

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO:2019/28878

1. REPORTABLE: **NO**/YES
2. OF INTEREST TO OTHER JUDGES: **NO**/YES
3. REVISED.

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SIGNATURE DATE

In the matter of:

adidas INTERNATIONAL TRADING AG (Switzerland)

First Applicant

adidas SOUTH AFRICA (PTY) LTD

Second Applicant

AND

THE COMMISSIONER FOR THE SOUTH AFRICAN

REVENUE SERVICE

Respondent

JUDGEMENT

THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY E-MAIL. THE DATE AND TIME OF HAND DOWN IS DEEMED TO BE 6 JUNE 2023

A. Introduction

1. This is an opposed application for referral to trial, in terms of Rule 6 (5) (g) of the Uniform Rules of Court. In their application, the applicants concede that some disputes of fact were foreseeable; however, what has now arisen points to fundamental and wide ranging disputes of fact, rendering the matter incapable of resolution on motion. The applicants submit that a referral to trial is apposite owing to the complexities involved, the diverse character of the business interests and complicated questions which are steeped in accounting.
2. The respondent, SARS, says the application ought to be dismissed as the disputes of fact were not only foreseeable but were foreseen and are covered in over six years' worth of correspondence exchanged between the parties. That correspondence is annexed to and dealt with in the founding affidavits. The respondent, in addition to the years of correspondence demonstrating disputes of fact, points to several instances in which the applicants could have and should have applied for trial but failed to do so. Instead of applying for the referral timeously, SARS says the applicants simply escalated commitment, continued to file various voluminous pleadings which required the respondent to deal with and answer. It was only at the judicial case management meeting of 10 June 2022 that the applicants changed course and decided they no

longer wished to continue with motion proceedings, having wasted valuable time, resources and costs, which could have been avoided had the applicants abided by the general rule of applying for referral timeously. Placing reliance on various authorities, the respondent further submits that the review component of the applicants' application was incompetent to start with, as the appeal contemplated in the Act is an appeal in the widest sense, which envisages a complete rehearing of the matter with or without additional evidence.

B. Background

3. A high level background of how the parties arrived at this point is necessary.

According to SARS, on 25 March 2013, it issued a letter of audit findings to the applicants. In the letter, SARS identified that aSA and aITBV had engaged in a simulated exercise which had led to underpayment of duty. The details of such simulation, according to SARS, were dealt with comprehensively in its letter. In April 2019, following an exchange of correspondence covering primarily the same issues for well over six years, the applicants brought their main application, having foreseen the disputes of fact.

C. Merits

4. The relevant aspects of the order sought by the applicants in their Notice of Motion reads:

1. That the High Court directs that it has jurisdiction.....

2. The Commissioner's determination giving rise to the debt raised against the applicants in his demand dated 1 June 2018 is hereby set aside on appeal, as contemplated by the Customs and Excise Act, 1964.

3. In addition, (or in the alternative) to prayer 2, the Commissioner's demand of 1 June 2018 is hereby set aside on review as contemplated by Rule 53, read with the provisions of the Promotion of Administrative Justice Act, 3 of 2000 and is declared invalid as contemplated in section 172 (1) of the Constitution of the Republic of South Africa, 1996.

5. In broad fashion, the applicants identify the disputes of fact as follows:

- (i) the alleged simulation;
- (ii) sale for export; and
- (iii) quantum.

6. In respect of the alleged simulation, the applicants submit that SARS' case against them is based on allegations of tax evasion and/or fraud. On the question of the sale for export, the applicants say the trial court will have to determine, *inter alia*, questions surrounding ownership and risk in the goods coupled with whether duty was paid on the basis of delivery-duty-paid (DDP), as claimed by the applicants, or on the basis of delivery ex-ship as contended by SARS. Finally, with regard to quantum, the applicants contend that they do not owe anything to SARS while SARS seeks to recover a large amount of money from them. All of these issues combined, contend the applicants, militate in favour of a referral to trial so that the issues are properly ventilated and the applicants are afforded the opportunity to properly answer to the allegations of fraud themselves. I may record that the amount SARS seeks to recover is set out in the pleadings as roughly R1.8 billion.

7. Referring to the Notice of Motion, the applicants submit, with reference to the Constitutional Court reasoning in *Mamadi and Another v Premier of Limpopo Province and Others*¹, that a court does not have a discretion under Rule 6 (5) (g) to dismiss an application brought in terms of Rule 53 on the basis that disputes of fact were reasonably anticipated on paper. The applicants submit that not all the disputes were foreseeable. However, what has now arisen are wide ranging disputes, which cannot be resolved on Motion. Secondly, it is common cause that review proceedings are normally instituted by way of motion, so that the applicant does not launch proceedings in the dark while the other side has daylight vision with regard to the issues pertinent to the application. Thirdly, placing reliance on various authorities, the applicants contend that in any event, a court not counsel is best suited to decide whether a matter is to be referred to trial. It is the applicants' submission that the order sought by SARS simply shuts the doors of court in their faces, which is Constitutionally untenable in light of section 34 of the Constitution, 1996.

