REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

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

29/5/2023
DATE SIGNATURE

APPEAL CASE NO: A 202/2020

TAX COURT CASE NO: IT 13950

In the appeal from the Tax Court between:

THE LION MATCH COMPANY (PTY) LTD **APPELLANT**

(Applicant in the Court a quo)

and

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

(Respondent in the Court a quo)

JUDGMENT: FULL COURT OF APPEAL

Before: Holland-Muter AJ; (Molopa-Sethosa and Mbongwe JJ concurring):

[1] The appeal before this court is against the judgment of the Tax Court on 25 February 2020. The appeal is twofold namely (1) an appeal against the refusal

of the application for postponement by the appellant (The Lion Match Company (Pty) Ltd and referred to as "LMC"), and (2) a counter appeal against the refusal by the Tax Court to grant the adjustment to the assessment sought by the respondent against the assessment made by the Commissioner for the South African Revenue Services (the respondent a quo and in this appeal referred to as "CSARS").

[2] The Tax Court is a specialized court operating within the ambit of the particular Division of the High Court where the parties normally carry on business or where its main place of business is. The Tax court is a court established in terms of Section 83 (3) of the Income Tax Act, 1962 and the Judge President of a division nominates and seconds a judge(s) from the division to such court. A Tax Court has the same status of a High Court and appeals from such court are determined by a full court (three judges) of the division. The Tax Court, when hearing an appeal against an assessment made by the Commissioner, is vested with certain powers arising from the Tax Administration Act, 28 of 2011 (the "TAA").

[3] The Tax Court has its own rules, but where these rules are silent the ordinary Rules of the division applies.

[4] On 30 April 2013 the Commissioner made an additional tax assessment in respect of LMC resulting in the current appeal by LMC, filing its notice of appeal on 16 May 2014. The importance of this date is that a Mr Trikamjee from the attorney's firm Garlicke and Bousfield, represented LMC from this date until at least 17 October 2019.

[5] The matter was, after a long protracted pre-trial process, set down for trial by the Registrar of the Tax Court, by the notice of set down during January 2019, for a two week trial, to commence on 18 November 2019 in the Tax Court. The Notice of Set Down was issued in the Gauteng High Court. This was

after Mr Trikamjee (the then attorney of record on behalf of the appellant as well as a director of Garlicke and Bousfield attorneys), and the representatives of the respondent, agreed to have the matter heard in Gauteng instead of Durban. This was for convenience since both the parties' counsel are all members of the Johannesburg Bar.

[6] At the pre-trial conference held on 22 August 2019, LMC was represented by Mr Trikamjee and Advocate Goldman. LMC noted that it intends calling at least two expert witnesses (on the valuation of the shares in issue-aspect) and to supplement the draft index before 27 September 2019. See Caselines 078-379-380 par 4.3.2 and 9 of the pre-trial minutes. The reasonable inference at that stage was that LMC was preparing for the upcoming appeal.

[7] It seemed up and until the pre-trial that both parties were aiming to be ready to proceed on 18 November 2019 as set out in the notice of set down. CSARS continued its preparation but became uneasy as to the readiness for trial by LMC. The cause of uneasiness began surfacing when LMC failed to deliver the necessary expert notices and its failure to respond to the proposed witness bundle. CSARS re-served the notice of set down and indices to the witness bundles.

[8] On 17 October 2019 Garlicke and Bousfield withdrew as attorneys of record per the Notice of Withdrawal, dated 16 October 2019. The notice was sent by email to CSARS's attorneys and to LMC per Mr Gora Abdoola at GoraA@lionmatch.co.za.

[9] On 18 November 2019 when the appeal was to proceed, LMC was represented by new attorney and counsel. They informed the court that they were only mandated to represent LMC to move for a postponement.

