HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.
DATE: 2023.08.17
SIGNATURE:

Appeal Court Case A82/22

Case no. IT25117

Date: 17.08.2023

In re:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES Appellant

and

VIRGIN MOBILE SOUTH AFRICA (PTY) LTD Respondent

(Income Tax no. 9781687141)

(In business rescue)

JUDGMENT

The judgment and order are published and distributed electronically.

VAN NIEKERK AJ (SETHUSHA-SHONGWE AJ concurring)

INTRODUCTION:

[1] This is an appeal to the Full Bench of this Court against a judgment and order handed down by Mali J. on 18 November 2021. In that judgment and order Mali J. dismissed an application in terms of Rule 30 of the Uniform Rules of Court wherein Appellant applied for an order to set aside an application for default judgment which Respondent applied for in terms of Rule 56(1) of the Tax Rules on the grounds that such application for default judgment amounted to an irregular procedure.

[2] Appellant is the COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE, a statutory body bestowed with executive power in terms of the provisions of the Tax Act[1] ("*SARS*").

[3] Respondent is a company with limited liability presently under business rescue and is a "*taxpayer*" as defined in Section 1 of the Tax Act, read with Section 151 of that Act ("the Taxpayer").

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[1] *Tax Administration Act, 2011 (Act 28 of 2011);*

[4] Where reference is made in this judgment to any rule it is a reference to the rules promulgated under Section 103 of the Tax Administration Act, 2011 which describe the procedures in dispute resolution and where reference is made to the Act, it is a reference to the Tax Administration Act *supra*. However, where reference is made to Rule 30 it is reference to Rule 30 of the Uniform Rules of Court which regulates the procedure to be followed by a litigant when an irregular step or proceeding is taken.

BACKGROUND TO THE APPEAL:

[5] SARS issued an additional assessment against the Taxpayer for the tax raised in respect of the 2014, 2015 and 2016 tax years of assessment. It is common cause that the Taxpayer then timeously filed an appeal against the assessment on 27 May 2019.

[6] In terms of Rule 31 SARS was obliged to file a statement within 45 business days after the lodging of the appeal in response to the appeal lodged by the Taxpayer, ("*the Rule 31 statement*").

[7] SARS failed to deliver the Rule 31 statement and the Taxpayer addressed correspondence to SARS on 6 September 2019 wherein SARS was reminded that the Taxpayer filed an appeal more than 3 (three) months earlier. SARS remained in default with the Rule 31 statement and the Taxpayer again addressed correspondence to SARS on the 2nd of September 2020, some one year later, and drew the attention of SARS to the fact that SARS failed to file a Rule 31 statement and have not applied for an extension of time under Rule 52(2)(a). SARS remained in default to file a Rule 31 statement.

[8] On 13 October 2020 the Taxpayer filed a Notice in terms of Rule 56(1)(a) informing SARS to remedy its default within 15 (fifteen) days (as the relevant rule reads) failing which the Taxpayer would apply for default judgment against SARS, dismissing the additional

assessment. On 20 October 2020 SARS filed a Rule 31 statement. The Taxpayer then applied for default judgment in terms of Rule 56(1)(b) on 30 November 2020 and in the affidavit in support of the default judgment the deponent averred that the Rule 31 statement filed by SARS on 20 October 2020 did not "*... remedy SARS's default ...* (because) *... SARS failed to address the reason for its delay and further failed to apply to this Honourable Court for an order to condone its non-compliance with the rules*". The reference to an application for condonation is clearly a reference to Rule 52.

[9] On 14 December 2020 SARS filed a Notice in terms of Rule 30 and afforded the Taxpayer an opportunity to withdraw the application for default judgment failing which, according to such notice, SARS would apply to Court to have the application for default judgment set aside as an irregular procedure. SARS premised the Rule 43 application on the contention that SARS, by delivering the Rule 31 statement within the 15 (fifteen) day period referred to in Rule 56(1)(a) remedied its default and that the Taxpayer therefore was not entitled to rely on Rule 56(1)(b) and apply for default judgment under those circumstances.

[10] SARS's application in terms of Rule 30 was dismissed by the Court *a quo* on the grounds that it was held that SARS was obliged to comply with either Rule 4 or Rule 56 and that SARS is not exempted from such obligation when it is required to remedy a default within the period of 15 (fifteen) days as set out in Rule 56(1)(a). In arriving at the conclusion that the application should be dismissed, Mali J. held that on a proper interpretation of the relevant rules, being Rules 31, 4(2) and 56 of the Rules, Rule 56 cannot be seen as a waiver of the provisions of Rule 4(2) and Rule 56 does not operate in isolation.[2]

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[2] *Judgment Mali J., para. [14] to [18];*

ISSUES ON APPEAL

[11] On an analyses of the arguments advanced on behalf of the parties it is clear that the crux of the issue relates to an interpretation of the provisions of Rule 56(1) and more specifically whether or not the word "*default*" as appears in Rule 56(1)(a), (b), and (c) refers to the failure of SARS to file a statement in terms of Rule 31 or whether it refers to the failure of SARS to file a statement in terms of Rule 31 out of time without availing itself of the provisions of either Rule 4 or Rule 52.

