THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO: 323/95

In the matter between:

DIE SUIDER-AFRIKAANSE KOöPERATIEWE

SITRUSBEURS BEPERK Appellant

and

DIE DIREKTEUR-GENERAAL:

HANDEL EN NYWERHEID 1st Respondent

DIE MINISTER VAN HANDEL EN NYWERHEID 2nd Respondent

CORAM: E M GROSSKOPF, F H GROSSKOPF, HARMS, MARAIS and ZULMAN, JJA

HEARD: 27 FEBRUARY 1997

DELIVERED: 13 MARCH 1997

J U D G M E N T

HARMS JA/

HARMS JA:

As part of its export trade promotion the Department of Trade and Industries introduced an Export Incentive Scheme on 31 October 1980. This scheme was replaced by the simpler General Export Incentive Scheme ("GEIS") with effect from 1 April 1990. GEIS is said to be a performance based scheme — the more an exporter exports, the greater the benefits he receives by way of financial rewards and tax concessions. Other features of the scheme include the encouragement of benef iciation and the export of products with a high local content.

In Dilokong Chrome Mines (Edms) Bpk v Direkteur-Generaal, Departement van Handel en Nywerneid 1992 (4) SA 1 (A) this Court, per Botha JA, had occasion to consider the nature of the original scheme. Some of his findings are pertinent to GEIS and this appeal:

(a) the scheme creates a relationship between the exporter and the State represented by the Minister (at 14A-C);

(b) the exporter stands in this relationship as subject vis-a-vis the State as governmental authority. It is governed by the rules of administrative law (at 18B-D);

(c) the scheme was promulgated by virtue of a state prerogative (at 19J-20I);

(d) it imposes no duties and infringes no right of the subject (at 20I-J);

(e) the Director-General of the Department, in administering the scheme, does so "as 'n funksionaris wat sy bevoegdheid ontleen aan die bepalings van die skema. As sodanig, en as ' n amptenaar van die Staat, is hy gebonde om op te tree binne die raamwerk van die skema. Hy tree dan op op 'n administratiefregtelike vlak wat sy

beslissings beregbaar maak deur 'n Hof" (at 22C-E);

(f) the scheme has pro tanto the force and effect of legislation (at 22E) and must be interpreted in the same manner (at 32A-C).

The rules or, as they are called, the "Guidelines" in respect of GEIS, have since been amended. Revision no 2 of 1 September 1992 (which became effective on 1 October 1992) is the version relevant to this case. There are indications in it (especially in par 3,11) that some amendments were effected in response to the Dilokong judgment, but these changes do not affect the abovementioned principles derived from Dilokong, nor the outcome of this appeal.

The appellant is an exporter of citrus and it exports on behalf of its farmer members. It was at all material times a duly registered and approved exporter under GEIS. For the claim period ending on 31 January

1991 it was paid under GEIS by way of promissory notes an amount of R12 075 305 and, for the period ending on 31 January 1992, R25 428 291. A problem and the cause of this litigation arose in relation to the claim for the period ending 31 January 1993. Due to delays somewhat beyond its control, the appellant submitted this claim (for R40 883 709,21) only on 28 May 1993. The claim was rejected in due course because it had been lodged out of time. The Director-General (the first respondent) adopted the attitude that he was bound to reject all late claims since he had no discretion to condone the failure to lodge claims in good time. His rejection gave rise to a review application in the Transvaal Provincial Division in which the appellant attacked the Director-General's denial of "jurisdiction". No relief was sought against the Minister (the second respondent). Preiss J dismissed the application with costs but granted leave to appeal to this Court.

The Guidelines were not drafted in familiar statutory language but were written more in a narrative form. This fact probably gave rise to the statement in Dilokong (at 32B-C) that it is conceivable that a benevolent approach to their interpretation might be permissible. Without wishing to adopt such approach in this case, I should note that I had little success in my attempt to find a coherent scheme of legislative thought or consistent usage of words or phrases.

