REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

GAUTENG

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

_____ _____

DATE SIGNATURE

CASE NO: IT 13862
& VAT 1374

In the matter between:

MR X **Appellant**

and

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

J U D G M E N T

INGRID OPPERMAN J

INTRODUCTION

[1] Two applications for leave to amend the Commissioner for the South African Revenue Service's ('SARS') Statements of Grounds of Assessment, serve before me. The one in respect of SARS Statement of Grounds of Assessment filed in respect of the taxpayer's income tax under case number 13862 ('the IT matter') and the other, SARS Statement of Grounds of assessment filed in respect of the taxpayer's VAT obligations under case number 1374 ('the VAT matter'). They are brought in terms of rule 35(2) read with rule 52(7) of the Rules ('the Rules of the Tax Court') promulgated in terms of section 103 of the Tax Administration Act, 28 of 2011 ('TAA'). SARS requested the taxpayer to agree to the proposed amendments in terms of rule 35(1), which he declined to do.

[2] In respect of both matters, the proposed amendment is annexed to the Notice of Motion and is annexure 'X'. In the IT matter the proposed amendment seeks to insert two paragraphs (paragraphs 24A and 28A) and to amend the existing paragraph 29 of the Statement of Grounds of Assessment. In the VAT matter, the proposed amendment seeks to amend paragraphs 19, 21 and 22 of the Statement of Grounds of Assessment. At the commencement of the hearing, counsel for SARS presented the court with an amended notice of amendment in the VAT matter. SARS was no longer persisting with the amendment in respect of paragraph 22 of the Statement of Grounds of Assessment but now wanted the paragraph deleted in its entirety.

BACKGROUND

IT matter

[3] SARS issued original assessments for the 2005 to 2007 tax years and later issued additional and reduced assessments for these years. SARS further issued original estimate assessments for the 2008 to 2011 tax years because the taxpayer failed to submit returns, which were later followed by further reduced and additional assessments for the 2008, 2010 and 2011 tax years and two reduced assessments for the 2009 tax year.

[4] The taxpayer objected to the assessments issued by SARS, which objections were partially disallowed. There are two relevant objections in the income tax appeal, namely the objection submitted by the taxpayer, dated 20 June 2013 and the objection submitted by the taxpayer, dated June 2014 and filed on 11 September 2014.

[5] SARS issued a notice of partial allowance and partial disallowance of the objection dated 20 June 2013, which notice is dated 8 April 2014. SARS also issued a notice of disallowance of the objection dated June 2014 and submitted on 11 September 2014, which notice is dated 4 February 2015 and further issued letters of outcome of the objections relating to the 2008 to 2011 tax years.

[6] SARS contends that the taxpayer failed to declare all his income and that it consequently had to estimate the taxpayer's income by considering *inter alia* the taxpayer's bank accounts to determine what amounts had been received by the taxpayer. The amounts reflected in the estimated assessments are based, so it contends, on the taxpayer's own bank accounts. The question for consideration by the tax Court, so it argues, is whether these amounts should be subject to tax.

Vat matter

[7] SARS issued its initial assessments that were followed by two further assessments for both the 2006 and 2007 VAT periods.

[8] The taxpayer objected to the assessments issued by SARS, which objection was partially disallowed by way of notice of disallowance of objection dated 4 June 2014.

[9] SARS contends that the taxpayer had failed to declare all his income. SARS consequently had to estimate the taxpayer's income by considering *inter alia* the taxpayer's bank accounts to determine what amounts had been received by the taxpayer. The amounts reflected in the estimated assessments are based on the taxpayer's bank accounts.

SALIENT FACTS

[10] In the course of 2011 to 2013, SARS conducted an integrated audit into the taxpayer's affairs. This resulted in SARS raising additional assessments in 2013, both for income tax (covering the years 2005 to 2011 years of assessment) and for VAT (covering the VAT period 02/2006 and 02/2007).[1]

[11] The Taxpayer objected to these additional assessments, which were disallowed, and then appealed against the disallowance of the objection. He elected that the IT dispute be referred to alternative dispute resolution ('ADR').[2]

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1 SARS did not raise individual additional assessments for each VAT period, but raised an unconventional assessment, covering a calendar year and not a VAT period.

2 In terms of section 107(5), SARS and the taxpayer may attempt to resolve the tax dispute through alternative dispute resolution, governed by the Tax Court Rules. The alternate dispute resolution rules are Rules 13 to 25.

[12] On 6 March 2015, an ADR facilitation meeting was held, in terms of which resolution was reached between the taxpayer's representatives and SARS officials, subject to confirmation by the SARS internal governance structure, the National Appeals Committee ('NAC').

[13] The NAC did not approve the resolution of tax disputes as M (Pty) Limited, a company in which the taxpayer had previously been a director and shareholder, was in liquidation in 2015 and subject to an insolvency enquiry.

[14] Consequently, the matter was referred for adjudication to the Tax Court on 15 July 2015. SARS was required to file its Statements of Grounds of Assessment within 45 days, namely by 5 October 2015.[3] SARS did not file its Statements of Grounds of Assessment by 5 October 2015. On 27 January 2016, SARS was granted authorisation by the Gauteng Division, Pretoria, of the High Court to appoint a presiding officer in a tax enquiry into the affairs of M (Pty) Ltd, the taxpayer and others.