[12] If, as Counsel acting on behalf of SARS argued, "*default*" in Rule 56(1)(a) simply refers to a failure of SARS to file a Rule 31 statement then such "*default*" was cured when SARS did in fact file a Notice in terms of Rule 31 after the Taxpayer filed the Notice in terms of Rule 56(1)(a) requesting SARS to remedy its "*default*" and which SARS then did. In such instance, so did the argument go, the Taxpayer's persistence in applying for default judgment would amount to an irregular proceeding which would have entitled SARS to an order setting aside the application for default judgment.

[13] On the other hand, on behalf of the Taxpayer it was argued that "*default*" in the context of Rule 56(1)(a), (b) and (c) of the Rules relates not only to the obligation to file a statement but also relates to the obligation that, in the event that SARS fails to comply with either the delivery of the statement or the time period wherein it has to be delivered, the obligation of SARS to remedy such default by way of either Rule 4(1) or Rule 52(1) of the Rules.

[14] In support of the argument advanced on behalf of the Taxpayer, reference was made to two judgments where the Court found that the late filing of a Rule 31 statement without an application for condonation results in the position that there is no proper Rule 31 statement

before the Court. In both these matters, SARS failed to file a Rule 31 statement at all, even after receiving a notice in terms of Rule 56(1)(a), and only after application for default judgment was made by the relevant taxpayer against SARS, SARS filed a Rule 31 notice without seeking any form of condonation for the late filing of such Rule 31 statement and relied on the provisions of Rule 56(2)(a) to escape default judgment.[3] These judgments however did not address the same issue as the issue *in casu*.

[15] On behalf of SARS it was argued that the issue was analogous to that of a party in civil proceedings who is under a bar for failure to file a pleading and who is faced with an application to strike out a claim or defence. In those circumstances such a party is afforded an opportunity to remedy the failure before an action or defence is struck out.[4] I am of the view that this analogy is not of assistance for the reasons that follow.

[16] In essence, the argument on behalf of SARS amounts to the following:

[16.1] If SARS filed a Rule 31 statement within 15 (fifteen) days after delivery of the Rule 56(1)(a) notice, the statement is "*valid*";

[16.2] Once SARS filed a Rule 31 statement within 15 (fifteen) days after service of the Rule 56(1)(a) notice, SARS need not apply for an extension and/or condonation in terms of Rule 4 or Rule 52;

[16.3] When the Taxpayer filed a Notice in terms of Rule 56(1)(a) it waived its right to insist that SARS must comply with Rule 4. In this regard SARS relied on a

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[3] *S Company v Commissioner for the South African Revenue Services [2017] ZATC 2;*
Taxpayer v the Commissioner for the South African Revenue Services, Case no. 78/2018 ZA (Gauteng Province, Johannesburg);

[4] *Standard Bank v Van Dyk 2016 (5) SA 510 (GP) par. [6];*

judgment of Cloete J. which held that "*Having said that SARS should take the lead, taxpayers themselves should not allow matters to drift*".[5]

[16.4] It is impractical to read Rule 4 and Rule 56 harmoniously as it will lead to an absurdity;

[16.5] Dismissing the Rule 43 application results in manifest prejudice to SARS.

[17] At the hearing of the appeal Counsel acting on behalf of SARS referred to a recent judgment of Cloete J. which is based on similar facts as the issue *in casu*.[6] This judgment refers to the judgment of the Court *a quo*[7] but did not follow the judgment of the Court *a quo*. On analysing the arguments, Cloete J. in that judgment held that the interpretation of the taxpayer (namely that SARS is obliged to follow Rule 52 if it intends to rely on a Rule 31 statement filed out of time) is unduly strained[8].

[18] The learned Judge further held that Rule 52(6) is not peremptory and that a party may apply to a Tax Court for condonation[9]. The learned Judge found that Rule 52(6) applied where a party is in default, that either party has done nothing about it, and the defaulting party then wish the case to proceed[10]. The learned Judge further held the view that the Taxpayer's interpretation namely that SARS was obliged to apply for the extension of time in terms of Rule 4(1) or condonation in terms of Rule 52 if it intended to rely on a Rule 31 statement filed out of time would render Rule 56(1)(a) superfluous as it means that the

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[5] *ITC 0122, 80 SATC 159;*

[6] *P Taxpayer v The Commissioner of South African Revenue Services, Case no. IT45935, delivered on 23 March 2023 in the Tax Court of South Africa (held at Western Cape Division; Cape Town);*

[7] *P Taxpayer (supra), par. [12];*

[8] *P Taxpayer (supra), par. [18];*

[9] *P Taxpayer (supra), par. [20];*

[10] *P Taxpayer (supra), par. [21];*

defaulting party would be obliged to deliver an application for condonation merely to satisfy the innocent party, and not the Tax Court, and that it could not have been the intention of the rule maker as condonation is a matter for the Court and not for a party to decide[11].

INTERPRETATION OF THE RULES

[19 The judgment of Cloete J. and the judgment of the Court *a quo* provides conflicting interpretations of Rule 56 read with the other applicable rules. In order to interpret the rules and determine the intention of the rule maker the relevant rules cannot be viewed in isolation but should be interpreted in the context of all the rules and the enacting provision being the Act.[12] Statutory provisions must be interpreted purposively, the relevant statutory provision must be construed consistently with the Constitution, and the relevant statutory provision must be properly contextualised[13].

