

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: **33023/2017**

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

In the matter between:

SAWADOGO GENERAL TRADING C.C.

Applicant

and

THE COMMISSIONER FOR THE SOUTH

AFRICAN REVENUE SERVICE

Respondent

JUDGMENT

[1] DE VOS AJ

- [1] The applicant seeks an order compelling the respondent to comply with an order granted by this Court on 19 January 2021. The order upheld the applicant's appeal concerning SARS' determination of a tariff rebate in terms of section 44(9)(e) of the Customs and Excise Act, 91 of 1975.
- [2] The order provided that -
- “1. The appeal is upheld
 2. The matter is referred back to the Customs National Appeal Committee for rectification of the material errors and re-consideration of the matter
 3. The Customs National Appeals Committee must substantiate their finding with comprehensive reasons, and if a determination is made, the basis on which the determination is calculated and the calculation must be set out clearly.
 4. The issue of costs is reserved pending the finalisation of the appeal before the Customs National Appeals Committee.”
- [3] Effectively, the judgment identifies five errors which SARS had made and mandated SARS to correct and, once corrected, reconsider the amounts due by the applicant. The Court referred the matter back to the Custom and Excise National Appeal Committee (“Appeals Committee”) to correct certain errors and reconsider SARS' determination.
- [4] The judgment resolved a rebate tariff dispute between the parties. The context within which the dispute arose is the applicant's import of worn clothing for the manufacture of wiping rags and cleaning cloths. The applicant holds an import permit and a rebate permit. The rebate grants a full rebate of customs duty for a specific volume of worn clothing. The volume of worn clothing that the applicant was permitted to import in a year was set out in the rebate permit. The applicant claimed a full rebate for its imports.
- [5] However, in 2014, SARS conducted an audit. The outcome of the audit was that the volume imported was more than what the rebate covered. In other words, there were imports which were not covered by the rebate. SARS picked up other discrepancies relating to missing invoices and the difference between the bill of entries and the bond registers.
- [6] As a result of these discrepancies, SARS issued a letter of demand claiming R 33 201 952.24. The applicant appealed against this demand. The appeal resulted in a

reduced letter of demand from SARS. The reduced amount was R 21 1331 473.76. The amount was again reduced, and SARS ultimately claimed an amount of R 15 881 549.51.

- [7] Shortly after the judgment was handed down, the applicant wrote to SARS asking for the implementation of the order. SARS responded that its original determination had not been set aside by the Court, the Appeals Committee lacked jurisdiction to entertain the matter, and the Court order was erroneously granted, or it contained a patent error. SARS' position was that it would not comply with the order but that it would apply for an order in terms of rule 42 of the Uniform Rules of Court.
- [8] The applicant again wrote, asking for compliance with the court order. It appears that SARS then had an about-turn as it wrote to the applicant, indicating that the matter is receiving attention. The applicant heard nothing more and lodged a contempt application. After the applicant's contempt application was launched, SARS issued its alleged redetermination outcome of the proceedings before its Appeals Committee.
- [9] The redetermination is dated 21 August 2021. The redetermination required the applicant to pay R 15 881 549.51, which was the amount SARS had determined was due and payable prior to the redetermination. In short, the redetermination yielded the same amount – to the cent – to be payable by the applicant. Despite SARS having to make five changes – the outcome remained unaltered.
- [10] The applicant contends that this was no redetermination by SARS but rather that SARS conducted an impermissible internal review of the order of this Court. SARS contends that its redetermination is proof of its implementation of the order of this Court. The dispute between the parties requires a consideration of the redetermination.
- [11] SARS' redetermination is presented in the format of a report from its Appeal Committee. The redetermination report states that pursuant to the order of 21 January 2021, SARS had to attend to the rectification of material errors and reconsider the matter, substantiate the findings with substantive reasons, and in the event a determination is calculated that the calculation be set out clearly. The report then has the telling heading: "Our response – alleged errors". Under this heading,

SARS then considers the substance of the errors as identified in the replying affidavit and “considers” these objections.

[12] SARS rejects the errors one by one.

[13] To highlight the way in which SARS dealt with the errors, I highlight paragraph 24:

“The ‘alleged’ error with regard to Bill of Entry 00233 (2011) equally falls away and therefore is moot.”

[14] It is on the face of the report clear that SARS did not correct the errors as directed by this Court but rather reconsidered them as they were “alleged errors”. It was not for SARS to respond to alleged errors. It was not open to SARS to “consider” the alleged errors. SARS was to implement the court order.

