REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

(HELD AT MEGAWATT PARK, JOHANNESBURG)

CASE NO: 24643

In the matter between:

A **APPELANT**

and

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

J U D G M E N T

UNTERHALTER J

[1] The applicant takes an exception to the respondent's statement of grounds of assessment. That statement has been issued by the respondent, to whom I shall refer as SARS, in terms of Rule 31 of the Tax Court Rules.

[2] The exception is framed in the alternative. It is said firstly that the statement of grounds under Rule 31 filed by SARS, to which I shall refer as the Rule 31 statement, lacks averments necessary to sustain a finding -of gross negligence- and the imposition of an. understatement penalty at the rate of 100%.

[3] In the alternative the exception complains that the Rule 31 statement is vague and embarrassing in that it fails to explain the basis upon which SARS opposes the appellant's appeal against the imposition of the understatement penalty at a rate of 100%.

[4] In a further alternative, the applicant says that the Rule 31 statement fails to set out a clear and concise statement of material facts upon which the respondent relies in opposing the appellant's appeal against the imposition of the understatement penalty at the rate of 100%.

[5] In either of these variants, the exception is directed at those portions of the Rule 31 statement which deal with the understatement penalties. These are dealt with in paragraphs 21 to 22 of the Rule 31 statement.

[6] Those paragraphs, after stating the relevant provisions under the Tax Administration Act Number 28 of 2011, and in particular section 222, then traverse the fact that SARS has levied an understatement penalty of 100% and then sets out the bases upon which SARS has done so.

[7] I should mention parenthetically that, in the introductory language at paragraph 22 of the Rule 31 statement SARS does reference the fact that the bases that it tabulates are only, inter alia, those relied upon for the purpose of the understatement penalty of 100%. To my mind that however does not found an exception because the consequence for failing to plead a ground upon which the penalty has been imposed would give rise to the disability on the part of SARS in advancing a fresh ground that had not been pleaded, given that in terms of Rule 34 it is the exchange of statements under Rule 31 and 32 that give rise to the issues in an appeal to the Tax Court.

[8] Accordingly, if something goes unsaid in the Rule 31 statement, it is not an issue that may go forward on appeal and an amendment would need to be sought. But returning to the substance of the grounds that are relied upon for the purpose of explaining how SARS has come to levy an understatement penalty of 100%, there are four matters that are raised. I quote the relevant passage which reads as follows:

> "22.1 The appellant neglected to provide complete and accurate information together with the submission of his annual income tax returns for the tax year in dispute;
>
> 22.2 The facts uncovered during the audit fell in the sole knowledge of the appellant, these facts the appellant failed to disclose to SARS;
>
> 22.3 It is SARS' contention that there was no *bona fide* inadvertent error on the part of the appellant when he completed and submitted his tax returns;
>
> 22.4 SARS deems the conduct of the appellant as stipulated above to fall under the category of gross negligence in completing a return as listed in the understatement penalty percentage table of section 22(3)(1) of the Tax Administration Act."

[9] It is common ground between the parties that the onus rests upon SARS in respect of the imposition of an understatement penalty. That is made plain in section 102(2) of the Tax Administration Act. This reads:

> "The burden of proof in whether an estimate under section 95 is reasonable, the facts on which SARS base the imposition of an understatement penalty under Chapter 16 is upon SARS."

[10] It is accordingly clear that SARS must ultimately satisfy the Court that there are facts that suffice for the imposition of the understatement penalty that SARS wishes to have imposed.

[11] The real question however that I must determine is whether the averments that are contained in paragraph 22 of the Rule 31 statement suffice for the purposes of Rule 31. It seems clear to me that the Rule 31 statement must set out a clear and concise statement of the material facts and legal grounds upon which SARS relies in opposing the appeal (see in particular Rule 31(2)(*c*)). That provision in the Rule is of course wholly consistent with the purpose of the Rule 31 statement and the Rule 32 statement because as Rule 34 explains, and as I have indicated these two statements set out the issues that go on appeal to the Tax Court.

[12] The Rule 32 statement has a similar requirement, which is that in the Rule 32(2) the statement must set out clearly and concisely, amongst other things, which of the facts or the legal grounds in the statement under Rule 31 are admitted and which of those facts and legal grounds are opposed. The very exercise that is therefore contemplated in the Rule 31 and Rule 32 statements is that there are facts and legal grounds that are sufficiently clearly and concisely specified so as to know what issues proceed to an appeal.

[13] The question that then must be asked is whether the matters that are raised in paragraph 22 of the Rule 31 statement suffice to meet the requirement that the facts are set out in compliance with Rule 31 sufficient to define the issues that are to proceed on appeal.

