IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: A74/2021

Before: The Hon. Mr Justice Binns-Ward
The Hon. Mr Justice Sher
The Hon. Ms Justice Mangcu-Lockwood

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE — Applicant in the Rule 30 application/Respondent in the condonation application

and

CANDICE – JEAN POULTER (NÈE VAN DER MERWE) — Respondent in the Rule 30 application/Applicant in the condonation application

In re:

In the matter between:

CANDICE-JEAN POULTER (NÈE VAN DER MERWE) — Appellant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE — Respondent

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JUDGMENT DELIVERED ELECTRONICALLY ON 25 OCTOBER 2022

MANGCU-LOCKWOOD, J (BINNS-WARD and SHER JJ concurring):

A. INTRODUCTION

[1] This matter concerns an application in terms of Uniform Rule 30 brought by the Commissioner for the South African Revenue Service (*"CSARS"*) and a condonation application brought by Ms Candice Jean-Poulter (née van der Merwe). Both applications relate to a notice of appeal delivered on behalf of Ms Poulter in this Court in respect of an intended appeal from an order made by Davis J in the Tax Court.

[2] The CSARS also seeks an order striking out certain matter from affidavits delivered on behalf of Ms Poulter, as well as punitive cost orders against her. In addition, before the hearing of this matter Ms Poulter's father, Mr Gary van der Merwe delivered an application for leave to intervene as a party, which was dismissed on the day of the hearing, for reasons discussed later.

B. BACKGROUND

[3] The background to this matter is a tax appeal that is currently being prosecuted by Ms Poulter in the Tax Court in terms of section 107 of the Tax Administration Act 28 of 2011 (*"the TAA"*). The tax appeal relates to an assessment issued by CSARS in respect of her 2018 taxable income.

[4] The matter was set down for hearing before the Tax Court (per Davis J) on 9 November 2020. However, on that day Ms Poulter did not appear, and an order was granted in the following terms (*"the Order"*):

> "The appellant [Ms Poulter] is called upon to appear before this Court on 23 November 2020 at 10h00 to show cause why the following order should not be made:

1.1 The appellants (sic) document styled as and purporting to be a "Supplementary Statement of Grounds of Appeal in terms of Rule 32(1)(B) of the Rules issued under s 103 of the Tax Administration Act 28 of 2011" is set aside as an irregular step;

1.2 The appellant's document styled as and purporting to be the appellants (sic) Notice of Opposition to the Rule 30 Notice (it being the incorrect procedure followed by [Ms Poulter]) and Appellant (sic) request in terms of Rule 36 of the Rules issued under s 103 of the Tax Administration Act 28 of 2011" is set aside as an irregular step;

1.3 The Appellant is to pay the costs of this application on an attorney and client scale.

2 The appellant is entitled to appear on her own behalf or to be represented by a representative who has a right of appearance in the High Court as an attorney or an advocate.

3 Mr Gary van der Merwe is not entitled to appear on behalf of the appellant in that s 125 (2) of the Tax Administration Act 28 of 2011 has been repealed.

4 The costs of the hearing of 9 November 2020 are to be paid by the appellant on an attorney and client scale."

[5] On 17 November 2020 a notice of intention to appeal against paragraphs 2, 3 and 4 of the Order was delivered in the Tax Court on behalf of Ms Poulter, signed by Mr van der Merwe, seeking an appeal to the full court of the High Court (Western Cape Division).

[6] On 28 January 2021 the registrar of the Tax Court issued a notice in terms of section 137(1)(a) of the TAA acknowledging receipt of Ms Poulter's notice of intention to appeal, and directing her to lodge a written notice of appeal in this Court within 21 business days, in terms of section 133 and 138 of the TAA. The 21 business days was to expire on 26 February 2021.

[7] A notice of appeal on behalf of Ms Poulter was only delivered on 1 March 2021. Furthermore it was filed in the Tax Court, not with the registrar of this court which was the relevant court of appeal. The notice was signed by Mr van der Merwe, who purported to be her representative. Mr van der Merwe is not an advocate or attorney with right of appearance in the High Court. On the same day the CSARS sent correspondence to Mr van der Merwe pointing out that the notice of appeal was out of time and had been filed in the wrong forum.

[8] On 8 March 2021 a condonation application was delivered on behalf of Ms Poulter. However, it was lodged in the Tax Court, and was signed by Mr van der Merwe. The CSARS responded by filing a notice in terms of Uniform Rule 30(2)(b) in the Tax Court dated 23 March 2021. The CSARS took the position that that the condonation application constituted an irregular step because it had been filed in the wrong forum, was out of time, and was not signed by the taxpayer, or a legal practitioner on her behalf.

[9] On 31 March 2021 a notice of withdrawal of the condonation application of 8 March 2021 was filed in the Tax Court on behalf of Ms Poulter, again signed by Mr van der Merwe. This prompted the CSARS to write to Ms Poulter on 6 April 2021 indicating his objection regarding Mr van der Merwe's representation and signature of her court documents, inviting her to withdraw the condonation application and appeal notice, and to deliver properly signed documents by herself or a legal practitioner. Ms Poulter eventually did withdraw her condonation application in the Tax Court, but did so only on 6 June 2021.

