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Case No. 79/1983

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

BP SOUTHERN AFRICA (PROPRIETARY) LIMITED

CALTEX OIL (SA) (PROPRIETARY) LIMITED

ESSO STANDARD SOUTH AFRICA (PROPRIETARY) LIMITED

MOBIL OIL SOUTHERN AFRICA (PROPRIETARY) LIMITED

SHELL SOUTH AFRICA (PROPRIETARY) LIMITED

SONAREP (SOUTH AFRICA) (PROPRIETARY) LIMITED

TOTAL SOUTH AFRICA (PROPRIETARY) LIMITED

TREK PETROLEUM (PROPRIETARY) LIMITED Appellants

and

THE SECRETARY FOR CUSTOMS AND EXCISE First Respondent

and

THE MINISTER OF FINANCE Second Respondent

CORAM: KOTZÉ, MILLER, VAN HEERDEN JJA, GALGUT et ELOFF AJJA

HEARD: 15 NOVEMBER 1984

DELIVERED: 26 NOVEMBER 1984

/JUDGMENT ...

JUDGMENT

VAN HEERDEN, JA:

This appeal concerns the interpretation of a number of the provisions of the Customs and Excise Act (Act 91 of 1964) and of the regulations promulgated under that Act. Amendments subsequent to the end of June 1978 are not relevant, but for convenience I shall use the present tense when referring to such provisions even though they may later have been amended.

By virtue of the definition of "excise duty" in s. 1 read with the provisions of Part 2 of Schedule 1 of the Act excise duty is payable on the proceeds of sales of mineral oil products manufactured in the Republic. The duty is payable "at the time of entry for home consumption" of such products, being excisable

/goods ...

goods (s. 47 (1)). "Home consumption" means consumption for use in the Republic (s. 1). Liability for the payment of duty is imposed on the manufacturer or owner of the goods (s. 44 (8)).

S. 37 (1) makes provision for the rates at which, subject to the provisions of s. 75, duty on goods manufactured in a customs and excise warehouse is payable on entry for home consumption. In so far as it is material, s. 27 (1) provides that goods liable to excise duty may not be manufactured except in such a warehouse, which is licensed under the Act. Goods so manufactured may be entered for storage in a customs and excise warehouse with deferment of payment of duty (s. 20 (1) (a)). But no goods stored or manufactured in a customs and excise warehouse may be taken or delivered therefrom except upon due entry for one of

a number of purposes, the relevant one being "(a) home consumption and payment of any duty thereon." (s. 20 (4)).

The Act therefore provides that goods manufactured locally and subject to excise duty may not be delivered from a customs and excise warehouse to, e.g., a purchaser for consumption in the Republic unless such goods have been entered for home consumption and unless excise duty has been paid. The only exception is to be found in s. 38 (4). I shall revert to that subsection.

S. 75 (1) (d) provides that, subject to the provisions of the Act and to any conditions which the Secretary may impose:

> "in respect of any excisable goods described in Schedule No. 6, a rebate of the excise duty specified in Part 2 of Schedule No. 1

> in respect of such goods at the time of entry for home consumption thereof or a refund of the excise duty actually paid at the time of entry for home consumption shall be granted to the extent and in the circumstances stated in the item of Schedule No. 6 in which such goods are specified, subject to compliance with the provisions of the said item ..."

Schedule 6 to the Act contains an item (609.05.10) providing for a rebate of duty on distillate fuels for use for certain purposes (hereinafter referred to as reduced rate purposes). Diesel oil is a distillate fuel.

The appellants are oil companies carrying on business as distributors of inter alia diesel oil in South Africa. For years they have been selling diesel oil for various purposes, including reduced rate purposes. An audit conducted in 1977 revealed that in certain instances they had not complied with regulation 410.04.04 (a) promulgated under s. 120 of the Act (G.N. R.1770 of 5 October 1973 as amended by G.N. R.1088 of 6 June 1975). That regulation must be read with regulation 609.05.10

/which ...

which provides that the former regulation shall mutatis mutandis apply in respect of any goods specified in and supplied under the provisions of the aforesaid item 609.05.10.

Regulation 410.04.04 (a) reads as follows:

> "Except as may be permitted by the Secretary no person shall be entitled to be supplied with distillate fuels (for example, gas oil and diesel oil) or residual fuel oils (furnace oils) under rebate of duty under the provisions of paragraph (2) of tariff heading 27.10 relating to such oils in item 410.04, unless, at the time of purchase or delivery of such oil, he furnishes the supplier thereof with a declaration in a form approved by the Secretary and no supplier or re-seller shall supply or sell oil admissible under rebate of duty in terms of the said paragraph unless the person to whom such oil is supplied or sold, has complied with the provisions of this paragraph."

