assessments.[4] That application, which was opposed, was heard by Henney J sitting as the Tax Court, Cape Town. He dismissed the application on 3 June 2016 (*'the Henney judgment'*).

[5] On 31 January 2017 the taxpayer filed its notice of appeal in terms of s 107(1) of the Tax Administration Act 28 of 2011 ('*TAA'*) as read with rule 10. In terms of rule 31, SARS was required to deliver its statement of the grounds of assessment and

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2 Judgment of Henney J dated 3 June 2016 (*'Henney judgment'*) under Tax Court number 0004/2016 between the parties, para [2].
3 Henney judgment paras [3] and [11].
4 Henny judgment para [12].

opposing the appeal (*'rule 31 statement'*) within 45 days thereafter. The 45 day period expired on 5 April 2017.[5] SARS did not deliver its rule 31 statement timeously. There was no agreement in place for late delivery by that date, nor had SARS requested an extension in terms of rule 4(2) which provides that:

> *'(2) A request for an extension must be delivered to the other party before expiry of the period prescribed under these rules unless the parties agree that the request may be delivered after expiry of the period.'*
>
> [Emphasis supplied].

[6] However Mr Victor Masola of SARS, to whom the appeal had been allocated on 27 February 2017, invited the taxpayer's tax consultant, Mr Johan Kotze, to a meeting which took place on 10 April 2017. The date of that invitation is not apparent from the papers but for present purposes I will accept, in SARS' favour, that the invitation was made prior to 5 April 2017.

[7] According to Masola (the deponent to SARS' affidavit) the purpose of the meeting was to introduce himself to Kotze as the SARS official delegated to deal with the appeal.[6] He informed Kotze that he had only recently been appointed in SARS' litigation division (on 7 February 2017, thus two months earlier) and would consequently *'need some time to acclimatise myself with* [SARS'] *processes and also with the facts of the appeals allocated to me'.* He requested an extension for delivery of the rule 31 statement. On 11 April 2017 Kotze advised Masola that the

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5 In terms of rule 1 *'day'* means a *'business day'* as defined in s 1 of the TAA, which in turn is defined as excluding weekends, public holidays and the period between 16 December and 15 January of each year.

6 As well as another of the taxpayer's appeals.

taxpayer reluctantly agreed to an extension until 13 June 2017, i.e. a further 45 days calculated from the initial deadline of 5 April 2017.

[8] On 26 May 2017 the taxpayer made a *'without prejudice'* settlement proposal to SARS, contained in an email from Kotze to Masola of the same date. Although the taxpayer did not waive privilege in respect thereof Masola saw fit to attach it to his affidavit in the condonation application. Given that privilege was not waived I will not deal with its contents, save to note that nowhere in that proposal is there any indication by the taxpayer that SARS was, as a result of the settlement offer, relieved of its obligation to deliver its rule 31 statement by the agreed extended deadline of 13 June 2017.

[9] On 31 May 2017 Masola advised Kotze that the rule 31 statement would not be forthcoming by 13 June 2017. On 1 June 2017 Kotze wrote to Masola informing him *inter alia* that:

> *'To remind you, the first 45 days expired Wednesday 5 April, and only after the date we agreed to afford SARS another 45 days. All in all SARS had 90 days to prepare and file the rule 31 statement.*
>
> *I mentioned previously that my client was extremely unhappy about the delay, but I then convinced them to accept the extension.*
>
> *The only difference now is that we have provided SARS with a settlement proposal Friday 26 May.*
> *Given that we would want SARS to consider the settlement proposal <u>whilst SARS is preparing the rule 31 statement</u> to allow SARS a better understanding and appreciation, I will advise my client to agree to a further extension, but no later than Friday 14 July 2017, which is basically a month in addition.*

> *My advice would be not to grant SARS any further extensions thereafter to file its rule 31 statement…*[7]
>
> [Emphasis supplied].

[10] Masola explained that he received the settlement proposal whilst *'busy dealing'* with the matter. He stated that on receipt of the settlement proposal *'I turned my attention to the contents thereof, its implication and whether or not it has merits, as its acceptance would conclude the matter and render further processes and action unnecessary, including the rule 31 statement'.* He further stated that:

> *'After having worked through it I forwarded copies thereof to my audit colleagues responsible for the case who should provide their input before I could present it* [i.e. the settlement proposal] *to our governance committee, known as the National Appeals and Settlement Committee.'* [8]

[11] Masola did not disclose the stage that he had reached in drafting the rule 31 statement, nor indeed whether he had started drafting it at all, by the date when he received the offer to settle. At that point 33 days of the agreed extended period of 45 days had already elapsed. The quoted paragraphs of his affidavit suggest that he had not yet begun, given his explanation that settlement would render further processes and actions unnecessary, *including* the rule 31 statement.