[10] When the Tax Court refused to postpone the matter, LMC's attorney and counsel withdrew from the matter. The respondent's counsel moved for an order to have the initial assessment by the Commissioner adjusted as set out in its papers, but after hearing the respondent, the Tax Court refused the relief sought by the respondent resulting in the cross-appeal on behalf of the respondent.

THE APPELLANT'S APPEAL: (AGAINST THE REFUSAL TO POSTPONE):

[11] The appeal is against the Tax Court's judgment for:

11.1 The refusal to grant the application for a postponement;

11.2 The costs order following the refusal supra; and

11.3 The dismissal of the appellant's appeal to the Tax Court with costs.

[12] The factors to consider when faced with an application for postponement were considered in **Myburgh Transport v Botha t/a SA Trucks Bodies** 1991 (3) SA 310 (NmS) 314 F-315 J. These principles were adopted in **National Coalition for Gay and Lesbian Equality v Minister of Home Affairs** 2000 (3) SA 1 CC at par [11]. The apex court held that a court of appeal is not entitled to set aside the decision of a lower court granting or refusing a postponement merely because the court of appeal would itself, and on the facts of the matter before the lower court, have come to different conclusion. It may interfere only when it appears that the lower court did not exercise its discretion judicially, was influenced by wrong principles or a misdirection of the facts. The appellant is faced with this onus before this court.

[13] When considering an application for a postponement, the court has a *discretion* to grant or refuse the application. The parties cannot bind a court by agreement *inter parte* to postpone, even where wasted costs are tendered. The court has to consider all *relevant facts* relating to the matter when

considering a postponement. In doing so, the court has to exercise its discretion judicially. It is not required from the court to consider *each and every possible factor* indicated in other judgments. See **Erasmus, Superior Court Practice Vol 2, D1-553** for the various authorities setting out the principles applicable to postponement. The applicable factors will be discussed *below* when dealing with the grounds raised by the appellant.

[14] The appellant raised nine (9) grounds of appeal against the refusal of the postponement but from a closer evaluation of the grounds it is apparent that the grounds are so intertwined that it can safely be accepted the thrust of the appeal is that the Tax court misdirected itself by not exercising its discretion judicially when refusing the application for postponement and failure to consider all principles applicable.

[15] The argument on behalf of the appellant that the Tax Court wrongly held that the averments by LMC did not address the most basic and fundamental requirements meriting a postponement is without any substance. The explanation offered on behalf of LMC that Mr Trikamjee's withdrawal as attorney of record is with respect so vague and does not explain it at all. The reason advanced for the withdrawal was that there was a *conflict of interest inherent* as Trikamjee was a director of both LMC and Garlicke and Bousfield. No explanation was given when the conflict arose in view of Trikamjee's longstanding involvement in both entities, and the substance of the conflict remains a mystery to today. A red herring is afloat in the muddy water of the appellant's pond where the application is drifting.

[16] Trikamjee was LMC's attorney of record since the inception of the matter and it seems rather odd that a conflict of interest only arose at this late stage. A further aspect clouding the explanation is that the founding affidavit by Me Mohamed (an attorney employed by LMC) of the application for postponement, does not shed any light upon the red herring as to what triggered the conflict to germinate at this late stage.

[17] The appellant was informed of the withdrawal of Garlicke and Bousfield Attorneys as its attorneys of record on 17 October 2019 (par 8 supra), about a month prior to the hearing of the matter; but Mohamed in her par 10 avers LMC was only notified of this development 10 days prior to the hearing. There is also no justification why this first surfaced in Mohamed's affidavit and that LMC was only informed of the withdrawal 10 days prior to the hearing. No explanation is tendered why Trikamjee (as director of LMC) did not inform LMC on 17 October 2019. He, as director of LMC and Garlicke & Bousfield), wearing two hats, ought to have known of the development and should have informed the appellant on that day. This impacts on the grounds of appeal that the court ought to exercise its discretion judicially. The Tax Court considered the factors raised but could not find any *bona fides* on the part of LMC, nor was any good cause shown to justify any postponement. The opposite is however that the vagueness by Mohamed is indicative of lack of *bona fides* and good cause.