[20] Counsel acting on behalf of the Taxpayer submitted that Section 39 of the Constitution directs the Court to interpret any legislation in a manner which promotes the spirit, purpose and objects of the bill of rights. Section 33 of the Constitution provides for administrative action which is lawful, reasonable and fair and anyone adversely affected by administrative action has the right to written reasons. It was further submitted that SARS, a statutory body with wide executive powers, is accountable in terms of the Constitution. I agree with this submission and remark that these principles are well entrenched and enjoins this Court to interpret the Act and Rules accordingly.

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[11] *P Taxpayer (supra), par. [24];*

[12] *Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 SCA, par. [18];*

[13] *Cool Ideas 1186 CC v Hubbard & Another 2014 (4) SA 474 par. [28];*

[21] The legal framework within which the relevant rules find application must therefore be interpreted in the context of accountability, fair and reasonable procedures, and the right to written reasons in instances where administrative action results in adverse affection.

[22] In the preamble to the Act reference is made for the provision of a set of rules, *inter alia* *"... to provide for dispute resolutions"*. Dispute resolution entitles everyone to a fair hearing that can be resolved by the application of law in a Court or independent Tribunal[14]. For this very purpose, Chapter 9 of the Tax Act provides various provisions aimed at dispute resolution, including a limiting provision that an assessment or "*decision*" may only be disputed under Section 105 of the Tax Act.

[23] Sections 104, 105, 106 and 107 of the Act regulates and limits the Taxpayer's right to object and/or appeal a decision or "*assessment*" and requires strict compliance which may only be relaxed with permission of a senior SARS official.

[24] Section 103(1) of the Tax Act reads:

> *"The Minister may, after consultation with the Minister of Justice and Constitutional Development, by public notice make "rules" governing the procedure to lodge an objection and appeal against an assessment or "decision" and the conduct and hearing of an appeal before a Tax Court"*.

These rules are therefore aimed at achieving the purpose of Chapter 9 of the Tax Act being efficient dispute resolution and creating a set of rules designed to regulate dispute resolution and is the only procedure available to an aggrieved Taxpayer who intends to object to or appeal a "*decision*" or assessment[15].

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[14] *Section 34 of the Constitution of the Republic of South Africa;*

[15] *Section 105 of the Tax Act;*

[25] Part E of the Rules serves to regulate the "*Procedures of a Tax Court*". Rule 31 is found under Part E and is therefore part of the "*Procedure of a Tax Court*" and reads as follows:

> "*31.* ***Statement of grounds of assessment and opposing appeal:***
>
> *1. SARS must deliver to the Appellant a statement of the grounds of assessment and opposing the appeal within 45 days after delivery of–*
>
> *(a) the document required by SARS under rule 10(5);*
>
> *(b) if alternative dispute resolution proceedings were followed under Part C, the notice by the appellant of proceeding with the appeal under rule 24(4) or 25(3);*
>
> *(c) if the matter was decided by the Tax Board, the notice of a de- novo referral of the appeal to the Tax Court under rule 29(2); or*
>
> *(d) in any other case, the notice of appeal under rule 10[2] the statement of the grounds of opposing the appeal must set out a clear and concise statement of –*
>
> *(a) the consolidated grounds of the disputed assessment;*
>
> *(b) which of the facts or the legal grounds in the notice of appeal under rule 10 are admitted and which of those facts or legal grounds are opposed; and*
>
> *(c) the material facts and legal ground upon which SARS relies in opposing the appeal.*
>
> *3. SARS may include in the statement a new ground of assessment or basis for the partial allowance or disallowance of the objection unless it constitutes a novation of the whole of the factual or legal basis of the disputed assessment or which requires the issue of a revised assessment.*"

[26] It is important to note that Rule 31 does not confer a discretion on SARS but is prescriptive in its use of language by insertion of the word "*must*" in Rule 31(1). Insofar as SARS is obliged to deliver a statement, the rule further provides for the following:

[26.1] The statement must be provided within 45 days of delivery of the documents described in the rule;

[26.2] The form and contents of the statement is specifically prescribed. It is clear from a reading of Rule 31(2) that the statement must provide any and all such information required by the Taxpayer to be able to determine the grounds, factual or legal, upon which SARS rely for a "*decision*" or assessment.

[26.3] The only discretion available to SARS under Rule 31 is the discretion bestowed in Rule 31(3).

[27] Underlying the principle of procedural fairness during any litigation or dispute resolution the *audi alteram partem* rule as well as the principle that a party is entitled not be surprised and therefore has the right to know in advance what the other party's case is, is of paramount importance and forms the cornerstone of the rules of engagement in an adversarial system of litigation. In my view, that is what Rule 31 intends to achieve as it informs the aggrieved Taxpayer on which principles of law or consideration of fact any "*decision*" or assessment was made by SARS, and it is the only statutory remedy available to a Taxpayer to achieve that end. Rule 31 therefore serves the important purpose of compliance by SARS with its constitutional duty under Section 32 of the Constitution to provide information to the Taxpayer, serves to satisfy the Taxpayer's right to written reasons under Section 33(2) of the Constitution, serves to facilitate a process of dispute resolution which is fair and reasonable under Section 33(1) of the Constitution, and assist

in creating a procedure of law in a fair hearing before a Court as envisaged in Section 33 of the Constitution.