[12] Further, if Masola subjectively believed that receipt of the offer to settle relieved him of his obligation to deliver the rule 31 statement by 13 June 2017, he should have

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7 Annexure DM2, p40 record.
8 Paras 12 and 13 Masola affidavit, record p56.

explained why he nonetheless informed Kotze on 31 May 2017 that he would not meet the agreed extended deadline.

[13] Kotze made it clear in his email of 1 June 2017 that a final extension for delivery of the rule 31 statement by 14 July 2017 was given on the basis that SARS would be able to consider the settlement proposal *while it prepared the rule 31 statement*. Masola did not deal with this at all in his affidavit. He also did not dispute that the final deadline was 14 July 2017.

[14] SARS did not comply with the final deadline. Accordingly, on 17 July 2017 the taxpayer delivered its notice in terms of rule 56(1) which was served on Masola by hand and by email. In that notice it was pointed out that, despite the extensions granted and having had a total of 113 days to deliver the rule 31 statement, SARS had still not done so. SARS was formally notified that the taxpayer would apply to the Tax Court for a final order in terms of s 129(2) of the TAA in the event of it failing to remedy its non-compliance within 15 days, i.e. by 7 August 2017. Yet again, SARS did not comply and on 8 August 2017 the taxpayer delivered its application for default judgment. SARS eventually delivered its rule 31 statement on 9 September 2017, one month after delivery of the application for default judgment.

[15] Masola's explanation is as follows:

> ‘ *14.*
>
> *On 17 July 2017 the Appellant served the Respondent with the Rule 56 Notice while the Respondent was busy with the drafting of the Rule 31 Statement and when at the same time its "settlement proposal" was still being considered by the audit*

division of the Respondent, which Rule 56 Notice required the Respondent to remedy the non-compliance by 7 August 2017.

15.

The process of drafting the Rule 31 Statement includes researching the law, [and] *several consultations with the auditors who are responsible for the case, which exercise can be cumbersome depending on the complexity of the matter.*

16.

On completion of the Rule 31 Statement, as is policy within the Respondent, the statements have to go through various governance committees for quality control in terms of both contents and lay-out, to ensure conformance to required standards. No product of unacceptable standards is allowed to be filed.

17.

This Rule 31 Statement has gone to the Pleadings Review Panel…on more than two occasions before it could be allowed to be filed.

18.

The Applicant had in the meantime filed Notice for Default Judgment in terms of Rule 56 on 8 August 2017 wherein it stated its intention to amongst others request the court to order the Respondent to deliver its statement of grounds of assessment and opposing the appeal in terms of Rule 31, or if the Respondent intended to oppose the application, to notify the [Applicant] *and within 15 (fifteen) days file the Answering Affidavit.*

19.

The Respondent accordingly filed Notice of Intention to Oppose on 22 August 2017 …".[9]

[16] It will be apparent from these quoted paragraphs that, again, Masola did not disclose when he commenced drafting the rule 31 statement. Nor did he divulge any details of when he forwarded the settlement proposal to his audit colleagues;

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9 Affidavit Masola, record pp 57-58.

when he consulted them for purposes of drafting the statement; how many consultations took place; if and when the audit colleagues provided input; how long he took to complete the initial draft thereafter; when that draft was submitted to the *'various governance committees'* for quality control; how long it took for them to respond; or when he had to submit the revised drafts on the *'more than two occasions'* mentioned. No confirmatory affidavits were filed by any of the other SARS officials allegedly involved in support of his allegations.

[17] Masola's averment at paragraph 18 of his affidavit is also somewhat disingenuous. It is clear from the application for default judgment that what the taxpayer sought, as its main relief, was a final order in terms of s 129(2)(b) of the TAA, upholding its appeal in terms of its notice of appeal dated 31 January 2017. It was only *in the alternative* that the taxpayer sought an order directing SARS to deliver its rule 31 statement within five days thereof *in the event* that the court found good cause for SARS' default.

[18] Although timeously filing its notice of intention to oppose, SARS failed to deliver its answering affidavit timeously, which it was required to do by 12 September 2017. Masola's explanation for this failure was as follows:

> *'I understood and honestly believed that should the Respondent remedy the non-compliance before 13 September 2017, then other subsequent actions, including the filing of the Answering Affidavit, falls away.'*[10]

[10] Masola affidavit, para 21, p58 record.

