REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE Number: **A24/2021**

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

2022 .....

In the matters between: -

BP SOUTHERN AFRICA (PTY) LTD
APPELLANT

AND

THE COMMISIONER FOR THE SOUTH AFRICAN REVENUE SERVICE
RESPONDENT

JUDGMENT

This Judgment was handed down electronically by circulation to the parties' and or parties representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed on July 2022.

BAQWA, J (TOLMAY J et SARDIWALLA J CONCURRING)

Introduction

[1] This is an appeal against two judgments handed down on 21 July 2020 (the first appeal) by Mothle J (as he then was) and on 14 July 2021 by Munzhelele J (the second appeal) before the North Gauteng High Court.

Background to the first appeal

[2] South Africa is a licenced trader in fuel imports which it imports as distillate fuel from abroad and delivers it to a refinery where it is stored in a warehouse. Some of it is sold in South Africa whilst the balance is exported. Upon leaving the warehouse for export, it attracts an important duty chargeable to the exporter by the respondent. After the exportation the exporter is entitled to claim export duty refund from the respondent and the refund is paid in a set off against the import duty which the exporter is liable for.

[3] The export process is conducted in a series of transactions which include the purchase of the fuel, collection from the refinery, transportation to the port of departure or entry right up to its delivery to the consignee in a foreign country.

[4] As proof of the claims for refund the exporter is legally obliged to keep in its possession and produce on demand by the respondent's inspectors, documents referred to as acquittals in the industry for each of the transactions regarding which a refund may be claimed.

[5] The applicant is such a trader and distributor of fuels not only locally but also conducts exportation to the neighbouring countries in the Southern Africa region.

[6] The method of exportation by the applicant was to sell distillate fuel to agents who would then arrange its transportation across the border for transportation to consignees in the neighbouring countries. After completion of the project the applicant would lodge the claims for the export refund which the respondent paid for by setting off on the import duty.

[7] The essence of the dispute between the respondent and the applicant arises out of the civil judgment obtained by the respondent after the failure of the appellant to produce valid acquittals regarding fuel which had been allegedly exported by the appellant to Zimbabwe.

[8] In seven letters of demand the respondent had demanded repayment of monies credited to the appellant. The credits remained unsupported by proof that the fuel exports had in fact taken place. The appellant wanted to retain the credits pending the completion of an internal investigation regarding the supporting documentation or pending the court challenge.

[9] On 23 January 2020, the respondent issued three Letters of Intent (Lol's) in which it gave the appellant notice of liability for duty and forfeiture in various amounts of approximately R40,5 million. The liability was 78 consignments of distillate fuel allegedly exported to Zimbabwe, without the appropriate

documentation. On 13 February 2020, the respondent issued 4 letters of demand to the appellant for payment of an amount of R37 751 091, 80, based on alleged exportation of 73 consignment of distillate fuel. On 24 February 2020 the respondent issued a final demand and notice of institution of legal proceedings. On 16 March 2020 the respondent obtained a civil judgment in terms of section 114 of the Act against the appellant.

[10] On the same date of the civil judgment the respondent's inspectors attended at the appellant's premises in order to execute the judgment. On 17 March the appellant requested the respondent for an undertaking that it would stay the execution on the civil judgment, pending the outcome of the internal administrative appeals and a court review challenge.

[11] In further communications the appellant requested a withdrawal of the civil judgment but this was summarily declined by the respondent. The respondent did however agree to stay execution on 19 March 2020 pending an application by the appellant in terms of Rule 77H.03 of the Customs and Excise Act 91 of 1964 (the Act).

[12] On 23 March 2020, the appellant launched the first application scheduled to be heard on 7 April 2020 where the respondent was directed to file an answering affidavit on 26 March 2020 but on 31 March 2020 the appellant removed the application from the urgent applications roll of 7 April 2020.

[13] The appellant's application for suspension of payment was rejected by a committee of the respondent on 19 May 2020 resulting in the lapsing of the undertaking to stay execution on the civil judgment.