[18] Trikamjee, as an afterthought, addressed a letter to the presiding Judge after the hearing to explain his view. This is inappropriate and a seasoned attorney like Trikamjee should have known better. The learned Judge expressed his displeasure with the conduct of the attorneys in question.

[19] The above lack of good cause and *bona fides* in the court's view is further clear from the fact that until the final pre-trial on 22 August 2019 both Trikamjee and Adv Goldman on behalf of LMC, were acting as if they were preparing full steam ahead for hearing. Not even the slightest hint was given of a possible conflict of interest by Trikamjee. Both attorney and counsel contributed to the pre-trial to prepare for the looming hearing.

[20] The appellant deemed it appropriate to serve the belated application for postponement on the morning of the hearing. Again, and in view of when the withdrawal occurred on 17 October 2019, it would have been reasonable to serve a substantial application for postponement timeously. The application

for postponement should have been timeously launched and served, and not on the doorstep of the Tax Court on the morning of the hearing. See **Greyvenstein v Neethling** 1952 (1) SA 463 (C) 467 F.

[21] Ms Mohamed states that there were interim attempts to settle the matter after Trikamjee's withdrawal but fails to state who represented LMC in these settlement negotiations. When the negotiations failed on 14 November 2019, last minute attempts were made to obtain further counsel. Another red herring afloat is that no mention was made who represented LMC in the negotiations. It could not be Trikamjee as he had already withdrawn. It is reasonable to infer that this person(s) was well aware of the facts of the matter because no reasonable entity like LMC would leave such attempted negotiations to one with no knowledge of the dispute.

[22] The notion arise that LMC, in view of the withdrawal and subsequent negotiations, was in all probability never serious to prepare for the hearing of its appeal after the pre-trial on 22 August 2019 for the following: (a) it did not comply with its undertaking to prepare and submit the names of its intended experts; (b) its attorney and director cause to file a very late withdrawal as attorneys of record not served timeously on the respondent; (c) tried to negotiate a settlement after the withdrawal; and (d) failed to timeously inform the respondent of its intention to request a postponement on the morning of the hearing of its appeal, the hearing of its appeal set down more than 10 months before.

[23] This court is well aware of the authority that a court of appeal will seldom interfere with the decision of a court a quo refusing postponement unless it is clear that the trial court failed to exercise its discretion judicially or misdirected itself on the facts or "wrong' principles. See **Prinsloo v Saaiman** 1984 (2) SA 56 (O); **Northwest Townships (Pty) Ltd v Administrator, Transvaal, and Another** 1975(4) SA 1 (T) at 8E-G; **Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd** 1988(3) SA 132 (A) at 152. Having had regard to the

papers before this Court, there is no reason for this Court to reverse the decision of the Tax Court in this regard.

[24] The argument in par 5 of the heads of arguments on behalf of the appellant to wit the *"true reason for a party's non-preparedness has been fully explained, where his unreadiness to proceed is not due to delaying tactics and where justice demands that he should have further time for the purpose of preparing his case" (***Madnitski v Rosenberg** 1949(2) SA 392 (A) at 398-9) is not applicable because this was not the appellant's case *a quo.* There is no evidence in the founding affidavit by Mohamed in this regard. It was never the appellant's case that the reason for postponement is "unreadiness" and that it needs time for further preparation. The main thrust on behalf of the appellant was the undisclosed conflict of interest supra.

[25] The following ground of appeal is that a court should consider the prejudice a party may suffer should a postponement be refused. The Tax Court in par 11 of the judgment listed all the legal principles applicable when considering a postponement and in par 12 thereof clearly set out why the postponement was refused. There is no reason why this court should interfere with the decision of the Tax Court refusing the postponement.