[28] It is therefore clear that the Rule 31 statement which SARS is obliged to deliver to the Taxpayer within 45 days in the form as prescribed in Rule 31 is of vital importance in the process of dispute resolution and serves to form the basis for the dispute, and to advance the dispute to resolution.

[29] Rule 4 provides for an extension of a time period imposed either in terms of the Act or the rules insofar as Chapter 9 of the Act does not provide for such extension. The application of the rule is discretionary as is evident from the use of the word "*may*" in the rule. On a proper reading of this rule, in my view, it can never be argued that the discretion afforded to the different parties referred to in Rule 4(1)(a), (b) and (c) invites an interpretation to the effect that a defaulting party may arbitrarily elect not to follow this rule but unilaterally remedy any default by simply complying with an obligation, albeit out of time. Such an interpretation would render the specific rule superfluous, and lead to a situation that rules which were promulgated with the specific intention to regulate the proceedings of dispute resolution in terms of the Act have no role, force or effect in the proceedings. This issue is further elaborated hereunder.

[30] Rule 52 provides for condonation by the Tax Court when a party failed to obtain an extension under Rule 4 which was discussed *supra*. The rule prescribes the procedure to be followed and entails a process where the Court can be approach for condonation for the failure of a party who did not achieve an extension of a time period under Rule 4. Rule 52(6) specifically refers to a Rule 31 notice and which notice constitutes an obligation on SARS to comply not only with a time period, but also a prescribed form and content, as

set out *supra* in par. [26]. It is thus important to note that Rule 56(6) contains the following words:

" *A party who failed to deliver a statement as and when required under rule 31, 32, or 33 may apply to the tax court under this Part for an order condoning the failure to deliver the statement…..*"

The use of the words "*as and when*" in my view clearly refers to substance, form and time as prescribed in terms of those rules and it is clear that a party has an obligation in terms of the relevant rules, including Rule 31, to comply in terms of substance, form and time.

[31] When Rule 4 and Rule 52 are read in the context of the purpose of the rules, it is clear that the two rules provide a mechanism for parties (SARS and a Taxpayer) to extend time periods prescribed in terms of the rules by agreement, failing which a condonation application can be brought to cure any non-compliance with time periods under Rule 52.

[32] It is further clear that Rule 52(6) may be employed to remedy any default in relation to substance, form and time as obligated in terms of *inter alia* R31. When seeking condonation, a party must explain the reasons for its default and the court must then decide on merit whether condonation should be granted and if so, determine the time period for compliance. In terms of this Rule, SARS is thus held accountable for its failure to comply with a statutory obligation.

[33] Rule 52(6) clearly requires an application for condonation from the tax court in the event that a party has failed to comply with Rule 31, 32 or 33. It follows therefore that a statement in terms of Rule 31 filed out of time without condonation of the tax court is not a statement envisaged in terms of Rule 31, is invalid, and cannot be used for the purpose for which it was intended in terms of the provisions of the rules for dispute resolution.

[34] Whereas Rule 52 is also discretionary in the sense that the rule utilise the word "*may*", similar to Rule 4 as set out *supra*, it is clearly a discretion afforded to a defaulting party to remedy a default. A defaulting party cannot be compelled to remedy a default but is afforded an opportunity to remedy a default and the sanction for a default which the defaulter fails to remedy is provided for in the rules, namely the right of the innocent party to apply for default judgment. Considering the context of these rules as set out above, in my view the discretion afforded to a defaulting party to avail itself of R52 is therefore not a discretion to ignore the relevant rule and escape the obligation to seek condonation and accountability for its failure to comply with the rules, but rather a discretion to elect to either cure its default by application of Rule 52 or face the consequences of a failure to do so. In my view, should the discretion in terms of Rule 4 and Rule 52 be interpreted to imply that the defaulting party may arbitrarily elect to follow Rule 4 or Rule 52 or alternatively elect to simply cure the default by filing within the 15 days period provided for in terms of Rule 56(1)(a) when faced with an application for default judgment it will result in an absurd interpretation. It will imply that a party may fail to comply with a statutory obligation under these rules and when faced with an application for default judgment partially comply with such obligation without having to seek permission from the other party under Rule 4 or apply for condonation under rule 52. This interpretation implies that a party to dispute resolution in terms of the Tax Rules may ignore obligations in terms of the rules with impunity, not be held accountable, and renders the provisions of Rule 4 and 52 as superfluous. This interpretation is thus absurd and mitigates against the principle of

purposively. With respect to the judgment of Cloete J,[16] this consideration illustrates the fallacious approach set out in paragraphs [20], [21], [22] and [23] of that judgment.