[14] The appellant launched the second application under case number 22772/2020. This application was before court *a quo* on 2 June 2020 when it was postponed to 17 June 2020 and an order granted to the appellant interdicting the respondent from executing on the civil judgment pending the hearing on 17 June 2020.

[15] The applications by the appellant were in Part A and Part B and Part A, the urgent interim interdict was ultimately heard by the court *a quo* on 21 July 2020 when the appellant's urgent interim interdict application was heard and dismissed. No order was made in respect of the relief sought by the appellant in Part "B" of its notice of motion.

[16] The court *a quo* on 4 September 2020 dismissed the appellant's application for leave to appeal against the judgment of 21 July 2020 and on 1 October 2020 the appellant applied to the Supreme Court of Appeal for leave to appeal, which leave was granted.

Supplementary affidavit

[17] The appellant filed a supplementary affidavit under both case numbers under the heading "Founding Affidavit (Review Application)" in respect of the relief

claimed under Part “B” of its notice of motion dated 24 May 2020 regarding an application for review.

[18] The respondent filed a rule 30 notice on 2 December 2020 for the appellant to remove the cause of complaint with regard to the supplementary affidavit.

[19] The appellant’s response was to invite the respondent to withdraw the said notices upon pain of punitive costs on failure to do so. It also filed a counterclaim in which it sought leave “to the extent that it was necessary” to file further affidavits.

[20] On 14 July 2021 Munzhelele AJ (as she then was) granted the applications under Rule 30 and dismissed the counterapplication.

[21] The “interlocutory appeal” comes with the leave of the court *a quo* granted on 9 September. The appeal is against the order regarding the two sets of interlocutory applications which served before Mothle J and the individual interlocutory applications under Rule 30 and counter application by the appellant which were dealt with by Munzhelele AJ.

The Applicable test

[22] The issue with regard to orders appealed against in both applications concerns the exercise of a discretion by a lower court. It is trite that an appellant court has limited power to interfere with the exercise of discretion by

a lower court, the test being whether the lower court exercised its discretion in a non-judicial manner; applied the wrong principles of law; misdirected itself on the facts; or reached a decision that could not have reasonably been reached by a court that has properly acquainted itself with the relevant facts and legal principles. *Mathale v Linda and Another*[1].

The Merits (First appeal)

[23] The essence of the appellant's applications was to interdict the respondent from attaching and disposing of the appellant's property pending the final determination of the relief sought in Part B of the notice of motion.

[24] The *onus* was therefore on the appellant to satisfy the requirements for an interim interdict. The effect of the relief would be for the appellant to retain the refund pending the intended litigation in which it must prove that it exported the fuel.

***Prima facie* right**

[25] The legislative default starting point is that the *prima facie* right lies with the respondent to receive payment pending the determination of any dispute rather than the applicant being permitted to withhold such payment. This is the so-called pay now argue later regime.

[1] 2016 (2) SA 461 (CC) at 471

[26] Section 77G of the Act provides:

Notwithstanding anything to the contrary contained in this act, the obligation to pay the Commissioner and right of the Commissioner to receive and recover any amount demanded in terms of any provisions of this Act, shall not, unless the Commissioner so directs, be suspended pending finalisation of any procedure contemplated in the chapter or pending a decision by Court.

[27] Evidently the common law position that an appeal suspends the operation of an order is inverted and not applicable in the present case. The section provides that where there is a procedure in terms of chapter XA or before a court, the obligation to pay is not suspended unless the Commissioner directs otherwise.

[28] The leading case is *Metcash Trading Ltd v C SARS*[2] where the constitutionality of the "pay now argue later" principle in taxation legislation was examined in the VAT context and was found not to be unconstitutional. The following passages from the judgment illustrate the point.

