THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 20059/2014
Reportable

In the matter between:

MEDOX LIMITED **APPELLANT**

and

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

Neutral citation:	*Medox Limited v The Commissioner for SARS* (20059/2014) [2015] ZASCA 74 (27 May 2015)
Coram:	Brand, Cachalia, Bosielo and Willis JJA and Fourie AJA
Heard:	15 May 2015
Delivered:	27 May 2015

Summary: Taxpayer failing to object to income tax assessments issued by the Commissioner ─ Absent any objection, the assessments became final and conclusive by virtue of the provisions of s 81(5) of the Income Tax Act 58 of 1962 ─ Taxpayer not entitled to relief by means of a declaratory order to have the assessments set aside ─ Appeal dismissed.

ORDER

On appeal from: Gauteng Division, Pretoria (Teffo J sitting as court of first instance):

The appeal is dismissed and no order as to costs is made.

JUDGMENT

Fourie AJA (Brand, Cachalia, Bosielo and Willis JJA concurring):

[1] The appellant, Medox Limited (Medox), approached the Gauteng Division, Pretoria, on application for an order declaring that all income tax assessments issued to it by the respondent, the Commissioner for the South African Revenue Service (the Commissioner), in respect of the years of assessment following its 1997 year of assessment, are null and void.

[2] The Commissioner opposed the application which was heard by Teffo J. The judge concluded that the high court did not have jurisdiction to entertain the dispute and accordingly dismissed the application with costs. Medox applied for and was granted leave to appeal to this court.

[3] In essence, the court below held that the dispute should have been pursued by way of an objection to the assessments, lodged with the Commissioner and, if necessary, followed by an appeal to the tax court created in terms of the Income Tax Act 58 of 1962 (the Act), as the appropriate forum to deal with matters of this kind.

Background

[4] Medox commenced trading in South Africa under the name and style of Drake Personnel during 1976, but in 1995 was provisionally wound-up in terms of an order of the high court. Whilst under provisional liquidation, Medox continued trading and

on 7June 1996, the winding-up order was set aside by the high court when it sanctioned a scheme of arrangement between Medox and its creditors in terms of s 311 of the Companies Act 61 of 1973.

[5] Medox submitted a return to the Commissioner in respect of the income accrued to it during the 1996 tax year. The Commissioner's assessment for this tax year reflected an assessed loss of R46 622 063. Medox did not submit a return to the Commissioner for the 1997 tax year, but thereafter submitted its income tax returns for the tax years 1998 up to and including 2010 (excluding 2003). In respect of each of the returns submitted in the tax years subsequent to 1997, Medox did not seek to carry forward the assessed loss incurred in the 1996 tax year and to set it off against profits earned during the subsequent tax years. The Commissioner duly issued income tax assessments to Medox in respect of these subsequent tax years without reflecting the assessed loss.

[6] Medox made no objection against the assessments issued by the Commissioner in respect of the 1998 and subsequent tax years, but alleges that during 2009 it realised that it had not submitted a return in respect of the 1997 tax year and that the income tax assessments issued by the Commissioner in respect of the 1998 and subsequent tax years, had failed to set off the assessed loss of R46 622 063 incurred by Medox in the 1996 tax year.

[7] Medox then took the view that the 1998 and subsequent income tax assessments were void as the Commissioner had acted *ultra vires* by issuing same in disregard of the mandatory provisions of s 20(1)*(a)* of the Act, requiring him to set off assessed losses of a taxpayer against income derived by the taxpayer in subsequent years. The Commissioner denied the allegation, whereupon Medox approached the court below for declaratory relief.

Applicable statutory provisions

[8] At the relevant time, the Act was the statute that regulated the relationship between the Commissioner, who performed the functions and exercised the powers assigned to him in terms of the Act, and Medox as the taxpayer. I should add that the Act was subsequently repealed and substituted by the Tax Administration Act 28

of 2011 with commencement date 1 October 2012, but it has no bearing on the present appeal.

[9] The following sections of the Act are pertinent to the adjudication of the appeal:

(i) Section 20, which provides that for the purpose of determining the taxable income derived by any person from carrying on any trade, there shall be set off against the income so derived by such person any balance of assessed loss incurred by the taxpayer in any previous year which has been carried forward from the preceding year of assessment.

(ii) Section 81, the relevant part of which reads as follows:

'(1) Objections to any assessment made under this Act shall be made in the manner and under the terms and within the period prescribed by this Act and the rules promulgated in terms of section 107A by any taxpayer who is aggrieved by any assessment in which that taxpayer has an interest.

(2) The period prescribed in the rules within which objections must be made may be extended by the Commissioner where the Commissioner is satisfied that reasonable grounds exist for the delay in lodging the objection: Provided that the period for objection may not be so extended—

(a) . . .

(b) where more than three years have lapsed from the date of the assessment; or

(c) . . .

