REPUBLIC OF TRINIDAD AND TOBAGO

Civil Appeal No. P256 of 2016

IN THE COURT OF APPEAL

OF

JIMDAR CATERERS LIMITED

APPELLANT

AND

THE BOARD OF INLAND REVENUE

RESPONDENT

PANEL: **Mendonça, JA**
Bereaux, JA
Jones, JA

APPEARANCES: **Mr Gayle for the Appellant**
Mrs I Rampersad-Suite for the Respondent

DATE OF DELIVERY: July 28th, 2017

I agree with the judgment of Mendonça J.A. and have nothing to add.

N. Bereaux,
Justice of Appeal

I too agree.

J. Jones,
Justice of Appeal

JUDGMENT

Delivered by A. Mendonça, J.A.

1. This is an appeal by way of case stated from the Tax Appeal Board (the Board). Before I refer to the questions of law arising on the case stated, I will set out the relevant facts and circumstances giving rise to this appeal.

2. By notice of appeal filed on July 21st 2015, Jimdar Caterers Limited (the appellant) appealed to the Board from the decision of the Board of Inland Revenue (the respondent). The Board's decision is contained in a letter dated June 23rd 2015 by which it refused to amend the additional determination of corporation tax found to be payable by the appellant in the amount of $130,337.63 for the year of income 2008. The notice of appeal was served on the respondent on July 21st 2015, the date on which it was filed. After the notice of appeal was served on the respondent, it was the respondent's obligation to immediately forward to the Board copies of all documents relevant to the decision appealed from (hereinafter referred to

the statutory bundle of documents) pursuant to S 7(6) of the Tax Appeal Board Act (hereinafter referred to as the TAB Act). Further, the respondent was obligated under rule 26(1) of the Tax Appeal Board Rules (the TAB Rules) within 21 days of the service of the notice of appeal on it to file in the Registry of the Board its statement of case setting out the matters referred in that rule and serve a copy on the appellant. The statement of case should therefore have been filed and served not later than August 11th 2015.

3. The tax appeal first came on for hearing before the Board on October 05th 2015. By that date the respondent had not forwarded to the Board the statutory bundle of documents pursuant to S 7(6) of the TAB Act nor had it had filed and served the statement of case as required by rule 26(1) of the TAB Rules. On that date, however, as stated in the judgment of the Board, counsel appearing for the respondent provided reasons to the Court for the delay in not filing a statement of case and statutory bundle of documents and indicated to the board that it was considering whether as a matter of law the notice of appeal was filed prematurely and that it needed time to research that point of law. The respondent applied for an adjournment. The application was unopposed by the appellant and the matter was adjourned to November 17th 2015 to allow the parties to discuss the point of law identified by the respondent.

4. On November 17th 2015, when the appeal next came before the Board, the respondent had not yet forwarded the statutory bundle of documents nor had it filed and served its statement of case. In those circumstances, it made an oral application for an extension of time within which to do so. Counsel for the appellant indicated his intention to oppose the application whereupon the Board ordered that the respondent "do file and serve a written application

accompanied by the requisite affidavit evidence for an extension of time to file and serve its statement of case and statutory bundle of documents". The Board also ordered that the respondent do file and serve a draft of the statement of case and statutory bundle of documents on or before December 08th 2015. Directions were also given for the filing of written submissions by the parties in relation to the intended application by the respondent for an extension of time.

5. The respondent did not meet the December 08th 2015 deadline. As a consequence, on December 09th 2015, the appellant filed an application by which it sought an order that the Board allow its appeal and vacate the assessment to corporation tax. The order sought by that application was essentially grounded on the failure of the respondent to forward the statutory bundle of documents and to file and serve its statement of case.

6. On December 09th 2015, the respondent filed its application for the extension of time for the forwarding of the statutory bundle of documents and the filing and service of the statement of case (hereinafter referred to as the first application). It also filed and served the draft statement of case and statutory bundle of documents as directed by the Board. The first application was supported by an affidavit sworn by Mr Errol Ramsubiek, the acting Commissioner of the Board of Inland Revenue. I will refer to this affidavit later in this judgment.

7. On January 14th 2016, the respondent filed a further application (hereinafter referred to as the second application). The second application sought an extension of time for the filing of the draft statement of case and statutory bundle of documents and for the filing and service of the

first application from December 08th 2015 to December 09th 2015, the date on which they were in fact filed and served. This application, as was the first application, was supported by an affidavit sworn by Mr. Ramsubiek.

8. All the applications were heard by the Board on February 03rd 2016. Mr Ramsubiek was cross examined on his affidavits. The Board gave delivered a written judgment on July 25th 2016.

9. In its judgment, the Board noted that applications for an extension of time are governed by rule 17 by the TAB Rules which provides as follows:

> "The Court may, on the application of any party, extend the time for doing any act or taking any proceedings under these Rules or under any other rules or procedure governing the exercise of its jurisdiction by the Court, upon such terms as it may think fit; and such extension may be ordered although the application for such extension is not made until after the expiration of the time appointed or allowed."

10. The Board observed that the rule gave it a liberal discretion to extend the time periods. The Board, however, asked the question how is that discretion to be exercised. In that regard, the Board referred to rule 21 of the TAB Rules. This rule is as follows:

> "21. Except as otherwise provided in the Act or in these Rules or in any written law, the Rules of the Supreme Court relating to applications to a Judge in Chambers and as to taxation of costs shall, with the necessary modifications, if any, apply to appeals and applications to the Court."

11. The Board was of the view that the "Rules of the Supreme Court" referred to in rule 21 were the Rules of the Supreme Court 1975 (the 1975 Rules) and not the Civil Proceedings Rules 1998 (the CPR), as the appellant had submitted. Accordingly in exercising its discretion

under rule 17, the Board was of the opinion that it was guided by the 1975 Rules and the principles developed in the cases in which the relevant rules were considered.

