



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 399/2017

In the matter between:

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

APPELLANT

and

DANWET 202 (PTY) LTD

RESPONDENT

Neutral citation: *CSARS v Danwet* (399/2017) [2018] ZASCA 38 (28 March 2018)

Coram: Lewis, Majiedt and Mbha JJA, Davis and Mothle AJJA

Heard: 15 March 2018

Delivered: 28 March 2018

Summary: Condonation for late filing of an appeal against an assessment – section 104(3) of the Tax Administration Act 28 of 2011 mandates a taxpayer to object to a refusal by SARS to extend the period for lodgment – failure by taxpayer to file an objection.

ORDER

On appeal from: Gauteng Tax Court, Johannesburg (Masipa J sitting as a court of first instance):

1 The appeal is upheld with costs including the costs of two counsel.

2 The order of the Tax Court is set aside and replaced with the following:

‘The matter is struck from the roll.’

JUDGMENT

Davis AJA (Lewis, Majiedt and Mbha JJA and Mothle AJA concurring):

[1] This case concerns three related issues: (1) whether a Tax Court has the necessary jurisdiction to entertain and thereafter grant an application for condonation of the late filing of an appeal against an assessment; (2) if so whether the appellant has a discretion to extend the period within which an appeal against an assessment may be lodged beyond the prescribed period of 30 days as set out in s 107 of the Tax Administration Act 28 of 2011 and (3) if the answer to the second issue is in the affirmative, whether good cause was shown by the respondent to justify the order in its favour.

The Facts

[2] In 2013 the appellant conducted an audit of the respondent's business. On 19 August 2013 it issued an additional assessment for the 2012 tax year in the amount of R1 208 919, which represented a significant increase from the initial assessment of R19 915.

[3] On 7 October 2013 the respondent objected to this additional assessment. On 7 November 2013 the appellant responded to the objections by partially reducing the amount of the additional assessment. On 9 December 2013 Mr Jan Coetzee, a tax consultant representing the respondent, filed a notice of appeal against the partial disallowance of the objection on the e-filing platform of the appellant. Attached to this notice of appeal was a document which set out the reasons for the respondent's appeal in some detail.

[4] More than six months passed without any attempt by the respondent to enquire into the status of its appeal until 30 June 2014, when Mr Coetzee telephoned the appellant's call centre to enquire about the status of the appeal. He was advised that there was no record of the appeal on the appellant's e-filing platform.

[5] According to Mr Coetzee, he telephoned Ms Ray-Anne van Schalkwyk at the appellant's office in Alberton, who advised him to re-submit the appeal. On 2 July 2014 he did so, together with a request for condonation, explaining that he believed the notice of appeal had been correctly uploaded. In his explanation, he recorded that Telkom ADSL lines had been water logged in the area where his office was situated, particularly during the first two weeks of December 2013. He suggested that, in the process of submitting the notice of appeal, the Telkom ADSL line had stopped working, thereby preventing the full transmission of the relevant documents on appellant's e-filing platform. He justified his failure to initiate an earlier enquiry into the status of the appeal on the basis that, in his experience, it could take appellant 'up to 9 months to respond to the lodging of an appeal'.

[6] The appellant refused to grant condonation, on the basis of its interpretation of s 107(2)(a) and 2(b) of the Act. In a letter of 12 February 2015, representatives of the appellant, wrote:

'Section 107(2) (a) or (b) of the TA Act provides that a senior SARS official may extend the period within which an appeal must be lodged up to 21 days if reasonable grounds exist for the delay or up to 45 days if exceptional grounds exist for the delay. No discretion is provided

to SARS to extend the period beyond 75 days. As the nature of appeal was delivered on 2 July 2014 it was more than 75 days late and accordingly Appellant has no discretion to condone.'

[7] The respondent applied for condonation for the late filing of the appeal before the Tax Court, Johannesburg (Masipa J), which granted an order on 1 February 2017 in terms of which leave was granted to the respondent to file its notice of appeal against the disallowance of the objection of the assessment for the 2012 tax year within ten days of the granting of the order.

[8] The appellant contends that the first issue is dispositive of the appeal in that the Tax Court did not have the necessary jurisdiction to entertain the respondent's application for condonation.

Jurisdiction

[9] The jurisdiction of the Tax Court is set out in s 117 of the Act which, to the extent relevant to this case, provides that the tax court has jurisdiction over tax appeals lodged under s 107. Section 107 reads as follows:

'Appeal against assessment or decision – (1) After delivery of the notice of the decision referred to in section 106 (4), 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 this Act and the "rules",

(2) A senior SARS official may extend the period within which an appeal must be lodged for 21 business days, if satisfied that reasonable grounds exist for the delay; or up to 45 business days, if exceptional circumstances exist that justify an extension beyond 21 business days.'

[10] The word 'decision' as contained in s 107 is defined in s 101 as meaning a decision referred to in s 104(2) of the Act which provides that:

'The following decisions may be objected to and appealed against in the same manner as an assessment:

- (a) a decision under subsection (4) not to extend the period for lodging an objection;
- (b) a decision under section 107 (2) not to extend the period for lodging an appeal; and
- (c) any other decision that may be objected to or appealed against under a tax Act.'