"At 114D

[42] The Commissioner, in exercising the power under s36, is clearly implementing legislation and as such s36 power constitutes administrative action and falls within the administrative clause of the Constitution. I cannot agree with Snyders J to the extent

[2] 2001 (1) SA 1109 (CC)

that she considered the exercise of the discretion conferred upon the Commissioner in s36 of the Act not to be reviewable. The Act gives the Commissioner the discretion to suspend on obligation to pay. It contemplates, therefore that notwithstanding the 'pay now, argue later' rule, there will be circumstances in which it would be just for the Commissioner to suspend the obligation to make payment of the tax pending the determination of the appeal. What those circumstances are will depend on the facts of each particular case. The commissioner must, however, be able to justify his decision as being rational. The action must also constitute 'just administrative action' as required by s33 of the Constitution and be in compliance with any legislation governing the review of administrative action.

At 1142

[62] Thirdly, the effect of the rule on individual taxpayers is ameliorated by the power conferred upon the Commissioner to suspend its operation. The rule is not absolute but subject to suspension in circumstances where the Commissioner considers it appropriate. The exercise of this power by the Commissioner constitutes administrative action within the contemplation of s.33 of the Constitution and as such is reviewable as discussed above. The existence of this discretionary power therefore reduces the effect of the principle 'pay now, argue later' in an appropriate manner. In all these circumstance, therefore, I am persuaded that even if the effect

of s.40(5) constitutes a limitation on the right entrenched in s.35 of the Constitution, it is a limitation which is justifiable within the meaning of s.36.

At 1144A

[71] But that does not mean that a court is prohibited from hearing an application for interlocutory relief in the fact of a pending VAT appeal, or from granting other appropriate relief. Nor does it mean that the jurisdiction is theoretically extant but actually illusory. A court would certainly have jurisdiction to grant declaratory relief to such a vendor if, for instance, it were to be alleged that the commissioner had erred in law regarding the applicant as a vendor; or had misapplied the law in holding a particular transaction to be liable to VAT; or had acted capriciously or in bad faith; or had failed to apply the proper legal test to any particular set of facts. These are as many examples as can be contemplated in the wide field of administrative law defences, to paraphrase Jansen JA in Kruger's case. In particular the vendor may take on review a decision by the Commissioner under s36(1) of the Act refusing to suspend the 'pay now, argue later' principle. Moreover, a vendor would now be able to found a cause of action for interim relief on any appropriate constitutional ground as well."

[29] Upon a proper reading of both the dictum of the Constitutional Court and the applicable legislation it is quite apparent that it is the Commissioner that has

the *prima facie* right to payment in the interim and not the applicant who has the *prima facie* right to withhold payment.

[30] The applicant has failed to demonstrate that the Commissioner has misapplied the law, or acted capriciously. On the contrary, from the applicant's own admissions, it has been selling fuel to local agents hence its failure to produce the requisite acquittals. The applicant has from a factual point of view, no leg to stand on.

[31] The applicant cannot adequately answer a very basic question as to whether the fuel was exported. It is required to keep all the documents evidencing all the exports and section 162(5) of the Act puts the *onus* on it to prove that the goods were exported. The failure to respond in this regard proves that this was not done. In the circumstance the applicant cannot assert a *prima facie* right.

Balance of Convenience, Irreparable Harm and Alternative Remedy.

[32] The applicant's case regarding the balance of convenience does not even leave the starting blocks as it is common cause that the payment that the applicant is required to make is of a provisional nature. If it launches a challenge against the payment and is successful, the payment is reversible. Closely linked to this fact is the important public interest regarding prompt payment of taxes which favours the respondent.

[33] The evidence regarding the applicant's financial standing which can be gleaned from audited financial statements presented by the applicant to the respondent does not support the allegation that applicant would suffer irreparable harm if it is not granted the relief sought.

[34] According to the financial statements the applicant had:

34.1 a net asset value of approximately R6.5 billion;

34.2 cash and cash equivalents of more than R1.5 billion;

34.3 its annual turnover was in excess of R47 billion; and

34.4 its profit before tax was in excess of R566 million.

[35] According to five bank statements submitted, the applicant had a total access to funds in excess of R2, 676 billion and had one account with an overdraft balance of R2.1 billion. With such huge cash reserves and credit facilities the applicant can hardly make out a case for irreparable harm.