[15] On 18 November 2016, the *subpoena* requiring the taxpayer to attend at the M (Pty) Ltd tax enquiry was stayed by order of the Gauteng Division, Pretoria. In November 2017, the authorisation granted by the Gauteng Division, Pretoria, to appoint Advocate Y SC as the presiding offer in a tax enquiry, was reviewed and set aside.

[16] On 5 December 2016, SARS was placed in default for failing to file its Statements of Grounds of Assessment. On 27 January 2017, SARS filed its Statements of Grounds of Assessment.

[17] On 3 April 2017, the taxpayer's legal representative ('TP's rep') addressed a letter to SARS' legal representative ('SARS'), pointing out that there were discrepancies between the Statements of Grounds of Assessment filed by SARS and the basis on which SARS disallowed the objection. It was pertinently enquired from SARS whether SARS conceded certain of the tax liability, as amounts previously included had been excluded from the Statements of Grounds of Assessment.

[18] On 15 May 2017, SARS responded, stating that no amounts were conceded, but that SARS intended to amend its Statements of Grounds of Assessment.

[19] In an attempt to resolve these discrepancies, the SARS auditor and the taxpayer's auditor met on 29 May 2017 and reached agreement on certain amounts. This agreement essentially was the same agreement reached at the ADR facilitation meeting and not approved by the NAC.

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[3] Tax Court Rule 31.

[20] On 26 June 2017, SARS informed the TP's rep that the concessions required the authorisation of the NAC, whereafter SARS would amend its Statements of Grounds of Assessment.

[21] SARS took no action to amend its Statements of Grounds of Assessment. On 13 March 2018, the taxpayer filed his Statements of Grounds of Appeal.

[22] On 11 April 2019 at the pre-trial conference, SARS stated that it intended to amend its Statements of Grounds of Assessment.

[23] SARS gave no indication of how it intended to amend its Statements of Grounds of Assessment. The taxpayer recorded his prejudice as SARS now sought to amend its Statements of Grounds of Assessment after a period of two years.

[24] On 10 May 2019, SARS filed its notice of intention to amend its Statements of Grounds of Assessment.

REASON FOR THE AMENDMENT

[25] SARS contends that the SARS auditor had made adjustments on her working papers, in line with discussions between her and the taxpayer's auditor during the ADR process. The proposed agreement discussed between the parties during the ADR process was, however, not approved by the relevant SARS committee. When the Statements of Grounds of Assessment were drafted, the figures, according to the SARS auditor's internal working papers, were used instead of the figures reflected on the assessments read with the disallowances of the objections.

[26] SARS argues that the proposed amendments are necessary to bring the Statements of Grounds of Assessment in line with the respective assessments read with the objections and the partial allowances of the objections.

RELEVANT LEGAL PRINCIPLES

[27] Amendments to pleadings are typically encountered in practice. More than a century ago, in *Whittaker v Roos*,[4] Wessels J stated:

> "This Court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the Court is to do justice between the parties. It is not a game we are playing, in which, if some mistake is made the forfeit is claimed. We are here for the purposes of seeing that we have a true account of what actually took place, and we are not going to give a decision upon what we know to be wrong facts. It is presumed that when a defendant pleads to a declaration he knows what he is doing, and that, when there is a

[4] 1911 TPD 1092 at p 1102 – 1103.

> certain allegation in the declaration, he knows that he ought to deny it, and that, if he does not do so, he is taken to admit it. But we all know, at the same time, that mistakes are made in pleadings, and it would be a very grave injustice if for a slip of the pen, or error of judgment, or the misreading of a paragraph in pleadings by counsel, litigants were to be mulcted in heavy costs. That would be a gross scandal. Therefore, the Court will not look to technicalities, but will see what the real position is between the parties."

[28] The principle is well established that amendments ought to be granted where they are necessary to facilitate the proper ventilation of the disputes between the parties.[5]

[29] In one of the leading cases on the issue, *Moolman v Estate Moolman*,[6] Watermeyer J formulated the approach to be adopted in considering whether an amendment ought to be allowed:

> "[t]he practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed."

[30] Each case has to be considered on its own facts. The granting or refusal of an application for the amendment of pleadings is the matter for the discretion of the Court, to be exercised judicially. In *Zarug v Parvathie*[7] the Court (per Henochsberg J) laid down some principles which provide guidance. These are:

> "1. The Court will allow an amendment, even though it may be a drastic one, if it raises no new question that the other party should not be prepared to meet.
>
> 2. With its large powers of allowing of amendments, the Court will always allow a defendant, even up to the last moment, to raise a defence, which may bar the action.
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> 3. No matter how negligent or careless the mistake or omission may have been, and no matter how late the application for an amendment may have been, the application can be granted if the necessity for the amendment has risen through some reasonable cause, even though it be only a bona fide mistake."

[31] An amendment should not be refused merely to punish the litigant for some mistake or neglect on his part. His punishment will be the wasted costs.[8]

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5 *Morgan & Ramsay v Cornelius & Hollis* 1910 NPD 262 at p 265; *Randa v Radopile Projects CC* 2012 (6) SA 128 (GSJ) at para 33.