12. The Board further noted that the relevant period of default by the respondent was in fact, one day, being the period between December 8th 2015, which was the date the respondent was ordered to file and serve the relevant documents and make the application for the extension of time, and December 09th 2015 being the date they were actually filed and served. Applying the 1975 Rules and the principles developed thereunder in the case law the question according to the Board was whether the time should be extended by one day. The Board was of the opinion that on the evidence before it that the time should be extended. It therefore granted leave to the respondent to:

> "(a) File its application for leave to extend the time to file its written application accompanied by affidavit evidence and the draft Statement of Case and Statutory Bundle of Documents on the 9th December 2015.
>
> (b) File its statement case and Statutory Bundle of Documents in terms of the drafts of such documents filed on the 9th December 2015 to the 8th August 2016."

In view of the grant of the extension of time for the filing of the statement of case and the statutory bundle of documents, the Board saw no need to consider the application of the appellant to allow the Tax Appeal and to vacate the assessment to tax.

13. The Board further noted that counsel for the appellant had submitted that the Board could not entertain oral applications except at the substantive hearing of the appeal which is yet to begin as to do so would be contrary to rule 5 of the TAB Rules. The Board, however, expressed the view that under rule 5(5) it could entertain an oral application at any hearing and not only at the hearing of the substantive appeal. The Board, however, stated that the

issue in any event had become a moot point as both applications for an extension of time had been made in writing.

14. The appellant, being dissatisfied with the ruling of the Board, requested that it state a case for the opinion of the Court of Appeal pursuant to S 9 of the TAB Act. The Board duly obliged and in the case noted that there were three issues before it for its primary determination and these were:

> "(1) whether or not leave should be granted to the Respondent for an extension of time for the filing and service of the Statement of Case and Statutory Bundle of Documents; and
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> (2) in the event that leave is not granted whether the Appellant should be granted an Order in default to allow the appeal and that the assessment related thereto be vacated; and
>
> (3) whether it is mandatory that an application for an extension of time be made in writing."

15. The Board in the case referred to its decision on each of the issues as I have outlined above and also referred to the various points that were identified by the appellant in its request to state a case for the opinion of the Court of Appeal. The Board annexed to the case its written judgment in which it had set out in extenso the applications for an extension of time and the affidavits in support of them. In view of case stated by the Board, the issues as set out therein that were before it for its determination and the submissions made before this Court, the following questions arise for the determination by this Court:

> (1) Do the Rules of the Supreme Court relating to applications to a Judge in Chambers which by rule 21 are made applicable to appeals and applications before the Board, refer to the 1975 Rules or to the CPR;

> (2) Did the Board err in the exercise of its discretion to extend the time for the forwarding of the statutory bundle of documents by the respondent and the filing and service of the respondent's statement of case; and
>
> (3) If the answer to the issue at (2) above is in the affirmative, should the appellant's application to allow the Tax Appeal before the Board and to vacate the assessment to tax be granted.

I may note at this point that the parties in their submissions did not address the issue relating to the power of the Board to entertain oral applications. In those circumstances and as the point had become academic since at the end of the day the applications were made in writing, I will make no further reference to that issue in this judgment.

16. The first issue asks the question whether the words "the Rules of the Supreme Court relating to applications to a Judge in Chambers" in rule 21 of the TAB Rules refer to the 1975 Rules or to the CPR. This, of course, depends on the proper interpretation of rule 21.

17. Counsel for the appellant submitted that the reference to "the Rules of the Supreme Court relating to applications to a Judge in Chambers" refers to the CPR and not the 1975 Rules. Counsel for the respondent at first sought to defend the Board's opinion that the 1975 Rules were the applicable rules but eventually accepted that the true meaning of rule 21 is that the CPR as it relates to applications to a Judge in Chambers, are the applicable Rules. In my opinion, counsel are correct.

18. The Board in arriving at its decision that the applicable rules are the 1975 Rules did not indulge in any real analysis. It simply referred to rule 21 and stated that it was bound by it and concluded "accordingly we are guided by the principles" of the 1975 Rules. The Board

may have thought that the reference to the "Rules of the Supreme Court" in rule 21 is an express reference to the 1975 Rules. But that is not so. The long title of the 1975 Rules is the "Orders and Rules of the Supreme Court of Judicature of Trinidad and Tobago 1975". At O.1 r.1 of the 1975 Rules, it is provided that the rules may be cited as the "Rules of the Supreme Court 1975". Reference to "Rules of the Supreme Court" in rule 21 is therefore not an express reference to the 1975 Rules.

19. The Interpretation Act defines the phrase "Rules of Court" at S 78 as follows:

> "Rules of Court" when used in relation to any Court, means rules made by the authority having for the time being power to make rules or orders regulating the practice and procedure of that Court;"

20. According to that definition, therefore, when the phrase "Rules of Court" is used in relation to any Court, it refers to the rules governing the procedure from time to time. As the rules change, the changed rules will be captured by the expression "Rules of Court". Of course the phrase in rule 21 of the TAB Rules is not "Rules of Court" but "Rules of the Supreme Court" and S 78 of the Interpretation Act it seems to me is not strictly applicable. But I do not believe rule 21 has a different effect.

21. It should be noted that if rule 21 of the TAB Rules is to be construed as referring to the Rules of the Supreme Court existing at the time the TAB Rules were made, it would not refer to the 1975 Rules but rather to the rules of court that preceded it, that is to say the Rules of the Supreme Court 1946 since the TAB Rules were made prior to be coming into force of the 1975 Rules and at a time when the 1946 rules were the governing rules. The Board, however, was clearly not of that view and therefore it seemed to think that rule 21 had some

updating effect in relation to the applicable rules. Further, since the commencement of the 1975 Rules, the 1946 Rules have not been applied to applications or appeals before the Board.

22. It is a presumption that an act of Parliament, while it remains the law is to be regarded to always speaking (see **Bennion on Statutory Interpretation** (6th ed.) at S 288). The same applies to subsidiary legislation, such as the TAB Rules which were made pursuant to S 6(12) of the TAB Act. The TAB Rules therefore, should be regarded as always speaking. This means that in their application on any date the language of the rules should be construed in accordance with the need to treat them as current rules. One effect of that is that it raises the presumption that the draftsman intended the rules to be applied at any future time to give effect to the true original intention. Accordingly the interpreter is to make allowances for any relevant changes in the law that have occurred since the making of the TAB Rules (see **Bennion on Statutory Interpretation** (6th ed.) pg. 800). In the construction of rule 21 it is necessary, therefore, to make allowances for the fact that the Rules of the Supreme Court have undergone changes over time.