[10] Meanwhile, on 30 March 2021, Ms Poulter delivered a notice seeking to appeal paragraphs 2, 3 and 4 of Tax Court Order to the full court. In summary, the grounds for appeal are that, in terms of section 129(2), read with section 117(3) of the TAA, the Tax Court did not have jurisdiction to grant the orders in paragraphs 2 and 3. Secondly, it is said that the Tax Court erred in granting an order prohibiting Mr van der Merwe from appearing on behalf of Ms Poulter and placing reliance on the repeal

of section 125(2) of the TAA. Thirdly, the punitive costs order granted in paragraph 4 is challenged on the basis that, prior to the hearing on the matter on 9 November 2020, Ms Poulter had tendered costs for the postponement of the matter.

[11] On 15 April 2021 the CSARS delivered a notice in terms of Rule 30 objecting to the taxpayer's notice of appeal of 30 March 2021 on the basis that it was filed late, without an accompanying condonation application, and was signed by Mr van der Merwe instead of by Ms Poulter or a qualified legal representative on her behalf. That gave rise to the application by the CSARS in terms of rule 30 that is before us for the striking out of the notice of appeal.

[12] On 28 April 2021 a condonation application for the late filing of the notice of appeal was delivered on behalf of Ms Poulter. The founding affidavit is deposed by Mr van der Merwe, and there is no accompanying confirmatory affidavit from Ms Poulter. It is opposed by the CSARS. This is the condonation application that is the subject of these proceedings.

[13] On 7 May 2021 the CSARS delivered a notice in terms of Rule 30(2)(b) raising objections to the condonation application, and on 13 May 2021, a full application was delivered. This is the Rule 30 application that is the subject of these proceedings. On 26 May 2021 a notice of intention to oppose the Rule 30 application was delivered on behalf of Ms Poulter, signed by Mr van der Merwe, and on 17 June 2021 an answering affidavit deposed by him was delivered. Again, there is no accompanying confirmatory affidavit from Ms Poulter.

[14] The main objection by CSARS in the Rule 30(2)(b) of 7 May 2021 is that the condonation application is not signed by Ms Poulter, or her attorney as required by the Uniform Rules, and that Mr van der Merwe is not entitled to represent her or to sign court documents on her behalf. There are other non-compliances mentioned, which are said to be contrary to Uniform Rule 6(5). In addition, the CSARS has brought a striking out application in respect of certain matter from the answering affidavit on the

basis that it is scandalous and defamatory, and also seeks a punitive costs order in respect thereof.

C. THESE PROCEEDINGS

[15] Ms Poulter's appeal was previously set down before a full court (Samela, Slingers and Thulare JJ) on 21 January 2022. The matter was struck from the roll with costs, on the basis that the Rule 30 application ought to be determined before the appeal could be heard. Mr van der Merwe appeared as a representative for Ms Poulter on that day, and the CSARS' legal representatives objected thereto, although the issue was not dealt with since the court's approach was to strike the matter from the roll.

[16] Thereafter, the rule 30 application and related condonation application were brought before Binns-Ward J, sitting as a single judge, on 12 May 2022. His view was that it was doubtful that a single judge had jurisdiction to determine the matters, and that it was in any event inappropriate for them to be heard by a single judge. In consultation with the Judge President of this Division, the matter was consequently referred for hearing before this Court.

[17] This Court issued a directive dated 15 June 2022 (*"the Directive"*), setting the matter down for hearing on 22 August 2022, and informing the parties that the Court would not entertain oral or written submissions in the matter except from the parties in person, or as represented by an advocate or an attorney with right of appearance in the High Court. Further, the directive sought representations from the parties regarding (a) whether the order made by Davis J in the Tax Court is appealable; and (b) why, if the costs order were the only appealable aspect of the Order, an appellate court might be moved, exceptionally, to entertain an appeal only in respect of costs.

Application to intervene

[18] Ms Poulter did not attend the court proceedings on 22 August 2022, and no reason was given therefor. Instead, as already indicated, Mr van der Merwe sought to intervene as a party to the proceedings, and that application was entertained first. The

affidavits supporting the application were deposed to by Mr van der Merwe, without any accompanying affidavit from Ms Poulter. The intervention application was met with a number of objections from the CSARS, including that it was not served in accordance with the Uniform Rules; that there was a failure to join the respondents in the application; as well as an application to strike out certain matter from the founding affidavit thereof.

[19] As regards the merits of the intervention application, its mainstay was that Mr van der Merwe has a real and substantial interest in the matter because paragraph 3 of the Tax Court Order prohibits him from representing Ms Poulter. Therefore, he is a party affected by the Order.

[20] Contrary to Mr van der Merwe's submissions the Tax Court order affects the taxpayer, Ms Poulter, and not him. It is she who has an interest in who represents her. He has no cognizable interest in the outcome of the tax appeal. The only reason he was referred to in the order is because Ms Poulter failed to appear on that day, contrary to the Rules of the Tax Court, and Mr van der Merwe sought to appear on her behalf.