6 *Moolman v Estate Moolman* 1927 CPD 27 at p 29.

7 *Zarug v Parvathie* 1962 (3) SA 872 at p 875 F to 876 C.

8 *Trans-Drakensberg Bank Ltd v Combined Engineering* (Pty) Ltd 1967 (3) SA 632 (D) at 640 H.

[32] In *Macduff & Co (in liquidation) v Johannesburg Consolidated Investment Co Ltd*[9] the Court relied on certain passages quoted in *Rishton v Rishton*[10] from an English decision to the same effect:

> "My practice has also been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he has done some injury to his opponent which could not be compensated for by costs or otherwise."
>
> And:
>
> "However negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice to the other side if compensated by costs."

[33] In *Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd and Another*[11] the Court discussed the discretion to be exercised by a Court in considering the application for an amendment and found:

> "… the aim should be to do justice between parties by deciding the real issues between them. The mistake or neglect of one of them in the process of placing the issues on record is not to stand in the way of this; his punishment is in his being mulcted in wasted costs. The amendment will be refused only if to allow it would cause prejudice to the other party not redeemable by an order for costs and, where appropriate, a postponement. It is only in this relation, it seems to be, that the applicant for the amendment is required to show it is bona fide and to explain any delay there may have been in making the application, for he must show that his opponent will not suffer prejudice in the sense I have indicated. He does not come as a suppliant, cap in hand, seeking mercy for his mistake or neglect. Having already made his case in his pleading, if he wishes to change or add to this, he must explain the reason and show prima facie that he has something deserving of consideration, a triable issue; … ."

[34] In *Shill v Milner*[12] De Villiers JA held that the importance of pleadings should not be unduly magnified. In *Robinson v Randfontein Estates GM Co Ltd*[13] Innes CJ held:

> "The object of pleading is to define the issues; and the parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for pleadings."

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9 1923 TPD 309.
10 1912 TPD 718 at 720.
11 1967 (3) SA 632 (D) at 640H – 641B **.**This was confirmed in *Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another* 1990 (3) SA 547 (A) at 565D – 566C.
12 1937 AD 101 at 105.
13 1925 AD 173 at 198.

ANNEXURE 'X' IN THE IT MATTER

[35] The taxpayer contends that the notice of intention to amend attached to the notice of motion in the IT matter, should be considered *pro non scripto*, as unprocedural and prejudicial to the taxpayer.

[36] SARS followed the process prescribed by rule 35(1) by sending the taxpayer a notice of intention to amend on 10 May 2019. In the last paragraph of that notice it is stated:

> "The Appellant is requested to consent to this amendment in terms of rule 35(1) of the Rules of the Tax Court, within ten days of this notice."

[37] It appears as though the taxpayer failed to distinguish between the procedure for amendment in the Tax Court and the procedure in the High Court. In the Tax Court, rule 35 prescribes that the parties may agree to an amendment (rule 35(1)) failing which, the party desirous of amending, is to apply to the Tax Court for leave to amend (rule 35(2)). The position is therefore not the same as in the High Court.

[38] Rule 42 of the Tax Court Rules states that only if the Tax Court Rules do not provide for a procedure, then the most appropriate rule of the Rules of the High Court may be utilised. The Tax Court Rules provide for amendments and consequently the Rules of the High Court do not have application in this instance.

[39] The taxpayer, instead of indicating whether he agreed or disagreed with the proposed amendment, filed a notice of objection to the intended amendment. SARS sent a letter to the TP's rep on 3 June 2019, addressing the objections raised by the taxpayer. In paragraph 5 of this letter it is stated that:

> "In order to address your concerns, we attach hereto as annexure 'A' an amendment notice of intention to amend, which makes it clear that the amounts contained in paragraphs 24 and 24A are different."

[40] The only difference between the initial notice of intention to amend sent to the taxpayer on 10 May 2019 and the notice of intention to amend attached to the notice of motion (annexure 'X'), is the introductory part of the first paragraph. In the initial notice it was stated

> "24A. Amounts disallowed (tax as gross income)."

[41] In the notice of intention to amend attached to the notice of motion (annexure 'X'), the introductory part of the first paragraph reads:

> "Apart from the amounts set out in paragraph 24, the taxpayer also failed to include the following amounts in his gross income."

[42] The reason why SARS changed the notice was because the taxpayer contended that he did not know whether the amounts included in paragraph 24 of the Statement of Grounds of Assessment are duplicated in the new proposed paragraph 24A. SARS therefore clarified that the amounts in paragraph 24 and the amounts in the proposed paragraph 24A, are different.

[43] The taxpayer is not prejudiced by this because the taxpayer has the right to oppose the intended amendment which he did in his answering affidavit. The only notice of intention to amend that is before the Court is the one attached to the notice of motion. There is nothing unprocedural about that, neither is there any prejudice to the taxpayer.

GROUNDS OF OBJECTION

IT Matter

Ground 1

[44] I have accepted the amended notice of intention to amend attached as annexure 'X' to the notice of motion as the proper notice, for the reasons set out hereinbefore, and accordingly this ground of objection falls away.

Grounds 2, 3 and 6 – Paragraphs 24A, 28A and 29

[45] Grounds 2, 3 and 6 relate to amounts which were excluded in the Statement of Grounds of Assessment dated 27 January 2017. This much is common cause.

