THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1047/2023 and 1067/2023

In the matter between:

THE LION MATCH COMPANY (PTY) LIMITED **Applicant/Appellant**

and

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

Neutral citation: *The Lion Match Company (Pty) Ltd v Commissioner, South African Revenue Service* (1047/23 and 1067/23) [2025] ZASCA 112 (28 July 2025)

Coram: MOKGOHLOA ADP, MEYER, MATOJANE and KEIGHTLEY JJA and NORMAN AJA

Judgments: Meyer JA (majority): [1] to [35]

Norman AJA (minority): [36] to [76]

Heard: 11 March 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal

website, and release to SAFLII. The time and date for hand-down is deemed to be 11h00 on 28 July 2025.

Summary: Practice – Postponement – Principles restated and applied.
Tax law – ss 107 and 129 of Tax Administration Act 28 of 2011 – r 44 (7) of Tax Court Rules – whether the Tax Court has the power to upwardly adjust an assessment at the behest of the Commissioner for the South African Revenue Service in the willful absence of the taxpayer or its legal representatives.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Holland-Muter AJ with Malopa-Sethosa and Mbongwe JJ concurring, sitting as court of appeal):

1. The reconsideration application in terms of section 17(2)*(f)* of the Superior Courts Act 10 of 2013 is struck from the roll with costs, including those of two counsel.
2. The appeal is dismissed with costs, including those of two counsel.

JUDGMENT

Meyer JA (Mokgohloa ADP, Matojane and Keightley JJA concurring):

Introduction

[1] This judgment deals with two matters arising from proceedings in the tax court, and a subsequent appeal and cross-appeal to the Gauteng Division of the High Court of South Africa, Pretoria (the full court), delivered on 6 September 2023. Before the full court the appellant, The Lion Match Company (Pty) Limited (Lion Match), sought to appeal the tax court's refusal of its application to postpone the tax proceedings (the postponement appeal). The respondent, the Commissioner for the South African Revenue Service (SARS) in turn cross-appealed against paragraphs 2 to 5 of the order of the tax court. The full court dismissed Lion Match's postponement appeal and upheld SARS' cross-appeal. On petition to this Court, special leave was refused in respect of the postponement appeal but was granted in respect of the full court's upholding of the cross-appeal. Subsequently, Lion Match

applied to the President of the Supreme Court of Appeal (the President) in terms of s 17(2)*(f)* of the Superior Courts Act 10 of 2013 (the Superior Courts Act) for a reconsideration of the decision to refuse special leave regarding the postponement appeal. The application was referred by the President for hearing before this Court. Consequently, this judgment deals, first, with the reconsideration application and, second, the appeal against the full court's decision to uphold SARS' cross-appeal. SARS opposes the reconsideration application and the appeal.

Background Facts

[2] Lion Match owned shares in Kimberley-Clark Southern Africa (Pty) Limited (KCSA) and Kimberley-Clark Southern Africa Holdings (Pty) Limited (KCSA Holdings). These shares were acquired before the introduction of capital gains tax into South African tax law on 1 October 2001. The shares were therefore 'pre-valuation date shares'. During the 2008 year of assessment, Lion Match disposed of 3 788 250 shares in KCSA and 85 329 shares in KCSA Holdings. The proceeds from these disposals amounted to R453 153 223.

[3] Lion Match computed its taxable capital gain by calculating the base cost of sold assets (shares) with reference to their market value as at 1 October 2001. It did so based on a KPMG report that was completed in September 2001. KPMG estimated the market value of the shares in KCSA as at 1 October 2001 to be R160 868 054 and in KCSA Holdings, R174 572 541. On 30 April 2012, SARS issued an additional assessment in respect of Lion Match's 2008 year of assessment (the additional assessment), *inter alia,* in relation to the base cost of the shares disposed of by Lion Match used in calculating the capital gains tax. SARS determined the market value of Lion Match's shares in KCSA as being R135 450 709 and in KCSA Holdings at R146 990 209 (the adjusted base cost).

[4] On 12 July 2013, Lion Match objected to the increased additional assessment. On 31 March 2014, SARS disallowed the objection in respect of, *inter alia,* the adjusted base cost. On 16 May 2014, Lion Match filed a notice of appeal to the tax court. SARS' statement of grounds of assessment and grounds for opposing the appeal in accordance with rule 31 of the Tax Court Rules promulgated under s 103 of the Tax Administration Act (the TAA)[1] was filed on 14 August 2015. In turn, Lion Match's statement of grounds of appeal under rule 32 was delivered on 18 June 2018, and SARS responded under rule 33 on 31 July 2018. With this the pleadings became closed. On 13 August 2018, SARS filed its discovery affidavit; Lion Match followed with its own on 8 November 2018.

[5] On 5 December 2018, Lion Match's attorney, Mr Ashwin Trikamjee (Mr Trikamjee), who was a director of both attorneys Garlicke and Bousfield Inc. (G&B) and of Lion Match, confirmed the company's agreement to have the tax appeal heard in Gauteng rather than Durban, where Lion Match is located. On the same day, Ms Louise Swart (Ms Swart), a senior SARS official, advised Mr Trikamjee that any settlement proposal should be submitted at least two months before the hearing date so that the proposal could be properly considered and, if a settlement was reached, would save unnecessary costs. This, according to Ms Swart, was especially significant considering that any money spent by SARS comes from the public purse. Ms Swart added that this also applied to any postponement of the tax appeal.

[6] Both parties planned to call expert witnesses to address the main issue in contention: the value of the shares. They also planned to call expert witnesses on the

[1] The Tax Administration Act 28 of 2011.

lingering issue of disallowing some deductions claimed by Lion Match. The parties agreed that the hearing in the tax court would last ten days.

[7] Ms Swart scheduled a ten-day hearing at the Johannesburg tax court. She was informed that the dates of 18 to 29 November 2019 were available, and after Mr Trikamjee confirmed these dates as suitable, SARS sought to set down the tax appeal for 22 January 2019. On the same day, a letter was issued to the Judge President of the Gauteng Division of the High Court, confirming that the case would be heard from 18 to 29 November 2019. On 23 January 2019, the tax court's registrar issued a notice of set down for that period, and on 11 February 2019, the judge president affirmed the set down period, in response, to Lion Match's attorneys.

[8] On 15 August 2019, SARS served the agenda for a pre-trial conference on Lion Match. The pre-trial conference was held on 22 August 2019, and the minutes were distributed the same day. SARS sent to Lion Match the indexes of the parties' discovered documents to indicate which documents it planned to include in the witness bundle. Lion Match did not express a desire to expand the witness bundle. SARS delivered the dossier on 23 September 2019. SARS gave notice of the expert witnesses it intended to call in terms of rule 37*(a)* of the Tax Court Rules, by e-mail to Lion Match on 7 October 2019 and filed at court on 14 October 2019. SARS delivered the expert summary of the expert witness, Mr Greg Beech (Mr Beech), as contemplated in rule 37*(b)* of the Tax Court Rules, on 18 October 2019.