The Director-General's decision was based upon par 4.3.1 of the Guidelines. Par 4, entitled "Claims Procedure", provides as follows:

> "4.1 Prospective claimants must ascertain whether they have been registered under the General Export Incentive Scheme before submitting their claims. Claim forms will be returned to applicants who have failed to register with the Department as exporters and claimants under the scheme.
>
> 4.2 The onus rests with the claimant to

ensure that all relevant information is included in the claim form(s). Incomplete forms will be returned to claimants.

4.3 Claims must be clearly addressed and can either be handed in in person at room 909 of the Department of Trade and Industry, Momentum Life Building, Cnr of Prinsloo and Pretorius Streets, Pretoria or at the Regional Representatives' offices in Cape Town, Durban or Port Elizabeth, or be posted to the Director-General: Trade and Industry, Private Bag X84, Pretoria, 0001.

4.3.1 Claims must be prepared timeously as only claims received within three months after the claim period expires will be entertained.

4.3.2 The term within [in] paragraph 4.3.1 above must be so construed as to mean a date on or before three months after the claim period which has been opted for by the claimant, ie either six months or twelve months, expires.

4.3.3 Claims posted before the expiry date but handed in or received after the expiry date will, however, be entertained if proof can be furnished that they have been dispatched by registered or certified mail before the expiry date.

4.3.4 The term expiry date in paragraph 4.3.3 above means a date three months later than the termination date of the claim period.

4.3.5 All claims will be date-stamped on the date of receipt and this date will be considered as the actual date of receipt.

4.3.6 An audit certificate completed by an external auditor who is a practising member of the Institute of Chartered Accountants of South Africa, must accompany all claims. It is incumbent on the claimant to immediately inform the Department of all adjustments to claims (eg credit notes passed, cancelled sales, CGIC claims iro lost revenue, etc.). See Annexures 6A, 6B and 6C. No claims will be processed without these audit certificates.

4.3.7 Commission paid in South Africa and transferred abroad at a later stage will not be allowed for inclusion in the export sales value (U) in the formula.

4.3.8 Conies of claims and of the prescribed annexures will not be acceptable. Facsimile transmissions of supporting documents will be accepted under certain conditions which could, inter alia, relate to the speedy processing of claims.

4.7 An alteration on an original claim form must be initialled by the person who signs the declaration called for in Annexure 3A."
[Underlining as in the original.]

It was submitted on behalf of the appellant that what par 4.3.1 provides is that claims received within the presented time limit will, and those received beyond that limit, may be entertained by the Director-General, In support of this argument it was stressed that the paragraph was not framed in the negative (eg that "no claim will be entertained unless ..."). In addition, it was pointed out that any other interpretation might lead to incongruous results: a timeous but incomplete claim has to be entertained, while a late but complete one will not under any circumstances.

The latter consideration, although weighty, has to yield to clear and unambiguous language. Additionally, it is not known with any degree of

certainty whether the Executive had reasons, good or bad, to permit such results. It may be that timeous claims are necessary or desirable for budgetary reasons, or were considered to be so.

Linguistically the paragraph is clear: only timeous claims will be entertained. The corollary must be (as Preiss J held) that late claims will not be entertained. An exception is to be found in par 4.3.3: if dispatched by registered or certified mail within the time limit but received thereafter, the claim will (not "may") be entertained upon proof of such posting. The structure of par 4.3 as a whole supports this conclusion. The addresses where claims may be handed in or to which they may be posted, are clearly stated. The method of calculating the term within (underlined in the regulation) which the claim must be lodged, is spelt out. One exception is made. The exception is not discretionary. The date upon which the claim period

"expires" is called an "expiry date" and it is also underlined in the original. Special provision is made for dating the claim upon receipt, and a presumption is created that such date is the actual date of receipt. In contrast to all of this, the incompleteness of a claim leads only to a delay in the processing thereof.