[19] On my calculation, the rule 31 statement was delivered 107 days after the initial deadline expired on 5 April 2017. However, SARS had failed to secure yet another extension for its delivery later than 7 August 2017, nor indeed had it even requested one. It has also, at no stage, sought condonation for late filing of the rule 31 statement itself. Simply serving that statement on the taxpayer and filing it in the court file did not automatically remedy its non-compliance, contrary to what Masola may have believed.

[20] On 13 September 2017 the taxpayer requested the registrar to allocate a date for hearing of the default judgment application. She duly provided the parties with the notice of set down on 20 September 2017. SARS only brought its application for condonation for late filing *of its answering affidavit* on 29 September 2017, i.e. five days before the hearing on 9 October 2017.

[21] In his affidavit Masola complained that the taxpayer had requested the registrar to set down the application for default judgment despite receipt of the rule 31 statement. He complained that his subsequent requests to the taxpayer's representatives to withdraw the default judgment application were refused. In his view, there was no prejudice to the taxpayer because it had been in possession of the rule 31 statement since 9 September 2017. It was on this basis that he sought condonation for the late filing *of the answering affidavit*.

[22] Masola also submitted that:

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[The]… *issues concerning the appeal are of such a substantial nature that they need to be ventilated in Court as they are likely to establish a precedent which might, depending on the outcome, prejudice the fiscus if the late submission is not condoned and the appeal is confirmed.*

29.

I further submit that the Respondent has a bona fide case as can be gleaned from the attached Rule 31 Statement marked "SARS3", and not allowing the Respondent to proceed with this matter in the Tax Court through the appeal process will definitely cause financial prejudice to the fiscus.'[11]

[23] The rule 31 statement was therefore simply attached as an annexure to Masola's affidavit. It runs to 12 pages. No attempt was made in the affidavit itself to summarise and – given SARS' contention that the issues involved are complex – to simplify the basis upon which SARS believes that it has good prospects of success.

[24] In response the taxpayer's Mr Dennis McCarthy[12] pointed out that Masola had not explained why he believed that SARS' non-compliance could simply be remedied by delivering its rule 31 statement before the deadline for delivery of its answering affidavit.

[25] McCarthy submitted that the taxpayer's prejudice arising from SARS' repeated failure to comply with the rules is manifest. He explained that the taxpayer has over the past 10 years tried to regularise its tax affairs, and during this period it has locked horns with SARS in court on 4 occasions. Consequently over these years it has had difficulty in performing income tax calculations, filing income tax returns

[11] Affidavit Masola, record p60.

[12] Masola's affidavit was an answering affidavit to the default judgment application, hence McCarthy's affidavit being filed in reply thereto.

and attending to provisional tax. It has nonetheless never defaulted on payment of sums due to SARS.

[26] He stated that despite Masola's averments about SARS' consideration of the offer to settle (submitted over 4 months earlier) it has yet to provide a response. While not disputing Masola's averments about SARS' internal processes, he submitted that the time frames provided in the rules are generous and thus presumably take into account the time that is reasonably required, even in complex matters, to prepare rule 31 statements and the like, although in his view the issues in the taxpayer's appeal do not fall into this category.

Discussion

[27] In *Van Wyk v Unitas Hospital*[13] the Constitutional Court dealt with condonation as follows:

> *'[20] This Court has held that the standard for considering an application for condonation is the interests of justice. Whether 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...*
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> *[22] An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable...'*[14]

[13] 2008 (2) SA 472 (CC).

[28] In Tax Case no. 12013/2012[15] the court stated:

> *'This case is characterised by conduct, both on the part of SARS and the taxpayer, in which the rules were not complied with, and in which neither side vigorously followed up these matters to keep the other party to the procedural timetable laid down in the rules. The timetable in the rules is a generous one; far longer periods are permitted for the filing of pleadings, by which I mean the statements in terms of Rule 10* [now 31] *and 11* [now 32]*, than applies in High Court proceedings under the Uniform Rules of Court…This perhaps takes into account that SARS is a busy governmental agency, and perhaps the rule makers intended it to have more time than applies to High Court litigation. Possibly also the rule maker bore in mind that many tax cases are complicated, and that more care and time might be needed.*
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> *Despite these generous time periods, one sees time and time again that neither SARS nor the taxpayers comply with them; they simply seem to go along in their own way. This is strongly to be discouraged. SARS, in particular, should take the lead and should display efficiency in the conduct of litigation. It should comply with time periods, and where it does not, it should promptly raise that matter in correspondence, providing reasons and seeking written agreements to extensions.*
>
> *Having said that SARS should take the lead, taxpayers themselves should not allow matters to drift. If SARS does not comply with a requirement imposed by the rules, a taxpayer is entitled, in terms of Rule 26* [now 56]*, to bring an application to compel compliance with the Commissioner's obligations. That is the way in which a taxpayer prevents the prejudice which can otherwise arise from lengthy delays in the finalisation of tax disputes…'*

[29] In *Van Wyk* the Constitutional Court also stated:

> *'There is now a growing trend for litigants in this Court* [i.e. the Constitutional Court] *to disregard time limits without seeking condonation…In some cases litigants either*

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[14] See also *Ferris v FirstRand Bank* 2014 (3) SA 39 (CC) at para [10] and *eThekwini Municipality v Ingonyama Trust* 2014 (3) SA 240 (CC) at para [28].