[9] The attorneys for Lion Match withdrew from the case on 17 October 2019. Lion Match did not notify SARS of its new legal representatives, nor did any attorney enter appearance on its behalf. Lion Match also did not give notice of its intention to call an expert witness, nor did it file a summary of any expert evidence

that it intended to lead. On 5 November 2019, SARS also served the notice of set down on Lion Match directly. On 13 November 2019, SARS served the index to the witness bundle on Lion Match directly.

[10] On Monday morning, 18 November 2019, when the appeal was set to begin in the tax court, Mr Morland, on behalf of Lion Match, informed the court that he held a brief from attorneys Nourse and Nourse Inc. (N&N) to apply for a postponement only. SARS' counsel, Mr Lüderitz SC, and its attorneys, Ledwaba Mazwai Inc., were not advised that there would be any appearance for Lion Match, or that a postponement would be sought. N&N had failed to place themselves on record as the attorneys for Lion Match. Later that morning, Mr Morland handed up what purported to be a notice of appointment of N&N as attorneys of record for Lion Match. It read:

'KINDLY TAKE NOTICE THAT we, the undersigned NOURSE AND NOURSE INC, do hereby appoint ourselves as attorneys for the APPELLANT herein.'

The above notwithstanding, Mr Lüderitz agreed that Mr Morland would address the tax court in support of the application for a postponement. Mr Morland handed up an affidavit in support of the postponement sought by Lion Match. SARS had drafted an affidavit during the previous weekend in anticipation that Lion Match might seek a postponement of the tax appeal. SARS' affidavit was also handed up. It was agreed that the factual averments therein would go unchallenged.

[11] Lion Match's affidavit was deposed to by Ms Farnaaz Mahomed (Ms Mahomed), an attorney employed as an assistant to the company secretary. It consists of 15 single-sentence paragraphs. The only relevant ones are:

'5. Mr Ashwin Hirjee Trikamjee is an adult male attorney admitted in the High Court of South Africa.

6. Mr Trikamjee is a director of both Garlicke and Bousfield and Lion Match.
7. Mr Trikamjee has represented the Appellant from the inception of this matter.
8. A conflict of interest arose because Mr Trikamjee is a director of Garlicke and Bousfield and Lion Match.
9. The board of directors of Garlicke and Bousfield instructed Mr Trikamjee to withdraw from the matter, and Mr Trikamjee subsequently withdrew.
10. The appellant was only informed of Mr Trikamjee's withdrawal 10 days prior to the hearing date.
11. The Appellant then attempted to obtain counsel without success due to limited time constraints.
12. The Appellant in the interim attempted to settle this matter; however, settlement negotiations failed on or about 14th November 2019.
13. Due to the settlement negotiations failing at the last minute, the Appellant was put under pressure to obtain a further counsel.
14. Due to the distance and time constraints, this original affidavit will be filed in the court file in due course.
15. We humbly request for the courts *(sic)* indulgence and request a postponement of the matter.'

[12] The tax court, in an *ex tempore* judgment, considered the principles applicable to the grant or refusal of a postponement. The tax court ruled that the assertions in Lion Match's affidavit—

'. . . do not address even the most basic and fundamental requirements for a postponement'

and that Lion Match—

'. . . would have had to show that the withdrawal was unforeseen, was not a consequence of its own actions and that it was not engineered to justify a postponement of the hearing. This is necessary for it to show that it had true and genuine reasons for the postponement and that it was *bona fide* in seeking the indulgence. The appellant made no effort to even respond to the respondent's concern which is that the matter dragged on for so long that any further delay would cause it prejudice that could not be cured by a costs order.'

[13] The tax court refused the application for a postponement with costs, including those of two counsel. After the ruling was issued, Mr Morland and the candidate attorney from N&N excused themselves from the proceedings on the basis that their instructions were limited to the application for a postponement. SARS then asked to call its witnesses.

[14] Of concern to the tax court, and, subsequently to the full court on appeal, was that after the tax court had granted the order refusing the postponement, the presiding judge received the following letter from Mr Trikamjee on 12 December 2019 on the letterhead of G&B:

'Dear Honourable Judge

RE: LION MATCH COMPANY (PTY) LTD/South AFRICAN REVENUE SERVICE CASE NO: IT13950

I am constrained to write to you pursuant to an Application for a postponement by Lion Match Company (Pty) Ltd in the matter against South African Revenue Service.

I was not in Court and only became aware of the contents of an Affidavit filed in support of the Application for postponement.

I, respectfully, feel duty bound to place on record the facts in this regard.

My firm officially withdrew on the 16th October 2019. A copy of the Notice is attached. This was after Lion Match Company (Pty) Ltd was informed a week before the intended withdrawal.

The firm has represented Lion Match Company (Pty) Ltd from the inception, as I am a Non-Executive Director of the Company and also specialise in tax matters. I acted without charging any fees. However, disbursements were incurred from time to time - especially Counsel's fees. The firm experienced delays in recovering these disbursements.

The trial necessitated briefing Counsel (Senior and Junior) for 2 weeks and the two expert witnesses for the same period of time as well – this clearly involved substantial disbursements, which was not forthcoming.

My firm did not want me to continue in these circumstances, hence the Notice of Withdrawal.

I respectfully humbly request My Lord to take the aforesaid facts into consideration when the Judgment in this matter is finalised.
I am copying this to SARS.'

[15] Lion Match appealed the decision of the tax court to the full court. On 29 May 2023, in a unanimous judgment, the full court dismissed Lion Match's appeal with costs, such costs to include the costs consequent upon the employment of two counsel. The high court noted that the core of Lion Match's appeal was that the tax court 'misdirected itself by not exercising its discretion judicially when refusing the application for postponement and its failure to consider all the principles applicable'. It endorsed the tax court's finding that the allegations contained in Lion Match's affidavit in support of the postponement 'did not address the most basic and fundamental requirements meriting a postponement'. It held that the explanation offered relating to Mr Trikamjee's withdrawal as attorney of record is so vague and-

'. . . does not explain it at all. The reason advanced for the withdrawal was that there was a *conflict of interest inherent* as Trikamjee was a director of both LMC [Lion Match] and Garlicke and Bousfield. No explanation was given when the conflict arose in view of Trikamjee's longstanding involvement in both entities, and the substance of the conflict remains a mystery today. A red herring is afloat in the muddy water of the appellant's pond where the application is drifting.'