[21] To be able to intervene in an appeal, which is by its nature directed at a wrong order and not at incorrect reasoning, an applicant must have an interest in the order under appeal.[1] The fact that Mr van der Merwe's name is mentioned in the Tax Court Order did not clothe him with a legal interest that could be prejudicially affected in these proceedings[2], any more than a legal practitioner would be entitled to intervene as a party in their client's case. His interest, as indicated by his attitude in the tax court proceedings, is in representing Ms Poulter in court proceedings. However, this does not amount to a real and substantial interest in the sense contemplated by the law. The application must therefore fail.

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1 *NDPP v Zuma* 2009 (2) SA 277 (SCA) para 85.
2 *Id*.. See also *United Watch & Diamond Co (Pty) Ltd v Disa Hotels Ltd* 1972 (4) SA 409 (C) 415H – 417.

[22] To the extent that Mr van der Merwe's intervention application amounts to an attempt to represent Ms Poulter in court proceedings, the recent Supreme Court of Appeal (*"SCA"*) case of *Commissioner for the South African Revenue Service v Candice-Jean van der Merwe*[3] disposes of that issue. There, the SCA, interpreting section 25 of the Legal Practice Act 28 of 2014 (*"LPA"*) and applying the common law, held that no lay person may represent a natural person in a court of law, and that a court has no discretion to allow a layperson to represent a natural person in a court of law.[4] Mr van der Merwe is not admitted and enrolled to practice as a legal practitioner in terms of the LPA. He therefore does not have legal right to represent Ms Poulter in High Court proceedings.

The Rule 30 Application

[23] Apart from the lateness of the noting of the appeal which is discussed below in the context of the condonation application, the main objection in the Rule 30(2)(b) application is that the notice of appeal delivered on behalf of Ms Poulter is not signed by her, or by her attorney as required by the Uniform Rules, and is instead signed by Mr van der Merwe, who is not entitled to do so.

[24] The issue regarding Ms Poulter's representation by Mr van der Merwe has already been dealt with above. It remains to be added that the Uniform Rules require that court documents be signed by an applicant or his or her attorney.[5] These requirements also apply to a notice of appeal. In the absence of Ms Poulter's signature or the signature of a legal practitioner, as defined, acting on her behalf, the notice of appeal is in contravention of the Uniform Rules of Court, and the basis for the Rule 30 application is upheld.

The condonation application

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[3] *Commissioner for the South African Revenue Service v Candice-Jean van der Merwe (211/2021 [2022] ZASCA 106 (30 June 2022).*

[4] At paras [45] – [46].

[5] See Uniform Rules 1 (definition of a 'party' includes the party's attorney with or without an advocate); 6(5)(a) read with Form 2a (a notice of motion must be signed by an applicant or his or her attorney); 7 (powers of attorney); 16 (representation of a party); 17(3)(a) (a summons must be signed by the plaintiff or his or her attorney).

[25] It is trite that condonation is not to be had merely for the asking. A full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility.[6] Factors which are usually weighed include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court *a quo*, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.[7] Prospects of success on appeal, the importance of the case, absence of prejudice to the parties, the respondent's interest in the finality of its judgment and the convenience of the court are some of the factors that the appeal court will weigh in deciding whether or not to grant condonation.[8]

[26] In this case the delay in filing the notice of appeal was some 21 days, and the reason given for the lateness is that Mr van der Merwe did not receive the section 137 Tax registrar's notice on 28 January 2021, and only received it on 1 March 2021. This reason for delay is strenuously disputed by the CSARS. The registrar's email, to which the section 137 notice was attached, is annexed to the answering affidavit, bearing the date of 28 January 2021, was sent to the same email address that was used, and continues to be used, for Ms Poulter in all the correspondence in the matter, without any problems. The email address is in fact for Mr van der Merwe's email address. The Tax Court registrar did not receive any notification that the email in question had not been delivered. Mr van der Merwe does not indicate what attempts he made to check whether the email address was otherwise received in his junk mail.

[27] Even if we were to decide in Mr van der Merwe's favour that he did not receive the registrar's notice on 28 January 2021, there are other aspects which render his explanation for the delay unsatisfactory. Whilst averring that the notice was not sent to

[6] *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) para 6.

[7] *Mulaudzi v Old Mutual Life Insurance Company (South Africa) Limited and Others, National Director of Public Prosecutions and Another v Mulaudzi* [2017] 3 All SA 520 (SCA); 2017 (6) SA 90 (SCA) paras 25 – 26.

[8] *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Share Block Limited and Others* [2016] 2 All SA 704 (SCA); 2016 (6) SA 181 (SCA) para [26].

him on 28 January 2021, he also alleges that, as a result, it 'should be presumed' that the CSARS also did not receive the notice on that date. Yet the evidence indicates otherwise. The CSARS has not only attached an email addressed to him on that date, but also an email addressed to SARS, dated 28 January 2021, attaching the said notice. There is also an attempt to lay the blame at the door of the CSARS's legal representatives for not alerting him to the notice on 28 January 2021, which is not a legal requirement. As the CSARS argues, Mr van der Merwe's explanation for the delay leaves much to be desired.