[15] 13 February 2017 at Tax Case no. 12013/2012, pp2 and 3.

> *did not apply for condonation at all or if they did, they put up flimsy explanations…This practice must be stopped in its tracks.'*[16]

[30] The explanation provided by SARS for its delay of 5 months beyond the time limit of 45 days stipulated in rule 31 is, to my mind, grossly inadequate. It is not a full explanation. It does not cover the entire period of the delay. Moreover it is not reasonable.

[31] During the period 5 April 2017 to 13 June 2017 (the first agreed extended deadline) the only steps Masola took were to meet with Kotze on 10 April 2017, essentially to ask for an extension, and to consider the offer to settle received on 26 May 2017. Apart from these the court is left with the bald averment that he was *'busy dealing'* with the matter.

[32] It is not possible to discern the actual steps taken by Masola between 14 June 2017 and 14 July 2017 (the second and final agreed extended deadline). All that is known is that by 17 July 2017 he was engaged in drafting the rule 31 statement.

[33] I have already highlighted the material deficiencies in his explanation for the delay over the period 17 July 2017 to 7 August 2017 and will not repeat them. What is clear however is that the rule 31 statement was still not finalised by 7 August 2017, and it must have been nowhere near completion even when SARS filed its notice of intention to oppose the default judgment application on 22 August 2017, given that the statement was only eventually served and filed on 9 September 2017.

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[16] At para [33].

[34] However SARS has a further, more fundamental, difficulty. This is that there is no application before the court for condonation for late filing of its rule 31 statement. The only application is for condonation for late filing of the answering affidavit. Even were it to be granted it would not cure that fundamental difficulty. The fact of the matter is that the rule 31 statement is not properly before the court. It was delivered months out of time and at the very least more than a month after the deadline of 7 August 2017 stipulated in the rule 56(1) notice.

[35] It may be that Masola was a recent appointee in the SARS litigation division when the taxpayer's appeal was allocated to him on 27 February 2017. There is no suggestion however that he lacked the necessary skills and experience. Indeed, this is unlikely given that SARS appointed him in the first place. It may also be that he required a reasonable amount of time to familiarise himself with SARS' internal processes and the appeal allocated to him. I also accept that the taxpayer's appeal was not the only matter on his desk.

[36] However he had been employed in the SARS litigation division for over 4 months by the date when the first agreed extended deadline of 13 June 2017 expired. In these circumstances it can surely be fairly accepted that by then he would have had the opportunity to familiarise himself with the rules. Indeed, even by 10 April 2017 he must have been aware of the 45 day time limit contained in rule 31, given that he knew he would require an agreed extension. The same applies to the further extension requested and to which the taxpayer agreed.

[37] It is thus rather difficult to accept that by 7 August 2017 he was nonetheless wholly unaware of the provisions of rule 4 relating to the extension of time periods and that he laboured under the misapprehension that delivery of the rule 31 statement would automatically remedy the non-compliance.

[38] Even if he genuinely believed this to be the case, it is not the end of the matter. This is not a typical case of an attorney representing a number of clients in a number of different types of matters. Masola is employed by SARS itself. In this regard the following passage in *Saloojee and Another v Minister of Community Development*[17] is relevant:

> *'In* Regal v African Superslate (Pty.) Ltd*., 1962 (3) S.A. 18 (A.D.) at p. 23, also, this Court came to the conclusion that the delay was due entirely to the neglect of the applicant's attorney, and held that the attorney's neglect should not, in the circumstances of the case, debar the applicant, who was himself in no way to blame, from relief. I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations* ad misericordiam *should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are. (Cf.* Hepworths Ltd. v. Thornloe and Clarkson Ltd*., 1922 T.P.D. 336;* Kingsborough Town Council v. Thirlwell and Another*, 1957 (4) S.A. 533 (N)). A litigant, moreover, who knows, as*

[17] 1965 (2) SA 135 (AD) at 141B-H.