(3) Any decision by the Commissioner in the exercise of his or her discretion under subsection (2) shall be subject to objection and appeal.

(4) . . .

(5) Where no objections are made to any assessment or where objections have been allowed in full or withdrawn, such assessment or altered assessment, as the case may be, shall be final and conclusive.'

(iii) Section 83, which provides that any person entitled to object to an assessment, may appeal against such assessment to the tax court established in terms of the provisions of s 83. The tax court may in the case of an assessment appealed against, confirm the assessment or order that it be altered or referred back to the Commissioner for further investigation and assessment.

Discussion

[10] It is trite that an appeal is directed at the order of the court of first instance and not the reasons for the order. In *Tecmed Africa (Pty) Ltd v Minister of Health & another* [2012] 4 All SA 149 (SCA) Ponnan JA put it thus at para 17:

'. . . appeals, do not lie against the reasons for judgment but against the substantive order of a lower court. Thus, whether or not a court of appeal agrees with a lower court's reasoning would be of no consequence if the result would remain the same.'

[11] For the reasons that follow, I am of the view that there is no merit in the application for a declaratory order. In view of this conclusion, there is no need to enter into the debate as to whether or not the learned judge a quo correctly held that the high court did not have the necessary jurisdiction to entertain the application. I will assume (without deciding) that the court a quo did have the jurisdiction to adjudicate upon the application.

[12] In order to obtain declaratory relief in the court below, Medox had to show that it has an existing, future or contingent right to have the assessments for the 1998 and subsequent tax years declared null and void. See s 19(1)*(a)*(iii) of the Supreme Court Act 59 of 1959 (now s 21(1)*(c)* of the Superior Courts Act 10 of 2013). As it is common cause that Medox did not object in terms of s 81 of the Act to any of the assessments issued in respect of the 1998 and subsequent tax years, it will immediately be apparent that Medox's contention that it has a right to have these assessments declared null and void, flies in the face of the provisions of s 81(5) of the Act. The latter subsection expressly provides that, where no objection is made to an assessment, such assessment shall be final and conclusive. In addition, it should be borne in mind that more than three years have lapsed from the date of each of these assessments, with the result that, by virtue of the provisions of s 81(2)*(b)* of the Act, the Commissioner is precluded from reopening the assessments.

[13] This court has over the years dealt with provisions worded similarly to s 81(5) of the Act and confirmed that, where no objection is made to an assessment issued by the relevant tax authority, the assessment is final and conclusive as between the tax authority and the taxpayer. These decisions have been collected in *Commissioner for Inland Revenue v Bowman NO* 1990 (3) SA 311 (A) at 316B-C.

Further at 316E, Goldstone AJA writing for the court, reiterated that an assessment to which no objection has been made, 'becomes binding upon the taxpayer as a statutory obligation'.

[14] When confronted with the significant obstacle in the form of s 81(5) of the Act, counsel for Medox was driven to argue that the section only applies to 'valid' assessments and not to 'invalid' assessments. I must confess that I have considerable difficulty in following this submission. As I understood counsel, a valid assessment is one issued in accordance with the provisions of the Act, while an invalid assessment is not. To me this appears to be a distinction without any difference.

[15] On this argument virtually any assessment in which the Commissioner erroneously refuses to allow a deduction, rebate or exemption provided for in the Act, could be regarded as invalid and therefore not subject to the provisions of ss 81 to 83 of the Act. This would render the mechanisms provided in ss 81 to 83 for objections to and appeals against assessments nugatory and grant aggrieved taxpayers carte blanche to approach the high court in virtually every instance where they disagree with an assessment made by the Commissioner. For the sake of completeness, I should mention that it has not been suggested by Medox that any other good cause, eg *iustus error* or fraud, exists for the setting aside of the relevant assessments. It has accordingly not laid any basis for an attack upon the assessments by virtue of any other avenue of relief.

[16] What counsel for Medox is effectively asking this court to do, is to read words into the Act by implication. As emphasised by Corbett JA in *Rennie NO v Gordon & another NNO* 1988 (1) SA 1 (A) at 22E-F, this cannot be done unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands. The submission on behalf of Medox requires the word 'assessment' in s 81 of the Act, and in particular in subsecs 81(2)*(b)* and 81(5), to be read as being a reference to a 'valid' assessment. In my view there is no basis upon which it can be said that the reading in of the word 'valid' in s 81 is necessary to give effect to the section as it stands. On the contrary, I believe that this construction would be in

conflict with the intention of the legislature as appears from the clear language of the subsections.