[16] The full court further held that:

'The Tax Court considered the factors raised but could not find any *bona fides* on the part of LMC, nor was any good cause shown to justify any postponement. The opposite is however that the vagueness by Mohamed is indicative of lack of *bona fides* and good cause. . . .
The above lack of good cause and *bona fides* in the court's view is further clear from the fact that until the final pre-trial on 22 August 2019, both Trikamjee and Adv Goldman on behalf of LMC, were acting as if they were preparing full steam ahead for hearing. Not even the slightest hint was given of a possible conflict of interest by Trikamjee. Both attorney and counsel contributed to the pre-trial to prepare for the looming hearing.'

The full court also held that-

'. . . in view of when the withdrawal occurred on 17 October 2019, it would have been reasonable to serve a substantial application for postponement timeously.'

The reconsideration application

[17] As indicated earlier, the reconsideration application follows a referral under s 17(2)*(f)* of the Superior Courts Act on 6 February 2024.[2] The refusal by two judges to grant the application for special leave to appeal on petition under s 16(1)*(b)* of the Superior Courts Act[3] was based on the grounds that there are no special circumstances meriting a further appeal to this Court. This triggered Lion Match's reconsideration application to the President of this Court. The binding jurisprudence of this Court establishes that it is for the Court to which the President's referral is made to decide, as a jurisdictional requirement, whether exceptional circumstances exist.[4] Section 17(2)*(f)* is intended to be restricted to matters that are truly exceptional.[5]

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[2] At the time of the referral by the President, s 17(2)*(f)* read thus:
'The decision of the majority of the judges considering an application referred to in paragraph *(b)*, or the decision of the court, as the case may be, to grant or refuse the application, shall be final: Provided that the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his pr her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.'
Section 17(2)*(f)* was amended with effect from 3 April 2024 by the deletion of the phrase 'in exceptional circumstances' and the substitution therefor with the phrase 'in circumstances where a grave failure of justice would otherwise result or the administration of justice may be brought into disrepute'.

[3] Section 16(1)(*b)* reads:
'Subject to section 15(1), the Constitution and any other law-
(a). . .
(b) an appeal against the decision of a Division on appeal to it, lies to the Supreme Court of Appeal on special leave having been granted by the Supreme Court of Appeal.'

[4] *Motsoeneng v South African Broadcasting Corporation Soc Ltd and Others* [2024] ZASCA 80; 2025 (4) SA 122 (SCA), confirmed in *Bidvest Protea Coin Security (Pty) Ltd v Mabena* [2025] ZASCA 23; 2025 (3) SA 362 (SCA) and followed, *inter alia*, in *The Rock Foundation Properties & Another v Chaitowitz* (1038/2023) ZASCA 82 (9 June 2025) paras 12-14 (*Rock Foundation*).

[5] See, for example, *Absa Bank Limited v Moore and Another* [2016] ZACC 34; 2017 (1) SA 255 (CC); 2017 (2) BCLR 131 (CC).

[18] Section 17(2)*(f)* outlines a deviation from the standard appeal process. Section 17 states that if two or more judges of the Supreme Court of Appeal refuse to grant leave to appeal, their decision is final. Section 17(2)*(f)* allows litigants to request reconsideration of a refusal of leave to appeal in 'exceptional circumstances'. This they do by way of application to the President of the Supreme Court of Appeal. The case law shows that what is typically contemplated by the words 'exceptional circumstances' is something out of the ordinary, markedly unusual, rare or different, and to which the general rule does not apply. This Court has held that the 'overall interests of justice will be the determinative feature' for the exercise of the President's discretion. Section 17(2)*(f)* 'keeps the door of justice ajar in order to cure errors or mistakes and for the consideration of a circumstance, which, if it were known at the time of the consideration of the petition might have yielded a different outcome. It is therefore a means of preventing an injustice'.[6] Section 17(2)*(f)* should be linked to either the probability of grave individual injustice or a situation where, even if grave individual injustice might not follow, the administration of justice might be brought into disrepute if no reconsideration occurs. But, s 17(2)*(f)* '. . . is not intended to afford disappointed litigants a further attempt to procure relief that has already been refused. It is intended to enable the President to deal with a situation where otherwise injustice might result and does not afford litigants a parallel appeal process in order to pursue additional bites at the proverbial appeal cherry.'[7]

[19] The question is, are there any factors, other than those already advanced before the tax court, the full court and this Court on petition, that show the presence

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[6] *Liesching and Others v S* [2016] ZACC 41; 2017 (4) BCLR 454 (CC); 2017 (2) SACR (CC) para 54.
[7] *S v Liesching and Others* [2018] ZACC 25; 2018 (11) BCLR 1349 (CC); 2019 (1) SACR 178 (CC); 2019 (4) SA 219 (CC) para 139.

of exceptional circumstances in this case? In its application to the President, as well as its application before this Court, Lion Match merely repeats arguments that have been rejected by all the aforementioned fora. It does not assist Lion Match to rely on a mere repetition of arguments that have been so rejected.[8] No case has been made out by Lion Match that it would suffer a grave injustice, or that the interests of justice dictate, or that the administration of justice would be brought into disrepute, unless it be granted leave to appeal the dismissal of its application for a postponement in the tax court. It simply failed to demonstrate grounds which, in law, might entitle it to a postponement, as shall be demonstrated below. It follows that there are no exceptional circumstances to justify a re-examination of the high court's dismissal of Lion Match's appeal against the refusal by the tax court to grant it a postponement of the tax appeal.

[20] Lion Match would face tremendous obstacles in pursuing an appeal against the tax court's refusal to grant the requested postponement. A court of appeal will not overturn a lower court's decision to grant or refuse a postponement unless it is evident that the lower court did not exercise its discretion judicially, was influenced by wrong principles, or committed a material misdirection of the facts. The onus is on Lion Match to prove this.[9] A postponement cannot be claimed as of right. The party applying for postponement must demonstrate good cause why it should be granted. The factors to be taken into account include: whether the application was timeously made; the reason for the lateness if it was not timeously made; whether the explanation given by the applicant for postponement is full and satisfactory; whether there is prejudice to any of the parties; whether the application is opposed;

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[8] *Rock Foundation* para 17.
[9] *National Coalition for Gay and lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 CC; 2000 (1) BCLR 39 (CC) para 11; *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd* 1988 (3) SA 132 (A) at 152.

the broader public interest; the prospects of success on the merits; the conduct of counsel; the costs involved in the postponement; the potential prejudice to other interested parties; the consequences of not granting a postponement; and the scope of the issues that must ultimately be decided.[10] The list is not exhaustive.