Non-compliance with the regulation consisted of a failure to obtain the required declaration timeously in cases where the appellants supplied diesel

/oil ...

oil to users for a reduced rate purpose. Subsequent to the audit the first respondent ("the Secretary") held the appellants liable for the payment of full excise duty on diesel oil supplied in such cases. The appellants then applied to the Secretary for condonation of their failure to obtain declarations at the time of delivery of the oil concerned, but he considered that he was not entitled to accede to their requests.

After the appellants had unsuccessfully approached the second respondent, they instituted proceedings against the respondents in the Cape Provincial Division. In their application they alleged that numerous claims had been made against them by the Secretary for payment of the difference between the full duty payable (if a rebate did not apply) and the limited amount of duty actually paid on the diesel oil supplied in contravention of the regulation. In other cases,

so the appellants also alleged, full duty had been paid but claims for refunds by them were later disallowed by the Secretary. The amounts involved totalled some R3 million.

In so far as the notice of motion is still material, the appellants claimed an order declaring that regulation 410.04.04 (a) is invalid, or alternatively that the Secretary is entitled to permit "a rebate and/or a refund of excise duty paid in respect of distillate fuel where he is satisfied that the said fuel was used ... [for reduced rate purposes] ... notwithstanding that the prescribed signed declaration was not furnished at the time of delivery of the said fuel ..."

As can be inferred from the relief claimed, the appellants contended that the regulation was ultra

/vires ...

vires, and alternatively that the introductory words of the regulation, viz, "[e]xcept as may be permitted by the Secretary" conferred upon him a discretion also in respect of cases where the required declaration was not timeously obtained with his prior approval. These contentions were disputed by the Secretary and the second respondent and rejected by the court a quo (Schock and Tebbutt, JJ). Hence the application was dismissed with costs.

Prior to the hearing of the appeal the appellants filed an application for leave to amend their notice of motion by the insertion of a further prayer for an order declaring:

> "that compliance with regulation 410.04.04 of Part 1 of the fourth schedule to the regulations made in terms of the Customs and Excise Act No. 91 of 1964, is not a condition precedent to the entitlement to a rebate of excise duty on distillate fuels or a resolutive condition depriving Appellants of their

entitlement to such rebate in terms of item 609.05.10: 105.05/105.10 of Schedule 6 to Act 91 of 1964."

The appellants alleged that a further point of law arose which was not argued in the court a quo, viz., that the regulation is intended to be an administrative measure only and does not purport to be a condition on the fulfilment of which the entitlement to a rebate depends. It was also alleged that the proposed amendment is not dependent on any issue of fact but relates solely to the provisions of the Act and the regulations.

The respondents filed an affidavit opposing the application and the appellants reacted by filing a replying affidavit. I find it difficult to understand why it was considered necessary to file these affidavits since their contents could have been put

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forward by counsel during argument in this court. Be that as it may, counsel for the respondents eventually did not oppose the application for amendment and it was granted because the point involved concerns a purely legal question, does not involve the presentation of any evidence and enables this court to deal fully with the real (main) dispute between the parties (Trust Bank of Africa Ltd v Imperial Garage and Filling Station, 1963 (1) SA 123 (A) 130). In accordance with the tender made in the application for amendment the appellants will have to pay the costs occasioned by that application, excluding the costs of opposition thereto.

There were also three applications for condonation before this court. One of these related to the late filing of the respondents' aforesaid opposing affidavit. In view of counsel's decision not to oppose the amendment the application fell away but

it is clear that the respondents will have to pay the costs occasioned by their application. The other two applications were filed by two of the appellants, Esso and Trek, who sought condonation of their failure to file powers of attorney timeously. These applications were not opposed and were granted during the hearing of the appeal. Here, again, the applicants for condonation will have to pay the costs occasioned by their applications.

It is common cause that, but for the provisions of regulation 410.04.04 (a), the appellants were entitled to rebates in those cases where they failed to obtain the required declarations timeously. Although not spelled out in the application in the court a quo, it also appears to be common cause that prior to delivery for reduced rate purposes the diesel oil in question was stored in customs and excise warehouses.

/Now ...