[46] On 3 April 2017, the taxpayer's attorney brought to SARS' attention that certain amounts, including these that SARS now seeks to introduce by way of amendment, were not in the Statement of Grounds of Assessment. SARS was asked whether these amounts had been conceded. SARS indicated that it had not and that it would amend its Statement of Grounds of Assessment.

[47] The taxpayer contends that SARS' conduct over more than two years amounts to an abandonment and/or concession of the amounts that it has omitted from its Statement of Grounds of Assessment.

Concession

[48] An admission is an unequivocal agreement by one party with the statement of fact by another.[14] For conduct to be an unequivocal agreement, it must be consistent with no other hypothesis.[15] An allegation of fact in the pleading is not an admission of that fact and can be readily withdrawn.[16] In any event the discretion of the court to relieve a party from the consequence of an admission that was made in error in a pleading should not be exercised in any other way than by granting an amendment of that pleading.[17]

[49] It was argued on behalf of the taxpayer that neither the TAA, nor the Rules of the Tax Court, prescribe the manner or form in which a concession should be. It follows, so the argument ran, that a concession could be inferred from conduct. There was no reason why the initial grounds of assessment and SARS' subsequent conduct should not be read together as constituting notice of SARS' concession. For this argument, Ms D, representing the taxpayer, relied on the decision of *ABC (Pty) Ltd v Commissioner of SARS*[18]. In the ABC matter, SARS initial grounds of assessment reflected an under-declaration of some R38 million. In SARS' expert notice it stated that its expert would be substantiating a R28 million under-declaration. In response to the expert notice the taxpayer delivered an amended statement of grounds of appeal in which it recorded its first point *in limine* being that the wrong assessments were before court. SARS advised through its attorneys that it did not intend to issue reduced assessments. The taxpayer maintained that SARS could not effect a material change in the amount of liability via notice of evidence intended to be led at the hearing of the appeal by an expert. It was argued that such new assessment could only be effected by the withdrawal of the original assessment and substitution thereof with an amended one. SARS responded that although the amount of liability had changed, SARS had conceded the amount in terms of section 107(7) of the TAA. SARS relied on an exchange of correspondence subsequent to service of the notice of evidence of the expert. The issue which fell for determination was whether or not SARS had conceded a portion of its claim against the taxpayer before the hearing clearly and unequivocally and without prejudice to the taxpayer and in accordance with the appropriate procedure. The court found that the point *in limine* raised by the taxpayer had to fail and that SARS had conceded a portion of its claim as understood in terms of section 107(7) of the TAA.

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[14] *Botha v van Niekerk* 1947 (1) SA 699 (T) at p 703.
[15] *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) at para 19.
[16] *Wild Sea Construction (Pty) Ltd v Van Vuuren* 1983 (2) SA 450 (C) at p 452G – H.
[17] *Gordon v Tarnow* 1947 (3) SA 525 (A) at p 532.
[18] ITC 13251/VAT1077 decision of Satchwell J for the full court: 16 May 2018.

[50] SARS' counsel did not argue that the ABC matter had been wrongly decided however he differed from Ms D in its application to the current set of facts. The court in the ABC matter had held that section 107(7) of the TAA did not give direction as to how the 'concession' was to be made other than that it had to be made before the matter was heard by the Tax Court. The format was also not prescribed. The court also found that there was no reason why the initial Grounds of Assessment, the rule 31 notice, the rule 37 notice and the subsequent letters could not be read together, to assess whether notice of the concession had been given to the taxpayer.

[51] The taxpayer in this matter argued that a) the Grounds of Assessment read with the Grounds of Appeal and b) the two and a half year delay in bringing the amendment, amounted to clear and unequivocal notice that the amounts excluded from the initial grounds of assessment, were conceded.

[52] The Taxpayer expressly stated in his grounds of appeal on a number of occasions (differing formulations but substantially) that : '*The appellant notes the concession made by SARS that the figure in the notice of assessment is incorrect. The appellant accepts the figure of RX as pleaded to be included in the taxable income for the 2009 year of assessment.'* It was argued that the failure by SARS to reply thereto constituted an admission and acceptance of such facts. SARS' counsel countered that the normal rules relating to pleading applies i.e. that a reply (or replication as it is known in conventional parlance) is only required when a fact is admitted and/or avoided but that fact is deemed to be denied in the absence of a reply. This, in my view, correctly summarises the legal position. I was not referred to any authority to contradict this.

[53] The grounds of assessment read with the grounds of appeal, do therefore not create the factual substrata to conclude that a concession was made.

[54] The Taxpayer was aware of the fact that SARS made no concessions. In the disallowance of the objection of 4 February 2015, SARS disallowed the amounts. In addition, SARS received a letter dated 3 April 2017 from the taxpayer's Attorneys in which the taxpayer enquired whether SARS conceded the amounts now contained in the proposed paragraphs 24A, 28A and 29 to which letter SARS' attorneys responded on 15 May 2017 clearly stating that these amounts were not conceded and that an amendment would be effected to include these amounts in SARS' Statement of Grounds of Assessment.