A further argument on behalf of the appellant was that since reg 4.3.1 deals with form and not substance, the requirement is not peremptory (cf Volschenk v Volschenk 1946 TPD 486 490). The argument would have had more force if the provision affected any right or privilege of the appellant or, for instance, concerned the judicial process (cf Benning v Union Government (Minister of Finance) 1914 AD 180 185; Whitla v Standerton Town Council 1952 (3) SA 567 (T) 572B-G; Phillips v Direkteur vir Sensus 1959 (3) SA 370 (A) 374). But there is authority to the effect that where a statute confers a right, privilege or immunity,

any prescribed formality is imperative (Orpen v Celliers 20 SC 261 264 referred to by both Steyn Die Uitleg van Wette (5th ed) 199 and Devenish interpretation of Statutes 236-237; R v Noorbhai 1945 AD 58 64; Springs Town Council v Macdonald 1968 (2) SA 114 (T)). This presumption, not necessarily a strong one, does not support counsel's premise.

From this it follows that Preiss J was in my judgment correct when he held that the Director-General has no discretion to entertain late claims. That brings me to the alternative argument which is to this effect: unless a procedural statutory provision has been introduced in the interests of the public, it may be renounced by the State for whose benefit it was enacted; this is true even of a peremptory provision; it is particularly applicable to time limits laid down for the benefit of the State; the Director-General has a discretion to waive compliance with the time limit even

if he has no discretion to extend it because of its (assumed for present purposes) peremptory nature; he has failed to exercise this discretion and his failure to do so is reviewable.

It is convenient to mention at the outset the authorities relied upon in support of the argument. Steenkamp v Peri-Urban Areas JfealtA Committee 1946 TPD 424 was concerned with a claim for repayment of moneys paid under protest to a local authority. The defence was one of prescription, based upon an Ordinance which provided that any action against a local authority had to be brought within six months of the time when the cause of action arose. In reply thereto, reliance was placed on a waiver of prescription. The local authority alleged that it could not in law waive its prescriptive right. Roper J disagreed and said (at 429):

> "It is true that there is authority for the proposition that a public body entrusted with powers

> to be exercised for the benefit of the public could [not] waive its right to exercise those powers ... The protection afforded by sec. 172 of the Ordinance is however, in my opinion, not intended for the benefit of the public or the ratepayers, but for the protection of the local authority itself, and on the principle guilibet potest renuntiare I can see no reason why it should not be able to waive it. Similar statutory protection appears to be capable of waiver by departments of the Government. ..."

See also Oosthuizen v Frazerburg Afdelingsraad 1964 (4) SA 95 (C); SA Eagle Insurance Co Ltd v Baruma 1985 (3) SA 42 (A) 49G-50C.

The same principle was applied in relation to the prescriptive period ("vervaltermyn") contained in s 32(1) of the now repealed Police Act 7 of 1958. This provision, it was held, was imperative but could have been waived since it had been enacted "uitsluitlik tot voordeel van die Staat en/of die betrokke polisiebeampte en nie in belang van die algemene publiek nie" (Minister van Polisie en 'n Ander v Gamble en 'n Ander 1979 (4) SA 759 (A) 770B-C). Then there are cases

such as Bezuidenhout v AA Mutual Insurance Association Ltd 1978 (1) SA 703 (A) that deal with the waiver of procedural provisions of statutes such as those that regulate third party claims arising from motor vehicle accidents. Even if peremptory, they may be renounced by the party for whose benefit they have been introduced (at 710A). Although often difficult to apply, the principle underlying these cases is clear and was thus formulated by Innes ACJ in Ritcn and Bhyat v Union Government (Minister of Justice) 1912 AD 719

734-735:

> "But the question remains whether this is a transaction in which waiver can properly operate. The maxim of the Civil Law (C. 2, 3, 29), that every man is able to renounce a right conferred by law for his own benefit was fully recognised by the law of Holland. But it was subject to certain exceptions, of which one was that no one could renounce a right contrary to law, or a right introduced not only for his own benefit, but in the interests of the public as well. (Grot., 3, 24, 6; n. 16; Scnorer, n. 423; Scnrassert, 1, c .1, n. 3, etc.). And the English law on this point is precisely to the same

effect. In Aunt v Hunt (31 L.J., Ch., p. 175), Lord Westbury expressed himself as follows:

> 'The general maxim applies guilibet potest renuntiare juri pro se introducto. I beg attention to the words pro se, because they have been introduced into the maxim to show that no man can renounce a right which his duty to the public, which the claims of society, forbid the renunciation of.'

And Alderson, B., in Granam v Ingleby (1 Exch., p. 657), remarked that 'an individual cannot waive a matter in which the public have an interest.' Cases in which the result of the renunciation or waiver would be to effect something either expressly forbidden by statute or absolutely illegal by common law, of course, present no difficulty. But the same principle must necessarily apply where, the result of a renunciation by an individual would be to abrogate the term of a statute which in their nature are mandatory and not merely directory. (See Craies, p. 83). Because otherwise the result would be not merely to destroy private rights, but to defeat the provisions of an enactment intended on general and public grounds to be peremptory and binding on all concerned."

(The statement, repeated in AA Mutual .Insurance Association .Ltd v Century .Insurance Co .Ltd 1986 (4) SA 93 (A) 101B-C, to the effect that it is not possible

to waive a statutory provision which in its nature is ' mandatory and not merely directory, is too wide and does not accord with Gamble or Bezuidenhout.)

Assuming for the sake of argument that the Director-General was entitled to waive the time constraints set out in par 4.3.1 of the Guideline, counsel's argument raises questions of jurisprudence and logic which were not considered prior to the hearing of the appeal. When put to counsel, they were not really in a position to deal with these problems. The first is whether a "right to waive" is in the nature of an administrative discretion and not a private law right; in other words, is there an administrative duty justiciable by the courts upon a holder of a right to consider, in each instance, whether or not to waive the right; and, should he refuse to waive in appropriate circumstances, may the court order him to waive his rights? If the answer is in the affirmative, the second question arises:

what is then the need to consider whether a provision is, so-called, peremptory if the functionary's discretion and duties are the same irrespective of whether the provision is directory or imperative? In the light of what follows, it becomes unnecessary to pursue these problems any further.

Concerning the application of the principle to the facts of this case, the first issue is whether the time limit was introduced solely for the benefit of the Director-General. I stress this because it is not the Minister's refusal to grant a relaxation that is the subject of this review. It has always been the Director-General ' s attitude that the Minister might, in the exercise of a prerogative, accept the appellant's claim, but that he is unable to do so. It was argued on behalf of the appellant that the sole object of par 4.3.1 of the Guidelines is to assist the Director-General in the administration of GEIS; it does not concern the

"jurisdiction" of the Director-General, but only procedure to be followed.

In Bezuidenhout this Court adopted as sound in principle the distinction drawn sharply in English law "between cases where there is a statutory grant of jurisdiction and those merely governing the procedure of civil courts not affecting the jurisdiction" (at 710D-E read with 710 in fine - 711A). The former may be waived, the latter not. It is not altogether clear whether Bezuidenhout extended the principle to cases not concerned with or related to civil procedure. Assuming it did, I am not satisfied that the provision of par 4.3.1 does not concern "jurisdiction". The scheme provides for the gratuitous dispensing of state funds. It has important fiscal implications for the country. The State's difficulty in financing the project is illustrated by the fact that it became obliged to issue promissory notes instead of making immediate payment.