[14] I was referred to the decision of *Transnet Limited t/a Portnet v Owners of the N B Stella Tingas and Another* 2003(2) SA 473 SCA and particularly the dicta that are to be found in paragraph 7. There, Scott, JA said the following, in relevant part:

> "It follows I think that to qualify as gross negligent the conduct in question, although falling short of *dolus eventualis* must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme. It must demonstrate where this is found to be conscious risk-taking, a complete obtuseness of mind or where there is no conscious risk taking a total failure to take care. If something less were required the distinction between ordinary and gross negligence would lose its validity."

[15] It is clear from the provisions of section 20 of Tax Administration Act that there is a distinction between different kinds of behaviour and the penalty percentages that flow from the different behaviour. Thus reading the table, the understatement penalty percentages differentiate substantial understatement from reasonable care not being taken in completing a return and gross negligence.

[16] The penalty percentages increase with the differentiation in the behaviour; and gross negligence in the standard case is visited with a penalty percentage of 100% and it is precisely that percentage that SARS alleges in the Rule 31 statement and that the taxpayer here has committed gross negligence.

[17] The question then is whether paragraph 22 of the Rule 31 statement makes sufficient averments of fact consistent with Rule 31 so as to sustain the claim of gross negligence and differentiate it from ordinary negligence as the Transnet case.

[18] What appears from paragraph 22 is that SARS plainly alleges that the applicant neglected to provide complete and accurate information in rendering his return. The further averment is that there were facts uncovered during the audit which fell within the sole knowledge of the appellant and that it was these facts that the appellant failed to disclose. That failure it is said amounts to gross negligence.

[19] It was emphasized to me in the submissions made on behalf of SARS by Mr Locke that these averments suffice as to the facts that need to be put up in a Rule 31 statement in order to make a case of gross negligence because in due course all the evidence of those facts that were uncovered during the audit would be led so as to substantiate the claim of gross negligence. It was also submitted to me that the process by which an assessment is made and the rights of the taxpayer to seek reasons under Rule 6 mean that a taxpayer in the position of the applicant before me is not kept in the dark but has a good sense of what it is that SARS contends for, for the purpose of making the claims that it does.

[20] In my view the Rule 31 statement does not go far enough to make out the requirements of a Rule 31 statement and in particular the facts that are relied upon and need to be pleaded as stipulated for in Rule 31(2)(b) and (c).

[21] It is so that facts were uncovered in the course of the audit and that is pleaded in paragraph 22.2. But which facts these are and why it is that the failure to disclose them to SARS gives rise to gross negligence is something which must be explained albeit in a summary and concise fashion.

[22] That is necessitated because without some averments as to why the failure on the part of the applicant was grossly negligent, there is no basis upon which the applicant can know why it is that SARS considers his conduct to be grossly negligent, rather than merely negligent or conceivably even to use the terminology of section 223, merely a substantial understatement.

[23] It is of the essence of the behaviour that is tabulated in section 223 that there are differentiated forms of culpability and in order to differentiate the behaviour it is necessary to understand by reference to some facts why the deviation that SARS has uncovered is so great from the standard of reasonable care that it amounts to gross negligence, rather than ordinary negligence or indeed simply a substantial understatement.

[24] That it seems to me is not purely a matter of evidence but is something where certain facts would have to be proved to show that gross negligence is present and that gross negligence must have something to do with what facts were not disclosed and why SARS believe that failure to disclose those facts is constitutive of gross negligence rather than mere negligence or indeed innocent understatement.

[25] That being so it appears to me that the exception here is properly founded in that something more is required in order to place the applicant in a position to know the case that it must meet and then to meaningfully plead in its Rule 32 statement as to which facts it admits and which facts it denies for the purposes of determining those matters that will proceed as the issues on appeal.

[26] Absent the essential facts that SARS relies upon as to why there is gross negligence, the pleadings will simply be a bare denial of gross negligence and that will not be helpful for the purposes of explaining the true dispute that must be resolved on appeal.

[27] I accordingly find that the EXCEPTION IS WELL TAKEN and it is a true exception in the sense that the Rule 31 statement lacks averments necessary to sustain a finding of gross negligence and the imposition of an understatement penalty at the rate of 100%.

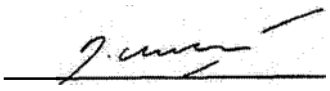
[28] I must then briefly deal with the question of costs. It is my understanding that in this matter the applicant was compelled to come to court in order to ensure that the Rule 31 statement sufficiently complied with what I conceive to be necessary averments by way of pleading under Rule 31. In accordance with ordinary practice the cost must follow that result.

[29] In the result I make the following order:

1. It is declared that the statement of grounds of assessment and opposing appeal delivered by the South African Revenue Service on 7 November 2018 lacks averments necessary to sustain a finding of gross negligence and the imposition of an understatement penalty at the rate of 100%.

2. The respondent is granted 15 (fifteen) days in order to remedy the defect in its Rule 31 statement.

3. The respondent is to pay the costs of this application.



Unterhalter J

3 May 2019