[36] Equally, the applicant is not without a remedy. The amount contested will be repaid to him if it succeeds in getting the final relief. Its loss will only have been the interim relief which is not irreparable and also does not deprive it the right to pursue repayment.

Urgency

[37] The appellant contends that the court *a quo* erred in dismissing their application on the basis of lack of urgency. In the same vein it contends that the correct order should have been to strike the matter off the urgent roll and allow the applicant to proceed with the matter in the ordinary opposed motion roll.

[38] The appellant appears to misunderstand the procedure in the urgent court. An urgent court judge has the discretion to request counsel to address him or her on the issue of urgency only and deal with that matter, *ante omnia,* before dealing with the rest of the application. He or she may then give his or her ruling on the question of urgency. Only if he or she finds that the matter is not urgent he or she may indeed strike the matter off the roll without dealing with the rest of the application thus giving an applicant an opportunity to deal with the rest of the application in the ordinary court. If the presiding judge does not proceed in this manner that is neither an error or a misdirection. After all he or she is seized with the matter on all the matters raised in the notice of motion and supported by the founding affidavit and he or she has the discretion to deal with all of them regarding the urgent application.

[39] As discussed above with reference to *Mathale v Linda and Another* (*supra*), the test is not whether the lower court was correct but rather whether the lower court has exercised its discretion in a non-judicial manner; applied the wrong principles of law, misdirected itself on the facts; or reached a decision

that could not have been reasonably reached by a court that has property apprised itself of the relevant facts and the law.

[40] In the present case I find that the court *a quo* did not misdirect itself in any of the ways described above.

[41] More specifically the court *a quo* exercised its discretion against the appellant in terms of section 96 of the Act which provides:

> "*(1)(a) (i)* *No process by which any legal proceedings are instituted against The State, The Minister, the Commissioner or an office for anything done in pursuance of this Act may be served before the expiry of a period of one month after delivery of a notice in writing setting forth clearly and explicitly the cause of action, the name and place of abode of the person who is to institute such proceedings (in this section referred to as the 'litigant') and the name and address of his or her attorney or agent, if any.*
>
> *(c)(i)* *The State, the Minister, the Commissioner or an officer may on good cause shown reduce the period specified in paragraph (a) or extend the period specified in paragraph (b) by agreement with the litigant.*

(ii) *If the State, the Minister, the Commissioner or an officer refuse to reduce or to extend any period as contemplated in subparagraph (i), a High Court having jurisdiction may, upon application of the litigant reduce or extend any such period when the interest of justice so requires.*

[42] The discretion was not exercised in favour of the appellant in term of section 96 and in the circumstances the whole of appellant's application was not proper in that it was brought contrary to statutory provisions. There is neither a legal or factual basis on which the appeal court can interfere with the discretion of the court *a quo* in circumstances where the appellant failed to persuade the court *a quo* that it was in the interests of justice for the one-month period to be abbreviated. It is not for this court to conclude that the decision of the court *a quo* could not have been reached by a court that has properly informed itself of the relevant facts and legal principles.

[43] The reasoning of the court *a quo* in its judgment was expressed thus:

"*[30]* *… the civil judgment whose execution the applicant wants to interdict is not based on an ordinary tax liability, where the taxpayer is expected to pay. It is based on a liability to repay or return some of the amounts of exports refunds claims, which were credited to the tax payer (the applicant in this case), in instances where the applicant either submitted invalid acquittals*

or is unable, at the stage of demand, to prove that fuel was in fact exported to Zimbabwe.

[31] Thus, the applicant prays to this court that while it conducts a search for the proper acquittals and simultaneously pursuing litigation against the respondent, in effect it must continue to keep in its possession the credits it obtained from the export refunds, some of which were based on irregular documents and others for which there is no proof that fuel was exported."

Conclusion

[44] None of the requirements for an interim interdict were proved by the appellant before the court *a quo*. No case is made out on appeal why the repayments to the appellant should be made as it has failed to vindicate its rights to the disputed refunds.