the applicants did, that the prescribed period has elapsed and that an application for condonation is necessary, is not entitled to hand over the matter to his attorney and then wash his hands of it. If, as here, the stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney (cf. Regal v African Superslate (Pty.) Ltd*.,* supra *at p. 23 i.f.) and expect to be exonerated of all blame; and if, as here, the explanation offered to this Court is patently insufficient, he cannot be heard to claim that the insufficiency should be overlooked merely because he has left the matter entirely in the hands of his attorney. If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself. That has not been done in this case. In these circumstances I would find it difficult to justify condonation unless there are strong prospects of success (*Melane v Santam Insurance Co. Ltd*., 1962 (4) S.A. 531 (A.D.) at p. 532).'*

[39] Also relevant is the following passage in *Commissioner for Inland Revenue v Burger*:[18]

' There are several unsatisfactory features about this matter. The Commissioner alleges in his petition that he and his officials were not aware of any urgency but there is no allegation that he or his officials were unaware of the Rule which requires the record to be lodged within three months after the date of the judgment. In the respondent's replying affidavit it is submitted that the Commissioner and his officials know or should know the Rule. The only answer to this in the Commissioner's answering affidavit is that compliance with the Rules is a matter attended to by his attorneys and that unless the attorneys notify the Commissioner that a final decision must be made expeditiously, the matter is dealt with in the normal course. This answer can scarcely be regarded as denying that the Commissioner and his officials knew the Rule. But in any event the Commissioner, who is one of the most frequent litigants in this Court, could hardly have believed that there was no time limit for the prosecution of appeals. There seems to be no reason why he and his officials should have regarded the question of prosecuting

[18] 1956 (4) SA 446 (AD) at 448H-449G.

the appeal as a matter to be dealt with in the "normal cause" and not as a matter of urgency…

*Making due allowance for the fact that the action of Government officials is often, although, perhaps, unnecessarily delayed by departmental routine, and that part of the delay, though unjustified, may not have been inexcusable (*vide Cape Town Municipality v. Paine, *1922 A.D. 568 at p. 569) the present case seemed to us to be a case where the delay, taken as a whole, was so protracted as to be inexcusable. It appears from* Paine's *case that the appellant Municipality sought condonation from the Court as soon as it discovered that it had not noted its appeal timeously. In the present case there is no explanation whatsoever of the long delay which took place after the Commissioner received the letter from the respondent's attorneys refusing to agree to an extension of time. Those attorneys wrote to the Commissioner on 11 April and the petition for condonation was not lodged until 25 May – a delay of some six weeks. Whenever an appellant realises that he has not complied with a Rule of Court he should, without delay, apply for condonation. Cf.* Croeser v. Standard Bank*, 1934 A.D. 77 at p. 79;* R. v. Mkize*, 1940 A.D. 211 at p. 213; and* Reeders v. Jacobsz*, 1942 A.D. 395 at p. 397.'*

[40] Although Masola has taken responsibility for his belief that simply delivering the rule 31 statement, albeit grossly out of time, would automatically remedy SARS' non-compliance, SARS is otherwise silent.

[41] I accept that the amount involved of some R44 million is substantial. However, insofar as the delay is concerned, SARS' conduct, in my view, falls into the category of "inexcusable". It has paid little, if any, regard to the proper administration of justice and the effect of its delay, both on the taxpayer in this matter and the *fiscus*.

[42] Turning now to the prospects of success. The taxpayer's appeal involves its 2005 to 2012 years of assessment. The parties were engaged in earlier litigation in relation to the taxpayer's 2002 to 2004 years of assessment and the Supreme Court of

Appeal judgment in *Commissioner, South African Revenue Service v South African…*[19] [the *'SCA judgment'*] sets out the factual matrix at paragraphs [4] to [21] thereof.

[43] The taxpayer entered into a PPP (public private partnership) with the Department of Correctional Services in 2000, in terms of which it financed, designed, constructed, operates and maintains a maximum security prison that was opened in February 2002.

[44] The amount received by the taxpayer in respect of the PPP was a Contract Fee which was split into two component parts, the Fixed Component and the Indexed Component. The taxpayer in turn split the Fixed Component into a capital portion and an interest portion, and treated this component as relating to the finance provided in terms of the PPP in order for it to construct and design the prison. The taxpayer treated the Indexed Component as remuneration to it for operating and maintaining the prison. The taxpayer has the right to occupy the land but has *'no title to, or ownership interest in, or liens, or leasehold rights, or any other rights in the land'* and the State at all times remains *'the owner of the land'*.[20] It is also common cause that the taxpayer does not own the prison itself which is the property of the State.

[45] In order to finance the project and to meet its other obligations the taxpayer entered into agreements with various banks for loans totalling R384 million. These banks required security which was provided in the form of guarantees given by the South

[19] 2012 (1) SA 522 (SCA).
[20] Clauses 11.1 and 11.2 of the contract.