[21] Lion Match's application for a postponement was not made timeously. It became aware of Mr Trikamjee's withdrawal around the 17th of October 2019 when G&B served their notice of withdrawal to Mr Abdullah at GorA@LionMatch.co.za This is not denied by Lion Match. Furthermore, there is no affidavit from Mr Abdullah that he did not receive the notice of withdrawal. I therefore find that the notice of withdrawal was served on Lion Match on 17 October 2019. It only made its application at the start of the tax court hearing on 18 November 2019, without first informing SARS or its legal representatives thereof. Its application for a postponement should have been made as soon as it became aware of the circumstances that may have warranted such an application, rather than on the morning of the tax court hearing.[11] No reason for the lateness of the application was proffered. This is not a case where fundamental fairness and justice necessitated a postponement despite the lateness of the application.

[22] I agree with the finding of the tax court and that of the full court that the averments contained in Lion Match's affidavit in support of the postponement '. . . did not address the most basic and fundamental requirements meriting a postponement'. It is not uncommon for litigants not to appoint a new legal practitioner when their attorney of record withdraws or his or their mandate is

[10] *Shilubana v Nwamita (National Movement of Rural Women & Commission for Gender Equality as Amici Curiae* [2007] ZACC 14; 2007 (9) BCLR 919(CC); 2007 (5) 620 CC para 9-12.
[11] *Greyvenstein v Neethling* 1952 (1) SA 463 (C) at 467F.

terminated, and, instead to request a postponement from the court because they are now unrepresented. It has been held that judicial officers have a duty to the court system, their colleagues, the public and the parties to ensure that this abuse is curtailed by, in appropriate situations, refusing to grant a postponement.[12] This is such a case.

[23] Lion Match's affidavit supporting its application for a postponement, deposed to by Ms Mahomed, raises more questions than answers. It does not address the facts surrounding Mr Trikamjee's conflict of interest, or when it developed. It does not address the attempts it made to engage the services of a replacement practitioner, nor does it explain why counsel briefed by Mr Trikamjee were unable to continue representing it. There is no indication that they too had any conflict of interest in continuing to represent Lion Match. It does not specify who represented it and SARS in the claimed settlement negotiations or when these took place.

[24] Furthermore, the affidavit includes inadmissible hearsay evidence. Ms Mahomed worked as an assistant to Lion Match's company secretary. She was not employed by G&B. Nevertheless, she claims that the board of directors of G&B instructed Mr Trikamjee to withdraw. She does not say whether she was involved in attempting to obtain new counsel to represent Lion Match in the upcoming tax appeal, or in the alleged belated settlement negotiations between the parties.

[25] A postponement is not simply for the asking. Had the tax court approved the postponement, it would have brought the judiciary into disrepute. That would evidently be against the interests of justice. Lion Match dismally failed to make out

[12] *Take and Save Trading CC and Others v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA); [2004] 1 All SA 597 (SCA) at 4H-5B.

a case in support of its application for a postponement. No exceptional circumstances have been established as contemplated in s 17(2)*(f)*. There is no probability of grave individual injustice to Lion Match. It is rather a situation where the administration of justice would be brought into disrepute if the reconsideration application were to be granted. As a result, the application for reconsideration should be struck from the roll together with an appropriate order as to costs.

The Appeal

[26] Once the tax court had refused the application for a postponement, the tax court hearing continued, as it should, in the absence of Lion Match. In its rule 31 statement, SARS *inter alia* claimed -

'[t]hat the additional assessment in respect of the 2008 year of assessment be altered in accordance with the Commissioner's reconsideration of the market price of the shares disposed of by the Appellant but otherwise leaving the additional assessment in relation to the disallowance of deductions intact, it being confirmed'.

[27] The effect was that SARS sought an upward adjustment of the market price of the shares indicated in the assessment. SARS called two witnesses to prove the upward adjustment it sought; an expert witness, Mr Beech, and a factual witness, Mr Imran Mohamed, who calculated Lion Match's tax liability using Mr Beech's conclusions. Mr Beech confirmed his expert summary under oath as well as an earlier review, his methodology, his assumptions and his conclusions. Their evidence was unchallenged.

[28] The tax court held that once Lion Match's legal representatives withdrew from the proceedings, the appeal was 'effectively' withdrawn by Lion Match, and the tax court lacked jurisdiction to determine SARS's case to have the assessment altered.

This is because, according to the tax court, s 107(1) of the TAA only allows for appeals by the taxpayer, not SARS.[13] Section 129(1) limits the tax court's jurisdiction to hearing 'the appellant's appeal lodged in terms of s 107.[14] Section 129(2) empowers the tax court to either 'confirm' the assessment, order that it be 'altered' or 'refer the assessment back' to SARS for re-evaluation.[15] This, the tax court held, '. . . can only mean that once [it] examined the appellant's appeal it can exercise either one of the three powers'. Due to the withdrawal of Lion Match's legal representatives, and the consequent withdrawal of the tax appeal, the tax court found it had no jurisdiction to exercise these powers.

[29] When Lion Match appealed the decision of the tax court refusing its application for a postponement, SARS cross-appealed the tax court's finding that it could not entertain SARS' case to have the assessment upwardly adjusted once Lion Match's appeal had been 'withdrawn'. The full court upheld SARS's cross-appeal. In relevant part, its order reads:

'2. The cross-appeal is upheld with costs, such costs to include the costs consequent upon the employment of two counsel.

3. The order of the Tax Court *a quo* is varied to insert the following orders between orders 2 and 3, namely:

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[13] Section 107(1) reads thus:
'After delivery of the notice of decision referred to in section 106(4), a taxpayer objecting to an assessment or "decision" may appeal against the assessment or "decision" to the tax board or tax court in the manner, under the terms and within the period prescribed in the Act and the "rules".'

[14] Section 129(1) reads as follows:
'The tax court, after hearing the "appellant's" appeal lodged under section 107 against an assessment or "decision", must decide the matter on the same basis that the burden of proof as described in section 102 is on the taxpayer.'

[15] Section 129(2) reads thus:
'In case of an assessment or decision under appeal, the tax court may-
(a) confirm the assessment or decision;
(b) order the assessment or decision to be altered; or
(c) refer the assessment back to SARS for further examination and assessment.'

4. Insofar as the respondent disallowed deductions in the amount of R6 409 109-00, the additional assessment of 30 April 2013 is confirmed, in accordance with section 129(2) of the Tax Administration Act, 28 of 2011 ("the TAA");
5. In relation to capital gains tax, the additional assessment is altered in accordance with section 129(2) of the TAA as follows:
   5.1 The base cost of 3 788 250 shares in Kimberley-Clark Southern African Holdings (Pty) Ltd, purchased by the appellant on 8 January 2001 and disposed in the 2008 year of assessment, is altered from R135 450 709-00 to R97 865 000-00.
   5.2 The base cost of 85 329 shares in KCSA Holdings (Pty) Ltd, purchased in the 2008 year of assessment, is altered from R146 990 209-00 to R115 858 000-00.
   5.3 The taxable capital gain is altered from R85 356 152-00 to R119 715 112-00.
   5.4 The increased taxable gain of R34 358 959-00 is included in the appellant's taxable income.
   5.5 The tax on the adjustment is altered from R7 419 555-00 to R9 620 509-00.'

