



IN THE TAX COURT OF SOUTH AFRICA

HELD AT BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case No: VAT 1999

In the matter between:-

FREE STATE DEVELOPMENT CORPORATION

APPICANT

and

THE COMMISSION FOR THE

SOUTH AFRICAN REVENUE SERVICE

RESPONDENT

JUDGMENT BY: MOLITSOANE, J

HEARD ON : 19 MARCH 2021

DELIVERED ON : 30 MARCH 2021

- [1] This is an interlocutory application. The applicant seeks to amend its Statement of Grounds of Appeal, filed in terms of Rule 32 of the Rules promulgated under section 103 of the Tax Administration Act, 28 of 2011. Reference to a Rule or Rules in this judgment refers to the Tax Court Rules.
- [2] On 12 June 2020 the applicant, appellant in the main case, lodged an appeal in this court in terms of Rule 32 against the decision of the respondent to charge it in-put VAT. The Statement of the Grounds of Appeal was filed by way of an affidavit.

- [3] The respondent accepted this statement with the proviso that the evidence insofar as the document was presented in the form of an affidavit was not accepted.
- [4] On 29 January 2021 the applicant filed a supplementary affidavit, which is the subject of this application. On 2 March 2021 the Respondent filed a Notice of Irregular Proceedings in terms of the Uniform Rule 30.
- [5] The applicant withdrew the filing of the supplementary affidavit and approached this court for the following relief:
- “(1) That the Court condone the filing of a supplementary affidavit on behalf of the Applicant, attached to the application as Annexure “A”;
- (2) That the applicant be allowed to use the supplementary affidavit in their submissions;
- (3) That the applicant pay the costs of this application;
- (4) That the respondent pay the costs of this application, only if opposed.”
- [6] The respondent opposes this application on the following grounds:
- a) That the application is fatally flawed or irregular;
- b) That the Tax Rules do not provide for the amendment of an affidavit;
- c) That the Tax Court proceedings being of an action in nature, do not permit that Statements of Grounds of Appeal being submitted in the form of an affidavit; and
- d) Prohibition from importing the Uniform Rules into the Tax Court Rules.
- [7] The applicant contends that Rule 32(1) does not prescribe a form in which the statement of the grounds of appeal must be in. The applicant contends that in essence, that it is immaterial if the statement is in the form of a statement or affidavit. The applicant thus contends that opposing the use of an affidavit to file the statement of the grounds of appeal would thus amount to emphasising form over substance. The applicant contends that Rule 35 makes provision for amendment of the statement of grounds of appeal. The applicant contends further that the amendment sought to be

effected does not introduce a ground of appeal that constitutes a new ground of objection against a part or amount of the disputed assessment not objected to. The applicant lastly contends that since Rule 35 of the Tax Rules is silent in dealing with an affidavit, the applicants seeks to invoke Uniform Rule 6(5)(e) to file supplementary affidavit or a further affidavit.

[8] It is contended by the respondent that the applicants elected to file the Statement of the grounds of appeal by way of an affidavit and Rule 35 read with Rule 42(1) which govern the procedure to 'amend' make no provision for amendment of an affidavit.

[9]. Rule 35 deals with the amendments in the Tax Court. It provides as follows:

“35. Amendments of statements

- 1) The parties may agree that a statement under rule 31, 32 or 33 be amended.
- 2) If the other party does not agree to the amendment, the party who requires the amendment may apply to the tax court under Part F for an order under rule 52.”

Rule 52(7) on the other hand provides as follows:

“52. Application provided for under rules

(7) A party seeking an amendment of a statement under rule 35, may apply to the tax court under this Part for an appropriate order, including an order concerning a postponement of the hearing.”

