

SOUTH AFRICA / JUDGMENT

Applicant X v Commissioner for The South African Revenue Service (2022/12) [2022] ZATC 11; 85 SATC 382 (21 December 2022)

[2022] ZATC 11

COURT
Tax Court

BEFORE
E Molahlehi

CASE / FILE NUMBER
2022/12

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REPUBLIC
OF SOUTH AFRICA
IN
THE TAX COURT OF SOUTH AFRICA HELD
AT MEGAWATT PARK, GAUTENG
CASE
NO: 2022/12

REPORTABLE: YES
OF
INTEREST TO OTHER JUDGES: NO
REVISED.

DATE: 21 DECEMBER 2022

In the matter between: APPLICANT
X Applicant
and
THE
COMMISSIONER FOR
THE SOUTH AFRICAN
REVENUE
SERVICE Respondent

JUDGMENT

DELIVERED ON 21 DECEMBER 2022

This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on caselines electronic platform. The date for hand-down is deemed to be 21 December 2022.

Summary: Application for default judgment based on the alleged failure by SARS to comply with the Rules of the Tax Court. The application made on the basis of the purported notices made by the applicant in terms of rules 56(1)(a) and 56(1)(b) of the Rules. The delivery of the notices found to be fatally defective because they were not delivered to the chosen address for delivery of documents or processes by SARS in terms of rule 2 of the Rules. The application is further fatally defective because it was not delivered on SARS in terms of rule 57 of the Rules. The application was delivered to the Registrar of the Tax Court and not to SARS. The application is dismissed and costs are awarded on attorney and client scale due to the reprehensible conduct of the applicant.

MOLAHLEHI J

Introduction

[1] This is an application for a default judgment in terms of rule 56 (2) of the Tax Court Rules (the Rules) promulgated in terms of section 103 of the Tax Administration Act.¹ [1] The applicant filed the application following the notice to the South African Revenue Services (SARS) to address the objections that he had raised. The notices were ostensibly delivered in terms of rule 56(1)(a) of the Tax Court (the Rules). SARS was given fifteen days' notice to respond to the following:

- i. the notice of objection filed manually by the applicant on 16 September 2021, and
- ii. notice of appeal filed manually on 26 November 2021.

[2] In the notice of motion, the applicant seeks the following relief:

"1. To reinstate the appellant's original assessment dated 25 July 2021.

2. To therefore allow the Applicants Manual NOO dated 16 September 2021.
3. To therefore allow the Applicant's Manual Appeal dated 26 November 2021.
4. To confirm the original assessment issued by the respondent on 25 July 2021 in respect of 2021 year of assessment, in accordance with section 129(2)(a) of the Tax Administration Act No. 28 of 2011.
5. Order the Respondent to pay the costs of the application."

- [3] The respondent opposed the application on the ground that application is not properly before the court.

Background facts

- [4] The dispute between the parties concerns the claim by the applicant for a home office allowance in the sum of R100 501.00.
- [5] The applicant filed her tax return, assisted by Mr Swanepoel, for the 2021 tax year assessment. The return was made on 25 July 2021 via the electronic system. She claimed home expenditure in the sum of R137 118. 00, including home office expenses.
- [6] SARS issued an original assessment on the same day of filing the return, 25 July 2021. However, it issued an additional assessment after reconsidering the applicant's tax return.
- [7] Aggrieved by the above decision, the applicant filed a notice of objection on 16 September 2021. She complained that she incurred home office expenditure due to Covid- 19 in the sum of R100 501.00. She also complained about the additional assessment raised by SARS. She filed another objection on 26 October 2021 because SARS failed to respond to her earlier objection.

The case of the applicant

- [8] The relief sought by the applicant is based on the contention that the respondent failed to respond within fifteen days of the notices she delivered on it in terms of rule 56 of the Rules. Put in another way, the applicant's case is that SARS did not comply with the time frames provided to respond to the notice of objection; thus, the original assessment has to be reinstated.
- [9] The applicant further contends that the application was properly delivered to the respondent. She further argued that even if it was not to be accepted that the notice was served, the respondent did, on its version, receive the notice. For this reason, she contends that the court should order the reinstatement of the assessment made on 25 July 2021.

The respondent's case

- [10] SARS contends that the applicant's application is unsustainable because it is not properly before the court. It contends in the first instance that the applicant's objection was dealt with and invalidated on 18 January 2021 on the grounds that the applicant did not comply with the Rules. She failed to file another objection despite being advised to do so.
- [11] SARS contends that in the absence of a proper appeal by the applicant, the default judgment application is premature and vexatious. And in the heads of argument, SARS argues that the appropriate approach the applicant should have followed for filing the application for default judgment was that of having to file the application under rule 52(1)(b) of the Rules.

- [12] In terms of rule 52(2) of the Rules, a taxpayer may, if his or her objection is treated as invalid apply to the court for an order declaring the objection to be valid.
- [13] The respondent further contends that the application for a default judgment is unjustifiable because both the notices in terms of rules 56(1)(a) and 56(1)(b) of the Rules were not delivered to it.
- [14] The jurisdictional facts for a default judgment are set out in rule 56 of the Rules. In terms of rule 56(1)(a), an applicant has to show that the other party has failed to comply with a period or obligation prescribed by the Rules or an order of the tax court. Before commencing the proceedings, the applicant must notify the defaulting party of his or her intention to make an application to the court for a final order concerning the default. The defaulting party has to be given fifteen days to rectify the default. Failure to rectify the default will give the applicant the right to approach the court for a final order by way of notice of motion.