[26] Next to consider is whether the court *a quo* considered the expanded considerations as in **Shilubana v Nwamita (National Movement of Rural Women & Commission for Gender Equality as Amici Curiae** 2007 (5) SA 620 CC at par 11, adding further two factors to consider when considering an application for postponement: (1) the broader public interest, and (2) the prospects of success on the merits. The appellant's founding affidavit did not address these aspects at all but the Tax Court, when it considered the factors listed in par 11 of the judgment clearly dealt with the aspect of prejudice. The Tax Court correctly in our view, addressed the appellant's failure to respond to the respondent's concern that the matter had dragged so long that any further

delay would cause the respondent prejudice that could not be cured by a cost order.

[27] The appellant failed/omitted to address any aspects regarding the broader public interest. It is not for this court to speculate what the broader public interest may be in this matter. This ground is without merit.

[28] The Tax Court dealt with the conflicting versions of Mohamed and Trikamjee (in his letter after judgment was delivered). This court deems it not necessary to highlight the discrepancies between the two versions. The Tax Court made it clear in par 16 and 17 of the judgment. Although Trikamjee's letter was not received as evidence *a quo,* the only reasonable inference is that the discrepancies are more red herrings in the appellant's pond.

[29] The question of costs is within the discretion of the court. The purpose of an award of costs to a successful party is to indemnify him for the expense to which he has been put to initiate or defend litigation, as the case may be. **Herbstein and Van Winsen, The Civil Practice of the Superior Courts of South Africa, 4th Ed p 701** (for case law listed in footnote 2). The Tax Court awarded the respondent the cost of two counsel in respect of the refusal of the application for postponement. The appellant bemoans the cost order granted *a quo.*

[30] The fees of more than one advocate are normally allowed on a party and party scale only when the court makes such order. The appellant did not oppose such order when the application for postponement was refused. Mr Morland appearing on behalf of the appellant *a quo* did not disagree with the respondent's notion that in view of the complexity of the matter and that the respondent was only informed on the morning of the hearing that the appellant sought postponement of the matter. The Tax Court was satisfied that the complexity of the matter warranted the employment of two counsel and

awarded costs for two counsel on the ordinary scale in favour of the respondent. **Kruger & Mostert, Taxation of Costs in the Higher and Lower Courts- A Practical Guide**, Lexis-Nexis p 76 and **Herbstein & Van Winsen,** supra 704.

Having regard to all the facts I am of a considered view that the appeal ought to be dismissed.

THE RESPONDENT'S CROSS-APPEAL: ADJUSTMENT OF ASSESSMENT

[31] The Tax Court, after hearing counsel on behalf of CSARS, refused to adjust the initial assessment by the Commissioner. The Tax Court held that when LMC's representatives withdrew from the appeal after their request for postponement was refused, the appeal by LMC, the appeal was withdrawn, and no finding could be made in the absence of LMC.

[32] The Tax Court held that in its view, Rule 44(7) overlooks the fact that when an appellant fails to appear, his/her appeal cannot be heard. It held that Rule 44(7) does not override the provisions of ss 107 and 129(1) of the TAA. It held that section 116 provides that the Tax Court is to hear an appeal in terms of section 107, the section which confines it to an appeal by a taxpayer against the assessment of the Commissioner. In view of section 129(1) the Tax Court can only arrive at a decision *after hearing the appellant's appeal.* The Tax Court is confined to these provisions. See par [27] of the judgment a quo. This is with respect wrong. See **African Cash & Carry (Pty) Ltd v Commissioner, South African Revenue Services** 2020 (2) SA 19 SCA at {46], [47], (hereafter referred to as **"ACC"(.**

[33] In par [28] the Tax Court concludes that once counsel for LMC withdrew from the proceedings and no representatives from LMC were present, the

appeal was effectively withdrawn and the court could not hear the respondent's case to have the assessment altered. The Tax Court held that the appellant deliberately chose not to participate in the appeal proceedings and that ideally, it should have withdrawn the appeal. This failure however led the Tax Court to conclude that the conduct by the representatives of LMC indicated exactly that the appeal was withdrawn.

