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TAX & EXCHANGE CONTROL ALERT

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A series of unfortunate events – the level of professional conduct required of officers of the court

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A series of unfortunate events – the level of professional conduct required of officers of the court

The appellant's appeal against an assessment issued by SARS was set down to be heard in the Johannesburg tax court for a period of two weeks commencing on 18 November 2019.

There are prescribed rules of conduct that attorneys and advocates must adhere to both when appearing in court and when dealing with litigious processes in general. Where these rules are disregarded or broken, the transgressors may face serious consequences.

In the recent judgment of *ABC (Pty) Ltd v The Commissioner for the South Africa Revenue Service* (TAdm 13950) [2020] ZATC 1 (24 February 2020), the tax court conveyed its displeasure at the conduct of the taxpayer appellant and its legal representatives during the proceedings. The court then went on to examine the consequences of such conduct on the appeal brought by the appellant.

The facts

The appellant's appeal against an assessment issued by SARS was set down to be heard in the Johannesburg tax court for a period of two weeks commencing on 18 November 2019. On the morning of the first day of the hearing, newly appointed counsel for the appellant applied for a postponement of the proceedings on the basis that the appellant's original attorneys had withdrawn from the matter, leaving the appellant without adequately prepared legal representation.

In deciding whether to allow the postponement, the court critically examined the following series of (what the court described as) unfortunate events:

1. The appellant's newly-appointed attorneys had not placed themselves on record as being the legal representatives of the appellant and the advocate who had been briefed by these attorneys could therefore not act on behalf of the appellant in the hearing.
2. Neither the appellant, nor its attorneys, had informed anyone of their intention to bring a postponement application prior to the date of the hearing.
3. The appellant had failed to participate in, and attend to, the finalisation of the necessary pre-hearing preparations.
4. At the date of the hearing, the appellant's instructing attorney was not present at court. However, a candidate attorney of the same law firm was present, although he/she was not fully apprised of the facts and issues of the matter.

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The question that arose was whether the court was obliged to dismiss the appeal together with a costs order and leave it at that, or whether the court was obliged to determine SARS' claim regarding the alteration of the assessment issued by it.

5. After the matter was stood down pursuant to a request by the appellant's counsel to take instruction from the instructing attorney, a faulty notice of appointment as attorneys of record was submitted to the court, which notice contained inaccurate information and was submitted without a notice of motion.
6. The instructing attorney had only been instructed the weekend prior to the commencement of the hearing and had been unable to prepare and present a proper postponement application in court as he had participated in a skydiving event that weekend.
7. The founding affidavit submitted by the appellant in support of the postponement application consisted of 15 single sentence paragraphs. It was stated in the affidavit that the appellant's original attorney had withdrawn from the matter only 10 days prior to the hearing and that the appellant was unable to obtain new legal counsel due to time constraints.
8. When compared to the affidavit submitted by SARS, the contents of which counsel for the appellant agreed to accept as true and correct, it became apparent that the appellant's affidavit contained factually incorrect information, in particular that the appellant's original attorneys had withdrawn one month before the hearing and not only 10 days before.
9. The contents of the appellant's affidavit also conflicted with the contents of a letter sent by the appellant's original attorney to the court after the postponement application was dismissed and the court adjourned to consider the matter as a whole.

Once the postponement application had been dismissed, counsel for the appellant advised the court that his brief only pertained to the said application, that he had no knowledge of the actual appeal, and that he therefore would not be acting on behalf of the appellant any further. Despite the lack of a legal representative present at the hearing on behalf of the appellant, SARS requested that the court allow it to lead its evidence as it sought an order replacing its original assessment with one setting out the amount of tax that the appellant had to pay, which amount was higher than that contained in the original assessment.

The question that arose was whether the court was obliged to dismiss the appeal together with a costs order and leave it at that, as the appellant (by failing to appear) was not pursuing its appeal, or whether the court was obliged to determine SARS' claim regarding the alteration of the assessment issued by it.

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The tax court reiterated that officers of the court have a duty of respect to the court and an obligation to ensure that all legal proceedings are conducted in a manner befitting the court's dignity.

The judgment

The postponement application

The tax court reiterated that officers of the court have a duty of respect to the court and an obligation to ensure that all legal proceedings are conducted in a manner befitting the court's dignity. In addition, the court highlighted the following duties that must be complied with by all officers of the court:

- the duty to provide a client with the best legal service to which it is entitled;
- the duty to always be candid with the court; and
- the duty to assist the court with the proper ventilation of the issues that are before the court.