Is the application properly before the court?

- [15] The question of whether this matter is properly before the court turns on the question of whether the application was properly delivered in terms of the Rules. The concept of "delivery" is defined in rule 1 of the Rules as follows:

“means to issue, give, send or serve a document to the address specified for this purpose under these rules in the following manner:

- (a) by SARS, the clerk or the Registrar, in the manner referred to in section 251 or 252 of the Act, except the use of ordinary post;
- (b) by SARS, if the taxpayer or appellant uses a SARS electronic filing service to dispute an assessment by posting it on the electronic filing page of the taxpayer or appellant; or
- (c) by the taxpayer or appellant, by—
 - (i) handing it to SARS, the clerk or the Registrar;
 - (ii) sending it to SARS, the clerk or the Registrar by registered post;
 - (iii) sending it to SARS, the clerk or the Registrar by electronic means to an e- mail address or telefax number; or
 - (iv) if the taxpayer or appellant uses a SARS electronic filing service to dispute an assessment, submitting it through the SARS electronic filing service.”

- [16] The form and manner through which delivery is to be effected are prescribed in rule 2 of the Rules. The rule provides that a document, notice or request required to be delivered or made under the Rules must be delivered to the address that:

“(i) the taxpayer or appellant must use or has selected under these rules;

(ii) SARS has specified under these rules or, in any other case, the Commissioner has specified by public notice as the address at which the documents must be delivered to SARS; or

(iii) is determined under rule 3 as the address of the clerk or the Registrar.”

[17] Rule 50 of Part F of the Rules governs the procedure for delivering documents in relation to applications on notice. This rule prescribes, amongst others, that documents are to be delivered at the address determined in terms of rule 2 of the Rules.

[18] The public notice for the address at which documents or processes may be delivered to SARS and as envisaged in rule 2(c)(ii) and (c)(iii) of the Rules was issued by the Commissioner in Government Notice to 95 Government Gazette 38666 dated 31 March 2015. Clause 4 of the public notice provides:

“4. Delivery of any document, notice or making a request relating to the dispute process after delivery of a notice of appeal or an application in terms of Part F of the Rules

Any document, notice or request relating to the dispute process after delivery of a notice of appeal or an application in terms of Part F of the Rules must be delivered or made to any of the following addresses:

4.1. Physical address:

(i) Tax Court Litigation Khanyisa Building, 1st Floor 271 Bronkhorst Street Nieuw Muckleneuk 0181

4.2. Electronic address: (Email) taxcourtlitigation@sars.gov.za (Fax) (+27) 12 422 5012.”

[19] Part F of the public notice generally deals with procedures relating to applications on notice. For the purposes of this judgment, it provides explicitly in clause 50(3)(b) that delivery of a document must be delivered at the address specified in rule 2(1) of the Rules.

[20] The address delivery of documents to the Registrar of the Tax Court is set out in clause 50(4) of the public notice as being the following:

“5.1 Physical address: Registrar of the tax court Khanyisa Building,

1st Floor 271 Bronkhorst Street Nieuw Muckleneuk

0181

5.2 Electronic addresses:

(Fax) (+27) 12 422 5012

(Email) RegistrarTaxCourt@sars.gov.za.”

Application before this court

- [21] I now turn to deal with the question of whether the request for a default judgment by the applicant is properly before the court having regard to the above analysis. On a proper application of the facts to the above analysis, there is no doubt that the applicant did not deliver the notices in terms of rules 56(1)(a) and 56(1)(b) to the Tax Court Litigation Unit of SARS as prescribed by the public notice issued by the Commissioner on 31 March 2015.
- [22] It is common cause that the applicant delivered both notices in terms of rules 6(1)(a) and 56(1)(b) of the Rules to the Registrar of the Tax Court. The notices were not delivered to SARS. In other words, instead of delivering the notices to the email address; taxcourtlitigation@sars.gov.za, the applicant delivered them to the Registrar at the email address, RegistrarTaxCourt@sars.gov.za.
- [23] The Registrar, who is appointed in terms of section 121 of the Act, is not a party to the dispute between the parties but rather is responsible for administering the dispute resolution processes envisaged in the Act. He or she performs his or her function impartially and independently of the parties.
- [24] For the above reasons, the applicant's application for a default judgment stands to fail. The application further stands to fail because of non-compliance with rule 57(3) of the Rules in that the notice of motion in the application for the default judgment was not served on SARS.
- [25] Having made the above findings, I do not deem it necessary to deal with the merits of the dispute between the parties.

Costs

- [26] SARS has requested costs against the applicant on the punitive scale of attorney and client.
- [27] The approach to adopt when dealing with the issue of costs on an attorney and client scale was summarised by the Constitutional Court in *Public Protector v South African Reserve Bank*,^[2] as follows:

“Costs on an attorney and client scale are to be awarded where there is fraudulent, dishonest, vexatious conduct and conduct that amounts to an abuse of court process. As correctly stated by the Labour Appeal Court—

“[t]he scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible [manner]. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium.”

- [28] In the present matter, the applicant persisted with the application despite advice from SARS that the application was fatally defective. The conduct of the applicant in this regard is reprehensible. The application was unnecessary and thus placed a financial burden on SARS in having to oppose it. The awarding of costs on a punitive scale is thus justified.

Order

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

(1) The applicant's application is dismissed with costs on the attorney and client scale.

E Molahlehi

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION JOHANNNESBURG

Heard on: 25 July 2022

Delivered: 21 December 2022

[1] Act number 28 of 2011.

[2] 2019 ZACC 29.

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