[34] This is challenged by CSARS. It is argued that the Tax Court referred to no authority for this finding. CSARS argued that section 129(1) is directed at disputed facts.

[35] Section 129 of the TAA provides:

Decision by tax court: -

(1) The tax court, after hearing the appellant's appeal lodged under section 107 against an assessment or 'decision', must decide the matter on the basis that the burden of proof as described in section 102 is upon the taxpayer.

(2) In case of an assessment or 'decision' under appeal, the tax court may-

(a) confirm the assessment or 'decision';

(c) refer the matter back to SARS for further examination and assessment.

SARS under a tax Act, the tax court must decide the matter on the basis that the burden of proof is upon SARS and may reduce, confirm or increase the understatement penalty so imposed.

[36] The question is whether the provisions of section 129(1) restricts the Tax Court's jurisdiction to the hearing "the appellant's appeal" lodged in terms of section 107, and that the Tax Court can only exercise the powers contained in section 129(1) ***after*** hearing the appellant's appeal. The Tax Court held that its jurisdiction to alter any assessment could only be done once after the appellant's appeal is heard.

[37] The question now arises what does section 129(1) mean? Does it mean that a hearing only occurs if the appellant leads evidence and/or cross-examines a respondent's witnesses or does it mean that in regard to factual disputes, the Tax Court must decide the tax appeal on the basis that the burden of proof is generally on the appellant. Does the withdrawal from the appeal procedure by the representatives on LMC (1) warrants the finding that the withdrawal from the proceedings by the representatives of LMC is a withdrawal of the appeal or (2) should the representatives on behalf of LMC formally have withdrawn the appeal in terms of Rule 46 of the Tax Court Rules? The Respondent argued the second option.

[38] A withdrawal in terms of Rule 46 must be by way of a Notice of Withdrawal delivered to the other party and the registrar of the court and indicate whether the party consents or not to pay the costs of the other party. Rule 46 does not provide for a "tacit" withdrawal without a Notice of Withdrawal. This did not happen and in our view does not constitute a withdrawal of the appeal. The Tax Court was wrong in this regard.

[39] It is trite that a court can normally proceed in the absence of a party and where the absent party has knowledge of the proceedings, an order may be granted by default against such party. In par [27] the Tax Court referred to Rule 44(7) and stated that a court may continue in the absence of a party and further allows the court to either *"confirm"*, *"alter"* or *"refer"* the assessment back to the Commissioner for re-evaluation. The Tax Court however held that the rule as subordinate legislation and cannot overlook or disregard the

provisions of ss 107 or 129(1). It is however also trite that legislation should be read in context of the specific act or rules and not in isolation. The Tax Court read section 129(1) in isolation without considering the "cross-pollination" of section 129(2) and Rule 44(7) thereupon.

[40] This court is of the view that the absence of LMC at the hearing, did not prevent the Tax Court to continue with the hearing of the appeal placed before it by the taxpayer (the appellant), although the appellant elected not to participate in the hearing, it was still an appeal that should have been heard by the Tax Court. The Tax Court should have proceeded with the appeal and with no opposition to the relief sought by the respondent, should have considered the request to alter the assessment on uncontested evidence on behalf of the respondent.

[41] In our view the Tax Court erred in finding that the withdrawal of the representatives on behalf of LMC amounted to a withdrawal of the appeal. There is no justification therefore. The conclusion by the Tax Court in par [28] is in our considered view incorrect.

[42] In our considered view, and in view of no authority to the contrary, the Tax Court erred in not proceeding with the appeal and considering the relief sought by the respondent. Section 129(2)(a) authorizes the Tax Court to alter the assessment as sought by the respondent in its Rule 31 statement filed on 14 August 2015. The appellant responded thereto in its Rule 32 statement and the Commissioner furnished a summary of the expert evidence it intended to lead at the hearing. This was unchallenged at the appeal hearing and the Tax Court had no reason to it.