Now, regulation 410.04.04 (a) does not expressly provide that in the absence of compliance with its provisions the supplier is not entitled to a rebate, or that a pre-existing entitlement to a rebate falls away. Nor, in my view, does the regulation so provide by implication. Indeed, the phraseology of the regulation seems to presuppose that a rebate is applicable. All that is provided, is that distillate fuels under rebate of duty may not be supplied or obtained unless the receiver furnishes the supplier with the prescribed declaration at the time of purchase or delivery. The requirement therefore clearly relates to fuel already entered under rebate of duty. Viewed in isolation the regulation consequently purports to be no more than an administrative measure designed to ensure that fuel under rebate of duty is in fact delivered by the supplier and used by the receiver for a reduced rate

/purpose ...

purpose. (By virtue of s. 78 (1), read with s. 1, of the Act, a contravention of the regulation constitutes an offence.)

I also do not find any indication in the general scheme of the Act that non-compliance with the regulation was intended to deprive a supplier of his right to a rebate. On the contrary - and subject to the provisions of s. 38 (4) and s. 75 (5) (a) (i), to which I shall return - duty is payable and the rate thereof determined at the time of entry for home consumption which must take place prior to delivery of the product concerned. It will be recalled that in terms of s. 20 (4) goods which have been manufactured or stored in a customs and excise warehouse may not be taken or delivered from the warehouse for home consumption unless they have been entered for such consumption and the duty thereon has been paid, and

/that ...

that in terms of s. 47 (1) duty on excisable goods shall be paid at the time of entry for home consumption. I have already mentioned that the Act makes provision for only one exception. This is to be found in s. 38 (4) which provides that the Minister may by regulation permit inter alia any excisable goods to be removed from a customs and excise warehouse on the issuing by the owner of such goods of a document prescribed or approved by the Secretary, and the payment of duty on such goods at a time and in a manner specified by regulation. The subsection further provides that such document shall for the purposes of s. 20 (4) - and subject to the provisions of s. 39 (2 A), which are not material - be deemed to be a due entry from the time of removal of those goods from the warehouse.

It seems clear that if in terms of the regulations

(4.04.02 and 4.04.09) made under s. 38 (4) excisable goods are removed from a customs and excise warehouse for home consumption, the issuing of the required document is by virtue of s. 38 (4), read with s. 20 (4), deemed to be due entry for home consumption. And although in such a case payment of duty may be deferred, liability accrues and the rate of the duty is determined prior to actual delivery to a consumer, i.e., before regulation 410.04.04 (a) can become operative.

Counsel for the respondents submitted, however, that although the rate of duty payable (and therefore the applicability of a rebate) is determined at the time of entry for home consumption, such determination is conditional in that full duty on goods entered under rebate of duty may later become payable. That much may be conceded - indeed, one of the main purposes of s. 75 (5) (a) (i) is to ensure that full duty is

/payable ...

payable on goods under rebate of duty but supplied for a purpose other than that for which they were entered, in casu otherwise than for a reduced rate purpose. As regards the disposal of goods, liability for full duty in terms of that subsection accrues, however, only if the goods have been disposed of "otherwise than in accordance with the provisions of this section [i.e., section 75] and of the item under which they were so entered." And since the diesel oil in question was in fact delivered for a reduced rate purpose, counsel for the respondents eventually conceded that the oil was disposed of in accordance with item 609.05.10. Nor could he point to any provision of s. 75 which was not complied with by the appellants in disposing of the oil in contravention of regulation 410.04.04 (a).

Counsel for the respondents also sought to

/place ...

place reliance on s. 75 (10) of the Act which reads as follows:

> "No goods may be entered or acquired under rebate of duty under this section or the regulations until the person so entering or acquiring them has furnished such security as the Commissioner may require and has complied with such other conditions (including registration with the Commissioner of his premises and plant) as may be prescribed by the Minister by regulation in respect of any goods specified in any item of Schedule No. 3, 4, 6 or 7."

The Court a quo found that the "acquisition" referred to in s. 75 (10) is not the acquisition by the end user of the fuel since he is not the person entitled to a rebate. That finding was, rightly, in my view, not challenged in this Court. It follows that for present purposes the subsection requires compliance with only such regulations as are applicable up to the stage of entry of diesel oil for home consumption which, as already stated, takes place prior

/to ...

to delivery of the oil to a consumer. And eventually counsel was constrained to concede that the subsection does not assist the respondents.

It will be recalled that s. 75 (1) (d) makes provision for a rebate of duty "subject to compliance with the provisions" of the relevant item of Schedule 6, and that the appellants in fact complied with such provisions. It is, however, not without significance that neither s. 75 (1) (d) nor s. 75 (5) (a) (i) makes the provision for a rebate of duty subject to compliance with any of the regulations.