[35] Having considered the effect of Rule 31, Rule 4 and Rule 52 it is therefore clear that the rule maker envisaged a fair procedure which impose obligations on both parties in terms of procedure, form and substance and which also enables a defaulting party to attempt to cure a default by agreement in terms of Rule 4 or by way of an application for condonation in terms of Rule 52 for purposes of curing the default, failing which the innocent party may apply for default judgment in order to bring finality to the process.

[36] Rule 56 provides a procedure for a party, where the other party remains in default, to apply for default judgment. Rule 56 reads:

> "***56. Application for default judgment in the event of non-compliance with the rules:***
>
> *1. If a party has failed to comply with the period or obligation prescribed under these rules or an order by the Tax Court under this Part, the other party may–*
>
> ***(a)*** *deliver a notice to the defaulting party informing the party of the intention to apply to the Tax Court for a final order under section 129(2) of the Act in the event that the defaulting party fails to remedy the default within 15 days of delivery of the notice; and*

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[16] *P Taxpayer (supra);*

(b) *if the defaulting party fails to remedy the default within the prescribed period, apply, on notice to the defaulting party, to the Tax Court for a final order under section 129(2).*

2. *The Tax Court may, on hearing the application –*

(a) in the absence of good cause shown by the defaulting party for the default in issue make an order under section 129(2); or

(b) make an order compelling the defaulting party to comply with the relevant requirement within such time as the court considers appropriate and, if the defaulting party fails to abide by the court's order by the due date, make an order under section 129(2) without further notice to the defaulting party."

[37] In my view it is imperative to note that in the first sentence to Rule 56(1) reference is made to "*... failure to comply with a period or obligation ...*" whereas Rule 56(1)(a) and (b) refers to the "*remedy of a default*". In my view it is necessary to determine the meaning of the word "*default*" in the context of the words "*period or obligation*" in Rule 56(1). The default referred to in Rule 56(1)(a) and (b), in my view, clearly relates to the words "*failed to comply with a period or obligation described under the rules*".

[38] The rules comprehensively describe a procedure to be followed by both parties in the course of the resolution of the dispute. The Taxpayer must comply with rules relating to the time period, procedure and form of any objection or appeal against a decision or assessment failing which there will be no valid appeal or objection as set out *supra* in paragraphs [29] to [34] Should the Taxpayer fail to adhere to a prescribed time period or procedure but still intend to raise a valid appeal or objection, the Taxpayer must follow

Rule 4 and failing which Rule 52 must be utilised in order to enable the Taxpayer to rely on such appeal or objection as set out supra.

[39] Similarly, the Rules direct that SARS "must" file a Rule 31 statement within 45 days. The Rule directs SARS to comply with Rule 31 both in form, substance and time, by using the words must in Rule 31, and therefore impose an obligation on SARS. Where SARS file a notice outside the time period of 45 days as directed to do in terms of Rule 31 then SARS failed to comply with its obligation in terms of Rule 31 and such failure can only be remedied by application of either Rule 4 or Rule 52 as set out *supra* in paragraphs [29] to [34]. Only once the default is remedied, has SARS complied with its obligation in terms of Rule 31. In my view, "*Obligation*" in the context of Rule 56(1) read with "default" in that rule thus refers to the obligation of SARS to file a statement in terms of Rule 31 which complies in substance, form and time with the prescripts of Rule 31 and failing which SARS must cure the defect in terms of Rule 4 or Rule 52.

[40] To hold otherwise and interpret Rule 56(1) to provide SARS an opportunity to file a Rule 31 statement which does not comply in form, substance or time to Rule 31 and without availing itself of the remedies provided for in terms of Rule 4 or Rule 52 to cure such defect, will have the following effect:

[40.1] The provision of Rules 4 and 52 would be superfluous. A party may ignore any relevant obligation or time period and be in default of its statutory duties imposed in terms of the Rules and only when faced with an application in terms of Rule 56(1) simply partly comply with a duty which was mandatory in terms of the rules without having to either seek agreement in that respect from the opposing party under Rule 4 or seek condonation under Rule 52. If the rule maker intended to allow parties to escape consequences of strict adherence to the relevant rules, it

would not have included Rule 4 or Rule 52. Such an interpretation, as already explained, would violate the principle of interpreting the rules purposively.

[40.2] As a statutory body with executive power it will diminish accountability of SARS for delays caused by non-compliance with time periods, failure to comply with statutory obligations such as the filing of a statement in terms of Rule 31 and the proper and expeditious execution of its statutory mandate namely the collection of income tax which is a vital state function because SARS will be relieved of its duty to apply for condonation under Rule 52 and will not have to explain and account for any non-compliance.

[40.3] It will clearly not be in the public interest that Taxpayers be allowed not to comply with their duties or adhere to time periods prescribed in the relevant Act and Rules in the process of dispute resolution, thereby prolonging and frustrating the collection of tax and to then allow such Taxpayer to unilaterally cure their defaults when faced with an application for default judgment under Section 56. If this situation is untenable insofar as the obligations of Taxpayers are concerned, there is no reason to hold otherwise insofar as SARS is concerned otherwise it will render the process of dispute resolution to be unfair.