African government and the taxpayer's shareholders.[21] The taxpayer was obliged to pay fees in respect of the guarantees furnished. As previously stated the prison is the infrastructure of the Department. The taxpayer occupies it as a service provider to the Department. The taxpayer earns fixed and variable income from its running of the prison in terms of the contract, and the Supreme Court of Appeal, in summarising the relevant historical facts, stated that:

> *'…the fixed fee income being, for all intents and purposes, payment* [by the Department] *for the construction of the prison. It is payable over a period of 18 years.'*[22]

[46] The issues raised in the taxpayer's notice of appeal are the following:

46.1 Whether the capital portion of the Fixed Component of the Contract Fee is also of a capital nature for income tax purposes (the taxpayer only treats the actual capital portion as a loan receivable and not the interest portion);

46.2 Whether the taxpayer is entitled to the exemption previously granted to it in terms of s 10(1)(zl) of the Income Tax Act (*'ITA'*);[23] and

46.3 Whether the Fixed Component of the Contract Fee is a recovery or recoupment of the building allowance; [24]

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[21] Para [13] of the SCA judgment.
[22] Para [21] of the SCA judgment.
[23] Act 58 of 1962.
[24] Affidavit McCarthy para 15 record p95. The issue raised at para 15.4 on p96 appears to be ancillary to the main issues.

[47] The taxpayer contends that the purported disallowance by SARS, in the disputed assessments, of the exemption in terms of s 10(1)(zl) previously granted to it by letter from SARS dated 4 May 2007 is impermissible, given the following findings in the Henney judgment (where he accepted the argument of *SARS* in that matter, not that of the taxpayer):

> *"As stated by Mr Emslie, it may well be argued that in the context of* [the Supreme Court of Appeal] *judgment, the assessment being referred to was only for the period 2001 to 2004.*
>
> *[37] I am, however, not able to agree with the view held by Mr Emslie, because on a plain reading and understanding of the letter dated 4 May 2007 and the SCA Judgment as a whole, no distinction is drawn between the period 2001 to 2004 and the disputed assessments in this particular case i.e. the 2005 to 2012. Nowhere in the letter does it state that the assessments only referred to a specific period even though the assessments under consideration in that case dealt with the period 2001 to 2004…*
>
> *[39] Mr Venables (who drafted the letter dated 4 May 2007 on behalf of the Commissioner) sets out in the schedule of the letter, the amounts the Applicant is entitled to be exempted from paying tax in terms of the provisions of section 10(1)(zl) as from the period 2002 up to 2019. What this represents, as held by* Plasket AJA *(supra), is clearly* "an assessment […] as the determination by the commissioner, by way of a notice of assessment […] served in a manner contemplated in s 106(2) … of an amount upon which any tax leviable under this Act is chargeable." *And as per* Galgut DJP *"what is required is at least a purposeful act, one whereby the document* [4 May 2007] *embodying the mental act is intended to be an assessment."*
>
> *[40] What this notice intended to convey in respect of section 10(1)(zl) was that such an exemption to the amount as mentioned was applicable and this assessment meticulously sets out and included the periods between 2005 to 2012 (and even beyond this period) to which this exemption was applicable. Clearly from this assessment the Applicant was informed in what respects it would be liable to*

pay tax after the exemption had been taken into consideration. It was clearly a calculation which determined what amount of tax would be payable by the Applicant and not merely a notice or a decision taken by the commissioner for the purposes of section 9(1) of the TAA to find application.'

[Emphasis supplied].

[48] The taxpayer accordingly submits that, this being the case, the three year period of limitations for the issue of revised assessments expired on 5 May 2010 in terms of s 99(1)(a) of the TAA, long before the disputed assessments were raised on 2 and 3 November 2015, and SARS is thus precluded from disallowing the exemption.

[49] The taxpayer further argues that, in keeping with settled legal principles relating to income tax recoupments, the allowances granted by SARS in terms of s 11(g) of the ITA (as adjusted to take account of the s 10(1)(zl) exemption) cannot be recouped by the Fixed Component of the Contract Fee.[25] The taxpayer can never sell the prison and accordingly the question of a recoupment does not arise. To take the approach now adopted by SARS – namely that the full Contract Fee constitutes gross income – would result in double taxation.[26]

[50] McCarthy summed it up as follows:

'16. It is obvious that the Capital Portion is also capital in nature for income tax purposes. There can be no question of a recoupment if the Capital Portion is not capital in nature (otherwise it will lead to double taxation), but the Capital Portion is not recouping the building's costs (which is not the Applicant's) and is not in relation to the building allowance otherwise; it is a payment to the Applicant for having