8. SARS began its case by making reference to the issues identified in its letter of March 2013. It referred to the disputes as identified in that letter. They are:

- (i) whether adidas SA (aSA) was the importer as opposed to adidas International Trading BV (aITBV), which was declared as the importer when the goods were cleared for home consumption; and
- (ii) whether the 'second sale' i.e., the sale from aITBV to aSA, was concluded before the goods were shipped to South Africa.

¹ [2022] ZACC 2, paragraph 43.

9. SARS contends that the applicants had sought to create the impression that the goods were imported into South Africa by aITBV for later sale from their warehouse, as if aITBV was a local supplier and its sales to aSA took place after the goods had been imported into South Africa when invoices were generated. To that extent, the transaction was simulated to give the appearance of a later sale when in fact the sale between aITBV and aSA was the sale which gave rise to the export to and import into South Africa. SARS further contends that aITBV had no physical presence in South Africa and had no staff. Everything that aITBV would have been required to do, were it genuinely selling its goods locally in South Africa after importation, was in fact done by employees of aSA and the warehouse, UTI, which dealt with the local employees of aSA.

10. These contentions, says SARS, are set out in the founding affidavit. They came as no surprise to the applicants because they were dealt with expressly in correspondence over a number of years, prior to the main application; this correspondence is attached to and referred to in the founding affidavit. In addition to the letter of 25 March 2013, SARS refers to, *inter alia*, its letters of 21 October 2015 and 1 June 2018, where SARS relied on exactly the same audit findings as set out in the letter of 25 March to make its determination and raise the debt.

11. With regard to the third dispute dealing with quantum, SARS contends that the dispute pertains to the methodology adopted by SARS in determining the customs

value. This dispute was known to the applicants well before they instituted the proceedings. The material disputes continued throughout the correspondence exchanged by the parties, submits SARS. Yet on 26 April 2019, the applicants brought this application comprising 1312 pages, including a forensic accountant's report, having known about the material disputes of fact. The respondents conclude that the disputes of fact were not only foreseeable, they were known to the applicants.

12. On the applicants' failure to timeously apply for referral to trial, the respondent refers, by way of examples, to the applicants' filing of their supplementary affidavit on 31 October 2019 after receiving the record furnished in terms of Rule 53. According to the respondent, the applicants did not rely on any document furnished as part of the record. Instead, they further escalated the disputes with a further forensic accountant's report. The respondent says it must be accepted that, at that stage, the applicants had clearly elected to press on with the application, as the respondents had to deal with the founding papers and file an answering affidavit.

13. On 10 September 2020, the respondent filed its answering affidavit which raised the disputes of fact foreshadowed in the correspondence exchanged over six years prior to the application. Yet on 2 August 2021, the applicants delivered a further 650 pages worth of a reply, together with an application running to almost 200 pages to strike out various passages in the answering affidavit. In responses to a supplementary affidavit filed by the respondents to correct certain annexures and respond to the criticisms raised against its answering affidavit, the applicants filed a

further 26 pages of a supplementary replying affidavit bringing the total record to 2270 pages. On 10 June 2022, at judicial case management, the applicants indicated for the first time that they no longer wished to pursue the matter by way of motion and that they intended to apply for referral to trial. This, after many years of wasted resources, time and costs.

D. The law

14. The discretion vested in the court when dealing with the question of hearing of oral evidence is set out in *Pahad Shipping CC v Commissioner for the South African Revenue Services*, and was expressed by the Court as follows:

'In terms of rule 6(5)(g) a court has a wide discretion in regard to the hearing of oral evidence where an application cannot properly be decided on affidavit...[20] However, it has been held in a number of cases that an application to refer a matter to evidence should be made at the outset and not after argument ... As was stated by Corbett JA in *Kalil* at 981E-F the rule is a salutary general rule. Unnecessary costs and delay can be avoided by following the general rule. But Corbett JA also stated that the rule is not inflexible. In *Du Plessis and another NNO v Rolfes Ltd* [1996] ZASCA 45, 1997 (2) SA 354 (A) at 366G-367A this court dealt with an application which was made for the first time during argument in this court. The application was dismissed but it is implicit in the judgment that, in appropriate circumstances, this court may decide that a matter should be referred to evidence even where no application for such referral had been made in the court below.'²