[55] Some inference might well, in the fullness of time, be drawn from the delay of two and a half years in bringing the application. The delay *per se* though, holds no bar to the granting of the amendment. It may of course have a bearing on SARS' *bona fides* and/or on costs – more about that later.

Abandonment

[56] It is well-established law that the compulsory nature of taxation is such that it cannot be waived.[19]

[57] However, insofar as the taxpayer wishes to challenge this principle or the application of such principle to these facts, it will be open to him to do so at the trial. For the moment though, all this court need concern itself with, is whether this argument is a bar to the granting of the amendment. It is not as all I need to be satisfied with is that there is a triable issue. I find that there is.

Grounds 4 & 5 – Paragraphs 28A & 29

[58] The taxpayer objects on the basis that the content of the proposed paragraphs 28A & 29 do no correlate with the current assessments and that SARS is seeking to raise a liability in respect of which no assessment exists.

[59] The capital gains tax in respect of the 2007 year of assessment is reflected in the assessment as an amount of R424 397. The proposed new paragraph 28A reflects exactly that amount. The taxpayer is therefore wrong to contend that this amount was not assessed and that the amendment would constitute the introduction of a new ground of assessment.

[60] The contents of the proposed paragraph 28A are identical to paragraph 6.1 of SARS' partial allowance of objection letter dated 8 April 2014 and as such does not constitute a new ground of assessment. The proposed amended paragraph 28A therefore reflects the assessment and correlates with the disallowance of the objection.

[61] The taxpayer is wrong to contend that the proposed new paragraph 29 seeks to introduce a new ground of assessment not previously assessed. The assessment dated 13 February 2013 reflects capital gain in respect of the 2009 year of assessment in the amount of R617 109. In the disallowance of the objection, the capital gain for 2009 is stated to be R143 276, exactly the same as in the new proposed paragraph 29. Therefore, SARS has to an extent allowed the taxpayer's objection against the assessment in relation to capital gains tax for 2009 and reduced the amount from R617 109 to R143 276. The contents of the proposed amended paragraph 29 is identical to paragraph 2.1 of SARS' partial disallowance of objection letter dated 4 February 2015 and as such does not constitute a new ground of assessment.

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[19] *Collector of Customs v Cape Central Railways* (1888) (6) SC 402 at 405-6; *Carlson Investments Shareblock v C:SARS* 2001 (3) SA 201 (W) at 231F-J.

VAT Matter

Ground 1 – paragraph 19

[62] The taxpayer contends that the proposed amended paragraph 19 is contradictory to paragraphs 17 and 18, and is unrelated to the taxpayer's failure to declare taxable supplies and duplicates deposits paid into the taxpayer's bank account. The taxpayer incorrectly suggests that the proposed paragraph 19 calculates the taxable supplies for the VAT period 02/2007. The proposed paragraph 19 deals with the 02/2006 (2006 year of assessment) VAT periods not 2007.

[63] Paragraph 17 contains a general statement made in respect of both the 2006 and 2007 VAT periods and is therefore not contradictory to the proposed amended paragraph 19. Paragraphs 18 and 19 relate to the 2006 VAT periods (not the 2007 VAT periods as contended for by the taxpayer).

[64] Paragraph 18 and the proposed amended paragraph 19 respectively deal with different bank account numbers and are not contradictory. Paragraph 18 deals with bank account number 031 485618 whereas the proposed amended paragraph 19 deals with bank account number 031 486177. It follows, there being two accounts, that it is incorrect that the proposed amendment *"duplicates deposits paid into the balance bank account"*

[65] The content of the proposed amended paragraph 19 is identical to paragraph 1.4 of the disallowance of objection letter dated 4 June 2014 (in relation to the 2006 VAT periods) and as such is not '*unrelated to the Appellant's failure to declare taxable supplies'*.

Ground 2 – Paragraph 21

[66] The taxpayer's argues that the proposed amended paragraph 21 is contradictory to paragraphs 17 and 18, is unrelated to the taxpayer's failure to declare taxable supplies and duplicates deposits paid into the taxpayer's bank account.

[67] Paragraph 17 is a general statement made in respect of both the 2006 and 2007 VAT periods and is therefore not contradictory to the proposed amended paragraph 21. The taxpayer in his objections states that the new paragraph 21 deals with the 02/2008 tax period, which is wrong. The proposed paragraph 21 deals with the 02/07 tax periods (including all the tax periods in the 2007 year of assessment).

[68] Paragraph 18 and the proposed amended paragraph 19 relate to the 2006 VAT periods, whereas paragraph 20 and the proposed amended paragraph 21 relates to the 2007 VAT period.

[69] Paragraph 18 and the proposed amended paragraph 21 deal with different VAT years as well as different bank account numbers and are accordingly not contradictory. Paragraph 18 deals with bank account number 031 485618 for the 2006 VAT period whereas the proposed amended paragraph 21 deals with bank account number 031 486177 in relation to the 2007 VAT period.

[70] The content of the proposed amended paragraph 21 is identical to paragraph 1.4 of the disallowance of objection letter dated 4 June 2014 (in relation to the 2007 VAT periods) and as such is not "*unrelated to the Appellant's failure to declare taxable supplies*".