The provision, therefore, seems to me to be more consistent with an intention to limit the "jurisdiction" of the Director-General than to assist him in administering the scheme. Some support for this conclusion is to be found in par 3.12: it entitles the Director-General to devise and implement rules and guidelines pertaining to the practical implementation and operation of the scheme. The time limit under consideration is not such a rule or guideline. I am consequently of the view that it cannot be said with any degree of confidence that the time limit was laid down solely for the sake of the Director-General and not in the wider state interest (cf Namex (Edms) Bpk v Kommissaris van Binnelandse Inkomste 1994 (2) SA 265 (A) 284H).

The same conclusion is reached if the question is framed as whether waiver would have affected any public policy, interest or right — the rule being that

waiver is not possible in such circumstances (Ports/rig v Deputation Street Investments (Pty) Ltd 1985 (1) SA 83 (D) 90C). Counsel argued that since limitations such as those referred to in Steenkamp, Gamble and Bezuidenhout do not affect public policy or interest, the present limitation ought to be assessed similarly. I disagree. The former are limitations upon a party's right to enforce accrued rights. There is no discernible public interest involved, and it is even arguable that such provisions are against the public interest. The present limitation differs in kind - it limits the right to claim a bounty from the fisc. It is more akin to revenue legislation, where the general approach is that waiver is not permissible (Collectur of Customs v Cape Central Railways (Limited) (1889) 6 sc 402; Soutn African Railways and Harbours v Transvaal Consolidated Land and Exploration Co Ltd 1961 (2) SA 467 (A) 481C-D). In Reckitt and Colman (New

Zealand) Ltd v Taxation Board of Review and Another [1966] NZLR 1032 (CA), Turner J expressed the principle in these words:

> "The authorities which I have already quoted show that while that person may waive compliance with an imperative statutory requirement for whose sole benefit it is enacted, yet if the performance of that requirement is invested with any substantial degree of public interest, waiver will be impossible. The requirement must be pro se introducto. I have come to the firm conclusion that the public has an interest in the due compliance with every requirement of a revenue statute — and if there can be any distinction between revenue statutes I would think that this conclusion is peculiarly applicable to income tax provisions. It is of the highest public importance that in the administration of such statutes every taxpayer shall be treated exactly alike, no concession being made to one to which another is not equally entitled. This is not to say that in cases where the statute has so expressly provided the Commissioner has not a discretion to differentiate between cases — but this is in my opinion only to be done when provision for it is expressly, or it may be impliedly, made in the legislation. Where there is no express provision for discretion, however, and none can be properly implied from the tenor of the statute, the Commissioner can have none; he must with Olympian impartiality hold the scales between taxpayer and Crown giving to no one any latitude not

given to others. Omne capax movet urna nomeu.

> The due and impartial administration of a revenue statute seems to me a matter in which every citizen has an interest, and, in so far as the rights of Commissioner and taxpayers are prescribed in a revenue statute, I do not think that, as regards any provision prescribed therein, it can be said by the taxpayer, of the Commissioner, that it is pro se introducto. Such provisions are prescribed in the process of promulgating a code of rules for the impartial and identical treatment of all taxpayers. Of a somewhat similar provision Isaacs J observed in federal Commissioner of Taxation v Hoffnung & Co Z,td (1928) 42 CL.R. 39: 'I would observe that that limit has been set by Parliament for public purposes, has been set definitely, without power of extension by the Commissioner, as in the case of 'payment' (s 33), and does not fall within the class of cases where a right is given to an individual for his private benefit and which he may waive' (ibid., 54)."

Inherent in the time limit in par 4.3.1 is the protection of state funds and the impartial and identical treatment of the public. To endow the Director-General with the ability to waive this non-discretionary right would in my view thwart these objectives and be contrary to public policy and interest.

The appeal is dismissed with costs, including the costs of two counsel.

L T C HARMS
JUDGE OF APPEAL

E M GROSSKOPF JA)
F H GROSSKOPF JA)
MARAIS JA) Concur
ZULMAN JA)