[25] In terms of s 8(4)(a) of the Income Tax Act.
[26] See also *CSARS v Pinestone Properties CC* 2002 (4) SA 202 (N) at 207.

provided the finance to build the prison. SARS' ability to assess the exemption has prescribed, and, in any case, the exemption is available to the Applicant.'[27]

[51] According to SARS, it raised the 2005 to 2012 tax assessments against the taxpayer by:

51.1 Disallowing the s 10(1)(zl) exemption as it was found not to be applicable; and

51.2 Adding to the taxpayer's taxable income amounts previously permitted as a s 11(g) allowance, as having been recouped in terms of s 8(4)(a) of the ITA, to the extent that the amounts in respect of expenditure so incurred by the taxpayer were subsequently *'reimbursed'* by the Department.[28] It took the following approach:

'29. …there is a direct link between the monies expended on the improvements to land and buildings which is the direct cause for the section 11(g) allowance, and the amounts received by the Appellant from the Department…as compensation for expenditure so incurred on land or to buildings to trigger a section 8(4) recoupment.'[29]

[Emphasis supplied].

[52] This approach appears to overlook what was found by the Supreme Court of Appeal – albeit in a different context – that:

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[27] Record p96.
[28] Record p79.
[29] Record p85.

> '[The taxpayer] *…never carried on "any construction, building, engineering or other trade in the course of which improvements" were effected by it to the fixed property of the State…*'[30]

[53] Inexplicably, in its rule 31 statement, SARS did not engage at all with these findings in the SCA and Henney judgments although the taxpayer specifically dealt with them in its notice of appeal. It appears to have simply ignored them and proceeded to motivate its case as if they did not exist.

[54] I accept that this court is not determining the merits of the disputed assessments. However, the onus rests upon SARS to persuade me that it has good prospects of success in the context of whether it has shown good cause for condonation. SARS failed to deal at all with the findings, by which it is bound, in the SCA and Henney judgments. Moreover it was content to merely incorporate the content of its rule 31 statement by reference, coupled with the bald averment that the statement shows that it has a *'bona fide case'.* To my mind, the approach adopted does not enable me to determine that it enjoys good prospects of success.

[55] It follows that the application for condonation must fail.

Point in limine – lack of jurisdiction

[56] Section 117 of the TAA provides that:

> *'**117. Jurisdiction of tax court.**---(1) The tax court for purposes of this Chapter has jurisdiction over tax appeals lodged under section 107.*

[30] At para [45] of the Supreme Court of Appeal judgment.

(2) The place where an appeal is heard is determined by the "rules".

(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".'

[57] Rule 41 in turn stipulates that:

*'**41. Places at which tax court sits***

(1) The Judge-President of the Division of the High Court with jurisdiction in the area where a tax court has been established under section 116 of the Act must –

(a) determine the place and the times of the sittings of the tax court in that area by arrangement with the registrar under section 117(2); and

(b) allocate a judge or an acting judge of the High Court as the president of the tax court for each sitting.

(2) The tax court established in the area which is nearest to the residence or principal place of business of the appellant must hear and determine an appeal or application under Part F by the appellant, unless –

(a) the parties agree that the appeal or application be heard by a tax court sitting in another area; or

(b) the tax court, on application by a party under Part F, orders that the appeal or application be heard and disposed of in that tax court if –

(i) there are reasonable grounds to determine the matter in that tax court; and

(ii) approved by the Judge-President of the Division of the High Court with jurisdiction in the area where that tax court sits.'

[58] The taxpayer has its principal place of business in Sandton, Gauteng. Its application for default judgment was filed in the Tax Court at Megawatt Park in Gauteng. Following SARS' failure to deliver its answering affidavit timeously, and on 15 September 2017, the taxpayer's attorney wrote to the registrar of the Tax Court (which is located in Pretoria) with the following request:

> *'5. On the basis that SARS has failed to serve and file an answering affidavit, the taxpayer hereby applies for a date for the hearing of the application in accordance with Rule 61(1) of the Rules.*
>
> *6. The taxpayer further requests that the hearing of the application take place in Cape Town on the basis that the taxpayer's attorney and counsel are situated in Cape Town. The taxpayer has already incurred unnecessary expense in instituting these proceedings to seek to enforce compliance with the Rules and thus it is respectfully requested that the matter be heard in Cape Town so that the taxpayer does not have to incur further expenses associated with travel costs.*
>
> *7. On the basis of the above, kindly proceed to enrol the matter for hearing in the Tax Court Cape Town.'*[31]

[59] Although it was technically not necessary to do so, given that SARS was in default, this letter was also emailed to both Masola and a certain Muthabuli at SARS. The registrar acceded to the request and set the matter down for hearing in this court in terms of a notice of set down dated 20 September 2017. The notice of set down was also emailed to SARS (again to Masola).[32]

[60] In his affidavit filed in support of the application for condonation for late delivery of the answering affidavit, Masola contended that this court lacked jurisdiction to entertain the application for default judgment on the basis that the taxpayer had failed to obtain SARS' consent to transfer the matter to Cape Town for hearing, or to obtain an order from the Tax Court to that effect, as envisaged in rule 41(2).