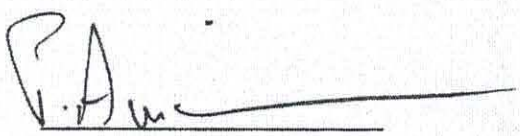
[41] SARS cannot be prejudiced by the dismissal of the Rule 30 application as SARS is entitled to show good cause for its delay to comply with its statutory duties, including its failure to apply for condonation in terms of Rule 52(6), at the hearing of the application for default judgment in terms of the provisions of Rule 56(2) and the Court may then make an order in terms of Rule 56(2)(b).

[42] To argue that the Respondent should have compelled SARS to file a Notice in terms of Rule 31 is, in my view, not correct. The obligation to file such a notice in the prescribed form within the prescribed time period squarely rest on SARS as is clear from the wording of Rule 31 and if SARS fails to do so notwithstanding the fact that it is a statutory body with executive power, there is no obligation on the Respondent to step into the proverbial shoes of SARS and compel SARS to execute its statutory mandate namely to effectively collect tax.

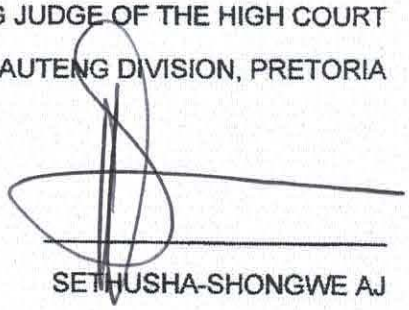
[43] In the result the appeal must be dismissed, and I will make the following order:

1. The appeal is dismissed;

2. Appellant is ordered to pay the costs of the appeal including costs of two counsel.



PA VAN NIEKERK AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA



SETHUSHA-SHONGWE AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

MABUSE J (dissenting)

I have read the judgment of Van Niekerk AJ in which Sethusha-Shongwe AJ agreed. I prefer to refer to that judgment, for ease of reference, as the majority judgment. On the same set of facts as were before the majority, I have reached a different conclusion as demonstrated in the dissenting judgment as appears below.

[1] This matter came before us as an appeal by the Commissioner of South African Revenue Services against the whole of the decision and order of Mali J dated 18 November 2021 and delivered on 1 December 2021. The appeal is opposed by the respondent, Virgin Mobile South Africa (Pty) Limited.

[2] For purposes of brevity I shall refer to the appellant as SARS and the respondent as Virgin Mobile.

Background

[3] On 22 May 2019, Virgin Mobile filed its appeals against the additional assessments for the income tax years of assessment 2014, 2015, and 2016. In terms of rule 31 of the Tax Administration Act 28 of 2011 (the TAA), SARS must deliver to Virgin Mobile a statement of the grounds of assessment and opposing the appeal within 45 days after the delivery of-

(a) the documents required by SARS under rule 10 (4);

(b) if alternative dispute resolution proceedings were followed under Part C, the notice by the appellant of proceeding with the appeal under rule 24(4) or 25(3).

(c) if the matter was decided by the tax board, the notice of a *de novo* referral of the appeal to the tax court under rule 29(2); or

(d) in any other case the notice of appeal under rule 10.

The delivery of the rule 31 statement is SARS' obligation. In this instant case SARS failed to comply with that obligation within the required period. That period was 45 days in terms of rule 31. If SARS wanted to comply with that obligation or wanted to remedy its default or failure to deliver its rule 31 statement after the expiry of the said period of 45 days, it had to apply to court in terms of rule 52. It can no longer rely on rule 4. Once the period of 45 days expires, it is no longer open to SARS to ask for an extension in terms of rule 4. Rule 4 has a limited time of operation and once it passes, no party, not even SARS, can invoke its provisions unless the application for extension was asked for before the expiry of the period of 45 days or unless the tax court extends the said period under rule 52(1)(b).

Rule 52(1)(a) provides that:

"A party who failed to obtain an extension of a period by agreement with the other party, the clerk or the registrar, as the case may be, under rule 4 may apply to the tax court under this part for an order, on good cause shown-

(a) condoning the non-compliance with the period; and

(b) extending the period for a further period that the tax court deems appropriate".

[4] On 2 September 2019, after the lapse of approximately one year and three months, Virgin Mobile sent a letter to SARS. The said letter stated as follows:

"Virgin Mobile has to date hereof not received SARS' rule 4 request for an extension to deliver its rule 31 statement before the expiry of 45 days period in which SARS rule 31 statement had to be delivered or received notice of SARS' intention to formally apply to the Tax Court for an order condoning its non-compliance with the rules".

[5] Now, for record purposes, rule 4 deals with the extension of time periods. It provides that:

"(1) Except where extension of a period under the Act or these rules is otherwise regulated in Chapter 9 of the Act or these rules, a period may be extended by agreement between:

(a) the parties.

(b) a party or the parties and the clerk; or

(c) a party or the parties and the registrar.

(2) a request for an extension must be delivered to the other party before the expiry of the period prescribed under these rules unless the parties agree that the request may be delivered after the expiry of the period

(3) if SARS is afforded a discretion under these rules to extend a time period applicable to SARS, SARS must in the notice of the extension state the grounds of the extension.

(4) if a period is extended under this rule by an agreement between the parties or a final order pursuant to an application under Part F, the period within which a further step of the proceedings under these rules must be taken commences on the day that the extended period ends".

