**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

Case no: 275/2013
Reportable

In the matter between:

**MTN INTERNATIONAL (MAURITIUS) LTD** **APPELLANT**

and

**THE COMMISSIONER OF SOUTH AFRICAN REVENUE SERVICES** **RESPONDENT**

**Neutral citation:** *MTN International v CSARS* (275/2013) [2014] ZASCA 8 (14 March 2014)

**Bench:** Mpati P, Lewis, Ponnan, Maya and Wallis JJA

**Heard:** **26 February 2014**

**Delivered:** **14 March 2014**

**Summary**: Income Tax Act 58 of 1962 – revised assessment – not invalid by reason of error in fixing due date.

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**ORDER**

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**On appeal from**: North Gauteng High Court, Pretoria (Tlhapi J sitting as court of first instance):

The appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

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**JUDGMENT**

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**Ponnan JA (Mpati P, Lewis, Maya and Wallis JJA concurring):**

[1] The issue that arises in this appeal is whether a revised assessment raised by the respondent, the Commissioner for the South African Revenue Service (SARS), on 31 March 2011 in terms of the Income Tax Act 58 of 1962 (the Act) to assess the appellant, MTN International (Mauritius) Limited (MTN), to tax for the 2006 year of assessment, falls to be set aside. The North Gauteng High Court, Pretoria (per Tlhapi J) held that it did not, but granted leave to MTN to appeal to this court.

[2] MTN is a subsidiary of the MTN Group Limited, a South African Company listed on the Johannesburg Securities Exchange and the intermediate holding company of cellular telephone operating subsidiaries outside South Africa for the MTN group. MTN claimed the following interest on loans it incurred as expenditure in terms of the Act, against its gross income for the 2006 year of assessment:

(a) R3 044 873 on a loan for the purposes of making investments in Nigeria (the Nigeria loan). The interest expenditure on this loan was claimed for a number of years up to and including the 2006 year of assessment; and
(b) R238 171 121 on a loan for the purposes of making investments in the Middle East (the Investcom loan). MTN incurred this loan from its holding company, MTN Holdings Limited. The interest expenditure on this loan was claimed for the first time during the 2006 year of assessment.

[3] The Nigeria loan was utilized to set up a new company in Nigeria as part of the MTN Group of companies. This new company, referred to as MTN Nigeria, successfully tendered for a mobile telephone licence in Nigeria. There are minority Nigerian shareholders in MTN Nigeria as required by Nigerian law. Investcom, on the other hand, was an already established mobile phone operator in the Middle East, with existing cell phone carrier licences and an existing business. The holding company of the group was situated in Dubai. MTN purchased that established, already functioning group, in its entirety. No minority shareholders were maintained in the Investcom company, which was renamed MTN Dubai.

[4] On 31 March 2011, which was the last day before the original assessment was due to prescribe in terms of s 79(1) of the Act, SARS raised the revised assessment disallowing the interest expenditure. When raising the revised assessment, the relevant SARS official, Mr Tshilongo, manually fixed the ‘due date’ on the IT40 form as 30 March 2011, being one day prior to the day on which the assessment was actually raised. The ‘second date’ and something described as a ‘process date’ was fixed as 31 March 2011. The IT40 form intimated that ‘a combined IT34 assessment [was] to follow’. The revised assessment resulted in an income tax liability by MTN of R73 476 101. SARS recovered this amount by setting it off against a tax refund due on MTN’s provisional tax account. On 2 April 2011 an IT34 notice of assessment was issued to MTN. It reflected the ‘due date’ as 1 May 2011 and the ‘second due date’ as 31 May 2011.

[5] On 15 April 2011 and after the issuance of the IT34 by SARS, MTN applied to the North Gauteng High Court, Pretoria for an order (as amended) that:

'1. The additional tax assessment in respect of the Applicant's 2006 tax year with a due date of 1 May 2011, be and is hereby set aside;

2. The additional tax assessment processed by the Respondent in respect of the Applicant's 2006 tax year on 31 March 2011, be and is hereby set aside;

3. The Respondent is ordered to credit or reverse any set-off that it has applied against the refund owed by the Respondent to the Applicant;

4. The Respondent is ordered to pay to the Applicant the amount of:

4.1. . . .; and

4.2. R73 476 101.00;

within 10 (ten) days after date of this order, together with any additional accrued interest in terms of s 89*quat*(4) of the Income Tax Act, No. 58 of 1962, as amended, and interest *a tempore mora* on the amount set-off by the Respondent against the Applicant's refund;

5. The Respondent is ordered to pay the costs of this application, including the costs consequent upon the employment of 2 (two) Counsel.'