[30] The tax court clearly interpreted the pertinent TAA provisions incorrectly. Section 107 and sections 129(1) and (2) are simply not open to such interpretation. By no stretch of the imagination can it be said that the taxpayer's appeal was withdrawn once Lion Match's legal representatives had withdrawn from the proceedings. Rule 44(7) of the Tax Court Rules provides as follows:

'If a party or person authorised to appear on the party's behalf fails to appear before the tax court at the time and place appointed for the hearing of the tax appeal, the tax court may decide the appeal under section 129(2) upon-

(a) The request of the party who does appear; and

(b) Proof that the prescribed notice of the sitting of the tax court has been delivered to the absent party or absent party's representative,

unless a question of law arises, in which case the tax court may call upon the party that does appear for argument.'

[31] In *Africa Cash and Carry (Pty) Limited v Commissioner, South African Revenue Service*,[16] Koen AJA said this:

'The point of departure should always be that a Tax Court is a court of revision and, "not a court of appeal in the ordinary sense". The legislature "intended that there could be a re-hearing of the whole matter by the Special Court and that the court could substitute its own decision for that of the Commissioner, if justified on the evidence before it. A tax court accordingly rehears the issues before it and decides afresh whether an estimated assessment is reasonable. It is not bound by what the Commissioner found. In rehearing the case it can either uphold the opinion of SARS or overrule it and substitute it with its own opinion. The powers of the Tax Court and its functions are unique. It places itself in the shoes of the functionary and re-evaluates the facts and circumstances of the subject-matter on which the assessments were based. By its very nature an estimated assessment is subject to change based on an evaluation of the evidence and any information that becomes available. What is important is that the methodology used and the assumptions on the strength of which the estimated estimates were made should remain the same, otherwise the conclusions reached by the Tax Court might not be procedurally fair. The Tax Court must place itself in the shoes of the functionary to determine whether the methodology followed and the assumptions on which the estimated assessment are based, are reasonable and produce a reasonable result.' (Footnotes omitted.)

[32] The Court held further that the tax court can order the assessment to be adjusted, upwards or downwards, within the powers conferred upon it in terms of s 129(2)*(b)* of the TAA. It may do so if the evidence before the tax court does not support the amount determined in an assessment of a taxpayer's liability, and subject to constitutional principles and compliance with *audi alteram partem* and fairness. Two additional provisos to the powers are that the basis for taxation should not be entirely different, and the tax court must have all the information it requires to make a determination.[17]

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[16] *Africa Cash and Carry (Pty) Ltd v Commissioner, South African Revenue Service* [2019] ZASCA 148; [2020] 1 All SA 1 (SCA); 2020 (2) SA 19 (SCA para 52.
[17] *Ibid* paras 57-58.

[33] Mr Beech's evidence plainly shows that the methodology and assumptions used by SARS to recalculate the additional assessment remained largely the same as those used when it made the first additional assessment. The full court accepted their testimony, but the tax court did not analyse it.

[34] As a result, the appeal should be dismissed with an appropriate award of costs.

Order

[35] In the result the following order is made:

1. The reconsideration application in terms of section 17(2)*(f)* of the Superior Courts Act 10 of 2013 is struck from the roll with costs, including those of two counsel.
2. The appeal is dismissed with costs, including those of two counsel.

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P.A. MEYER
JUDGE OF APPEAL

Norman AJA

[36] I have read the judgment of my brother Meyer JA (the first judgment). I have also considered the facts that are well articulated therein. Where I part ways with him is in relation to the findings of the full court relating to the refusal of the postponement by the tax court and on whether or not it was in the interests of justice to refuse postponement and to conclude the trial in the absence of the appellant; and whether a grave injustice would occur if the decision of the full court is not reconsidered or varied.

[37] The crisp issues for determination in this appeal are: whether the full court misdirected itself in finding that the conflict of interest which was the cause of the appellant's legal representative's withdrawal was a red herring; whether the refusal of the postponement was in the interests of justice; and whether the full court was correct in upholding the respondent's cross-appeal and its variation of the order of the tax court in this respect.

[38] The issue of the refusal of the postponement, if successful, according to the appellant, would be dispositive of the matter. That is the issue to which I direct my views.

Background facts

[39] It is common ground that Mr Trikamjee, a director of the attorneys' firm, G&B represented the appellant in a tax dispute between it and the respondent as far back as 30 April 2013 until 17 October 2019. He had participated in a pretrial conference held on 22 August 2019 in preparation for the appeal. The dates for hearing were arranged between the parties and were set down to commence on 18 November 2019 before the tax court for a period of 10 days. On the first day of the hearing the appellant brought an application seeking a postponement of the hearing.

[40] The reason advanced for the appellant's lack of readiness to proceed with the appeal before the tax court was that Mr Trikamjee had withdrawn due to a conflict of interest. The appellant contended that it was only informed of Mr Trikamjee's withdrawal 10 days prior to the hearing date. It attempted to obtain counsel without success due to limited time constraints. It also tried to settle the matter but settlement negotiations failed on 14 November 2019. These facts were stated in a very short affidavit. Although the application for a postponement was opposed, there was no

answering affidavit filed to deal directly with the averments made by the appellant. The respondent had filed an answering affidavit in anticipation of the application for a postponement but did not deal with the allegations made by the appellant in an affidavit.

[41] The tax court found, amongst others, that-

'In the same vein, the other attorney, Mr Trikamjee, voluntarily decided to act for a client in whose affairs he was intimately involved. By doing so he exposed himself to a conflict of interest, and soon enough the conflict became real when his partners in the law firm asked him to terminate his relationship as a legal representative of the appellant.' These findings of the tax court were not disturbed by the full court.

The findings of the full court

[42] The full court in its judgment set out the principles to be considered in an application for a postponement as having been adopted in, inter alia, *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs (National Coalition)*[18]. The full court made the following findings:

'The reason advanced for the withdrawal was that there was a conflict of interest inherent as Trikamjee was a director of both LMC and Garlicke and Bousfield. No explanation was given when the conflict arose in view of Trikamjee's longstanding involvement in both entities, and the substance of the conflict remains a mystery to today. A red herring is afloat in the muddy water of the appellant's pond where the application is drifting.