[28] In addition to all of this is the delay in filing the application for condonation. Although the notice of appeal was delivered on 30 March 2021, the condonation application was delivered about a month later, on 28 April 2021. No reason is given for this delay. The SCA has stated that what calls for an explanation is not only the delay in the timeous prosecution of an appeal, but also the delay in seeking condonation. An appellant should, whenever (s)he realises that (s)he has not complied with a rule of this court, apply for condonation without delay.[9] The result, when taking into account all the above, is that the explanation for the delay is not satisfactory.

[29] Next is a consideration of the prospects of success of the issues raised in the notice of appeal. The appeal is directed at paragraphs 2, 3 and 4 of the Tax Court Order. However, except for paragraph 4, those orders are not appealable. The orders granted in terms of paragraphs 2 and 3 are not final orders that may be granted by a Tax Court in terms of section 129 or 130 of the TAA, which a taxpayer would be entitled to appeal in terms of section 133. Instead, because Ms Poulter failed to appear on 9 November 2020, the Tax Court granted an order in the form of a rule *nisi*, calling upon the parties to show cause why the order should not be confirmed. This was done in accordance with the powers of the Tax Court to regulate its own proceedings.

[30] The result of the rule *nisi* is that, in terms of paragraphs 2 and 3, Ms Poulter is invited to appear on her own behalf or represented by a representative with right of

[9] *Mulaudzi* n 7 para [26].

appearance on the return day. As it turns out, we were informed from the bar that the return date of the rule *nisi* in the Tax Court has been extended to a date in November 2022.

[31] In any event, the appeal against paragraph 3 of the Order, which prohibits Mr van der Merwe from representing Ms Poulter in any further proceedings, has no prospects of success because of the SCA judgment of *Commissioner for the South African Revenue Service v Candice-Jean van der Merwe* which disposes of the question raised on appeal, as already discussed.

[32] That leaves paragraph 4 as the only appealable aspect of the Order, and it pertains only to costs. The question arising is whether there are sufficient exceptional circumstances for a court to entertain the appeal. This is the issue that was raised with the parties in the Directive. Ms Southwood SC, representing the CSARS argued that even if the costs order is the only aspect of the Tax Court Order that has final effect, this Court must nonetheless determine the matter because section 133 of the TAA grants a right to appeal in respect of a costs order. In other words, once this Court is seized of such an appeal, it must determine it.

[33] The relevant part of section 133 of the TAA provides:

> "(1) The taxpayer or SARS may in the manner provided for in this Act appeal against a decision of the tax court under sections 129 and 130.
>
> (2) An appeal against a decision of the tax court lies—
>
> (a) to the full bench of the Provincial Division of the High Court which has jurisdiction in the area in which the tax court sitting is held;…"

[34] In my view this provision does not place an obligation on the High Court to determine every appeal emanating from the Tax Court. It merely grants a litigant a right to appeal to this court. It remains the appeal court's discretion to regulate its own processes and to exercise its appeal jurisdiction in terms of the provisions of the Superior Courts Act of 2013.

[35] In terms of section 16(2)(a)(ii) of the Superior Courts Act[10], save under exceptional circumstances, the question as to whether a decision would have any practical effect or result is to be determined without reference to any consideration as to costs. The Constitutional Court[11] has confirmed that few appellate courts countenance appeals on costs alone and that the practical impact of section 16(2)(a) of the Act is that appeals on costs alone are allowed very rarely indeed.[12]

[36] Nevertheless, a court of appeal is not precluded from considering an appeal directed only at costs. Rather, section 16(2)(a) grants the court of appeal a discretion to decide whether there are exceptional circumstances that warrant the hearing of such an appeal.[13] In the absence of exceptional circumstances, the appeal would not have reasonable prospects of success.

[37] In this matter it has not been shown that the Tax Court, in granting the costs order against Ms Poulter, did so in a manner that constituted a misdirection or improper application of the law[14], which would constitute exceptional circumstances[15]. The context for the costs order is that, after Ms Poulter took an irregular step in the form of filing a second Statement in terms of Rule 32, the CSARS filed an application in terms of Uniform Rule 30 to set it aside. Ms Poulter filed a notice to oppose that application, although no answering affidavit was delivered. The CSARS had the matter set down on 9 November 2020 in the Tax Court, and served a copy of the notice of set down upon Ms Poulter. A week before the hearing, Mr van der Merwe, who purported to act on behalf of Ms Poulter, sought agreement to postpone the matter on account of his ill-health, which was refused by the CSARS.

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[10] This provision corresponds with the amended section 21A of the Supreme Court Act 59 of 1959, the Superior Courts Act's predecessor.

[11] *Tebeila Institute of Leadership Education, Governance and Training v Limpopo College of Nursing and Another* 2015 (4) BCLR 396 (CC) at para [13].

[12] See also *Justice Alliance of South Africa v Minister for Safety and Security and Others* 2013 (7) BCLR 785 (CC).

[13] See *Khumalo v Twin City Developers* [2017] ZASCA 143 para [14].

[14] See *Public Protector v South African Reserve Bank* 2019 (9) BCLR 1113 (CC); 2019 (6) SA 253 (CC) para [12].