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[31] Record p63.
[32] Record pp48-49.

[61] To my mind, this argument had no merit because at the time when the request was made to the registrar SARS was in default, given that it had failed to timeously deliver its answering affidavit. It was only *'a party'* to the extent that it had earlier delivered a notice of intention to oppose.

[62] Rule 59 provides that where a party has failed to deliver a notice of intention to oppose, the applicant may apply to the registrar to set the matter down and:

> *'(2) An application must be heard by a tax court having jurisdiction within any area in which the appellant resides or carries on business unless the applicant and the registrar agree that it be heard in another area…'*
>
> [Emphasis supplied].

[63] Rule 62 deals with the set down of a matter for hearing where no answering affidavit has been delivered. It simply provides that:

> *'(1) If no answering affidavit is delivered by the respondent within the period referred to in rule 60(c)* [i.e. within 15 days of delivery of its notice of intention to oppose] *the applicant may within 5 days of the expiry of that period apply to the registrar to set the application down.*
>
> *(2) The registrar must deliver to the parties a written notice of the time and place appointed for the application at least 10 days before the date upon which it has been set down.'*
>
> [Emphasis supplied].

[64] There is nothing, on the plain wording of rule 62, that requires an applicant in the position of the taxpayer to obtain the prior consent of a defaulting party, or an order

from the Tax Court, for what has become an application for default judgment to be heard at a place other than where the application was originally filed. That such consent, or an order to that effect, is not required, is supported by the wording of rule 59 which expressly provides that, where no notice of intention to oppose has been delivered, an applicant and the registrar may agree that it be heard in another area. In any event, rule 62 appears to permit the registrar, in her discretion, to appoint the place for the hearing of the application. In the normal course, she would appoint the place where the application has been filed. The registrar clearly exercised her discretion in accommodating the taxpayer's request for the matter to be heard in Cape Town for the reasons set out in the email of 15 September 2017. It also appears to me that the purpose of the "default position" in the rules, namely that a matter will be heard at the place nearest to the residence or principal place of business of the appellant, is predominantly for the latter's convenience.

[65] However, if I am wrong in this regard, SARS was nonetheless given two opportunities to object to the transfer of the matter from Gauteng to Cape Town, namely upon receipt of the email dated 15 September 2017 and the registrar's subsequent notice of set down. It raised no objection.

[66] Moreover, SARS failed to disclose to this court that the interlocutory application between the same parties had earlier served before Henney J during 2016. No objection was raised by SARS to that interlocutory application being heard in Cape Town and it was simply dealt with on its merits. There can thus be little doubt that SARS, in any event, tacitly consented to the transfer of this matter to Cape Town. It was for these reasons that the point *in limine* was dismissed with costs.

Conclusion

[67] The taxpayer has complied with the procedural provisions of rule 56. SARS has failed to show good cause for condonation for its default. In terms of rule 56(2) this court is empowered to make an order under s 129(2) of the TAA which provides as follows:

> *'(2) In the case of an assessment or "decision" under appeal or an application in a procedural matter referred to in section 117(3), the tax court may --*
> *(a) confirm the assessment or "decision";*
> *(b) order the assessment or "decision" to be altered; or*
> *(c) refer the assessment back to SARS for further examination and assessment.'*
>
> [Emphasis supplied].

[68] The taxpayer seeks a final order under s 129(2)(b) of the TAA to alter SARS' assessment in the manner contemplated in its notice of appeal. I am persuaded that it is entitled to such an order. There is no reason why costs should not follow the result.

[69] **The following order is made:**

1. **The respondent's application for condonation for the late filing of its answering affidavit is dismissed.**
2. **A final order is granted under section 129(2)(b) of the Tax Administration Act 28 of 2011 altering the assessments issued by SARS on 2 November 2015 in respect of the tax periods 2005 to 2010, and on 3 November 2015**

in respect of the tax periods 2011 and 2012, in the manner contemplated in the applicant's notice of appeal dated 31 January 2017.

3. **The respondent shall pay the applicant's costs in respect of both applications, including the costs of 2 (two) counsel where employed.**

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J I CLOETE