In contemplating each of the duties, the court expressed its displeasure at the conduct of the appellant's legal representatives during the proceedings and found that the relevant individuals had failed in their duties in the following ways:

1. The appellant's newly-appointed attorney, despite accepting the brief, did not prioritise it over his skydiving event and therefore did not apprise himself fully of the matter. The attorney also did not place himself on record as the attorney for the appellant. In addition, the attorney was not present at the hearing, nor was any other attorney, who was

knowledgeable of the facts of the matter, present on his behalf. As a consequence of the aforementioned conduct, the attorney failed in his duty to ensure that the appellant received the best legal service to which it was entitled.

2. The affidavit submitted by the appellant in support of the postponement application was sworn to by an attorney employed by the appellant as an assistant to the appellant's company secretary. The contents of this sworn affidavit conflicted with that of the affidavit submitted by SARS, the facts of which were accepted by the appellant's counsel to be true and correct. Furthermore, the letter received by the court from the appellant's original attorney contained facts that were contrary to those set out in the aforementioned affidavit supporting the postponement application. On this point, the court stated that –

"A court should be able to accept affidavits and letters from attorneys in the confidence that the averments contained therein are beyond reproach. It is a recognised principle that attorneys should never place themselves in a situation where they are forced to be less than candid with the court."

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As both the deponent to the affidavit and the author of the letter were officers of the court, the court found that there had been a failure by at least one of them to comply with their duty to be candid with the court.

As both the deponent to the affidavit and the author of the letter were officers of the court, the court found that there had been a failure by at least one of them to comply with their duty to be candid with the court.

3. The appellant's newly-appointed attorney was not present on the day of the hearing and the candidate attorney that was indeed present was not fully apprised of the facts or background to the dispute. As such, the candidate attorney was unable to advise counsel, or enlighten the court, about the history, details or substance of the appellant's case. In this regard, the court noted that this conduct of the appellant's legal representatives was not amenable to the proper ventilation of the issues before the court. In addition, the letter sent by the appellant's original attorney was received by the court only after the hearing was finalised. Upon receiving this letter, the court ascertained that the version put forward by the deponent in the appellant's affidavit in support of the postponement application and the version contained in the letter received by the court were irreconcilable. The court therefore noted that it was regrettable that the original attorney did not alert the court to his version before the finalisation of the hearing. If this had been done, the court could have ordered that the issues be ventilated more fully. However, in the present circumstances, the court was precluded from reaching finality on which of the versions forwarded by the parties was correct.

In this way, the legal representatives of the appellant had failed in their duty to assist the court with fully ventilating all of the issues of the matter.

Ultimately, the court noted its displeasure with the conduct of the appellant, its present attorney, and the two officers of court responsible for the affidavit in support of the postponement application and the letter sent to the court. The court remarked that the manner in which the postponement application was brought by the appellant and its attorney is not consistent with their duty of respect to the court.

Notwithstanding these remarks, the court went on to make an order regarding the postponement application that was brought by the appellant. In coming to its decision, the court considered the following well-known legal principles concerning an application for postponement:

- a) *A court has a discretion to grant or refuse a postponement, which discretion has to be judicially exercised.*
- b) *A judicial exercising of the discretion must commence with a careful consideration of the facts presented in support thereof by the applicant, who by seeking the postponement is asking for an indulgence.*
- c) *The facts must establish that the applicant has true and genuine reasons (show good cause) for seeking the indulgence.*

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The court stated that the appellant also had to show that the withdrawal of its attorney was unforeseen, was not a consequence of its own actions and that it was not engineered to justify the postponement of the hearing.