PREJUDICE

[71] In *Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd*[20] Caney J, in a comprehensive review of numerous cases decided in the various Divisions of the Supreme Court, concluded that the primary objective is to allow at least a proper ventilation of the dispute between the parties. The consideration in the decision whether to grant an amendment is whether the amendment will cause the other party *"such prejudice as can be cured by an order for costs and, where appropriate, a postponement"*.[21]

[72] In *Moolman v Estate Moolman*, the Court held that an amendment will always be allowed unless *"such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for purposes of justice in the same position as they were when the pleading which it is sought to amend was filed".*[22]

[73] The position in which the taxpayer was when the pleading was filed, was that he had followed the dispute resolution process provided for in Chapter 9 of the TAA. In terms of that process an assessment was issued, there was an objection and a disallowance of that objection. If the amendment is granted, the taxpayer will be in exactly the same position except that the pleading will, as required by law, be in line with the assessment read with the objection and the disallowance of the objection. The taxpayer is therefore not prejudiced. The proposed amendments do not introduce anything new that has not been raised in the assessments, the objections and the disallowances of the objections.

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[20] 1967 (3) SA 632 (D) at 637A – 641C.
[21] 1967 (3) SA at 638A – B.
[22] *Moolman v Estate Moolman* 1927 CPD 27 at 29.

[74] The taxpayer, if the amendment is granted, will have the right to effect consequential amendments to its Statements of Grounds of Appeal. In those circumstances there is no prejudice to the taxpayer which cannot be compensated by costs. The only potential prejudice would be that the tax trial is postponed until a later date (which the taxpayer and SARS had agreed to prior to arguing the applications for amendment), which prejudice can be compensated by a costs order.

[75] The prejudice the taxpayer contends for lies in the fact that SARS took two and a half years to amend its Statements of Grounds of Assessment, the effect of the proposed amendments would be to bring into dispute taxable income of approximately R10 million (in the IT matter) and the effect of the additional tax, interest and penalties on the amount of R10 million, if payable. The taxpayer contends in respect of the VAT liability sought to be introduced, that it is not supported by an assessment, which is incorrect.

The delay

[76] In *Trans-Drakensberg Ltd (under judicial management) v Combined Engineering (Pty) Ltd and Another*[23] the Court held that a delay in bringing the application for leave to amend will not in itself constitute a sufficient reason for refusing the amendment. The Court held:

> "Speaking for myself I do not know why a long delay alone should be a bar to the granting of an amendment where the amendment facilitates the proper ventilation of the disputes between the parties."

[77] In *Morgan & Ramsay v Cornelius & Wallis*[24] the Court held:

> "The Court has very wide powers to effect the change in the pleadings at any stage of the action – it has been said, though not decided here, even after argument and before judgment."

[78] Only if the delay causes prejudice to the other party which cannot be cured by an order for costs and (where appropriate a postponement), the amendment will generally be refused.[25]

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[23] 1967 (3) SA 632 (D) at 641B – 642.
[24] 1910 NPD 262 at 264.
[25] *GNF Kontrakteurs (Edms) Bpk v Pretoria City Council* 1978 (2) 219 (T) at 223A – B **(AB, pp 38 – 39)**.

[79] Mr F, who deposed to the founding and replying affidavits, explained that he took a decision in September 2017 not to refer the proposed agreement discussed at the ADR, between the taxpayer and SARS to the NAC, because there were not sufficient facts to justify such concession. Furthermore, Mr F explained in the founding affidavit that the SARS auditor who worked with the matter had resigned from SARS in September 2017.

[80] The delays referred to by the taxpayer were in large part occasioned by (i) the unavailability of adequate resources (lack of human personnel) within SARS owing to large scale resignations, (ii) the nature of the non-declarations by the taxpayer necessitating in-depth investigations, (iii) verification of the explanations tendered by the taxpayer against various sources, (iv) compliance with various governance processes before any concessions could be made and (v) strict adherence to legal prescripts prohibiting concessions in circumstances where there are no compelling reasons.

Additional R10 million subject to tax

[81] The fact that the taxpayer will potentially be subject to an additional R10 million if the amendment is granted, does not constitute prejudice. These amounts were assessed. Shortly after SARS delivered its Statement of Grounds of Assessment, SARS' attorney informed the taxpayer's attorney that there would be an amendment of the Statement of Grounds of Assessment and specifically indicated that the amounts that SARS seeks to include in the amended paragraphs (paragraphs 24A, 28A and 29) were not conceded.

[82] It would appear that the taxpayer failed to declare his income which made it necessary for SARS to issue estimated assessments. The estimated assessments were based on the amounts received by the taxpayer in his different bank accounts. If an amount is properly taxable, then the fact that an amendment will bring this amount into the tax net, does not constitute prejudice to the taxpayer. There is an obligation on any taxpayer to properly declare his/her income, which the taxpayer in this instance is alleged not to have done. Of course the tax court will have to determine this issue after being presented with evidence.

Interest and Penalty

[83] To the extent that the taxpayer contends that he is prejudiced by the fact that interest would be payable if the amounts that SARS wants to include, by way of an amendment, is found to be taxable, that does not constitute prejudice. If an amount is duly payable then there is no prejudice to the taxpayer and the taxpayer should have paid those amounts in the first place instead of not declaring the income. Furthermore, there was nothing that prevented the taxpayer from making the payment of the full amounts of the assessment pending the outcome of the tax appeal. This would have stopped the interest running and if

the taxpayer is successful with his tax appeal, he would have been entitled to a refund with interest.[26]

[84] The understatement penalty / additional tax of 200%, will only apply if it is ultimately found that the taxpayer failed to declare his income which finding would justify the imposition of a penalty. This is not the type of prejudice that would preclude the granting of the amendment.