The main contention of counsel for the respondents was based on the introductory phrase of s. 75 (1), the material part of which reads "[s]ubject to the provisions of this Act". Counsel submitted that since in terms of s. 1 "this Act" includes any regulation made under the Act, the right to a rebate provided for in s. 75 (1) (d) is subject to compliance

/with ...

with the regulations. And since the appellants failed to comply with regulation 410.04.04 (a), so the submission continued, they did not dispose of the diesel oil concerned in accordance with the provisions of s. 75. Consequently full duty became payable under s. 75 (5) (a) (i).

The above submission in my view unjustifiably equates "subject to the provisions of this Act" with "subject to compliance with" such provisions. As already stated, the latter phrase was employed in s. 75 (d) and s. 75 (5) (a) (i) of the Act, and had it been the legislature's intention to make the right to a rebate dependent on actual compliance with all the other sections of the Act and also the regulations, it would no doubt have said so. Consequently I have little doubt that it could not have been the intention to grant a right to a rebate subject to compliance

/with ...

with each and every provision of the Act and the regulations, or at any rate such provisions as have a bearing on the entry or disposal of goods under rebate of duty. In this regard it suffices to refer to regulation 410.04.04 (b) which provides that a "seller ... shall keep such books and documents relating to such supply [i.e., supply of distillate fuel in terms of para. (a)] as the Secretary may require, and the said books and documents shall at all reasonable times be available for inspection by the Controller". I find it difficult to believe that the legislature could have intended that a supplier should forfeit his right to a rebate merely because, e.g., the relevants books and documents were fortuitously not available for inspection at a time which can be regarded as "reasonable".

If the phrase under consideration is read in conjunction with the operative provisions of s. 75

/it ...

it plainly means that the rebates provided for in paragraphs (a) to (e) are subject to such other provisions of the Act (including the regulations) as may further qualify the entitlement to a rebate. I have already pointed out that regulation 410.04.04 contains no such qualification. It does not provide, either expressly or by implication, that a right to a rebate conferred by s. 75 (c) is conditional on compliance with its provisions, or that a pre-existing right to a rebate falls away in case of non-compliance.

The regulation falls to be contrasted with a number of other regulations which indeed qualify the right to a rebate. I mention only the following examples:

1) In terms of regulation 608.01.01 the granting

/of ...

of a rebate or refund of duty in terms of the provisions of item 608.01 is subject to submission to the Controller of a prescribed application.

2) Regulation 609.04.10 provides that no person shall be entitled to a rebate unless he furnishes prescribed returns, particulars and declarations.

3) In terms of regulation 609.04.20 any rebate granted under item 609.04.20 "shall be subject" inter alia to a declaration by a responsible official of the church that the wine supplied will be used in the church concerned solely for religious purposes.

By contrast regulation 410.04.04 (a) is singularly silent as far as the effect of non-compliance with its provisions on the entitlement to a rebate is concerned, and hence I do not think that the introductory phrase of s. 75 (1) assists the respondents.

/Of ...

Of course, had the regulation qualified the right to a rebate in the sense contended for by counsel for the respondents, the question would have arisen whether its promulgation was *intra vires* the powers to make regulations conferred upon the Minister by s. 120 of the Act.

In the result I hold that a mere non-compliance with the provisions of regulation 410.04.04 (d) did not deprive the appellants of their entitlement to rebates. It follows that their main prayer must be granted, and it is therefore unnecessary to deal with the bases on which the court *a quo* dismissed the application.

The appeal succeeds with costs, including the costs of two counsel, and the following is substituted for the order of the court *a quo*:

/1) ...

1) It is declared that compliance with regulation 410.04.04 of Part 1 of the fourth schedule to the regulations made in terms of the Customs and Excise Act No. 91 of 1964, is not a condition precedent to the entitlement to a rebate of excise duty on distillate fuels or a resolutive condition depriving the Applicants of their entitlement to such rebate in terms of item 609.05.10: 105.05/105.10 of Schedule 6 to Act 91 of 1964.

2) The respondents are directed to pay the costs of the application.

The following further orders are made:

(a) The appellants are directed to pay the costs

/occasioned ...

occasioned by their application for amendment of their original notice of motion, excluding the costs of opposition thereof.

(b) The respondents are directed to pay the costs occasioned by their application for condonation of the late filing of their opposing affidavit in respect of the application mentioned in (a) above.

(c) The third and eighth appellants, Esso and Trek, are directed to pay the costs occasioned by their applications for condonation of the late filing of their powers of attorney.

H.J.O. VAN HEERDEN JA

KOTZé JA

MILLER JA

GALGUT AJA

ELOFF AJA

CONCUR