23. The CPR came into operation in September 16th 2005. The CPR apply to all civil proceedings begun on or after that date and its provisions apply to, *inter alia*, applications to a Judge in Chambers within rule 21.

24. There are proceedings in the Supreme Court to which the CPR do not apply. They are essentially the same proceedings to which the 1975 Rules did not apply (see O. 1 r. 2(2) of

the 1975 Rules and rule 2.2 of the CPR). The CPR, therefore, in that regard may be considered a straight swap for the 1975 Rules.

25. With respect to those proceedings to which by rule 2.2. the CPR do not apply, there are other rules which apply to them and which may be regarded as Rules of the Supreme Court relating to applications to a Judge in Chambers, such as for e.g. the Family Proceedings Rules and the rules relating to insolvency. I however, do not believe that it could have been the intention of rule 21 to apply any of those rules, which apply to specific and limited types of applications, to appeals and applications before the Board.

26. The 1975 Rules it should be noted were not repealed by the CPR. They continue to have limited application to matters which were commenced before September 16th 2005 that may still be pending and that have not been converted to the CPR (see CPR r. 80.3). Although, therefore, the 1975 Rules have not been repealed by the CPR they have been effectively replaced by them.

27. In my judgement rule 21 must be construed to reflect the changes in the rules of the Supreme Court and the reference to the Rules of the Supreme Court in rule 21 is to be construed as referring to the CPR.

28. The second issue is whether the Board erred in the exercise of its discretion to grant the respondent's applications for the extension of time. Before this Court can conclude that the Board erred in so doing it must be satisfied that it was plainly wrong to exercise its discretion in the manner that it did. What the expression "plainly wrong" means is that generally this

Court must be satisfied that in coming to its decision, the Board took into account irrelevant considerations or failed to take into account relevant ones, or that the Board exercised its discretion under a mistake of law or in disregard of principle or its decision is against the weight of the evidence or cannot be supported having regard to the evidence or the conclusion of the Board is outside the general ambit within which reasonable disagreement is possible.

29. As I have mentioned earlier, in coming to its decision, the Board applied the 1975 Rules and the principles developed thereunder in a relation to applications for an extension of time. I have held that it was wrong to do so and that it should have applied the CPR. It is sufficient for me to say that in so doing the Board acted under a mistake of law. Further, the CPR introduced different considerations, which by applying the 1975 Rules, the Board would not have taken into account. In those circumstances the Board erred in the exercise of its discretion and it therefore falls to this Court to consider the matter afresh.

30. In two decisions of this Court, namely ***CA. 44/2014 Roland James v The AG*** and ***CA. 215/2014 Rowley v Ramlogan***, the Court considered the principles relevant to an application for an extension of time under the CPR for the filing of a defence and a witness statement respectively. It was held that in exercising its discretion whether or not to extend time, the Court must do so so as to give effect to the overriding objective of the CPR, which is identified at rule 1.1(1) and is to enable the Court to deal with cases justly.

31. Rule 1.1(2) of the CPR identifies some of the considerations relevant to dealing justly with the case. This rule is as follows:

> 1.1 (1) The overriding objective of these Rules is to enable the court to deal with case justly.
>
> (2) Dealing justly with the case includes –
>
> (a) ensuring, so far as is practicable, that the parties are on an equal footing.
>
> (b) saving expense;
>
> (c) dealing with cases in ways which are proportionate to –
>
> (i) the amount of money involved;
>
> (ii) the importance of the case;
>
> (iii) the complexity of the issues; and
>
> (iv) the financial position of each party;
>
> (d) ensuring that it is dealt with expeditiously; and
>
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allow resources to other cases.

This rule is not intended to be exhaustive as to the matters to which the Court should have regard in giving effect to the overriding objective. As was noted in the ***Rowle**y* and ***Roland James*** cases other relevant consideration may be found at rules 26.7(1), (3) and (4) of the CPR. They provide as follows:

> 26.7 (1) An application for relief from any sanction imposed for a failure to comply with any rule, court order or direction must be made promptly.
>
> (3) The court may grant relief only if it is satisfied that -
>
> (a) the failure to comply was not intentional;
>
> (b) there is a good explanation for the breach; and
>
> (c) the party in default has generally complied with all other relevant rules, practice directions, order and directions.
>
> (4) In considering whether to grant relief, the court must have regard to -
>
> (a) the interests of the administration of justice;
>
> (b) whether the failure to comply was due to the party or his attorney;
>
> (c) whether failure to comply has been or can be remedied within a reasonable time; and
>
> (d) whether the trial date or any likely trial date can still be met if relief is granted.

Therefore factors such as whether the application is prompt, whether the failure to comply was intentional, whether the applicant is in general compliance with all relevant rules, orders, directions and practice directions, the interests of the administration of justice and so on are relevant to an application for an extension of time. However as was stated in the ***Rowley*** and ***Roland James*** cases the requirement that the applicant must satisfy the criteria at 26.7 (3), which are necessary to obtain relief from sanction, is not applicable to an application for an extension of time. An applicant may succeed notwithstanding, for example, that his application is not prompt or he does not provide a good explanation. What is necessary is the weighing and balancing of the relevant criteria.

32. The question of prejudice is also relevant and the Court must consider the prejudice to the parties in granting or refusing the application.

33. The Court must have regard to the relevant factors and give to them such weight as the circumstances of the case require and exercise its discretion so as to deal with the case justly, which is what the overriding objective demands. The Court of Appeal also stated in the ***Rowley*** and ***Roland James*** cases that inherent in the overriding objective is the notion of proportionality. The discretion should therefore be exercised in such a way that provides a proportional response to the application in the circumstances of the case.