[15] *Logistic Technologies (Pty) Ltd v Coetzee* 1998 (3) SA 1071 (W) at 1075J-1076A.

[38] Given that no agreement was reached regarding the postponement, one would have expected Ms Poulter or an authorised representative to appear at the Tax Court on 9 November 2020 to seek such postponement. This was not done. The result was that the CSARS was put to the expense of attending to a matter which involved the setting aside of an irregular step, which Ms Poulter had opportunity to timeously withdraw. In such circumstances the Tax Court was entitled to grant the costs order that it did. A punitive costs order may be granted as a means of showing displeasure against a litigant's objectionable conduct, as well to ensure that the successful party will not be out of pocket in respect of the expenses caused to him or her by the approach to litigation by the losing party.[16] No basis has been established for this Court to interfere with that order.

[39] In the result, no exceptional circumstances have been shown for a court of appeal to entertain the appeal. In addition, as shown by the same discussion above, the appeal bears no prospects of success. Taking all the above into account, the application for condonation stands to be dismissed.

Applications to strike out

[40] As already mentioned, the CSARS has brought applications to strike out certain matter from the intervention application and from the Rule 30 answering affidavit as being vexatious, irrelevant, defamatory and insulting. Punitive costs orders are also sought against Ms Poulter in respect of each striking out application. All of the matter that is the subject of the applications emanated from affidavits deposed to by Mr van der Merwe, and before the applications were delivered, correspondence was sent, demanding withdrawal of the contentious averments, to no avail.

[41] A court may grant an application to strike out in terms of Uniform Rule 6(15), which provides:

[16] *Van Loggenberg: Erasmus* Superior Court Practice vo 2 (2nd ed.), G5 – 21.

> "The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted."

[42] Thus, in terms of the Rule, in addition to being scandalous, vexatious or irrelevant, it must be shown that if the matter is not struck out the party seeking relief will be prejudiced.[17] It has been held[18] that 'scandalous matter' consists of allegations which may or may not be relevant, but which are so worded that they may be abusive or defamatory; 'vexatious matter' consists in allegations which may or may not be relevant, but which are so worded as to convey an intention to harass or annoy; and 'irrelevant matter' consists in allegations which do not apply to the matter in hand and do not contribute one way or the other to a decision of such matter.

[43] As regards the phrase 'prejudice to the applicant's case' in Uniform Rule 6(15), it "*clearly does not mean that, if the offending allegations remain, the innocent party's chances of success will be reduced. It is substantially less than that. How much less depends on all the circumstances…[i]f a party is required to deal with scandalous or irrelevant matter, the main issue could be side-tracked, but if such matter is left unanswered, the innocent party may well be defamed.*"[19]

[44] I now turn to the objections regarding the Rule 30 answering affidavit dated 17 June 2021 which was deposed to by Mr van der Merwe. In the first instance, the striking out application is sought on the basis that certain statements constitute scandalous matter. Most of the statements relate to CSARS' litigation strategy in the tax matters which consist of interlocutory applications, especially applications in terms of Uniform Rule 30. That litigation strategy is singularly attributed to Mr Zaheer Vadachia, the legal advisor of and deponent to the CSARS' affidavits. This is because the CSARS, according to Mr van der Merwe, only adopted the litigation strategy once he (Vadachia) became responsible for the litigation. The litigation

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17 *Beinash v Wixley* (457/95) 1997 (3) SA 721 (SCA); [1997] 2 All SA 241 (A); para 24.

18 *Vaatz v Law Society of Namibia* 1991 (3) SA 563 (Nm) at 566B – E.

19 *Id*, 335F-H.

strategy is variously referred to as ‘delaying tactics’, a ‘delay game’, ‘playing ducks and drakes’, ‘absurd’, ‘unreasonable’, a ‘strategy’ designed ‘to take advantage’ of Mr van der Merwe and Ms Poulter, ‘reprehensible and vexatious’, an ‘abuse of process’; and it is alleged that Mr Vadachia is ‘on a frolic of his own’, has made ‘an attempt to mislead this Honourable Court’, and is ‘not acting with integrity’.

[45] In my view, except for the last two quoted statements, the statements complained about amount to strong criticism of the litigation strategy adopted by the CSARS in its matters against Ms Poulter. They are not unusual in vigorously opposed matters such as the ones between the parties in this matter. And to the extent that the CSARS wished to refute the allegations, he had an opportunity of filing a replying affidavit, which he did on 1 July 2021, which was deposed to by Mr Vadachia. Further, since these statements are made in the context of litigation, the overall remedy for the CSARS is to establish that it is not playing delaying tactics and that its applications have merit. I am accordingly not satisfied that these statements are scandalous or that the CSARS is prejudiced thereby in the sense contemplated in Uniform Rule 6(15).

[46] As regards the statements that Mr Vadachia has attempted to mislead the court and that he is not acting with integrity, I consider those to be serious defamatory statements going to the heart of his profession as a senior SARS official and Tax Court Specialist, who is tasked with dealing with the public as a representative of SARS. No basis has been established for making these statements. I am of the view that the statements should be struck out for being scandalous and defamatory.