[6] SARS failed to respond to the said letter by Virgin Mobile. Then on 13 October 2020 Virgin Mobile served on SARS a notice in terms of rule 56(1)(a) calling on SARS to remedy its

default within 15 business days of the notice being served upon it. Rule 56(1)(a) provides that:

"56(1)(a) If a party has failed to comply with a period or obligation prescribed under these rules or an order by the Tax Court under this Part, the other party may:

(a) deliver a notice to the defaulting party informing the party of its intention to apply to the tax court for a final order under section 129(2) of the Act in the event that the defaulting party fails to remedy the default within 15 days of delivery of the notice." (My underlining)

[7] On 20 October 2020, SARS complied with the notice in terms of rule 56(1)(a). It delivered its rule 31 statement. This was obviously done within a period of 15 days set out in rule 56(1)(a) notice. It is immaterial that the rule 31 statement was delivered 310 business days after the expiry of 45 days. What is of paramount importance is that the delivery of its rule 31 statement took place within the period prescribed in the rule 56(1)(a) notice. That period was 15 days from the date of delivery of the relevant notice. In this case the rule 31 statement was delivered within six days of the receipt of the notice.

[8] For unknown reasons and despite SARS having complied with its rule 56(1)(a) notice within six days of such notice having been served upon it, on 13 November 2020 Virgin Mobile proceeded with the step set out in Rule 56(1)(b). It launched an application for default judgment.

[9] The reason Virgin Mobile launched an application in terms of rule 56(1)(a) is that it contended that SARS did not apply for condonation when it filed its rule 31 statement or did not invoke the provisions of rule 4(2) which regulate the extension of time periods.

According to Virgin Mobile the filing of the rule 31 statement by SARS should have been accompanied by the filing by SARS of an application for condonation or for an extension of time periods. In the circumstances Virgin Mobile was of the view that, because in filing the rule 31 statement, SARS did not apply for an extension of time nor did SARS apply for condonation for the late filing of the rule 31 statement after receiving the notice in terms of rule 56(1)(a), there was therefore no rule 31 statement before the court. Rule 56(1)(a) does not require SARS to apply for condonation or for an extension of any period before filing its rule 31 statement. It only requires SARS, as the defaulting party, to purge the default or to remedy the default and the default in this case was failure to deliver the 31 statements within 45 days after the taxpayer had lodged an appeal against the assessments. It must be recalled that SARS was responding to Virgin Mobile's rule 56(1)(a) notice. Nowhere in the said rule was SARS required to file any application for extension of time periods or for condonation. The provisions of rule 4(2) are not applicable because SARS was not applying for an extension of time periods. Virgin Mobile had thought that it was entitled to proceed to the next step which was an application for an order in terms of section 129(2). The law speaks in rule 56(1)(a) in clear and unequivocal language. Therefore, the maxim *Judicis est jus dicere sed non dare* applies. The language of rule 56(1)(a) is certain. It is not ambiguous. It may well be that the rule would have achieved a better result if it had expressly insisted on SARS applying for an extension of the period for lodging its rule 31 statement or applying for condonation, but that does not entitle the Court to do violence to the language of the legislature. There are no express words in the rule that require SARS to apply for condonation or for an extension of any period when it responds to the other party's rule 56(1)(a) notice. The rules cannot be interpreted in a manner that suggests that SARS has a duty, when it responds to the taxpayer's rule 56(1)(a) notice, to apply for condonation or to apply for extension.

[10] Upon receipt of Virgin Mobile's application in terms of rule 56(1) (b), SARS requested Virgin Mobile to reconsider its approach, but Virgin Mobile remained resolute. It was not prepared to switch its approach. Arrangements were made between SARS and Virgin Mobile for the suspension of the application for default judgment pending the result of this appeal.

[11] When Virgin Mobile remained resolute, SARS thereafter served upon Virgin Mobile a notice in terms of rule 30 of the Uniform Rules of Court on the basis that Virgin Mobile's application in terms of rule 56(1)(b) was an irregular step. According to rule 30 notice, Virgin Mobile was granted an opportunity until 30 December 2022 to remove SARS' cause of complaint. Despite the opportunity afforded to it, Virgin Mobile refused to remove SARS' cause of complaint. In letters dated 18 January 2021 and 1 February 2021 Virgin Mobile persisted with its application for default judgement. It is for that reason that SARS proceeded with the application in terms of rule 30. Rule 30 of the Uniform Rules of Court states that:

"A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside."

In terms of rule 30 application SARS sought an order in the following terms:

"1. That application for default judgement dated 13 November 2020 brought by the respondent, Virgin Mobile South Africa (Pty) Limited (in business rescue) under case number IO T 25117 the default judgement application is irregular'

2. That the default judgment application be set aside.

3. That the respondent pays the cost of the application".

There was no complaint by Virgin Mobile that rule 30 was not applicable in this case.