34. Are the principles as explained in the ***Rowley*** and ***Roland James*** cases applicable to applications for an extension of time before the Board? In my judgment they are. Although the ***Rowley*** and ***Roland James*** cases were concerned with applications for an extensions of

time for a defence and a witness statement, the principles developed by them are not applicable to only those applications but are of wider application and apply, with possibly few exceptions only, to cases where the Court has a general discretion to extend time under the CPR. The principles have been developed applying the relevant rules in the CPR. It is not in doubt that the rules referred to in the ***Rowley*** and ***Roland James*** cases are applicable to applications to a Judge in Chambers within the meaning of rule 21 of the TAB Rules. By the operation of that rule these principles become applicable to applications before the Board and therefore should have been applied by the Board to the applications for the extension of time that were before it.

35. I will therefore consider the various factors and in doing so it is necessary to have regard to the evidence that was before the Board. I will begin with the factors contained in rule 26.7(1), (3) and (4).

36. The first consideration at rule 26.7(1) is whether the application for relief, or in other words the applications for the extension of time, was made promptly. The statutory bundle of documents should have been forwarded by the respondent to the Board immediately after receipt of the appellant's notice of appeal from the assessment to tax (see S 7(6) of the TAB Act). "Immediately" simply means without delay. It does not refer to any predetermined period of time. What would amount to without delay in any given case would be fact dependent. Here the task is to forward the statutory bundle of documents. I would think that in this case, if the statutory bundle of documents were forwarded within a period of seven working days, from the receipt of the notice, it would, in my view satisfy this requirement. So that the statutory bundle of documents should have been forwarded not later than July 30th

2015. The statement of case was required to be filed and served not later that August 11th 2015. The application for the extension of time was, however, not made until December 09th 2015. That on the face of it cannot be said to be prompt.

37. However, the additional feature in this case is that when the matter came before the Board on November 17th 2015, the Board directed the respondent's application for the extension of time be made in writing and that it be made by December 8th 2015. The Board, by so directing appear, in effect, to have granted an extension of time to the respondent to file and serve the application for the extension of time to on or before December 8th 2015. That order has not been appealed. The first application, however, was not filed as directed on December 8th 2015 but filed on December 9th 2015. It was only on January 17th 2016, that the respondents filed the second application seeking an extension of time for the filing of the first application. In my view, it was only then, on January 14th 2016, that it can be said that the first application for an extension of time was properly before the Court. This was 36 days after the respondent was directed to file its application. In my judgment, in those circumstances, it cannot be said that the applications for relief were made promptly.

38. The considerations at r 26.7(3) start with whether the failure to comply was intentional. The question then is whether the failure to meet the deadlines for the forwarding of the statutory bundle of documents and the filing and service of the statement of case was intentional. On the evidence as a whole it was always the intention of the respondent to comply. It has offered an explanation for its failure to meet the deadlines. Whether that is a good

explanation is what I will turn to next, but on the evidence as a whole, I cannot draw the conclusion that the failure to comply was intentional.

39. The next consideration at rule 26.7(3) is whether there is a good explanation for the breach. An explanation that connotes real or substantial fault on the part of an applicant cannot amount to a good explanation. But as this Court has observed in ***CA. 52/2012 Roopnarine & Anor v Kissoo & Anor***, a good explanation is not an infallible one. Further, when consideration is given to the explanation for the breach, it must not be subjected to such scrutiny as to require a standard of perfection.

40. The Board, in its judgment, considered that the delay the respondent had to explain was one day. This is the period of time from December 8th 2015, the date by which the respondent was directed to file and serve the draft documents and the application for the extension and December 9th 2015 when they were actually filed and served. The Board, in coming to that decision, seemed to be under the impression that by its order of November 17th 2015, it had in fact extended the time for the forwarding of the statutory bundle of documents and the filing and service of the statement of case to December 8th 2015. That however is not apparent on the face of the Board's order. What it did on November 17th 2015 was direct that the draft statement of case and statutory bundle of documents be filed and served on or before December 8th 2015. It did not extend the time for the filing and service of the said documents to that date. I think that is evident from the fact that the Board by its order also directed that an application be filed for an extension of time.

41. As the time was not extended it cannot be that the period of delay was only one day. By December 09th 2015, when the draft statement of case and statutory bundle of documents were filed, they were respectively 121 days and 132 days out of time. The respondent was, therefore, by then in breach for that period of time.

42. But I do not consider that is the period of delay for which the respondent should provide a good explanation. Ordinarily the period of delay would be counted from the date that the document is to be filed to the date of the application to remedy the default. That is the breach for which a good explanation must be provided. The fact is that in this case the first application was not made on December 8th 2015 as directed by the Board and it was not until January 14th 2016 that the second application was filed for an extension of time for the filing of the first application. It was only then, in my view that the application for relief, or in other words the application for an extension of time, was properly before the Court. By that time, the statement of case was 157 days out of time and the statutory bundle was 168 days out of time. In my view, that is the breach for which the respondent must provide a good explanation.

43. It was submitted by counsel for the respondent that in ascertaining the period of default, the Court should not take into account any period of time that fell in two periods; first the long vacation and second the period from October 5th 2015 (when the parties agreed to an adjournment of the matter to consider a point of law to which I have referred earlier) to November 17 (the date to which the matter was adjourned). I do not agree. As to the first period (ie the long vacation), the TAB Rules apply the provisions of the CPR relating to applications to a judge in chambers. That in my opinion would not apply rule 2.9 of the CPR

which relates to the running of time in the long vacation for the service of a statement of case. Further, the CPR have no provision that could possibly impact on the running of time in relation to the statutory bundle of documents. And I have seen no rule in the TAB Rules, nor have I been referred to any, that has any bearing on the running of time in the long vacation for the statement of case or for that matter the statutory bundle of documents. In relation to the second period, although the tax appeal was adjourned for the parties to consider a point of law, the fact is that the time lines for the documents were not extended. Nor was there any agreement between the parties to extend the time and the agreement to adjourn the matter does not have that result. In my judgment therefore the periods of delay are as set out in paragraph 42.