The Second appeal

[45] The appellant was granted leave by the Supreme Court of Appeal to this court against the judgment of Mothle J in the first appeal (*supra*). The second appeal is a sequel to facts arising from Part A in first appeal and it is against Munzhelele AJ's judgment handed down on 14 July 2021.

[46] The parties are the same as in the first appeal.

Background

On 18 November 2020 the appellant filed an affidavit in respect of Part B of its Notice of Motion being the application to review the SARS decision. The supplementary founding affidavit is headed "Founding Affidavit (Review Application)". The purpose of the affidavit was to set out the grounds and the facts and circumstances upon which the appellant relied in its review application and to supplement the affidavit which formed part of the interim interdict application.

[47] On 2 December 2020 the respondent delivered a notice in terms of Rule 30 to afford the respondent an opportunity to remove the cause of complaint within 10 days. The respondent alleged that the supplementary affidavit was an irregular step.

[48] On 14 July 2021 the court *a quo* made the following order:

> "*1. The delivery of the affidavit of Reneiloe Maesemene styled as founding affidavit (review application), delivered under cover of a filing sheet dated 18 November 2020, is hereby set aside as an irregular step.*

2. Applicant's application brought under the notice of motion dated 18th of January 2021 is dismissed.

3. The applicant is ordered to pay the costs, including costs of two counsel on attorney and client scale."

[49] On 9 September 2021 the court *a quo* granted leave to appeal to this court and that the appeal should be heard with the Part A appeal. The respondent contends that such an order ought not to have been made by the court *a quo* but by this court. I however say no more about the appropriateness of such an order as this court is now effectively seized with and has to consider both appeals.

[50] The appellant relied on Uniform Rule 53 for filing the supplementary affidavit without requesting the leave of court and Rule 53(4) provides:

"*53(4) An applicant for review may within 10 (ten) days after the Registrar has made the record available to an applicant, by delivery of notice and accompanying affidavit, amend, add to or vary the terms of his or her notice of motion and supplement the founding affidavit.*"

[51] The respondent contended before the court *a quo* that the appellant had not been furnished with a copy of the record when they filed the supplementary affidavit and that fact was not disputed by the appellant and it would therefore

seem that Rule 53(4) was not applicable thus making the filing of the supplementary affidavit premature.

[52] It is trite that a supplementary affidavit will not be considered when filed without leave of the court. The court has the discretion to grant leave in terms of rule 6(5)(e) of the Uniform Rules to grant such leave. In *Meropa Communications (Pty) Ltd* [GLDH][3] the court said:

> "*The affidavit will in any event not be considered admitted until leave is granted by the court dealing with the application. If good cause is shown why the supplementary affidavit should be permitted and the court, in its discretion, allows the affidavit it will in effect retrospectively condone the filing of the affidavit. If the respondent had filed the affidavit without seeking the leave of the court, the affidavit at best, in the discretion of the court, could be regarded a* ***pro non scripto****."*

[53] Relying on *Khunou & Others v Fihrer & Son*[4] counsel for the appellant argued that the courts should not be rigid and apply flexibility in considering the granting of leave to file supplementary affidavits.

[54] For an applicant to succeed in such applications, he or she has to satisfy three requirements:

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[3] *Case No: 29646/2016 (Unreported).*
[4] 1982 (3) SA (WLD)

54.1 Give a satisfactory explanation as to why it failed to put the said information or facts and to file the said affidavits timeously.

54.2 That such failure was not *mala fide* or due to its culpability; and

54.3 That regard being had to all the circumstances, the affidavit should be allowed.

[55] The record shows that the appellant failed to provide an explanation as to why they had not dealt with the facts in the supplementary affidavit at an earlier stage, that is in the founding affidavit. Such an explanation could have provided the justification for their omission and a possible reason why the supplementary affidavit should be allowed. Put differently, the appellant failed to show good cause for the granting of the relief sought. I therefore conclude that court *a quo* found correctly that the appellant's case was not sustainable.