- d) *To establish this the applicant should at the very least be open and candid with the court: the application must be made in good faith.*
- e) *The applicant should place the full facts of its non-preparedness for the hearing before the court.*
- f) *The facts must constitute a satisfactory reason for the non-preparedness.*
- g) *The postponement must not result in the respondent having to endure a prejudice which cannot be cured by an order of costs.*
- h) *The application must be brought timeously so that any prejudice that the respondent may suffer can be mitigated.*

On the basis of these principles and on a balance of probabilities, the court found that the appellant's version that its original attorneys had withdrawn only 10 days

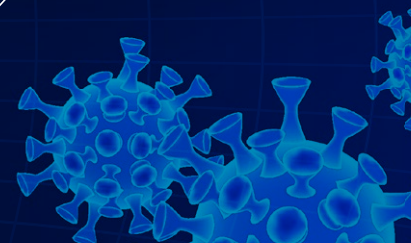
before the hearing simply could not be true. It was noted that even if that version was true, the appellant failed to furnish any explanation as to why the knowledge of the withdrawal of the attorney came so late to the appellant. The court stated that the appellant also had to show that the withdrawal of its attorney was unforeseen, was not a consequence of its own actions and that it was not engineered to justify the postponement of the hearing. This, it was held, was necessary for the appellant to show that it had "true and genuine reasons for the postponement and that is was bona fide in seeking the indulgence".

Lastly, the court took into account the fact that the appellant made no effort to respond to SARS' concern that an extended delay in the proceedings would cause SARS prejudice that could not be cured by a costs order.

In the result, the postponement application was dismissed.

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It is apparent that these sections of the TAA only make provision for an appeal against an assessment by a taxpayer, and not by SARS, and the court held that section 129 restricts the court's jurisdiction to hearing only "the appellant's appeal".

The appeal

After the decision by the court that the hearing would not be postponed, the court had to determine whether the appeal could proceed in the absence of any representative of the appellant and whether SARS would be entitled to present its evidence to increase the assessment that it had issued.

SARS provided the court with written submissions in this regard, arguing that there was still a live issue before the court and that the court was empowered, if not obliged, in terms of the Tax Administration Act 28 of 2011 (TAA) and the Rules of the Tax Court (Rules), to determine whether the assessment issued by SARS may be altered.

It was noted that the appellant brought its appeal in terms of section 107 of the TAA, which appeal had to be dealt with in terms of section 117(1), and the decision to be made by the court had to be made in accordance with section 129 of the TAA.

Section 107 enables a taxpayer that is objecting to an assessment to appeal against the assessment to the tax court or the tax board in the manner prescribed in the TAA and the Rules. Section 129 provides that the tax court, after hearing the appellant's appeal, may decide either to –

1. confirm the assessment;
2. order that the assessment be altered; or
3. refer the assessment back to SARS for further examination and assessment.

It is apparent that these sections of the TAA only make provision for an appeal against an assessment by a taxpayer, and not by SARS, and the court held that section 129 restricts the court's jurisdiction to hearing only "the appellant's appeal". It was found that the powers granted to the court in terms of section 129 to either confirm, alter or refer an assessment back to SARS, can only be exercised by the court after a taxpayer has exercised its rights to appeal

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The court concluded that once counsel for the appellant had withdrawn from the proceedings and no representative for the appellant was present, the appeal was effectively withdrawn.

and the court has heard the said appeal.

On this basis, the court concluded that it would not be in a position to alter the assessment as requested by SARS, unless the appellant's appeal had been heard.

It was contended on behalf of SARS that rule 44(7) of the Rules nevertheless enabled the court to come to a decision in circumstances where –

1. one of the parties to the dispute fails to appear before the court;
2. the party that does appear requests the court to make the decision in terms of section 129;
3. there is proof that the prescribed notice of the sitting of the tax court has been delivered to the absent party; and
4. no question of law arises.

The court held that rule 44(7) overlooked the fact that where an appellant does not appear, the appeal is not heard and that in applying the rule to these circumstances, there would be a disregard of the provisions of sections 107 and 129. It was reiterated that the provisions of the

TAA, being the primary legislation, remain predominant, whereas the rules (being delegated legislation) are subordinate. Furthermore, the Tax Court is a creature of statute and the provisions of the statute lay down the parameters of its jurisdiction.

The court concluded that once counsel for the appellant had withdrawn from the proceedings and no representative for the appellant was present, the appeal was effectively withdrawn. This was so despite the fact that the appeal was not formally withdrawn.

The court therefore dismissed the appeal without allowing SARS to lead its evidence and granted a costs order in favour of SARS.

Comment

It is incumbent on all officers of the court to take the utmost precaution in ensuring that the rules of the court, and courtroom decorum in general, are observed at all times. The consequences of the failure to do so may result not only in adverse outcomes of the legal proceedings as demonstrated in this case, but may also result in disciplinary action being taken against the transgressor.

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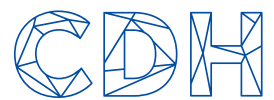
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