[43] The Commissioner led the expert evidence at the hearing and a further witness supported the consideration of altering the initial assessment. Section 129(2)(b) empowers the tax court to receive evidence and, if the evidence

justifies it, to alter the initial assessment by the Commissioner. See **ACC supra [47].** LMC was forewarned of the intended alteration and LMC enjoyed the benefit of *audi alteram partem.* The Tax Court is a court of revision which hears a matter and substitutes its own decisions for that of the Commissioner. See **ACC supra [52].**

[44] The Tax Court had the opportunity to examine the provenance for the alteration sought when hearing the opinion of the expert, Mr Beech during the appeal procedure. This evidence supports the alteration of the initial assessment. The version by Beech was confirmed by Mr Mohamed, a chartered accountant and operational specialist at SARS. Mohamed made the re-calculation of the tax liability of LMC as set out in exhibit "A" handed in during the hearing before the Tax Court.

[45]There was no rebutting evidence by the appellant (who elected not to participate in the proceedings, knowing very well that the respondent intended seeking an order for the alteration of the existing assessment), and no reason can be found to reject the re-calculations by Mohamed. Despite the evidence, the Tax Court did not make any finding on this evidence for reason that it held that the withdrawal from the matter by LMC's representatives, the appeal was withdrawn. The Tax Court overlooked the provisions of Rule 44(7) which permits the Tax Court to grant an order in terms of section 129(2)(b) in the absence of one of the parties. This is contrary the provisions of Rule 46 with regard to withdrawal of appeals. See par [37] supra.

[46] To conclude, the Tax Court erred in not granting the orders sought by the respondent in terms of section 129(2) of the TAA. In the premises, the respondent is entitled to an order in the following terms:

I therefor propose the following order:

1. The appeal is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.

2. The cross-appeal is upheld with costs, such costs to include the costs consequent upon the employment of two counsel;

3. The order of the Tax Court *a quo* is varied to insert the following orders between orders 2 and 3, namely:

4. Insofar as the respondent disallowed deductions in the amount of R 6 409 109-00, the additional assessment of 30 April 2013 is confirmed, in accordance with section 129(2) of the Tax Administration Act, 28 of 2011 (the "the TAA");

5. In relation to capital gains tax, the additional assessment is altered in accordance with section 129(2) of the TAA as follows:

5.1 The base cost of 3 788 250 shares in Kimberly-Clark Southern African Holdings (Pty) Ltd, purchased by the appellant on 8 January 2001 and disposed in the 2008 year of assessment, is altered from R 135 450 709-00 to R 97 865 000-00.

5.2 The base cost of 85 329 shares in KCSA Holdings (Pty) Ltd, purchased in the 2008 year of assessment, is altered from R 146 990 209-00 to R 115 858 000-00.

5.3 The taxable capital gain is altered from R 85 356 152-00 to R

119 715 112-00.

5.4 The increased taxable capital gain of R 34 358 959-00 is included in the appellant's taxable income.

5.5 The tax on the adjustment is altered from R 7 419 555 to R 9 620 509-00.

J HOLLAND-MUTER

Acting Judge of the Pretoria High Court

I agree and it is so ordered.

L M MOLOPA-SETHOSA

Judge of the Pretoria High Court

I agree.

M MBONGWE

Judge of the Pretoria High Court

Matter heard on: 1 February 2023

Judgment handed down on: 29 May 2023

On behalf of the Appellant: Attorney: Nourse Inc- tim@nourseattorneys.co.za

Adv A Bishop-nithing@mweb.co.za

On behalf of Respondent: Attorneys: Ledwaba Mazwai-BonganiS@lmz.co.za

Adv KW Luderitz SC-luderitz@law.co.za

Adv F Southwood SC-southwood@counsel.co.za