15. In *Mamadi*, the court reasoned:

'Does a litigant who brings a review in terms of rule 53, and thus on motion where disputes of fact are reasonably foreseeable, act in an impermissible way? Quite plainly not. Litigants are constitutionally entitled to make use of rule 53 in review proceedings, in order to properly give effect to their section 34 rights. 36 It therefore cannot be that a litigant can be penalised through the use of rule 6(5)(g), merely because rule 53 was utilised. It follows that a court does not have a discretion under rule 6(5)(g) to dismiss an

² (529/08) [2009] ZASCA 172; [2010] 2 All SA 246 (SCA) (2 December 2009), paragraphs 19-20.

application brought in terms of rule 53 on the basis that reasonably anticipated disputes of fact arise on the papers. ...[44] This does not mean that an applicant in a rule 53 application is entitled, as of right, to have a matter referred to oral evidence or trial. General principles governing the referral of a matter to oral evidence or trial remain applicable. Litigants should, as a general rule, apply for a referral to oral evidence or trial, where warranted, **as soon as the affidavits have been exchanged**. Where timeous application is not made, courts are, in general, entitled to proceed on the basis that the applicant has accepted that factual disputes will be resolved by application of *Plascon-Evans*...A court should however proceed in a rule 53 application with caution....¹³ (own emphasis)

E. Discussion and Conclusion

16. The complaint raised by SARS is valid, given the history of correspondence, and the exchanges of lengthy affidavits. It cannot be taken lightly. Having said, the principle espoused in *Pahad* makes plain that the court is vested with a wide discretion when it comes to hearing of oral evidence, where an application cannot be properly decided on affidavit. That an applicant must act timeously is beyond dispute as can be seen from the two decisions quoted in this judgment. In this case, the applicants missed several opportunities to apply for the referral of the matter to trial. Even after receiving the record and the answering affidavit, the applicants simply escalated their commitment and continued to exchange pleadings in circumstances where the disputes were clearly foreseen.

³ Note 1 *supra* at paragraphs 43-44.

17. There is also the contention raised by the respondent to consider, i.e., that the Act makes provision for an appeal in the widest sense as opposed to a review, as espoused in *Pahad*:

'The parties dealt with the case as if it was an appeal in the wide sense, i.e., as if it was a complete re-hearing of the case and a fresh determination of the merits of the case. Correctly so, in my view, for the following reasons: (a) The Act does not require of the respondent to hear evidence, to give any reasons for his determination or to keep any record of proceedings. As was held in *Tikly* at 592B-C these considerations militate completely against the 'appeal' being an appeal in the strict sense. (b) It is implicit in the provisions of s 65(4)(c)(ii)(bb) to the effect that the determination by the respondent cease to be in force from the date of a final judgment by the high court or this court that the court must itself make a determination upon appeal to it. That eliminates the appeal being a review in the sense set out in (iii) above (see *Tikly* 591H-592A). (c) As there is no provision for a hearing before the determination of the transaction value by the respondent, the legislature must, in my view, have intended 'appeal' to be an appeal in the wide sense.'⁴

18. The applicants say their Notice of Motion makes plain that they had brought a review. It seems to me that for purpose of deciding whether to refer the matter to trial there are further considerations beyond the question of whether a review was properly brought. These are, first, the matter is by no means a simple one. Second, that there are material disputes of fact is conceded by both parties. Third, the applicants are accused of engaging in a simulated transaction with the result that they underpaid tax. This allegation, according to the applicants, points to fraud. Fourth, the amounts in issue are by no means negligible. For all these reasons, it seems to me that in order to do justice, the matter must be referred to trial. With regard to the failure to apply timeously for the referral and whatever conduct the applicants

⁴ Paragraph 14.

engaged in which can be directly attributed to having wasted costs, time and resources, is something that can be dealt with by the trial court by way of an appropriate costs order. The answer is not to close the door to the applicants at this stage.

G. Order

19. This matter is referred to trial.

(i) The Notice of Motion shall stand as a simple summons.

(ii) The applicants shall deliver a declaration in terms of rule 20 within one month from date of this order.

(iii) Thereafter the rules and time periods for the conduct of actions provided for in the Uniform Rules of court shall apply to the further conduct of the matter.

NN BAM

JUDGE OF THE HIGH COURT,

PRETORIA

DOH: 13 SEPTEMBER 2022

DOJ: 6 JUNE 2023

Appearances:

For Applicant:

Adv A.P Joubert SC

Adv E Muller

Instructed by:

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For Respondent:

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