44. The explanation for the breach was provided in two affidavits filed by the respondent, both sworn by Mr Errol Ramsubiek, the acting Commissioner of the respondent. The first affidavit was filed in support of the first application which was filed on December 9th 2015 and sought to explain the delay up to that time. The second affidavit was filed in support of the respondent's second application and provided an explanation for the filing of the first application one day late.

45. In the first affidavit, Mr Ramsubeik states that he received the notice of appeal on July 21st 2015 and on July 23rd 2015 assigned the case to Mrs Rampersad-Suite "for conduct of this matter before" the Board. He states that as was the usual practice, Mrs Barban, a clerk attached to the legal section of the respondent, requested the audit and objection files from the objection section. After two weeks the files were not located and Mrs Barban called the section to find out when these files might be expected. Subsequently verbal requests were

made over a period of five weeks. Mrs Barban was then told there was no objection filed in the objection section. Mr Ramsubeik further stated:

> "5 … Mrs Barban then requested a search in the main file room for any files or returns that may be relevant to the income year as the Notice of Appeal stated that an audit was conducted on the Appellant and that an objection letter was sent to the BIR.
>
> 6. Mrs Barban then searched the GENTAX system which contains all the records of taxpayers in order to extract a document location number so that the tax return could be identified and then located. She observed that there was no tax return filed for the income year 2008 on the system and informed Mrs Suite. Mrs Barban has limited access to the system and could not do any further investigation.
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> 7. The officer with responsibility for the assessment was contacted for an explanation and assistance in locating the relevant files as the system showed that there was no tax return filed for that year and no objection. The officer then submitted the information to the legal section which showed that no audit was done on the Appellant as explained hereunder.
>
> 8. The appellant had not filed a tax return for the income year 2008 and the BIR made a best of judgment assessment. The details of the assessment and relevant particulars are contained in the attached Draft Statement of Case and Documents attached hereto and marked "ER1". The assessment was based on information obtained from the GENTAX system which is the BIR's main database. There were no other documents since a first assessment was made on the Appellant using the information available on GENTAX and no audit carried out as provided for under the Income Tax Act.
>
> 9. The delay in locating and filing the documents was due partly to the pleadings contained in the Notice of Appeal which made reference to an audit and objection. Mrs Barban conducted the normal search for audit and objection files as carried out when an appeal is filed. In the case of a first assessment the search would be done differently. In addition she has limited access to the GENTAX system so that when she discovered that the files were not available she then had to get another officer who has access to print the necessary documents. Copies of the relevant documents were printed and submitted to the legal section as soon as the issue was resolved. The limited access to the GENTAX system is in operation for the protection and security of the records of the Inland Revenue Division.

> 10. The BIR has made every effort to file the relevant documents as soon as the issues were resolved and the documents were located."

46. In the second affidavit Mr Ramsubeik in an effort to explain why the first application was not filed on December 8th 2015 as directed by the Board, stated:

> "4. I was made aware on or about the 4th December 2015 that on the 17th of November 2015 an order was given by the court for the Respondent to file a written application for an extension of time and the requisite affidavit. The attorney for the Respondent had discussed the need for the preparation with the Clerk III attached to the legal section.
>
> 5. On the 4th December, 2015 I was informed by Attorney for the Respondent in the above named appeal that Mrs Anne Barban, Clerk III attached to the Legal Section had proceeded on vacation leave without completing the affidavit with respect to the searches done. Mrs Barban could not be contacted during her vacation leave period. I therefore had to access her files and notes from the legal section in order to have the affidavit prepared. I addition I interviewed the auditor who was involved in making the assessment on the Appellant
> As I was not involved in the stages of the searches I needed time to properly examine the official records and to interview the persons involved. This resulted in the late filing of the documents by one day which was filed on 9th December 2015 instead of the 8th December 2015".

As I mentioned earlier Mr. Ramsubiek was cross examined on his affidavits. However, as is apparent from the case stated, nothing of any significance came out of the examination.

47. In the first affidavit Mr Ramsubeik says that the delay in locating the relevant documents was due partly to the appellant misleading reference in the notice of appeal to an audit and objection. That directed the search for the relevant documents in a futile direction. But it seems to me that although that might provide an explanation for some part of the delay, it cannot explain the whole of the delay and in fact can only properly account for a small part of it.

48. Although the search for the first two weeks did not immediately turn up the documents, this did not seem to inject into the situation any degree of urgency on the part of the respondent. Indeed, it is not excusable that two weeks were allowed to pass before Mrs Barban made any inquiries about the documents when they were required to be forwarded immediately. Then for a period of five weeks verbal requests were made of the legal section by which time seven weeks had elapsed from the receipt of the notice of appeal, by which time both the statutory bundle of documents and the statement of case were well out of time. The affidavit does not identify the time after the first seven weeks when apparently Mrs Barban requested a search of the main file room. It is therefore not known when that occurred and for how long that search was carried out. Similarly there is no indication when the search of the GENTAX system was done, and how long it took. It seems that it was only when the officer with responsibility for the assessment was contacted for an explanation were the documents located. There is no indication why such a simple and logical thing to do, when the documents were not immediately located, was not done before.

49. There is also no indication in the affidavit when the documents were actually located making it impossible to say whether the respondent moved with any reasonable alacrity to make the application for the extension of time. Nor is it possible to determine whether after the documents were located the respondent moved with all reasonable dispatch to prepare the statement of case and the statutory bundle of documents. It is therefore not known whether they could have been prepared in a timelier manner. Nor does the affidavit offer an explanation why an application for an extension of time was not made much earlier when it

ought to have been apparent that the statement of case and the statutory bundle of documents could not be forwarded and filed and served to meet the deadlines.

50. Mr Ramsubeik might be right in saying that the reference to an audit and objection in the appellant's notice of appeal partly occasioned a delay but the affidavit does not provide a good explanation for the entirety of the delay.

