REPORTABLE

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 491/97

In the matter of:

SOUTH AFRICAN CLOTHING INDUSTRIES (PTY) LTD t/a PRESTIGE LINGERIE Appellant

and

THE DIRECTOR, DEPARTMENT OF TRADE AND INDUSTRY First Respondent
MINISTER OF TRADE AND INDUSTRY Second Respondent

Coram: Mahomed CJ, Hefer, Grosskopf, Marais JJA et Mpati AJA

Date of hearing: 8 November 1999

Date of delivery: 26 November 1999

Trade and Industry - Export Incentives Scheme - Participating exporters not entitled to select claim period with each claim submitted.

J U D G M E N T

Hefer JA

Hefer JA

[1] During 1990 the Department of Trade and Industry initiated a scheme known as the General Export Incentive Scheme to encourage the export of certain goods. The scheme was introduced as a State prerogative and was phased out at the end of 1997 but while it was in operation it had the effect of legislation (*South African Co-operative Citrus Exchange Ltd v Director-General: Trade and Industry and Another* 1997(3) SA 236 (SCA) at 238I-239G) which bound participating exporters and government officials alike. This entailed *inter alia* that participating exporters had to submit periodic claims for the payment of incentives earned in a prescribed manner and within a prescribed time.

[2] The appellant is a manufacturer and exporter of clothing and lingerie. It participated in the scheme from 1990 and until 1994 its claims were duly met. But during 1995 the Department refused to pay part of its claim for the period from July 1994 to June 1995. The appellant sought relief in the Transvaal Provincial Division of the High Court by way of an application to review the Department's refusal. Roux J dismissed the application and subsequently granted leave to appeal to this Court.

[3] Guidelines for its practical operation were published before the scheme came into effect and revised from time to time thereafter. At issue in the appeal is the interpretation of the guidelines relating to the selection of a so-called “claim period”. For an understanding of what a “claim period” really meant (the definition of the term in guideline 1.2 being entirely unhelpful) one has to turn to guidelines 3.2 and 3.3. The claim with which we are concerned was governed partly by Revision No 3 (which came into effect on 1 January 1994) and partly by Revision No 4 (which came into effect on 1 April 1995). After Revision No 3 guidelines 3.2 and 3.3 read as follows:

> “3.2 Claimants must furnish the required basic information on form Annexure 2 to the Department each time when they submit a claim under this scheme.

3.3 Approved claimants can, according to their particular needs, select to have their claims paid out at six or twelve monthly intervals. Claim periods must correspond with the claimant’s financial year, ie half year and year ends and claimants must indicate on form Annexure 2 (see paragraph 3.2 above) their selected claim period (ie six or twelve months). The claim period which has been chosen by a claimant, will only be reviewed in exceptional circumstances and must be fully motivated by the claimant.”

The only material change in Revision No 4 was that the concluding sentence of guideline 3.3 was amended to read:

> “The claim period which has been chosen by a claimant, will only be reviewed in exceptional circumstances and must be fully motivated by the claimant before the expiry date of the selected claim period.”

[4] Of further relevance is guideline 4.3.1 which contained the provision on which the Department relied for its refusal to pay the appellant’s claim in full. After Revision No 3 it read as follows:

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

[5] In its first Annexure 2 form submitted during 1990 the appellant selected a **six months** claim period and the same period was reflected in each form submitted thereafter with every claim until the end of June 1994. The claim for the period from 1 July 1994 to 30 June 1995 was submitted during September 1995 and for the first time the accompanying Annexure 2 form reflected a **twelve months** claim period.

[6] The Department refused to pay the claim relating to the first six months because it was of the view that it had been received out of time. The respondents support this view. They reason that a claimant's first selection (ie the selection in the first Annexure 2 form submitted to the Department) remained binding until reviewed under the concluding sentence of guideline 3.3; the appellant did not ask for the review of its selected period of six months; in order to qualify for payment the claim relating to the period 1 July to 31 December 1994 had to be received within three months after the last date; it was only submitted during September 1995 and could thus not be considered.

[7] The appellant's case is that claimants were entitled to select a new period with the submission of each claim and that it did so when it submitted the claim in question.