[10] The applicant contends that the proceedings in the Tax Court may either be by way of an action or motion, hence I suppose the applicant saw fit to file his grounds of appeal by way of an affidavit. Part E of the Tax Rules deal with the procedures in the Tax Court. These rules provide for a pre-trial conference (R38); for subpoena of witnesses (R43); discovery of documents (R36), Notice of Expert witnesses(R 37).These rules do not apply in ordinary appeals. In ordinary appeals, unlike in an appeal in the Tax Court, the litigants and the Court are generally bound by the record of the Court against which an appeal lies. The Court in **Metcash Trading Ltd v Commissioner, SARS** 2001(1) SA 1109, dealing with the nature of the Special Court, the predecessor to the present Tax Court said the following:

“[47] The Special Court operates to all intents like an ordinary court and has extensive powers to interfere with, amend or set aside decision of the Commissioner. Although the procedure is referred to in the legislation as an appeal, it is a full hearing more akin to a trial (my emphasis)..... The Court is presided over by a judge, who sits with an accountant and a representative of the business community. There is a right to legal or other expert representation, to adduce evidence and to challenge or rebut adverse evidence in a full blown trial on the issues raised in the tax payer’s notice of appeal.”

The view expressed in this decision apply squarely to the Tax Court.

- [11] I am of the view that is unnecessary to deal with all issues raised by the respondent. The first issue to deal with is whether a party may rely on the Uniform Rules where the Rules provide for a specific procedure. It is perhaps apposite as a starting point to refer to the following Tax Court Rule:

“42(1) If these rules do not provide procedure in the tax court, then the most appropriate rule under the Rules of 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.”

- [12] Tax Rule 35 read with Tax Rule 52(7) provide for the amendment of the pleadings in the Tax Court. For the purposes of an appeal the statement of grounds of assessment and opposing the appeal filed by South African Revenue Services, in terms of Rule 31 as well as the Statement of the grounds of appeal filed in terms of Rule 32(1) and the reply if any filed under Rule 32 constitute pleadings. (See in this regard *ITC 1846 73 SATC*). Rule 35 makes provision for the amendment of pleadings. There is no provision in the Rules for the amendment of an affidavit. This much is also conceded by the applicant. In paragraph 8.4 of the founding affidavit the Applicant avers that *“Since Rule 35 of the Tax Rules is silent in dealing with affidavit, the Appellant hereby applies to court in terms of Rule 6(5) (e) to file supplementary affidavit.”*

- [13] In my view the applicant misses the point in relying on Uniform Rule 6(5)(e). The question which must be asked and answered is whether the Rules make provision for an amendment. If the answer to this question is in the affirmative, then the next question is whether one may ignore the Rules and utilise the Uniform Court Rules in those circumstances. As alluded to above Rule 42(1) may only be used where the

Rules do not provide for the procedure or matter. Amendments in terms of the Rules are made in terms of s35 read with the corresponding Uniform Court Rule 28. Nothing more and nothing less.

[14] Although in the notice of motion the applicant seeks relief to file a supplementary affidavit, the essence of the application is to amend the affidavit filed in terms of Rule 32(1). This much is also the contention of the applicant as in paragraph 1.1 of its heads of argument it says the “Applicant in the main proceedings seeks leave from court to amend its statement of grounds of appeal by filing a supplementary affidavit.” Rule 35 deals with amendments and Uniform Rule 6(5)(e) can therefore not be used where there is an express rule in the Rules to effect amendments. In my view it is irrelevant whether the respondent accepted the filing of the affidavit when the grounds of appeal were filed. The end result is that amendment can only be done in terms of Rule 35. Failure to seek an amendment in terms of the said Rule is fatal to the applicant’s case. This in my view is dispositive of the issues before me.

[15] I am of the view that costs should follow the cause but although both parties engaged the services of two Counsels, I am of the considered view that due to the nature of this application, costs of two Counsels is unwarranted. I cannot grant the costs for the employment of two Counsels to the successful party. I make the following order:

ORDER

1. The application is dismissed with costs.

P.E. MOLITSOANE, J

On behalf of the Applicant:	Adv M Mojaki Adv T Ngubeni
Instructed by:	Rampai Attorneys BLOEMFONTEIN
On behalf of the Respondent:	Adv N Snullenburg SC Adv DR Thompson
Instructed by:	The State Attorney BLOEMFONTEIN