[6] The gist of MTN's application is expressed in the affidavit of Mr Carel Gericke, the Executive: Group Tax of the MTN Group, thus:

'This application deals with the Applicant's year of assessment for 2006 and the Respondent raising an additional tax assessment on 31 March 2011. The additional tax assessment (also referred to as a "revised" assessment) for 2006 is attached as "**CG2**". May I immediately point out that the additional tax assessment was backdated to show the due date as being 30 March 2011, which is the date of the assessment, as prescribed in the Income Tax Act, No. 58 of 1962 ("the Act"), as amended, even though the assessment was clearly only processed and created on 31 March 2011. It shall be submitted to the Honourable Court that such a manipulation of dates to meet the Respondent's needs is so irregular and unlawful that the additional tax assessment stands to be set aside on this basis alone. . . .'

[7] In response to those allegations Ms Amanda Warner, a Senior Manager: International Tax at SARS' Large Business Centre, stated:

'SARS contends that it at all relevant stages acted within its powers and duties in terms of the Income Tax Act. It was entitled and in fact duty bound in terms of s 79 of the Income Tax Act to

raise the 2006 additional assessment on 31 March 2011. The original 2006 assessment had by then not prescribed. SARS was satisfied as envisaged in terms of s 79(1)(a) of the Income Tax Act that an amount which was subject to tax and should have been assessed to tax had not been assessed, due to the fact that the interest expenditure that the applicant claimed was erroneously allowed by SARS as a deduction when raising the original 2006 assessment. SARS was satisfied that the expenditure should from the outset have been disallowed, since it was not incurred for the purposes of producing taxable income in the form of management fees and royalties. It was expended for purposes of producing non-productive dividend income which was in terms of the Income Tax Act exempt from tax.

SARS contends that the so-called **"manipulation"** or **"backdating"** of the **"due date"** of the assessment and the fixing of the **"second date"** not 30 days in the future, are of no consequence for present purposes. This, at best for the applicant, may theoretically have had a one day detrimental impact on the period allowed within which applicant could file an objection or when prescription started to run. However, the said detrimental effect never materialised insofar as the objection period is concerned and the chances of it ever materialising in three years' time insofar as prescription is concerned is so remote that it can be ignored. However, from whatever angle the matter is viewed, it had no impact on the validity of the assessment.'

[8] In explaining how the due date and second date came to be fixed on the IT40 form, Ms Warner stated:

'An IT40 local assessment was therefore raised on 31 March 2011, which was sent to the taxpayer under cover of the assessment letter. Mr Tshilongo informs me that he manually fixed the "**due date**" and the "**second date**" of the local assessment, as respectively 30 March 2011 and 31 March 2011. According to Mr Tshilongo, he was under the impression that the two dates could not be on the same day (erroneously, SARS has been advised) and was afraid that if he fixed later dates, then it could perhaps be said that the assessment had prescribed (which was also wrong since the relevant date was the date upon which the assessment was raised, SARS has been advised). Mr Tshilongo therefore fixed the "**due date**" as the date prior to the date upon which the assessment was raised. SARS contends that nothing inappropriate or untoward can be inferred from this. In fact, little turns on this whole issue and the applicant's contentions regarding this are factually unfounded and legally untenable.'

[9] It is common cause in this case that: (a) on 31 March 2011 SARS assessed MTN to additional tax; (b) that assessment was made within the prescriptive period allowed by the Act; and (c) the assessment was notified to MTN on that day. An 'assessment' is defined in s 1 of the Act as:

'. . . the determination by the Commissioner, by way of a notice of assessment (including a notice of assessment in electronic form) served in a manner contemplated in section 106 (2)—

(*a*) of an amount upon which any tax leviable under this Act is chargeable; or

(*b*) of the amount of any such tax; or

(*c*) of any loss ranking for set-off; or

(*d*) of any assessed capital loss determined in terms of paragraph 9 of the Eighth Schedule . . . .'

An assessment, so *First South African Holdings (Pty) Ltd v Commissioner for South African Revenue Service* 73 SATC 221 para 15 held, is a determination by SARS of one or more matters. What is required is at least a purposeful act – one whereby the document embodying the mental act is intended to be an assessment (*Commissioner for the South African Revenue Service v South African Custodial Services (Pty) Ltd* 2012 (1) SA 522 (SCA) para 29).

