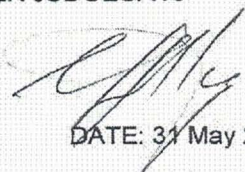




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 0092/2019

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


DATE: 31 May 2021

In the matter between:

AIRPORTS COMPANY SOUTH AFRICA SOC LIMITED **Applicant**

And

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

JUDGEMENT

ALLY AJ

INTRODUCTION AND FACTUAL BACKGROUND

[1] This is an opposed application for leave to amend in terms of Uniform Rule 28(1) read with Tax Court Rule 42(1), Part A of the Notice of Motion and for further relief in terms of Part B of the Notice of Motion.

[2] The Applicant gave the Respondent notice that it intended amending its grounds of objection by including an amendment that they attached to the notice.

[3] The Respondent delayed in filing their answering affidavit and on filing same, also requested condonation for the late filing of the answering affidavit which request is contained in the answering affidavit. The Applicant in its replying affidavit did not formally oppose the condonation request and chose to abide by the decision of the Court. Counsel for the Applicant re-iterated this stance in respect of condonation when addressing the Court.

[4] Having considered the facts relating to condonation, I am of the view that the Respondent has made out a case for condonation to be granted and this was made known to the parties during the hearing of the application.

[5] The Respondent outlined three grounds for objecting to the Applicant's proposed amendment of their grounds of objection to the assessment of 2011, in the answering affidavit¹.

“7.1 The amendment seeks to introduce new grounds of objection after the relevant time periods prescribed in the Rules have expired;

*7.2 The amendment seeks to introduce new grounds of objection after the additional assessment in relation to the said grounds became final;
and*

¹ Caselines: 0006 – 579

7.3 *The statutory provisions relied upon by the Applicant for the amendment sought do not apply in relation to the amendment of an objection.”*

[6] Essentially, the Applicant wants to re-introduce an objection relating to a dispute in the 2011 assessment after obtaining advice from a new set of Attorneys. The crux of the advice to the Applicant is that the advice given by their former Attorneys is wrong, namely that they should concede to 2011 assessment as finalised.

[7] The Applicant argues that Respondent's grounds of objection are bad in law and incorrect and enjoined the Court to approach this matter as one that is encompasses applications for amendment.

ANALYSIS AND EVALUATION

[9] It is common cause between the parties that the Rules do not make specific provision for an amendment in circumstances such as present in this case, namely, the amendment of a notice of objection.

[10] In this regard Counsel for the Applicant enjoined the Court to consider Tax Court Rule 42 wherein it provides:

(1) If these rules do not provide for a procedure in the tax court, then the most appropriate rule under the Rules for the High Court made in accordance with the

Rules Board for Courts of Law Act and to the extent consistent with the Act and these rules, may be utilised by a party or the tax court.

(2) A dispute that arises during an appeal or application under Part F concerning the use of a rule of the high court must be dealt with by the president of the tax court as a matter of law under section 118(3) of the Act.

[11] The Applicant then submits that the circumstances of this case fall within the realm of Rule 42 of the Tax Court Rules and as such this application is brought in terms of Rule 42 of the Tax Court Rules read with Rule 28 of the Uniform Rules of Court. Applicant's Counsel developed the argument further to indicate that clearly, if the Tax Court Rules do not make provision for amendment of pleadings and documents, then as permitted in terms of Rule 42 of the Tax Court Rules, the Applicant is permitted to make use of Rule 28 of the Uniform Rules of Court.

[12] I must indicate that such a matter has not come before our Courts and Counsel for the Applicant was only able to site cases relating to repealed provisions of the Income Tax Act, namely, section 83(7) thereof. It should be pointed out that section 83 (7) (c) of the Income Tax Act, made provision for the amendment by a special court on where such amendment was made within a reasonable time and subject to conditions relating to a postponement and the appropriate costs where necessary.

[13] I am of the view that Rule 42 of the Tax Court Rules permits an applicant to approach a Court for an amendment in terms of Rule 28 of the Uniform Rules of Court. This, however, is not the end of the matter. An Applicant in circumstances

such as the present must convince a Court and fulfil the requirements for an amendment as espoused in numerous judgments.

[14] In **Affordable Medicines Trust & Others v Minister of Health & Others**² the following was stated and with which I align myself:

“The principles governing the granting or refusal of an amendment have been set out in a number of cases. There is a useful collection of these cases and the governing principles in Commercial Union Assurance Co Ltd v Waymark NO. The practical rule that emerges from these cases is that amendments will always be allowed unless the amendment is mala fide (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or “unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed.” These principles apply equally to a Notice of Motion. The question in each case, therefore, is what do the interests of justice demand.”

[15] In the **Commercial Union case**³ mentioned above, the Court outlined certain principles:

“The principles enunciated in the abovementioned cases can be summarised as follows:

1. *The Court has a discretion whether to grant or refuse an amendment.*

² 2006 (3) SA 247 CC @ para 9

³ 1995 (2) SA Tk 73

2. *An amendment cannot be granted for the mere asking; some explanation must be offered therefore.*
3. *The applicant must show that prima facie the amendment 'has something deserving of consideration, a triable issue'.*
4. *The modern tendency lies in favour of an amendment if such 'facilitates the proper ventilation of the dispute between the parties'.*
5. *The party seeking the amendment must not be mala fide.*
6. *It must not 'cause an injustice to the other side which cannot be compensated by costs'.*
7. *The amendment should not be refused simply to punish the applicant for neglect.*
8. *A mere loss of time is no reason, in itself, to refuse the application.*
9. *If the amendment is not sought timeously, some reason must be given for the delay."*

[16] Has the Applicant satisfied the requirements for requesting leave to amend its objection?

[17] One of the considerations mentioned by the Respondent is that the Income Act and the Rules do not make provision for such an amendment. I have dealt with this ground of objection above and indicated that I am satisfied that Rule 42 of the Tax Court Rules caters for the situation the Applicant finds itself in.

[18] The Respondent submits further that the Applicant is out of time in bringing the application and an appropriate order as to costs will not alleviate the prejudice it would suffer in having to deal with an objection raised then abandoned

some time ago. The reason for raising the objection at this time is stated to be that the Applicant changed Attorneys and were advised to raise the impugned objection which has been objected to by the Respondent.

[19] Counsel for the Applicant referred the Court to another principle in the adjudication of applications for amendment, namely that the Court should allow for the proper ventilation of the issues so that justice may be done to all the parties. I am in agreement with this principle but the question is whether it finds favour with this Court in the circumstances of this case? I am of the view that the question must be answered in the affirmative.

[20] Accordingly it is my view that the Applicant has satisfied this Court that a proper case is made out for relief in terms of Part A and Part B of the Notice of Motion.

COSTS

[21] The norm and what has become trite in relation to costs is that a Court has a discretion which discretion must be exercised judiciously taking into account the circumstances of the case.

[22] In my view whilst the Applicant has been successful and the norm is that costs follow the result, I am of the view that each party should pay their own costs in respect of both Part A and Part B of the Notice of Motion.

[23] In the result, the following Order shall issue:

- 1) An Order is granted in terms of paragraphs 1, 4 and 5 of the Notice of Motion;
- 2) Each party to pay their costs of the application.



ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 31 May 2021.

Date of hearing: 18 August 2020

Date of judgment: 31 May 2021

Appearances:

Applicant : **Adv. P Swanepoel SC** [with him Adv. M. Molea]

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