51. The second affidavit does not improve on the explanation in the first affidavit. It makes no attempt to do so. What it attempts to do is provide an explanation why the first application was not filed on December 8th 2015, as directed by the Board, but on December 9th. If that was all that the respondent had to do, then notwithstanding that the explanation advanced is poor, as it amounts to simply clerical inefficiency and mismanagement, I would take no issue with it. But what the affidavit should have done is provide an explanation why the second application was only made 36 days after the December 8th deadline. That is material to the respondent providing a good explanation for the breach, but it fails to do so.

52. In my judgment, therefore, the respondent has not provided a good explanation for its breach.

53. The last factor for consideration under rule 26.7(3) of the CPR is whether the party in default has generally complied with all other relevant rules, practice directions, orders and directions. It is relevant to note that this rule requires general compliance and not absolute compliance.

54. At the time the applications were heard by the Board in February 2016, there were four things that were to be done by the respondent as required by the TAB Act, the TAB Rules and the orders of the Board. The first is that the statutory bundle of documents was to be immediately forwarded on receipt of the notice of appeal. Second, the statement of case had to be filed and served on or before August 11th 2015, third, the respondent was required by order of the Board made on November 17th 2015 to file the application for the extension of time and the draft documents by December 8th 2015. And fourth, the respondent was required to file submissions in reply to submissions filed by the appellant in relation to the applications before the Board on or before January 18th 2016. Of these four things, three were not done, namely the first three. The fourth seems to have been complied with. In the circumstances it cannot be said that there was general compliance by the respondent.

55. The considerations under rule 26.7(4) start with the interest of the administration of justice. This involves consideration of not only the parties in this appeal but other court users. If the extension of time for filing the statutory bundle of documents and the statement of case were not granted, it is likely, though I cannot say it is inevitable, that the Tax Appeal will go no further and the appeal should be determined in the appellant's favour. The effect of that would be that the additional determination to corporation tax against the appellant should be set aside. The respondent will then be unable to defend its position that the appellant failed to pay the appropriate amount by way of corporation tax no matter how strong that position might be. This has implications for the wider public as the non-payment of tax impacts on the public purse. Looked at that in that way this would seem to be a factor that would lean in favour of the respondent.

56. On the other hand, the time taken by the Board in having to deal with the applications for an extension of time means that time that could have been spent on this matter and other matters involving other taxpayers before the Board was lost and of course there is an appeal from the Board's decision. Given the long period of default by the respondent in complying with its obligations and the poor explanation for so doing, it is not unreasonable to expect that the applications would have been opposed, so the whole of the time taken up by the applications before the Board should count against the respondent. In relation to the appeal the position is different. As was noted in ***Roland James***, if an appellant were able to rely on the whole of the time taken up in that way as adverse to the interests of the administration of justice that would increase the temptation to oppose applications for an extension of time.

57. Having regard to all the circumstances on balance, in my view, the interests of the administration of justice favour the grant of an extension of time.

58. The next consideration, at rule 26.7(4) is whether the failure to comply is due to the party or to his attorneys. The task in locating the documents and preparing the statement of case was given to the legal section of the respondent. It would therefore be artificial to draw any distinction between the respondent and its attorneys. I would therefore say that failure to comply was due to respondent.

59. The next consideration is whether the failure to comply has been or can be remedied within a reasonable time. The answer to this must be in the affirmative. By the time the applications were heard by the Board, the respondent had filed, as directed by the Board, a draft statement of case and statutory bundle of documents. In those circumstances when the Board granted

the extension of time, it directed the respondent to file and serve the documents in a relatively short period of time – just around two weeks - and they were filed and served within a matter of days thereafter.

60. The final consideration under rule 26.7(4) is whether the trial date or any likely date can still be met if the leave is granted. The appeal first came on for hearing on October 5th 2015 on which date it was adjourned to November 17th 2015. Thereafter the Court's time was taken up with the hearing of the applications filed by the parties. No one has suggested that if the statutory bundle of documents and statement of case were in time, the appeal would have been heard on either October 5th 2015 or November 17th 2015. When the Court ruled on the applications, it did not fix a date for the hearing of the appeal and this Court was informed that a date has not since been fixed. There is no reason to doubt that if a date were now fixed for the appeal to be heard before the Board that the appeal would not be heard on that date.

61. On the question of prejudice, the prejudice to both sides by the grant or refusal of the applications should be considered. The focus should be on the prejudice caused by the failure to forward the statutory bundle of documents and to file the statement of case in time and the effect of that prejudice if the applications were granted or refused. In this case the appellant does not advance anything by way of prejudice it will or has suffered by the delay caused by the failure of the respondent to meet its deadlines. Assuming that failure might have delayed the determination of the tax appeal, I do not consider that such delay without more is prejudice the Court should take into account. As was mentioned in ***Roland James***, if, for example, if the delay caused harm, such as the loss of relevant documents or resulted in the unavailability of a witness so that if the time were extended the appellant would be

disadvantaged in establishing its claim, that would be prejudice the Court can take into account. But nothing of this kind was alleged by the appellant.

62. If the applications were refused then there is the possibility that the appeal could not proceed and the appellant would escape the possibility of any further liability to tax, no matter how sound the respondent's assessment to tax would be. It could be denied an opportunity to establish the respondent's liability to tax and as I have mentioned above, this has implications for the general public.

63. In the circumstances, it does not appear to me that the appellant will suffer any prejudice if the extension were granted, the issue of prejudice is therefore a factor that favours the grant of the applications, whereas the respondent might. However, it is relevant to bear in mind as was said in ***Roland James***, that the absence of prejudice is not a sufficient reason to grant the applications as the Court must consider all the relevant circumstances.

64. Rule 1.1(2) of the CPR sets out certain matters to which the Court must have regard, so far as they are relevant, in giving effect to the overriding objective. It is to these that I now turn.

65. The first such matter is to ensure that so far as is practicable, the parties are on an equal footing. The primary aim of this is to ensure that there is a level playing field between the litigants of unequal financial resources. I do not believe that this has any relevance to this matter. The second consideration is saving expense. Of course, if the statutory bundle of documents and the statement of case were forwarded and filed in time that would have avoided any application for extension of time and the saving of expense associated with it.