[17] Finally, and in any event, I believe that the premise from which Medox departs in its quest to have these assessments set aside, is fatally flawed. What Medox contends, is that it was the duty of the Commissioner to take the necessary steps to have the assessed loss of 1996 set off against profits earned by Medox during the subsequent tax years. As I understand the provisions of the Act, it is the taxpayer who has to render a return in which any loss occurred in any previous year is carried forward to be set off against income derived by the taxpayer from carrying on any trade. That this is the taxpayer's duty, is made clear in s 20(2A)*(b)* of the Act which states that the taxpayer shall not be prevented from carrying forward a balance of an assessed loss merely by reason of the fact that he or she has not derived any income during any year of assessment. Further, s 82*(b)* of the Act places the burden of proof ─ that any amount is subject to set-off in terms of the Act ─ upon the person claiming such set-off, ie the taxpayer.

[18] It follows, in my view, that the application for declaratory relief was correctly dismissed by the court a quo and that the appeal accordingly falls to be dismissed.

[19] This brings me to the issue of costs. When the record of the appeal was presented to the members of this court, it transpired that the Commissioner's attorney (the State attorney, Pretoria) had not complied with SCA rules 10(1)*(b)* and 10A. The first requires heads of argument in an appeal to be lodged by the respondent within one month from the receipt of the appellant's heads of argument. The latter requires the heads of argument to be accompanied by a practice note dealing with prescribed procedural aspects to assist the members of the court in adjudicating the matter.

[20] This failure by the State attorney created the impression that the appeal may not be opposed, yet no notice to abide had been filed on behalf of the Commissioner. This uncertain state of affairs led the court to request the registrar to address the State attorney in writing, to establish whether or not the appeal was opposed.

[21] The registrar's letter caused a flurry of activity on the part of the State attorney. The registrar was advised that the Commissioner's heads of argument and practice note had, due to an administrative oversight, not been filed. It was further indicated that an application for condonation would in due course follow, together with the required heads of argument and practice note. In the event, an application for condonation accompanied by the Commissioner's heads of argument was filed on Friday, 8 May 2015 (four court days before the hearing of the appeal), while the practice note was only filed with the registrar on Monday, 11 May 2015.

[22] In the condonation application, the State attorney attempted to explain the cause of the delay in filing these documents, but woefully failed to present a plausible or acceptable explanation. There is no need to traverse the explanation in any great detail. The following aspects, may, however, be highlighted:

(i) the appellant's heads of argument were served on the State attorney and filed with the registrar of this court on 27 August 2014. In terms of SCA rule 10(1)*(b)* heads of argument on behalf of the Commissioner had to be filed on or before 29 September 2014.

(ii) Junior counsel acting on behalf of the Commissioner was instructed to and did settle heads of argument, which were received by the State attorney on 29 September 2014. A copy thereof was served on the appellant's attorneys on 6 October 2014 (there is no explanation as to why it was not served on the appellant's attorneys timeously on 29 September 2014). However, the heads of argument were not lodged with the registrar of this court nor was the prescribed practice note prepared for filing.

(iii) Subsequent to 6 October 2014, and due to a litany of administrative deficiencies, no steps were taken to forward the heads of argument to this court nor was any practice note prepared for filing. The administrative deficiencies leading to this sorry state of affairs can only be described as grossly negligent, demonstrating a flagrant disregard for the rules of this court. It is clear that, had this court not brought the failure to file the heads of argument and practice note to the attention of the State attorney, nothing would have been done and the appeal would have been heard without the Commissioner being represented.

(iv) It also appears that on 15 March 2015 a notice of set down of the appeal for hearing on 15 May 2015, was forwarded to the State attorney by its Bloemfontein

correspondent. Notwithstanding this, no steps were taken to attend to the filing of any heads of argument or a practice note.

[23] Whilst the appellant's legal representatives may not have been prejudiced as they had received the Commissioner's heads of argument on 6 October 2014, this court has been seriously inconvenienced by the supine attitude adopted by the State attorney. This was readily conceded by counsel for the Commissioner. The members of this court had to prepare for the appeal without the benefit of the Commissioner's heads of argument or practice note, which were only filed at the very last minute. It has often been emphasised that a disregard of the rules of this court will not be tolerated and that the court may mark its disapproval by means of a punitive costs order. See *Africa Solar (Pty) Ltd v Divwatt (Pty) Ltd* 2002 (4) SA 681 (SCA) para 45.

[24] The Commissioner's application for condonation was granted, mainly in view of the good prospects of success in the appeal, while the question of costs was reserved. In my view, the circumstances set out above justify a departure from the general rule that a successful litigant should normally be entitled to its costs. I believe that an appropriate sanction for the flagrant disregard of the rules of this court by the State attorney, would be to disallow the Commissioner's costs of appeal.

[25] In the result the following order is made:
The appeal is dismissed and no order as to costs is made.

_____
P B FOURIE
ACTING JUDGE OF APPEAL

APPEARANCES:

For the Appellant:	J Truter Instructed by: Couzyn Hertzog & Horak, Pretoria c/o Spangenberg Zietsman & Bloem, Bloemfontein
For the Respondent:	L G Nkosi-Thomas SC L Sigogo Instructed by: State Attorney, Pretoria