[8] There are several reasons why the appellant's contention cannot be sustained. The first is that the wording of the first sentence of guideline 3.3 after Revision No 3 is against it. Approved claimants were only allowed to select the **intervals** at which they required payment of their claims and , for the simple reason that no single claim can be paid "at ... intervals", this is entirely inconsistent with the appellant's submission that each selection related to a particular claim and was to be made after the accrual of the claim. The sentence can only mean that each approved claimant was entitled to select the intervals at which **all his claims** were to be paid.

[9] Although it is obvious to me that the appellant's case really falls at the very first hurdle I will mention the other reasons why I am not able to accept the construction for which it contends.

[10] It seems equally obvious to me that it is exports which had taken place within the chosen claim period which gave rise to the claims which could be made for that period. If this were not so, the provisions limiting the period of time for the submission of claims would be rendered entirely nugatory. If, as counsel for appellant contends, an exporter, when making a claim, is not only free, but obliged, to select simultaneously what period is to govern its submission, no claim could ever be late. The scheme plainly postulated that when and as each claim accrues there will be in place a chosen period by reference to which it will be possible to ascertain the last date upon which such a claim could be made.

[11] Bearing in mind that the scheme was administered by a

department of state and was funded with state money, it comes as no surprise that the guidelines envisaged a measure of consistency in the submission of claims. Government departments operate on strictly controlled budgets and the Department of Trade and Industry could not possibly have budgeted for the scheme if claimants were allowed a random and mutable selection of the time for payment of claims which we know from experience were sometimes massive. It is understandable, therefore, that the selection was limited to either six or twelve months coinciding with year and half year ends.

[12] It stands to reason that constant unilateral changes in selections would have had a serious effect, not only on the Department's ability to budget properly, but also on its ability to control the submission of claims under guideline 4.3.1. It would indeed have left the door wide open for abuse if each claimant were allowed to select a new claim period whenever a fresh claim was submitted: all that he or she would have to do in order to obtain payment of a claim which had not been submitted within three months after the expiry of a selected six months period would be to change the selection to twelve months and thus circumvent guideline 4.3.1. Such a result could never have been intended.

[13] Then there is the history of guideline 3.2. Until October 1991 an Annexure 2 form containing the claimant's "basic information" and the selection of a claim period had to be filed **once only** and it had to be done **before the submission of the first claim.** Moreover, there was at that stage no provision for the review of the selection. In other words, there was room for only one selection which could not be changed under any circumstances. How it came about that an Annexure 2 form had to be submitted with each claim appears from a circular letter in the following terms which was sent to claimants during October 1991:

> "Due to the fact that some claimants neglect to inform the Department of address changes and other adjustments to basic company particulars, the processing of claims is often delayed while cheques and promissory notes go astray as a result of incorrect address information.
>
> Under the circumstances claimants would in future be required to submit the Annexure 2 to the claim form with every claim, irrespective of whether the particulars in question have been amended or not. Claims received without this form will not be processed."

The mere fact that this requirement was incorporated in guideline 3.2 when Revision No 2 took effect during 1992 and was retained in subsequent revisions affords no ground for suspecting that the intention was to depart from the previous regime (which, as I have indicated, left no room for changing a selection) save to the extent that a selection once made, might be reviewed in exceptional circumstances.

[14] Moreover, the need to fully motivate a desired change of claim period does not fit readily into a scheme which, as the appellant would have it, permits a fresh unilateral selection whenever a new claim is submitted. Appellant's counsel sought to meet this by drawing attention to the fact that claimants could select either six or twelve months **according to their needs**, and suggesting that a change may be required when there is a change in a claimant's needs. That begs the question. The submission assumes that

the phrase applies whenever a claim is made. If it is confined to the claimant's initial choice, as I think it is, then it cannot be invoked to justify a subsequent unilateral alteration.

[15] So much for the appellant's construction. Needless to say none of the problems which I have mentioned present themselves on the construction put forward by the respondents. Their construction is entirely logical and strictly in accordance with the wording and history of the guidelines. In my view it is correct.

[16] The parties are agreed that the appeal falls to be dismissed if the respondents' contention is upheld.

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

JJF HEFER
Judge of Appeal

Mahomed CJ
Grosskopf JA
Marais JA
Mpati AJA