The expense occasioned may however be recovered by appropriate orders as to costs and is not a factor to which I will attach much weight.

66. The next consideration is dealing with the case in ways that are proportionate to (i) amount of money involved; (ii) the importance of the case; (iii) the complexity of the issues; and (iv) the financial position of the parties. I do not believe that the applications for an extension of time impact on (i), (ii) and (iii) in this case. With respect to (iv), the applications would have occasioned costs that would not have been incurred had the documents been ready in time. However there is nothing to suggest that they caused the appeal to be dealt with in ways that are disproportionate to the financial position of the parties.

67. The last two considerations will be taken together, they are to ensure the case is dealt with expeditiously and has allotted to it an appropriate share of the Court's resources by taking into account the need to allot resources to other cases. It is likely that the applications for the extension of time have delayed the hearing and determination of the appeal and have certainly used Court's resources that would not have been required if the statement of case were filed and served within time and the statutory bundle of documents forwarded in time. Of course if the time is extended the appeal would require no greater resources than would normally be the case and the matter could proceed in a timely manner.

68. In giving effect to the overriding objective I must weigh the material considerations that favour the grant of the applications against those that favour their refusal. Those that favour the refusal of the application are as follows. It was not prompt, nor was there a good explanation for the breach. As was mentioned ***Roland James,*** insofar as the explanation for

the breach is concerned, the greater the delay, the greater the weight to be attached to the absence of a good explanation. In this case the delay is significant. So the absence of a good explanation is to be given due weight. The respondent has also failed to generally comply with its obligations to date. The respondent's failure would have added to the expense in this matter. That, however, is not a factor to which I consider much weight should be attached in the circumstances of this case. That failure may also have delayed the hearing of the appeal and resulted in the Board allotting to this matter a share of its resources that would not have been ordinarily required. It is also the case that the failure to comply was due to the respondent.

69. Against these matters, the interests of the administration of justice favour the grant of the applications. The failure to comply was capable of being remedied within a reasonable time and in fact has been remedied. The breach was not intentional. If a date for the hearing of the tax appeal were now to be fixed there is no reason to doubt that it would proceed on that date. The absence of prejudice on the part of the appellant and the likely prejudice to the respondent also favour the extension.

70. In view of the factors for and against the grant or refusal, I believe the scales are tipped ever so slightly in favour of the grant of the applications. What in my judgment has led to that outcome are the issues of prejudice, the interests of the administration of justice and the implications for the wider public interest if the applications were refused. In my judgment therefore to give effect to the overriding objective requires that the applications for the extension of time be granted and to refuse them would be a disproportionate response in the circumstances of this case.

71. In the circumstances, the appeal is dismissed although for very different reasons than advanced by the Board.

72. In view of the dismissal of the appeal, issue (iii) as outlined earlier in this judgment, which refers to the appellant's application to vacate the assessment and allow the tax appeal by reason of the respondent's failure to file the statutory bundle of documents and the statement of case, does not arise for determination.

73. I would hear the parties on the issue of costs.

74. Before leaving this appeal, there is one final point raised on the submissions of the parties to which I should refer. This deals with the proper procedure for the bringing of appeals to the Court of Appeal from the Board. The appellant began this appeal by filing of a notice of procedural appeal which was accompanied by a record of procedural appeal. Subsequently the appellant filed the case stated by the Board under S 9 of the TAB Act. Counsel for the respondent in her initial written submissions in this appeal, which were filed on November 4th 2016, indicated that appeals to the Court of Appeal from the Board are by way of case stated but noted that the appellant had proceeded by way of a notice of procedural appeal. She indicated that the respondent would like some clarification and guidance on the correct procedure to be adopted for the future as this has been a matter of concern for some time.

75. This appeal was first heard on November 7th 2016. In his written submissions and in the course of oral argument, counsel for the appellant made reference to this Court's judgment in ***Roland James***. During the hearing it was apparent that the respondent had not considered that judgment and the appellant had not in its submissions said anything on the proper procedure to appeal to the Court of Appeal. In the circumstances, the decision was taken to adjourn further hearing of the appeal and invite written submissions from the respondent on this Court's judgment in ***Roland James*** and from the appellant as to the proper procedure to appeal to the Court of Appeal from the Board.

76. In the further submissions filed by counsel for the respondent, the question of the proper procedure was again raised but on this occasion counsel submitted that there was no proper appeal before the Court as the correct procedure was not followed and the appeal should therefore be dismissed.

77. In my judgment it would not be a proper application of the overriding objective to entertain the submission that the appeal should be dismissed at the time it was raised. The fact of the matter is that the parties had filed submissions on the substantive issues in the appeal and the Court heard argument on them. If objection were intended to be taken that the appeal was not properly before the Court because the wrong procedure was adopted, it ought to have been properly raised at the outset. While the respondent did allude to the procedure relating to appeals from the Board to this Court, it was not in support of the submission that the appeal should be dismissed but was simply to say that the respondent though there should be guidance by this Court on the issue.

78. In any event, by the time the appeal was heard, the Board had stated the case and that was before the Court. As will be seen below the proper procedure is by way of case stated and in so far as there was the case stated by the Board before the Court, it would be a wholly disproportionate and erroneous response to dismiss the appeal because the appeal was initiated by the filing of a notice of procedural appeal.

79. S 9 of the TAB Act sets out the procedure for bringing of appeals from the Board to the Court of Appeal. The relevant provisions are S 9(1) to 9(6) and these are follows:

> "9. (1) The appellant or the Board of Inland Revenue or other respondent, if dissatisfied with the decision of the Appeal Board as being erroneous in point of law, may, within twenty-one days after the delivery of the decision or within such other time as may be prescribed by Rules of Court made under section 10, appeal against such decision by –
>
> (a) Filing with the Registrar a notice in writing, in the prescribed form, requesting the Appeal Board to state and sign a case for the opinion of the Court of Appeal; and
>
> (b) Serving a copy of the said notice on the Board of Inland Revenue or other respondent or on the appellant, as the case may be.
>
> (2) Where the appellant requires the case to be stated, the notice shall be accompanied by a fee of ten dollars.
>
> (3) The case shall set forth the facts and the determination of the Appeal Board and the party requiring it shall transmit the case, when stated and signed, to the Court of Appeal within twenty-one days after receiving the same.
>
> (4) At or before the time when he transmits the case to the Court of Appeal, the party requiring it shall send notice in writing of the fact that the case has been stated on his application, together with a copy of the case, to the other party.
>
> (5) The Court of Appeal shall hear and determine any question or questions of law rising on the case, and shall reverse, affirm or amend the determination in respect of which the case has been stated, or shall remit the matter to the Appeal Board with the opinion of the Court thereon, or make such other order in relation to the matters as to the Court may seem fit.