[10] As is apparent from the definition of 'assessment' it is not a requirement that in order for a notification of a determination by SARS to be a valid assessment, it should be dated. Much less that a valid 'due date' should be fixed. On the contrary the legislature in s 1 of the Act defined 'date of assessment' to mean '. . . the date specified in the notice of such assessment as the due date or, where a due date is not so specified, the date of such notice'. It follows that where no 'due date' (to be read 'lawful or valid' due date) is specified (*S v Mapheele* 1963 (2) SA 651 (A) at 655D-E), it cannot be said that the assessment is a nullity. Indeed, counsel for MTN accepted during argument that the notice did not have to be dated and that 'an undated notice' would still constitute a valid notice. Likewise, it was accepted that inadvertently fixing an incorrect date by way, for example, of a simple clerical error would not have affected the validity of the assessment. In those circumstances had the dates fixed by Mr Tshilongo (which plainly were unworkable) been disregarded, the default position in terms of the Act would have been the date on which the taxpayer was notified of the determination. In fact, it seems to me, that it was open to Mr Tshilongo to have raised the revised assessment on 31 March

2011 and fixed the due date on some later occasion, which, I daresay, was the effect of the IT34 that issued on 2 April 2011. If it is to be accepted (as I believe it must be) that the fixing of a due date in the IT40 was not necessary for a valid assessment, it must follow that the fact that the 'due date' may have been incorrectly fixed would be irrelevant to deciding whether or not the assessment is valid. Much less, can it be said, that that in and of itself must result in the revised assessment being set aside.

[11] That conclusion, ordinarily at any rate, ought to dispose of the appeal, but it may nonetheless be necessary to touch, albeit briefly, on two further contentions advanced on behalf of MTN. First, according to MTN, Mr Tshilongo's approach left it with only 29 days to object to the assessment. This, so the contention went, 'robbed' it of its right (being the 30 days afforded to it by the Act) within which to object. It goes without saying that the Commissioner cannot 'rob' a taxpayer of a right afforded it by the Act. But, that plainly did not occur here. It is important to note that it is not the notice of assessment that allows or disallows MTN the 30 days within which to object. Its right to do so derives from the Act as read with the rules promulgated under s 107A.[1] Thus where, as here, the due date was unworkable, the 30 days fell, in terms of the Act, to be computed from the date of assessment, being 31 March 2011. In any event, MTN elected not to file an objection within 30 days from the date of assessment. By 29 April 2011 it requested reasons for the assessment, as it was entitled to do in terms of rule 3(1)(*a*). That suspended the initial 30 day period, giving MTN a renewed 30 day period from the date when the reasons were provided to file its objections (rule 4(*e*)). It can therefore not be said that MTN was indeed deprived of the 30 day period within which to respond to the revised assessment.

[12] Second, it was contended by MTN that we must make it clear that the Commissioner is subject to the Constitution and the law and that the lack of probity and good faith encountered here will not be countenanced by our courts. The effective way of achieving that end, so the contention went, is to set aside the assessment in its entirety (see *Pretoria Portland Cement Co Ltd v The Competition Commission* 2003 (2) SA 385

[1] GN R467, 1 April 2003.

(SCA) para 71). Here though one is not dealing with conduct that even remotely comes close to conduct of the kind encountered in *Pretoria Portland Cement*. Schutz JA considered the conduct encountered there an abuse of power. Here, we are concerned with no more than an official, in the form of Mr Tshilongo, who simply misapprehended what was required. Labouring under that misapprehension he fixed the dates in the belief that he was obliged so to do. Nothing in his conduct was clandestine or surreptitious. According to MTN, however, Mr Tshilongo, in acting as he did, was 'influenced by ulterior motives'. But motive is irrelevant (*National Director of Public Prosecutions v Zuma (Mbeki and another intervening)* 2009 (1) SCAR 361 (SCA) para 37). For, as Schreiner JA put it in connection with arrests, the best motive does not cure an otherwise illegal arrest and the worst motive does not render an otherwise legal arrest illegal (*Tsose v Minister of Justice* 1951 (3) SA 10 (A) at 17). There thus appears to be no logical or rational distinction that can be drawn between the error which underpinned Mr Tshilongo's conduct and the simple clerical error postulated earlier.

[13] It follows that the appeal must fail and in the result it is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

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V M PONNAN

JUDGE OF APPEAL

APPEARANCES:

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| For Appellant: | M M Rip SC (with him T Emslie SC and H V Vorster)<br><br>Instructed by:<br>Maurice Phillips Wisenberg c/o Rooth & Wessels Attorneys, Pretoria<br>Symington & De Kok, Bloemfontein |
| For Respondent: | J J Gauntlett SC (with him H G A Snyman SC and M P D Chabedi)<br><br>Instructed by:<br>Edelstein-Bosman Inc, Pretoria<br>McIntyre & Van Der Post, Bloemfontein |