DISCRETION TO GRANT AN AMENDMENT

[85] The practical approach adopted by the courts, is that an amendment will always be allowed unless the application is *mala fide* or will cause an injustice which cannot be compensated by costs.[27]

> "An amendment however is not to be had for the mere asking. Some explanation must be offered as to why the amendment is required and if the amendment is not timelessly made some reasonable satisfactory account must be given for the delay."[28]

[86] The grant or refusal to amend a pleading rests in the discretion of the court.[29]

[87] SARS took the view in July 2015 that it would not make any concessions on the taxpayer's tax liability. SARS filed its Statements of Grounds of Assessment in January 2017 without the disputed amounts. SARS' auditor and the taxpayer's auditor reached agreement on the issues in dispute on 29 May 2017, subject to the approval of the NAC. The same SARS auditor resigned in September 2017 and emigrated to New Zealand. Contrary to SARS' undertakings to submit the agreement reached between the auditors at the meeting of 29 May 2017, which was in essence the agreement reached between such auditors at the ADR of 6 March 2015 encapsulated in the ADR facilitator's report of 15 July 2015 to the NAC, SARS failed to submit this to the NAC. SARS contends that it did not do so as, upon reflection, there was insufficient evidence to support the proposal/agreement. SARS failed to inform the taxpayer or his attorney of record that a submission would not be made to the NAC or why this was so. The matter was not submitted to the NAC. There was no pending decision of the NAC to impede SARS amending its Statements of Grounds of Assessment as of September 2017.

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[26] Section 187 read with sections 188 & 189 of the TAA.

[27] *Moolman v Estate Moolman & Another* 1927 CPD 27, at 29.

[28] *Zarug v Pavathie NO* 1962 (3) SA 872 (D), at 876 C.

[29] *Caxton Ltd & Others v Reeva Forman (Pty) Ltd & Another* 1990(3) SA 547 (A), at 565G.

[88] The explanations proffered by SARS as to why it did not amend its Statements of Grounds of Assessment after Sept 2017 and before May 2019, is criticised by the taxpayer. Indeed, SARS' attempt in its replying affidavit to elaborate on the reasons, was met with striking out applications for constituting new matter in reply and for containing hearsay evidence. Some of these criticisms are certainly not without merit but are, in my view, relevant to the appropriate costs order and not, whether the amendment has been properly justified by admissible evidence.

[89] In my view it is clear that the Statements of Grounds of Assessment issued in January of 2017 were based on the working papers of the SARS auditor, which working papers were still to be submitted to the NAC for approval and as such, did not reflect the correct amounts in dispute.

[90] The long delay was explained in broad, brush strokes. The attempt at amplifying the reasons in the replying affidavit, marginally missed being struck out for constituting new matter. I accept that the foundation for such matter was laid in the founding affidavit and that such allegations were expanded upon in reply. However, the striking out applications were not without merit and despite dismissing them, I intend ordering SARS to pay the costs occasioned thereby as the matter raised in the replying affidavits ought properly to have been in the founding affidavits.

[91] The taxpayer and SARS entered into an *interim* payment agreement in respect of the disputed tax liability, subject to the pending appeal. In terms of this agreement the admitted tax liability is being paid off at the amount of R20 000 per month and the disputed tax liability is suspended pending finalisation of the appeal. The decision to suspend will be reviewed on 31 August 2019. This would have allowed for the tax appeal to run its course. Given the late amendment, the review of the suspension and payment arrangement will be considered without the finalisation of the appeal. Mr F, the deponent to SARS replying affidavit and a senior litigation specialist (and advocate) of SARS dealt with this as follows:

> "During January/February 2019 I was approached by SARS' "Debt Collection Unit" who wanted to enforce collection of the entire amount outstanding as per the assessment. I explained to them that it would not be fair to enforce collection of the entire amount as there were delays that were occasioned by SARS. If there were to be collection, it had to be only in respect of those amounts that the taxpayer himself conceded formed part of his gross income. In this regard, the taxpayer only made payment to SARS, to the extent of what he believed was owing. In this way, any actual or potential prejudice to the taxpayer was cured through not collecting the entire amount as per the assessment."

[92] In terms of the pay now argue later principle, the taxpayer may well be required to pay all currently disputed amounts on 31 August 2019. In view of the clear acknowledgment by SARS that the delays were occasioned by SARS, one trusts that the taxpayer will be afforded the same indulgences which he has received to date.

[93] The explanation as to how the original Statements of Grounds of Assessment omitted the disputed amounts and why SARS took no action from April 2017 to May 2019 to amend its Statements of Grounds of Assessment, although wanting, is not *mala fide.*

[94] The subject of the amendments, all contain triable issues. The contents of these amendments have something deserving of consideration and constitute triable issues. The correctness of the facts underpinning the amendments, will be determined at the trial. Having regard to all the facts and circumstances presented in these applications, I exercise my discretion in favour of the applicant.