[12] SARS' view is that the provisions of rule 56(1)(a) are clear. They do not require a party who has timeously remedied his default to, in addition, apply for condonation. I agree with SARS' interpretation of rule 56(1)(a). That interpretation accords with the interpretation of the same rule by Cloete J in the **Taxpayer v Commissioner for the South African Revenue Services, Case number T45935,** paragraph [22], in which he stated that:

"[22] *Rule 56(2) supports this interpretation. This rule makes clear that it is only when the tax court hears the application for a final order that it must consider whether or not condonation should be granted. Put differently, if the defaulting party remedies the default within the 15-day period referred to in rule 56(1)(a), then the statement in question is properly before the Tax Court and there is nothing for it to consider. It is only where the defaulting party nonetheless remains in default and the innocent party applies for a final order that the tax court will be in a position to consider whether or not the defaulting party has made out proper case for condonation." (My underlining).*

Similarly, it accords with interpretation of Keightley J, who in paragraphs [27] and [31] of the ***Taxpayer v Commissioner for South African Revenue Services, Case number 0078/ 2018****, held that:*

"[27] *In my view, where the very complaint that the default judgement application is aimed at is the earlier failure by SARS to file a rule 31 statement timeously, the fact that the statement was indeed subsequently filed must be a factor of material relevance to the court in determining whether good cause exists, and whether default judgment would be appropriate in the circumstances.*

[3] All these factors together, in my view, constitute good cause for the purposes of rule 56(2). The interests of justice require that the appeal process should go ahead, and SARS should be permitted to continue to oppose it. At the end of the day, substantive justice between the parties must be served. This can only be done through the appeal process. The application for default judgement must be refused."

"The golden rule of statutory interpretation has long been invoked with frequency to help overcome the difficulties inherent in linguistic formalism. The golden rule requires adherence to the "plain words" of a statute unless this would lead to an absurdity or to a result contrary to the intention of legislature. Faced with any of the latter prospects, a court may part with the literal meaning of a provision in an attempt to eliminate absurdity or to give effect to the "true intention" of the legislature. See ***Re-Interpretation of Statutes p.103*** *by Lourens du Plessis.* In Manyasa v Minister of Law-and -Order 1999 (2) SA 179 SCA, 185B-C, the court had the following to say:

"It is trite that the primary rule in the construction of the statutory provisions is to ascertain the intention of the Legislature; in the present matter it is, more pertinently, the intention of the Rule maker that needs to be determined. One seeks to achieve this, in the first instance, by giving the words of the provision under consideration the ordinary grammatical meaning which their context dictates, unless to do so would lead to an absurdity so glaring that the Rule maker could not have contemplated it."

This rule makes it clear that Virgin Mobile would only have been entitled to apply for default judgment if SARS had failed to remedy its default within 15 days of the notice in terms of

56(1)(a). This conclusion is fortified when regard is had to what precisely SARS was obliged to do on receipt of the notice from the taxpayer in terms of rule 56(1)(a). There is, in my view, no reason, or no sufficient reason, to depart from the literal interpretation of rule 56(1)(a). Accordingly, its application for default judgement was premature and therefore irregular. Virgin Mobile stance was, in my view, baseless and without merit.

[13] In its judgement the court a quo correctly pointed out that the question was whether the step followed by Virgin Mobile was irregular. The court a quo failed to address this point. According to the court *a quo's* interpretation of the rules and the plethora of judgments it referred to, in responding to Virgin Mobile's application in terms of 56(1)(a), SARS should have applied for an extension of the time periods in terms of rule 4(2). In my view, this is not correct. The court *a quo* misdirected itself, as I have already set out above. The provisions of rule 4(2) are not applicable in this case.

[14] In his heads of argument counsel for Virgin Mobile states that when SARS fails to comply with its own filing obligations if a taxpayer seeks the default judgment it wishes SARS' non-compliance. This is obviously wrong. Counsel for Virgin Mobile states that SARS must remedy all its defaults. He contends furthermore that when it received the rule 56(1)(a) notice, SARS was required to:

1. to obtain a delayed agreement to extension under rule 4(2);
2. apply for condonation under rule 52(1);
3. justify it when defending the default judgement application.

He states furthermore that what SARS was not permitted to do was in fact what it did; simply file 31 statements, without extensions, without condonation and seek to avoid over having to explain or justify his default. I disagree with Virgin Mobile counsel's view. I have given in paragraphs (9) and (13) above the reasons why I do not agree with his view. The

interpretation of rule 56(1)(a) as contended by counsel for the respondent could not possibly have been intended by the legislature.

[15] In my view, the appeal should succeed. I would propose the following order:

1. The appeal against the order of the court *a quo* be upheld.

2. The order of the court *a quo* be set aside and in its place be substituted the following:

"(a) The application for default judgment dated 30th November 2020 brought by the respondent Virgin Mobile Services Virgin Mobile South Africa (Pty) Limited in business rescue under the case number IT25117, is hereby declared to be irregular.

(b) The said default judgement application is hereby set aside.

(c) The respondent is hereby ordered to pay the costs of the application".

PM MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Appellant's Counsel	Adv K W Luderitz SC
Assisted by	Adv K T Seshoka

Instructed by	Van Hulsteyns Attorneys
Respondent's counsel	Adv Steven Bundlender S C
Assisted by	Adv Michael Bishop
Instructed by	Messrs Piet Retief Inc
Date of hearing	24 May 2023
Date of Judgment	17 August 2023