Trikamjee was LMC's attorney of record since the inception of the matter and it seems rather odd that a conflict of interest only arose at this late stage. A further

[18] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 para 11.

aspect clouding the explanation is that the founding affidavit by Me Mohamed (an attorney employed by LMC) of the application for postponement, does not shed any light upon the red herring as to what triggered the conflict to germinate at this late stage.

. . .

Trikamjee, as an afterthought, addressed a letter to the presiding judge after the hearing to explain his view. This is inappropriate and a seasoned attorney like Trikamjee should have known better. The learned Judge expressed his displeasure with the conduct of the attorneys in question.

The above lack of good cause and *bona fides* in the court's view is further clear from the fact that until the final pretrial on 22 August 2019 both Trikamjee and Adv Goldman on behalf of LMC, were acting as if they were preparing full steam ahead for hearing. Not even the slightest hint was given of a possible conflict of interest by Trikamjee. Both attorney and counsel contributed to the pretrial to prepare for the looming hearing.'

Discussion

[43] I deem it convenient to address first some of the glaring errors made by the full court. The citation referred to by the full court, in relation to *National Coalition* is, with respect, incorrect. The judgment reported in the volume and page referred to by the full court is *S v Manamela*[19] and not the *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*. Furthermore, the principle dealt with in *S v Manamela* is the right to be presumed innocent as envisaged in s 35(3)*(h)* of the Constitution. In *National Coalition*, at paragraph 11 thereof, which paragraph is purportedly relied upon by the full court, there are no principles set out that deal with

[19] *S v Manamela and Another (Director-General of Justice Intervening)* [2000] ZACC 5; 2000 (3) SA 1; 2000 (5) BCLR 491.

a postponement. The Constitutional Court in that case engaged with, amongst others, human rights in the context of a right not to be discriminated against on grounds of sexual orientation in terms of s 9 in Chapter 2 of the Constitution of the Republic of South Africa 108 of 1996 (the Constitution). The full court erred by relying on irrelevant authorities in support of its findings. Such an error constitutes a misdirection. It follows that a challenge directed at its discretion in refusing the postponement is not far-fetched.

[44] I say so because the Constitutional Court in *Mabaso v Law Society, Northern Provinces & another*[20], set out the factors to be considered where an appellant challenges the discretion that has been exercised by the court whose decision is a subject of appeal. It found that ordinarily the approach of an appellate court to the exercise of such a discretion is that it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.

[45] In *Omar Mahmud v Secretary of State for the Home Department*[21], the Court of Appeal in Northern Ireland had to deal with the proper application of the 'anxious scrutiny'[22] standard and the correct interpretation of a certain paragraph 353[23] of the

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[20] *Mabaso v Law Society, Northern Provinces& Another* [2004] ZACC 8; 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC) at para 20.
[21] *Omar Mahmud v Secretary of State for the Home Department* (No. 2) [2023] NICA 80.
[22] The '*anxious scrutiny'* is defined as a high standard of review applied by courts to ensure that immigration decisions comply with legal standards and do not stem from unreasonable or biased reasoning. It contrasts with less rigorous scrutiny levels applied in other administrative reviews.
[23] The relevant provisions of the Immigration Rules is paragraph 353 which reads:
'353. When a human rights or protection claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submission will

Immigration Rules in assessing whether additional submissions could constitute a fresh asylum claim. The Court of Appeal found that the Secretary of State had misapplied the legal tests by failing to adequately consider whether the new evidence distinguished the claim sufficiently from previous considerations and whether there was a realistic prospect of success under the said paragraph 353. It set aside the decision on appeal as a result of the misapplication of the legal tests.

[46] The full court found that the conflict of interest was a red herring. It also found that there was no explanation given by the appellant about how the conflict of interest arose at such a late stage. In my view, the full court, with respect, misconstrued the whole notion of a conflict of interest. The concept of a conflict of interest applies to professionals, and in the context of this matter, to legal practitioners. It is Mr Trikamjee who withdrew from representing the appellant. His mandate was not terminated by the appellant. If the mandate was terminated by the appellant, it would be expected of it to consider the timing of such termination and to make provision for another legal practitioner to take over the matter with minimal inconvenience to its opponent and the court.

[47] The undisputed fact is that G&B and Mr Trikamjee withdrew as the appellant's attorneys of record. That cannot be a red herring. The Shorter Oxford English Dictionary defines red herring as: 'to attempt to divert attention from the real question; hence red-herring a subject intended to have this effect.'[24] With the

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amount to a fresh claim if they are significantly different from the material that has previously been considered. The submission will only be significantly different if the content:
(i) Had not already been considered; and
(ii) Taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection. This paragraph does not apply to claims made overseas.'

[24] The Shorter Oxford English Dictionary on Historical Principles 3 Ed (1983) Volume II, Marl-Z and Addenda page 1772.

findings which the full court directed at Mr Trikamjee and not the appellant it was incongruous to place the conflict-of-interest issue at the door of the appellant. That, in my view, constituted a misdirection.

[48] A conflict of interest develops for various reasons. It is not expected of a litigant to prepare for that eventuality. In the United States of America, the position on this issue is as described by the American Bar Association in an article entitled *Rule 1.7: Conflict of Interest: Current Clients–Comment*, which states the following-

'Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. . . *The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn*. . .

. . .

In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate.' [Emphasis added]

[49] The Uniform Rules of Court (the rules) do not have a rule specifically dealing with a situation where a conflict of interest has arisen between a client and an attorney. The relevant rule that prescribes a process to be followed where an attorney ceases to act and thus relevant to address the situation at hand is rule 16(4)*(a)* and*(b)*. I shall refer to the original rule and the amended one for reasons that shall be apparent later in this judgment.

[50] The original rule 16(4)*(a)* provided:

'16 Representation of parties

. . .

(4)(a): Where an attorney acting in any proceedings for a party ceases so to act, he shall forthwith deliver notice thereof to such party, the registrar and all other parties: Provided that notice to the party for whom he acted may be given by *registered post*.

(b) After such notice, unless the party formerly represented within 10 days after the notice, himself notifies all other parties of a new address for service as contemplated in subrule (2), it shall not, be necessary to *serve any documents upon such party*.' [Emphasis added]

[51] Rule 16(4)*(a)* was amended[25] and it now reads:

'(4)(a) Where an attorney acting in any proceedings for a party ceases to act, such attorney shall forthwith deliver notice thereof to such party, the registrar and all other parties: Provided that notice to the party for whom such attorney acted may be given by facsimile or electronic mail in accordance with the provisions of rule 4A.'

[52] Rule 4A of the rules provides for delivery of documents and notices. It provides:

'(1) Service of all subsequent documents and notices, not falling under rule 4(1)(a), in any proceedings on any other party to the litigation may be effected by one or more of the following manners to the address or addresses provided by that party under rules 6(5)(b), 6(5)(d)(i), 17(3), 19(3) or 34(8), by -

(a) hand at the physical address for service provided, or

(b) registered post to the postal address provided, or

(c) facsimile or electronic mail to the respective addresses provided.'