[47] There is also an application to strike out material from the Rule 30 answering affidavit on the basis that it is irrelevant. Although it may be argued that some of the matter complained about is unnecessarily prolix, with specific reference to the attachment of an annexure “C2” (heads of argument from the Tax Court), on the whole, there is no evidence of prejudice caused by the statements that are the subject of this complaint.

[48] The CSARS also complains that paragraphs 9.1 and 9.4 should be struck out because they constitute hearsay evidence. In paragraph 9.1 Mr van der Merwe opines that since he has been involved with Ms Poulter's matters from 2013 it would take a substantial amount of time and money for a new legal practitioner to come on board in his stead. Although there is a fair amount of speculation in these averments, they do not amount to hearsay.

[49] At paragraph 9.4 Mr van der Merwe states that *"it was impossible for [Ms Poulter] to get the help she required and nobody was able to and/or was prepared to read themselves into the matter at that late stage, specifically without [Mr van der Merwe's] input"*. Since these assertions are made without a confirmatory affidavit from Ms Poulter, they do constitute hearsay and will accordingly be struck out.

[50] The CSARS also seeks the striking out of annexure "C1" to the Rule 30 answering affidavit on the basis that it has not been authenticated and is inadmissible. Annexure "C1" is a document signed by Ms Poulter, purporting to authorize Mr van der Merwe by special power of attorney, to act on her behalf in respect of the tax period between 2014 and 2020. In regard to an appeal, the document states that Mr van der Merwe is authorized *"to file and pursue an appeal against disallowance of an objection by SARS"*. The CSARS objects to this document because it is not authenticated, and on its own terms, does not extend to an appeal in this Court. All of these objections are correct and are upheld. Accordingly, annexure C1 to the Rule 30 answering affidavit is struck out.

[51] I now turn to the objections pertaining to the founding affidavit in the intervention application dated 29 July 2022 (*"the intervention affidavit"*). Paragraphs 18, 19, 36 thereof contain matter which is couched in similar language as that discussed above, which I have characterized as criticism of the CSARS' litigation strategy. These paragraphs similarly allege that the CSARS has adopted a delaying strategy which amounts to an abuse of court process. As per the earlier discussion, in my view they are not scandalous. Paragraph 37 amounts to criticism of the Tax Court

Order which is said to be *"coloured by unjustifiable and unsustainable conclusions"*. Since that is the essence of the appeal that has been noted to this Court, I similarly do not find these allegations to be scandalous.

[52] There are also complaints that some of the matter in the intervention affidavit is irrelevant. In this regard the CSARS complains that he is prejudiced because there is so much irrelevant matter, a large portion of which is disputed. In the first place, the CSARS complains about 'paragraph 6, lines 4 – 11", which does not exist. Next there is a complaint about paragraphs 13 to 24, and 28 to 37 of the affidavit, which set out the background to the application, including the proceedings held before Davis J in the Tax Court. Upon a reading of these paragraphs, it is apparent that they constitute a repetition of averments and arguments previously made, which all amount to stating that Mr van der Merwe should be permitted to represent Ms Poulter. Thus, they do indeed contain repetitive and argumentative material. However, in my view this is not prejudicial to the CSARS because he can deal with the repetitive averments by cross referencing them to one of the many applications between the parties which are before us.

[53] As for paragraphs 42 to 48 of the intervention application, which are also said to be irrelevant, they set out the basis on which Mr van der Merwe seeks to intervene in these proceedings. Although they are repetitive, in my view they are not irrelevant.

[54] What remains are objections regarding paragraphs 20 to 23 of the intervention affidavit. Those paragraphs relate to the conduct of the legal representatives of the CSARS in these matters, and are worth setting out:

> 20 …[W]hen SARS appeared in this matter before the full court to argue the merits of the appeal against the Davis order, **Ms Southwood misled the court and supported the matter being struck from the role** (sic) and thereafter being referred to a single judge of the High Court for adjudication on its Rule 30 application.
>
> 21 **The attorney for SARS also sent an irregular letter to both the Judge President and the Judges of the Full Court to influence them and did not keep the appellant informed of the correspondence to the full court**.

> 23 Judge Binns-Ward however would not entertain the matter for lack of the court's jurisdiction and **Ms Southwood then argued the opposite to what she previously contended, which has now led to this hearing**, for her preparation and the one hearing alone, Ms Southwood billed SARS R155 250… **the above begs the question why SARS are embarking on this course of action and why the taxpayer should pay the costs on a punitive scale when it is Ms Southwood that has caused the problem with misrepresentations and delays, she has now been to Cape Town three times to argue unfounded interlocutory applications end delayed the merits of the tax dispute**.[20]

[55] Having regard to the transcript of the proceedings of 21 January 2022, the allegation at paragraph 20 above that Ms Southwood supported the matter being struck off the roll when she appeared before the Full Bench, on the basis that the Rule 30 application had not yet been determined, is correct. She stated that *"until the Rule 30 application has been resolved the application for the hearing date was premature and the appeal should then simply be struck from the roll with costs."*[21] Later, in the same proceedings she submitted that *"the making of the appeal was premature and should be struck from the roll with costs."*[22] However, no basis has been laid for the allegation that she misled the court on that day. After all, her submissions were supported by the contents of the letter of 10 November 2021, including the attachments thereto, which were addressed to the Judge President and the Presiding Judge of the Full Bench, in which CSARS's legal representatives stated the same. The unfounded allegation that Ms Southwood misled the court is very serious and is an attack to her reputation as a legal practitioner. I am accordingly of the view that the allegation that *"Ms Southwood misled the court"* in line 2 of paragraph 20 should be struck out for being scandalous and defamatory.