(6) The Court of Appeal may cause the case to be sent back for amendment, and thereupon the case shall be amended accordingly, and judgment shall be delivered after it has been amended."

80. It is quite clear from those provisions that the party who is dissatisfied with the decision of the Board as being erroneous in point of law may appeal such decision by filing with the Registrar of the Board a notice in the prescribed form within 21 days of delivery of the Board's decision or within such other time as may be prescribed by Rules of Court made under S 10 of the TAB Act, requesting the Board to state and sign a case for the opinion of the Court of Appeal and by serving a copy of that notice on the other party. It is important to point out that the filing of the notice requesting the Board to state and sign a case and the service of a copy of that notice commences the appeal process. That is the procedure by which the dissatisfied party begins the appeal as is apparent from the language of section 9(1) of the TAB Act.

81. When the case is stated and signed the party requiring it shall transmit the case to the Court of Appeal. At or before the time when he transmits it to the Court of Appeal, he shall send written notice that the case has been stated together with a copy of the case to the other party. According to the current practice, the transmitting of the case to the Court of Appeal is simply done by filing the case at the office of the Court of Appeal. After receiving the case the Court of Appeal, subject to its powers under S 9(6), shall then hear and determine the question or questions of law arising on the case.

82. Of course the Court of Appeal before entering on the hearing of the appeal will, as is generally done in relation to every appeal, notify the parties of the date of the hearing of the

appeal and require the parties to attend before it on a cause list hearing, the goal of which is primarily to ascertain whether the appeal is ready to be heard and if so to fix a convenient date for the hearing of the appeal and to give directions for the filing of submissions and authorities.

83. The procedure is fairly simple and straightforward. However, despite the clear provisions of S 9(1) to 9(6) of the TAB Act, there appears to be a body of opinion that there are parts of the CPR that apply to appeals to the Court of Appeal from the Board and provide some other way to approach the Court of Appeal. The parts that may possibly be of relevance to appeals to the Court of Appeal from the Board are Parts 61 and 64. However, it can be seen on a closer examination that they are not.

84. Part 61 is entitled "Appeals to the Court by the way of Case Stated". The title may suggest that this part applies to appeals from the Board to the Court of Appeal. However, I think it is clear from Part 61.1(1) that it does not. This rule is as follows:

> "61.1(1) This Part deals with the way in which the High Court or the Court of Appeal determines –
>
> (a) (i) a case stated; or
> (ii) a question of law referred to it,
>
> by a minister, magistrate, judge of a tribunal, a tribunal or other person; or
>
> (b) an application for an order directing a minister, magistrate, judge of a tribunal, tribunal or other person to refer a question of law to the court by way of case stated,
>
> where under any enactment the High Court or the Court of Appeal has power to determine such matters."

Therefore, in so far as this part deals with a case stated, it is a case stated by a minister, magistrate, judge of a tribunal, a tribunal or other person.

85. Quite clearly we are not dealing here with a case stated by a minister or magistrate. With respect to a "tribunal" or "judge of a tribunal" reference should be made to rule 61.1 (2) which defines "tribunal". This definition is as follows:

> "tribunal" means –
>
> (a) in relation to proceedings under section 14(4) of the Constitution, a court other than the High Court, the Court of Appeal or a Court Martial; and
>
> (b) in relation to any other proceedings, any tribunal constituted by or under any enactment other than a court of law."

Part (a) of the definition is not applicable to this matter, which is an appeal from an assessment to tax. In any event what section 14 of the Constitution does is that it enables a person presiding in any Court (other than the High Court or the Court of Appeal) to refer to the High Court questions that may arise in proceedings before that Court as to the contravention of any provisions of Chapter 1 of the Constitution. Part (a) of the definition therefore does not deal with appeals to the Court of Appeal. In relation to part (b) of the definition, in my view, the Board cannot be considered as a tribunal constituted by or under any enactment other than a court of law. The Board is after all a superior court of record.

86. So far as the words "other person" appearing in rule 61.1 are concerned, in my view they are to be construed ejusdem generis with the words minister, magistrate, and judge of a tribunal and refer to persons exercising decision making power who are not judges or members of a superior court. Those words therefore do not capture members of the Board.

87. In the circumstances it is I think clear that Part 61 has no application to this appeal. I should note that both parties before this Court were agreed on this.

88. As I mentioned earlier, the appellant filed a notice of procedural appeal pursuant to Part 64 of the CPR. He thought that this was the appropriate way to approach the Court of Appeal. "Procedural appeal" is defined by the CPR at rule 64.2 to mean "an appeal from a decision of a master or judge which does not directly decide the substantive issues in a claim". The definition goes on to exclude from those general words certain specific orders and decisions to which I need not refer. An appeal from the Board, however, is not a decision of a master or judge. An appeal from the Board is therefore not a procedural appeal for the purposes of Part 64.

89. Further and in any event, it is made clear by rule 64.1(1) that part 64 does not apply to appeals by way of case stated. Rule 64.1(1) is as follows:

> "This Part deals with any appeal to the Court of Appeal not being an appeal or application to the court for which other provision is made by these Rules nor appeals by way of case stated on a question of law for determination by the court."

90. In my view, therefore, the CPR do not contain any provisions that govern the manner in which appeals from the Board are brought to the Court of Appeal. That procedure is as set out in the TAB Act as I have above sought to explain.

A. Mendonça
Justice of Appeal