[25] Rule 16(4)*(a)* was substituted by GN R1318; GG42064 dated 30 November 2018 with effect from 10 January 2019.

[53] In the notice of withdrawal referred to by the full court, G&B referred the appellant to the provisions of rule 16(4)*(a),* in its original form prior to its substitution or amendment. It follows therefore that the full court ought to have considered whether the notice was sent by registered mail to the appellant. This was crucial given the fact that the respondent, without deposing to an affidavit to refute the allegations made in the founding affidavit of the appellant in support of the postponement application, called into question the appellant's contention that it was only informed of Mr Trikamjee's withdrawal 10 days prior to the hearing date.

[54] On this issue, the full court found that the appellant was informed of the withdrawal of G&B on 17 October 2019. It also found that there is no justification for why it first surfaced in Ms Mohamed's affidavit that the appellant was only informed of the withdrawal 10 days prior to the hearing. It found further that no explanation was tendered why Mr Trikamjee (as director of the appellant) did not inform the appellant on 17 October 2019. The full court further found that Mr Trikamjee as a director of both the appellant and G&B, wearing two hats, ought to have known of the development and should have informed the appellant that day. Strangely, and contrary to the finding that Mr Trikamjee ought to have informed the appellant on that day, the full court, found that 'the vagueness by Mohamed is indicative of lack of bona fides and good cause'.

[55] There were no facts placed on affidavit before the tax court that suggested a lack of bona fides on the part of the appellant. It only had the affidavit of the appellant to consider in relation to the date when it became aware of Mr Trikamjee's withdrawal. In the first judgment a finding is made that the appellant was not candid in its affidavit supporting an application for a postponement because the withdrawal of attorneys occurred at least a month before the hearing. In this regard reliance is

placed on the notice of withdrawal. No registered slip was tendered evincing that the appellant was made aware and knew of Mr Trikamjee's withdrawal on 17 October 2019. In fact, the findings of the full court that Mr Trikamjee ought to have informed the appellant on that day do not support the finding made in the first judgment on this issue.

Consideration of Mr Trikamjee's letter by the full court

[56] The full court misdirected itself in endorsing the consideration of a letter that Mr Trikamjee had delivered directly to the presiding judge of the tax court as constituting a version to be compared with the evidence of Ms Mohamed in the application for a postponement. This was accepted in circumstances where the letter was not evidence as it had not been received into evidence by the tax court. It is not apparent from the judgment of the full court why it relied on that letter and drew the inference that it did in its judgment.

[57] Such reliance, in my view, constitutes a misdirection. I say so for this reason. There is no room in our civil court processes for an attorney who represented a party and subsequently withdrew, to approach a judge by way of a letter, in an attempt to either refute allegations made or exonerate himself from any wrongdoing.

[58] The full court misdirected itself in its finding that the letter of Mr Trikamjee was received by the tax court after judgment was delivered. This is contrary to what is stated in the judgment of the tax court, at paragraph 15, where Vally J stated:
'Before closing on this issue it is necessary to deal with a development that occurred after the order was issued and the Court had adjourned to consider the matter as a whole. On 12 December 2019 a letter was received by my office from Mr Trikamjee.

It is on the letterhead of the appellant's erstwhile attorneys, Garlicke and Bousfield. It reads. . .' [the contents of the letter were incorporated in the judgment].

[59] The tax court issued an order on 18 November 2019 dismissing the application for a postponement but when it delivered its judgment on 25 February 2020, it had already considered the letter. There are two fundamental difficulties with the findings of the full court in relation to Mr Trikamjee's letter. First, the appellant was not afforded an opportunity to respond to the letter. Second, it was addressed to the presiding judge directly. Third, Mr Trikamjee stated in the last paragraph-'I respectfully and humbly request My Lord to take the aforesaid facts into consideration when the Judgment in this matter is finalised'. Indeed, the tax court considered the letter and its contents hence they were incorporated and analyzed in its judgment. That, in my view, offended the appellant's right to be heard on an issue that affected it directly. The full court misdirected itself by not finding that the consideration of the letter by the tax court was, with respect, irregular, unfair and prejudicial to the appellant.

The complexity of the matter

[60] The deponent, Ms. Swart, on behalf of SARS, in the 'Respondents Answering affidavit in anticipated postponement application' stated at paragraphs13 and 33:

'13. Given that the main issue in dispute is the valuation of shares, *a matter for expert evidence*, it was expected that experts would be called by the parties in relation to this issue. It was also envisaged that experts might be called in relation to the remaining issue which related to the disallowance of certain deductions claimed by the appellant.

. . .

33. The respondent has been preparing for this hearing and it wishes this appeal to proceed as there are important legal issues over and above the appellant's tax liability which the respondent seeks to have determined.'

[61] From these statements it is apparent that the matter that was before the tax court was not a simple matter that a taxpayer could deal with on his own without legal assistance.

[62] The full court also found and appreciated that the matter between the parties was complex and warranted the employment of two counsel. It was common cause between the parties that Mr Trikamjee was the appellant's legal representative on the matter as far back as 30 April 2013 until 17 October 2019. He had participated in a pretrial conference on 22 August 2019, in preparation for the appeal. Mr Morland had indicated to the tax court that due to the complexity of the matter any legal representative who was going to take over would need more time to prepare for the appeal. The nature of the matter ought to have tilted the scales in favour of the appellant in the application for a postponement.

[63] The full court blamed the appellant for the following acts: it did not comply with its undertaking to prepare and submit the names of its intended experts; it's attorney and director filed a very late withdrawal as attorneys of record not served timeously on the respondent; it tried to negotiate a settlement after the withdrawal; and failed to timeously inform the respondent of its intention to request a postponement on the morning of the hearing of the appeal which was set down more than ten months before. These acts are attributed to the appellant in circumstances where it had an attorney to act on its behalf. It is the withdrawal of G&B and Mr

Trikamjee that triggered the application for a postponement and if viewed in that context, a postponement ought to have been granted.

[64] The first judgment found that the findings of the full court were properly made and as a result refrained from interfering therewith. I differ, with respect, from those findings expressed in the first judgment.