Section 129(2) of the Act sets out the powers of the tax court as follows:

‘In the case of an assessment or “decision” under appeal or an application in a procedural matter referred to in section 117 (3), 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.’

[11] In the present case, the Tax Court granted condonation for the late filing of an appeal against the revised assessment. The appellant interpreted s 107(2) to justify its refusal of an extension for the lodging of an appeal; that is beyond the periods prescribed in the section, the appellant had no power to grant an extension.

[12] A decision in terms of s 107(2) of the Act is ‘a decision’ for the purposes of s 104(2) and s 129(2). It follows that, irrespective of the merits of the interpretation of s 107(2) as contended for by appellant, a decision not to extend the prescribed period falls within the definition of ‘decision’ for the purposes of s 129(2). Thus, the Tax Court, subject to compliance with the procedures set out in s 104(3), had the jurisdiction to determine an application for condonation for the failure by a taxpayer to lodge an appeal timeously.

[13] Had the respondent objected to the decision to refuse an extension of time, as it was obliged to do by s 104(3), the Tax Court would have had the power to order that an extension should be granted in terms of s 117(3) of the Act read with Rule 53. Rule 53 confers on the Tax Court the power to grant condonation and allow an extension of time in which to lodge a notice of appeal.

[14] It follows that a decision to condone the late lodgement of an appeal is appealable to this court in terms of s 129 read with s 133(1) of the Act. However, counsel for the appellant based his argument on the qualification to which I have made mention, namely he contended that the respondent had failed to comply with the requirements set out in s 104(3) and accordingly the tax court did not have jurisdiction to hear the condonation application

The procedure to be adopted by a taxpayer in terms of s 104(3)

[15] Section 104(3) provides as follows: ‘a taxpayer entitled to object to an assessment or “decision” must lodge an objection in the manner, under the terms, and within the period prescribed in the ‘rules’. It is common cause that no objection was lodged against the decision taken by the appellants’ representatives to invalidate the appeal by refusing to extend the period within which the appeal could be brought. Rule 7 of the Tax Court Rules¹ provides that a taxpayer who may object to an assessment under s104 of the Act may deliver a notice of objection within 30 days. There is however no mention of an objection to a decision as provided for in s 104. Rule 10(1)(b) provides that a taxpayer who wishes to appeal against an assessment to the tax court must deliver a notice of appeal within 30 days after the delivery of the disallowance or such extended period granted under s 107(2) of the Act.

[16] The Rules are therefore hardly a model of clarity when dealing with the prescribed period within which a taxpayer must object to a decision such as a refusal to extend the prescribed period. What is clear however, is that, in the event that a taxpayer seeks to have such a refusal reversed, s 104(3) provides expressly that the taxpayer is obliged to lodge an objection against the decision taken by a senior SARS official acting in terms of s 107(2).

[17] In the context of the present case, an objection by the respondent to a refusal to extend the period within which an appeal may be lodged may appear on the face of it to be a pointless exercise, in that s 107(2) circumscribes the power of the appellant to extend the period within which the appeal is to be lodged. The appellant would not have the legal power to uphold an objection to a refusal to extend the time for the lodging of an appeal beyond the period expressly provided for in s 107(2).

[18] The question then arises as to whether s 104(3) is absurd or pointless in this instance. There is a common law presumption that a statute does not contain

¹ Tax Court Rules as published in the Government Gazette No37819 on 11 July 2014

purposeless provisions. If, however, the legislative provision cannot be given a meaningful construction, the presumption is taken to be rebutted.²

[19] Notwithstanding the present case dealing with a refusal to extend the period for the lodgment of an appeal, there are cases where the obligation to object to a decision made in terms of s 107(2) serves a clear purpose. For example, the appellant may refuse to extend the period for lodgment on the basis that it is not satisfied that reasonable grounds exist for the delay. An objection by a taxpayer would seek to rebut the reasons given for this decision. There would be no legal impediment to the appellant's reconsideration of its decision in the light of the objection by the taxpayer. There is therefore no basis on which to conclude that s 104(3) is pointless or leads inevitably to absurdity.

[20] In summary, s 104(3) obliged the respondent to object to the decision taken by the appellant on 15 February 2015 to invalidate its appeal. It failed to do so. It follows that there was no valid application before the tax court which, accordingly, did not have jurisdiction to hear the application.

[21] For these reasons, the following order is made:

- 1 The appeal is upheld with costs including the costs of two counsel.
- 2 The order of the Tax Court is set aside and replaced with the following:
‘The matter is struck from the roll.’

D Davis
Acting Judge of Appeal

² LC Steyn *Die Uitleg van Wette* (5ed) at 119-124; LAWSA Vol 25 para 330 and cases cited in footnote 8 thereof.

APPEARANCES

For the Appellant: N Snellenburg SC with D R Thompson
Instructed by: State Attorney, Bloemfontein

For the respondent: C Dreyer with A Saldulker
Instructed by: Pierre Retief Inc., Bedfordview
Maree & Partners, Bloemfontein