POSTPONEMENT OF THE TRIAL AND COSTS

[95] SARS knew as at 3 April 2017 that it ought to amend its Statements of Grounds of Assessment. SARS' auditor and the taxpayer's auditor then met and certain recommendations about potential concessions were made by SARS' auditor. SARS again indicated that it would amend its Statements of Grounds of Assessment once these recommendations had been considered and decided by the NAC. These recommendations were never presented to the NAC. This decision was made in September 2017. It was however never disclosed to the taxpayer.

[96] By October 2017 the taxpayer, through his attorney, complained about SARS' delay in amending its Statements of Grounds of Assessment and demanded SARS effect its amendment so that he could file his statement of grounds of appeal. This request was ignored, it was never responded to and no amendments were made. The taxpayer filed his Statement of Grounds of Appeal in March 2018.

[97] SARS has taken no action in this matter and has done nothing to bring it to finality. Despite knowing in April 2017 that it may have to amend its Statements of Grounds of Assessment, SARS has sat by idly and allowed this matter to progress to trial stage without taking any steps to rectify its papers and to ensure that the matter is ready for trial.

[98] During the pre-trial conference in April 2019 SARS, for the first time in two years, mentioned its intention to amend its Statements of Grounds of Appeal. It was recorded on the taxpayer's behalf that he is prejudiced by such late amendment. SARS filed its notice of intention to amend on 10 May 2019, proposing substantial and material amendments.

[99] Due to the magnitude and the lateness of the amendments, the taxpayer objected to these amendments, as he is entitled to do. His objection was filed within the time periods allowed but it was obvious that, should SARS have to launch applications for leave to amend, it would run into the trial set down for 29 July 2019. This would not have been the situation had SARS brought its amendments timeously.

[100] SARS knew since April 2017 that it wished to bring amendments. This was not a situation that arose at a late stage and it knew also exactly what those amendments would have to be. Yet SARS failed to do so until it was too late to allow the trial to proceed. The taxpayer's attorney enquired from SARS what SARS' intentions were with the trial and whether or not SARS would be able to continue with the trial if its amendments were not allowed. SARS indicated that in such event it would have to "*consider its position*". It is undoubtedly SARS' behaviour that has caused the trial to be postponed.

[101] SARS now contends that the taxpayer should not have objected to its amendments and that, accordingly, this has caused the postponement of the trial. This contention is without foundation. Had SARS brought its amendments within a reasonable time (considering that it knew it should do so as far back as April 2017), this application would have been disposed of long ago and the trial would have proceeded on 29 July 2019. It was agreed that the trial would be postponed and the taxpayer's attorney indicated to SARS that the taxpayer reserved his right to argue the costs of the postponement.

[102] The parties are in agreement that both parties stopped preparing for trial on 20 June 2019 when it was agreed that regardless of the outcome of the amendment applications, the trial would be postponed.

[103] Ordinarily, a party seeking an indulgence would be liable for the costs unless the opposition were unreasonable. SARS contends that the taxpayer's opposition to the amendments was unreasonable and had it consented to the amendments on 10 May 2019 when the applications were served, the matter would have been ready for trial on 29 July 2019.

[104] At the commencement of the hearing, SARS advised that it was no longer seeking leave to amend paragraph 22 in the VAT matter. At the bare minimum thus, the taxpayer was entitled to oppose the amendment in respect of such paragraph and its opposition cannot be labelled as unreasonable. It also follows that the taxpayer had to be present at the hearing of the application to amend to oppose, at the very least, the amendment in respect of paragraph 22 of the VAT matter.

[105] The issue of whether concessions were made and whether reliance on certain amounts was abandoned, is still open. All that this court has determined is that there are triable issues. That being so, it can certainly not be said that the opposition on this basis was unreasonable.

ORDER

[106] I accordingly grant the following orders:

The IT Matter – Case no: 13862:

1. SARS is granted leave to amend its Statement of Grounds of Assessment as set out in annexure 'X' to the Notice of Motion.

2. SARS is ordered to pay the costs of the application for leave to amend including the costs of two counsel where so employed.

3. The application to strike is dismissed.

4. SARS is ordered to pay the costs of the application to strike including the costs of two counsel where so employed.

5. The tax appeal set down for 29 July 2019 to 3 August 2019 is postponed sine die.

6. SARS is ordered to pay the wasted costs occasioned by the postponement of the tax appeal up to and including 20 June 2019 including the costs of two counsel where so employed.

The Vat matter – case no 1373:

1. SARS is granted leave to amend its Statement of Grounds of Assessment as set out in annexure 'X' relied upon on 31 July 2019 in which paragraph 22 of its Statement of Grounds of Assessment is deleted.

2. SARS is ordered to pay the costs of the application for leave to amend including the costs of two counsel where so employed.

3. The application to strike is dismissed.

4. SARS is ordered to pay the costs of the application to strike including the costs of two counsel where so employed.

5. The tax appeal set down for 29 July 2019 to 3 August 2019 is postponed sine die.

6. SARS is ordered to pay the wasted costs occasioned by the postponement of the tax appeal up to and including 20 June 2019 including the costs of two counsel where so employed.

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Ingrid Opperman
Judge of the High Court
Gauteng Local Division, Johannesburg