[65] In *S v Ndima*[26] the court stated that:

'It is quite plain that an attorney must, if he is going to withdraw from a case, withdraw from it timeously and inform his client that he is withdrawing so that the client can make other arrangements or, if there are none which he can make and if he wishes to do so, so that he may appear in person to argue his appeal. If an attorney wishes to carry on hoping that at the last minute he will be given funds and does not wish to withdraw at an earlier stage of the case because he will jeopardise his chance of being paid, then he must be willing to take the risk that he will find himself financing the appeal and go on with it.'[27]

[66] It is the interests of justice consideration mentioned in *Psychological Society of South Africa v Qwelane and Others*[28] that I now turn to. In *Erasmus, Superior Court Practice*[29], the legal principles applicable when a court considers applications for a postponement are set out. I shall only refer herein to those that are relevant to the views I express herein. It is trite that a court has discretion as to whether to grant or refuse an application for a postponement. That discretion must be exercised in a judicial manner. It should not be exercised capriciously or upon any wrong principle.

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[26] *S v Ndima* 1977 (3) SA 1095 (N).
[27] Ibid at 1097 A-D.
[28] *Psychological Society of South Africa v Qwelane and Others* [2016] ZACC 48; 2017 (8) BCLR 1039 (CC) para 31.
[29] D E van Loggerenberg *Superior Court Practice, Erasmus*, Volume 2 (Loose-leaf, 2nd ed), at D1-552A.

[67] A court should be slow to refuse a postponement where the true reason for a party's non-preparedness has been fully explained. Where there is a conflict of interest, an expectation that a party must give details of such a conflict when there is an attorney–client privileged relationship, would be intrusive and not sanctioned by law even in circumstances where one seeks a postponement. There is only one route for a legal practitioner when there is a conflict of interest and that is to withdraw from the case. A legal practitioner is not only legally bound to do so but has an ethical obligation to do so. The appellant's unreadiness to proceed was not due to delaying tactics. Mr Trikamjee attended a pre-trial conference. That was a step that advanced the appellant's readiness for the hearing.

[68] Justice demands that where an issue such as the one in this case, involving the appellant's tax affairs, the appellant must be heard. Being heard means being fully prepared and legally represented. The respondent recognised the complexity of the matter. Most importantly, where the capital gains tax is applicable there are certain elections that must be exercised by the taxpayer, the appellant in this case.

[69] In his work entitled: *Capital Gains Tax, A Practitioner's Manual*, Professor R C Williams, discusses the election of a taxpayer in regard to, inter alia, pre-evaluation date assets. Professor Williams states[30]:

'If the asset was acquired by a person prior to 1 October 2001 and was disposed of after that date, the determination of its base cost as at 1 October 2001 is more complex because of the difficulty- and inevitable imprecision- in determining its value as at 1 October 2001. Even a market-value valuation by an expert is only an educated estimate….

[30] R.C. Williams *Capital Gains Tax, A Practitioner's Manual (Juta 2001) page 62.*

It is implicit that this election is exercisable by the taxpayer in relation to each affected asset, hence, the taxpayer can elect one method of valuation for certain assets, and another method for others.' [Emphasis added]

[70] These remarks made by Professor Williams demonstrate the importance of affording a taxpayer an opportunity to make the elections that are available to it and present expert evidence where necessary. When the appellant's application for a postponement was refused in a complex matter, it was deprived of that opportunity. Such a decision is inconsistent with the constitutional imperatives including fairness and the audi alteram partem principle.

[71] It is so that an application for a postponement must be made timeously, as soon as the circumstances which might justify such an application become known to the applicant. It is not the appellant who terminated the mandate of G&B. It is Mr Trikamjee who withdrew. If, however, fundamental fairness and justice justify a postponement, the court may in an appropriate case allow such an application for postponement even if the application was not so timeously made. This was one such case. The fact that the respondent acknowledged, amongst others, that there were important legal issues, over and above the determination of the appellant's tax liability and that the issue of the valuation of shares was a matter for expert evidence, qualified this case as one of those where a postponement should have been allowed.

[72] The full court found that the application for a postponement was not bona fide. That finding was not supported by facts. Mr Trikamjee did not depose to an affidavit. His conduct of sending a letter to a presiding judge did not present a version as erroneously found by the full court, especially in circumstances where the full court found his conduct to be inappropriate. Curiously, the very inappropriate conduct was

used by the full court to discredit the case that the appellant presented under oath for seeking a postponement.

[73] In considering issues of prejudice the court has to consider whether any prejudice caused by a postponement can fairly be compensated by an appropriate order of costs or any other ancillary mechanism. The tax court considered mainly prejudice to be suffered by the respondent. It did not consider any prejudice that would be suffered by the appellant if it were denied a postponement. That prejudice was manifest when the proceedings proceeded in the appellant's absence and the upward adjustment, by the full court of the assessment, amounting to millions of rands, that was central to the dispute. It is so that the respondent in defending its position is funded by the fiscus. Any prejudice suffered by it would have been cured by an order of costs that would ensure that the public purse is not impoverished by the postponement. An order of costs on an attorney and client scale would have remedied any prejudice suffered by the respondent as a result of the postponement.

[74] Factors that need to be taken into account in an application for a postponement were also set out by the Constitutional Court in *National Police Service Union and Others v Minister of Safety and Security and Others*[31] where Mokgoro J said-

'The postponement of a matter set down for hearing on a particular date cannot be claimed as of right. An applicant for a postponement seeks an indulgence from the Court. Such postponement will not be granted unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must show that there is good cause for the postponement. In order to satisfy the Court that good cause does exist, it will be necessary to furnish a full and satisfactory explanation of the circumstances that give rise to the application. Whether a postponement will be granted is therefore in the discretion of the Court and cannot be secured by mere agreement

[31] *National Police Service Union and Others v Minister of Safety and Security and Others* [2000] ZACC 15; 2000 (4) SA 1110; 2001 (8) BCLR 775 (CC).

between the parties. In exercising that discretion, this Court will take into account a number of factors, including (but not limited to): whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed.'[32]

[75] In *Psychological Society of South Africa v Qwelane and Others*[33], the Constitutional Court held-

'. . .All these factors will be weighed to determine whether it is in the interests of justice to grant the postponement. And, importantly, this Court has added to the mix. It has said that what is in the interests of justice is determined not only by what is in the interests of the immediate parties, but also by what is in the broader public interest.'

[76] In conclusion, I find that for all the reasons advanced the full court failed to exercise its discretion judiciously and this court is at large to interfere with its decision. I would, had I commanded the majority, have made the following order.

Order

The appeal is upheld with costs.

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T.V. NORMAN
ACTING JUDGE OF APPEAL

[32] Ibid para 4.
[33] Op cit fn 28 para 31.

Appearances

For appellant:	W N Shapiro SC
Instructed by:	Nourse Incorporated, Johannesburg
	Hattingh Attorneys Inc, Bloemfontein
For respondent:	K W Lüderitz SC with F Southwood SC
Instructed by:	Ledwaba Mazwai Inc., Pretoria
	Honey Attorneys, Bloemfontein.