[56] In addition to the letter addressed to the Judge President and to the Presiding Judge mentioned above, the CSARS has attached to its answering affidavit a letter of that same date, addressed to Ms Poulter *"confirming that we have delivered a copy of the attached letter addressed to the judge president to your residential address this morning and it was signed by your housekeeper"*. The letter bears a signature of the

[20] The bold portions are the subject of the striking out application.
[21] Transcript of 21 January 2022, p5 lines 11 – 18.
[22] *Id*, p7 lines 22 - 25.

recipient and a date. In addition, attached to the answering affidavit is a copy of an e-mail sent to Ms Poulter on the same date, which in turn enclosed all the correspondence for her attention. Thus, the allegation in paragraph 21 that Ms Poulter was not kept informed of the correspondence addressed to the Judge President and the Full Bench is without substance.

[57] The contents of the letter of 10 November 2021 and the attachments thereto, set out the history of the litigation in this court, as well as the CSARS' unsuccessful attempts to set the Rule 30 application down. The CSARS' view was that the allocation of the appeal was irregular for, amongst other reasons, the fact that Mr van der Merwe was not entitled to represent Ms Poulter, and the fact that the Rule 30 application ought to be determined first. Although those issues also constitute the subject of the matters before court, they also pertained to the allocation of the appeal matter to the Full Bench by the Judge President. I therefore do not consider the sending of the letter to have been irregular or an attempt to influence the Bench. In any event, since the letter was delivered to Ms Poulter nothing precluded her or her representative from challenging its contents by also sending correspondence to the same addressees. As it turned out, the appeal was allocated to the Full Bench and the set down of 21 January 2022 was not revoked, despite the contents of the letter. I consider the allegations in paragraph 21 to be serious, scandalous and prejudicial to the reputation of the CSARS' attorney, and it ought to be struck out in its entirety.

[58] I now turn to the objection regarding the contents of paragraph 23 of the intervention application. The contents of the exchange between Ms Southwood and Binns-Ward J on 12 May 2022 are worth setting out:

> "MS SOUTHWOOD: The appeal court should have heard all of the applications.
>
> COURT: Of course it should have, yes.
>
> MS SOUTHWOOD: The bundles were before them. The Commissioner made certain…[intervenes]
>
> COURT: Sorry to interrupt you, but was the issue argued as a matter… I mean it's immaterial, but as a matter of interest to me, was this issue argued?

> MS SOUTHWOOD: It wasn't. There wasn't an opportunity to be raised. So the bundles were before the court, all three matters the condonation application, the Rule 30 application and the merits of the appeal were dealt with in the heads of argument. They had the files two months before the hearing."[23]

[59] Later, Ms Southwood argued as follows:

> "So we would ask that Your Lordship hear at least the Rule 30 and the objection *in limine* of the condonation application if necessary. It may not be necessary if the Rule 30 is upheld. If your Lordship is inclined not to hear the matter… that these interlocutory applications must be heard with the appeal and that costs be costs in the cause…".[24]

[60] Although at first blush it might appear that Ms Southwood argued the opposite of what she previously contended, the transcripts in both proceedings need to be considered in their proper context. What she argued on 21 January 2022 was that the Rule 30 application ought to be determined first, and that the appeal had been set down prematurely. She did not contend that the Full Bench was not suited to dealing with the other matters. The jurisdiction issue did not arise. On 21 January 2022, the exchange with the Bench related to whether the appeal was ripe for hearing, while the exchange with the Bench on 12 May 2022 related to which court should have heard the interlocutory applications. Her position, it seems, was that if the Court was not inclined to determine the Rule 30 application first, then none of the matters should be heard.

[61] The transcript of 21 January 2022 shows that she inquired from the Full Bench whether it was willing to determine the Rule 30 application[25], and the Presiding Judge indicated that it was not. It was Ms Southwood who alerted the Court that day that all the bundles in the various applications were before it.[26] Furthermore, the Full Bench itself on that day was of the view that, if the appeal was to proceed after the Rule 30 application had been heard, it [the Full Bench] would then be seized with the matter.[27] It remains unclear from the record why the Full Bench did not determine the Rule 30

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[23] Transcript of 12 May 2022, p 17 lines 12 – 24.
[24] *Id*, pp 26 line 13 – 27.
[25] See transcript of 21 January 2022, pp5 -6.
[26] See transcript of 21 January 2022, p2 lines 5 – 12.
[27] Page 33, lines 5 – 7.