SARS Rule 30 Defective

[56] The appellant argues that the court *a quo* ought not to have made the order because the Rule 30 application was defective in that it did not allege prejudice in terms of Rule 30(3).

[57] If the Rule 30 application was defective, the appellant ought to have objected to it in the form of another Rule 30 application by the applicant. Instead, the appellant raised the issue of prejudice in the affidavit in its counter-application which also served as an answering affidavit to the Rule 30 application.

[58] Rule 30(3) makes no specific mention of prejudice as a consideration that has to be ranked above others. Instead, it provides the court with a wide discretion whether or not to set aside the irregular proceedings. It is trite that the discretion has to be exercised judicially after due consideration of all the facts. This does not mean to say that prejudice is of no relevance. It is however one of the factors which a court might consider in the exercise of its discretion. It would be however incorrect to elevate it to an essential requirement above all other factors. What cannot be disputed is that the delivery of an additional affidavit is not a matter of right but an indulgence with the leave of court. That much is clear from a proper reading and interpretation of Rule 6(5)(e) of the Uniform Rules of Court.

The effect of Section 96 order

[59] What complicated matters for the appellant was the fact that the section 96 relief had been refused. The application could therefore not be pursued further until an abridgment of the period was granted. This applied to both applications that were brought by the appellant. Even though there was an application for leave pending before the Supreme Court of Appeal at the time the affidavit was filed, this did not alter the position brought about by the refusal of the section 96 relief.

[60] The appellant argues that a purposive interpretation of section 96 should be applied in that the purpose of the section is to alert the Commissioner of prospective litigation and that SARS had been alerted for years that BP seeks to review and set aside the SARS decisions in issue. The fact is, the period prescribed in section 96 has to be complied with or alternatively be abridged by the Commissioner or the Court. None of these events happened. It cannot be validly contended as the appellant does that the statutory outcomes run counter to the intention of the legislature.

Rule 53(4)

[61] The only exception provided for in the rules for the filing of a supplementary affidavit is to be found in Rule 53(4) which permits an applicant in review proceedings to supplement the founding affidavit as well as varying the notice of motion within 10 days after the registrar has made a record available to the applicant. The appellant purports to be making use of this rule but that allegation does not accord with the facts.

[62] Firstly, the affidavit filed does not purport to supplement the founding affidavit. Secondly the appellant cannot rely on Rule 53(4) because the record had not been made available and the affidavit purports to be a new founding affidavit to Part B of the applications

[63] As per usual procedure and practice, the appellant opted for a procedure where provision only for one founding affidavit even though the notice of

motion might be divided into two parts, one being the relief sought urgently and the other part to be sought in the ordinary course. There is no provision in the rules permitting, as of right, the filing of a second founding affidavit, such an affidavit is irregular.

Conclusion

[64] The court *a quo* exercised its discretion when granting the orders appealed against. As discussed (*supra*) the test is not whether the lower court was correct but rather whether the lower court exercised its discretion in a non-judicial manner; applied the wrong principles of law; misdirected itself on the facts or reached a decision that could not have reasonably have been reached by a court that has properly acquainted itself with the relevant facts and legal principles.

[65] In the present case I am persuaded that the court *a quo* did not deviate from the requisite standard when applying its discretion thus obviating the need for the appeal court to interfere.

Costs

[66] The appellant was given an opportunity to remove the cause of the complaint but it failed to utilise it and instead contended that its conduct was regular.

[67] This has resulted in a voluminous record including the affidavit giving rise to the applications as well as the parties' heads of argument in the court *a quo*.

[68] This was once more an issue which lies within the discretion of the of the court *a quo* on the same basis explained in paragraph 65 above with which the appeal court will be slow to interfere with.

[69] In light of the above I propose that the following order be made:

Order

[70] Both appeals are dismissed with costs, including the costs of two counsel, on an attorney and own client scale.

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SELBY BAQWA

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Date of hearing: 13 April 2022

Date of judgment: 20 July 2022

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