[15] The concluding paragraph in the report reads as follows –

“We submit therefore that appellant’s appeal in as far as the issues of ‘5 errors’ is concerned is without basis, and does not find support in any of the documentation relating to the matter.”

[16] SARS, in its own redetermination, does not correct the errors but rather finds the errors to be "without basis". The errors were raised in pleadings, debated and adjudicated by this Court. It was no longer open to SARS to disagree as to the existence of the errors. If it sought to do so, it ought to have launched a Rule 42 rectification, a rescission or appealed the judgment. SARS did not do so and was therefore bound by the order of this Court.

[17] In addition to the clear wording of SARS' redetermination, the applicant points to SARS' redetermination yielding the same amount as its original determination: R 15 881 549.51. Common sense dictates that if five errors are to be corrected, the determination will alter consequently. The fact that the amount has not altered, in fact has remained identical - to the cent – indicates that SARS did not conduct a recalculation.

[18] The Court considers SARS' position. SARS pleaded two positions: first, it contended that the judgment is vague and cannot be implemented and, secondly, that “SARS has fully complied with the court order of 19 January 2021”.

[19] The allegation that the order is vague and cannot be implemented runs into peremption. The respondent, if it believed the order to be vague, ought to have availed itself of the remedies available to challenge the vagueness. In fact, the

respondent identified these remedies and indicated its intention to exercise these remedies in correspondence with the applicant. The respondent specifically indicated its intention to rely on Rule 42 to rectify the order. However, having threatened to invoke the remedies, the respondent acted to the contrary and decided to implement the order. In so doing, it is not available for the respondent to argue the same point in this forum. It has accepted the order and sought to implement the order. It is barred from arguing the order cannot be implemented by peremption.¹

[20] In addition to the issue of peremption, the applicant highlighted that SARS' two positions were mutually destructive. SARS cannot contend simultaneously that the order is unimplementable due to vagueness and that it has implemented the order. SARS' defences, as pleaded, present two contradictory factual positions and are mutually destructive.

[21] In its oral submissions, SARS pressed the second point (that it had complied with the order). The Court considers that the amount remained constant and that SARS' own documents expressly reject the basis of the errors. These indicate that SARS did not conduct a redetermination but rather rejected the errors and presented the same amount to the applicant.

[22] The applicant's notice of motion requests an order seeking compliance with the order as well as a finding of contempt. At the hearing, however, the applicant persisted only with the compliance relief. The Court, therefore, only considers the compliance relief and does not express itself regarding the issue of contempt.

[23] The applicant requested this Court to grant an order permitting it to "set the matter down upon notice as a matter of urgency for contempt" proceedings in the event that the respondent does not comply with this court order. The Court declines to grant this relief as it would fetter the discretion of any Court having to consider the urgency of such contempt proceedings in the event they become necessary.

[24] The applicant has requested costs on a punitive scale. It points to the fact that it had to launch contempt proceedings to ensure compliance with a court order. The Court weighs the seriousness of SARS' non-compliance with a court order and its attempt

¹ Venmop 275 (Pty) Ltd v Cleveland Projects (Pty) Ltd 2016 (1) SA 78 (GJ)

to defend its non-compliance. Whilst the Court concludes the applicant is entitled to its costs, it finds no basis for a punitive cost order. The applicant is, however, entitled to the costs of two counsel, as the matter is weighty and the principles at play are vital to the enforceability of the rights in the Constitution.

Order

[25] As a result, the following order is granted:

- a) The respondent is directed and compelled to forthwith implement or comply with paragraphs 2 and 3 of the order of this Court dated 19 January 2021.
- b) The respondent is granted ten days from the date of this order to implement or comply with the court order of 19 January 2021 referred to in paragraph (a), failing which the applicant may set the matter down upon notice for contempt of Court or other relief, with or without the amplification of the papers.
- c) The respondent is to pay the applicant's costs on an attorney and client scale, which scale shall include the costs occasioned by the employment of two counsel.

I de Vos

Acting Judge of the High Court
Gauteng Division, Pretoria

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the applicant:

VP Ngutshana

M Molea

Instructed by:

Omphile Kedijang Attorneys

Counsel for the Respondent:

SK Hassim SC

KD Magano

Instructed by:

Maponya Incorporated

Date of the hearing:

7 August 2023

Date of judgment:

23 September 2023