application on that day. It seems that the issue which exercised the Court on that day, was that the issues raised in the Rule 30 application were determinative of the question of whether or not the appeal could proceed.[28]

[62] When the matter came before Binns-Ward J on 12 May 2022, he raised the question whether, as a single judge, he had jurisdiction to determine this matter. As I have already indicated, his view was that any interlocutory issues arising in respect of the notice of appeal were for the appeal court to determine. On that occasion, Ms Southwood sought to convince the Court that it did indeed have jurisdiction to determine all the applications that were before it, and she sought to have at least the Rule 30 application determined, which the Court declined to do. Her submission that it was not raised with the Full Bench on 21 January 2022 that it should hear all the matters was not incorrect, because as I have said, that discussion did not arise. Thus, the allegation that she misled the court or misrepresented the true position to it that day is unfounded, and should be struck out.

[63] On the basis of the issues discussed immediately above, Mr van der Merwe has repeatedly alleged that Ms Southwood has engaged in persistent *mala fide* conduct to delay and generate fees, and that she misled Binns-Ward J, thereby committing serious misconduct. These allegations were first made in correspondence between the parties and were eventually escalated to Binns-Ward J's registrar *via* email, and were copied to Ms Southwood and her junior counsel, Mr Vadachia, Ms Poulter, and three other individuals who are not part of these proceedings, namely a court registrar and two unknown individuals. Mr van der Merwe was requested by email to withdraw these statements, which he failed to do and instead included them in the intervention application.

[64] The allegations were coupled with demands that the costs order granted by the Full Bench on 21 January 2022 should be withdrawn. Ordinarily, a litigant is free to propose that the other party should abandon an order which was made in its favour, and the latter can decide to consent thereto or not. However, when such a demand is

[28] Transcript p 14 lines 14 – 15.

coupled to allegations of *mala fide* conduct, as it was in this case, it is understandable that the CSARS's legal representatives would consider it as defamatory. The remedy for Ms Poulter, if she was unhappy with the costs order granted by the Full Bench, was to appeal it.

[65] I do, however, accept that at first glance, the submissions made by Ms Southwood are contradictory. I do not want to speculate regarding whether a qualified legal practitioner would have construed the statements as Mr van der Merwe did. I would make the observation, however, that it is not in the nature of qualified and trained legal practitioners to send disparaging emails, regarding other legal practitioners, to all and sundry, which contain allegations of the kind contained in Mr van der Merwe's emails. The persistent and unbridled manner in which the allegations were made has had a defamatory effect.

[66] The remaining allegations in paragraph 23 regarding 'delays' and 'unfounded interlocutory applications' are akin to the statements discussed earlier, which I have characterized as merely amounting to criticism of the CSARS' litigation strategy. I do not regard them as being susceptible to striking out.

[67] The striking out applications have only been partially successful. As is apparent most of the statements complained about I have characterized as amounting to criticism of the litigation strategy of the CSARS. Furthermore, I have found that Ms Southwood's submissions were susceptible to being misunderstood. In the circumstances, I do not think it would be appropriate to grant a separate costs order in relation to the striking out applications.

[68] Scandalous matter - allegations which may or

[69] may not be relevant, but J which are so worded as to be abusive or defamatory

D. ORDER

[70] In the circumstances, orders are made in the following terms:

1. The order made at the hearing refusing the application by Mr Gary van der Merwe for leave to intervene is confirmed and it is directed that Mr van der Merwe shall be liable for the CSARS's costs of suit in that application.

2. The application by Ms Poulter for condonation of the late filing of the appeal is dismissed.

3. The CSARS's application in terms of Rule 30 is upheld, and the Notice of Appeal delivered on behalf of Ms Poulter is set aside.

4. Ms Poulter shall pay the costs of the Rule 30 application and the condonation application, such costs to include the costs of two counsel.

5. The costs incurred in respect of the abortive hearing before Binns-Ward J on 12 May 2022 are excluded from the ambit of the foregoing costs orders, each party to bear their own costs in that regard.

6. The following matter in the appellant's answering affidavit in the Rule 30 application deposed by Mr Gary van der Merwe on 17 June 2021 is struck out:

   a. Pages 85-86, paragraph 5.23, lines 3-5 "*…he is accordingly attempting to mislead this Honourable Court*";

b. Page 91, paragraph 12, lines 3 - 4;

c. Page 89 paragraph 9.4;

d. Pages 96 - 97, annexure “C1”.

7. The following matter in the founding affidavit supporting the application for leave to intervening deposed to by Gary van der Merwe on 29 July 2022 is struck out:

a. *“Ms Southwood misled the court”* in line 2 of paragraph 20;

b. Paragraph 21, in its entirety;

c. *“…with misrepresentations and”* in line 8 of paragraph 23.

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N MANGCU-LOCKWOOD

Judge of the High Court

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A G BINNS-WARD

Judge of the High Court

____

M L SHER

Judge of the High Court

APPEARANCES

For the applicant	**:**	**Adv F Southwood SC**
Instructed by	**:**	**Ms C Hunter-Linde** **DM5 Incorporated Attorneys**
For the respondent:		**In person**
Instructed by	**:**	**Mr G van der Merwe**