IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 19955/2020

CASE NO: 22772/2020

Reportable NO

Of interest to other Judges YES

Sign…… Date…….

In the matter between:

BP SOUTHERN AFRICA (PTY) LTD Applicant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

JUDGMENT

MOTHLE J

Introduction

[1] BP Southern Africa (Pty) Ltd, the Applicant launched two applications against the respondent, the Commissioner for South African Revenue Service, in the Motion Court for urgent

applications. The First application was launched in March 2020 under case number: 29955/2020, while the Second application was launched in May 2020 under case number: 22772/2020. Both cases were first heard together in the virtual court on 24 June 2020 and stood down for hearing in open court on 30 June 2020.

[2] In Part A of both applications, the applicant sought interim relief in the form of an interdict, in essence prohibiting the respondent from executing on a debt management certified statement (civil judgment) obtained in terms of Section 114(1)(a)(ii) of the *Customs and Excise Act, 91 of 1964 (the Act).* Section 114 of the Act empowers the Commissioner of SARS with a preferential debt collecting procedure and "*…. Is used in the collection of debt in cases where the debtor has already failed to comply with its obligations and, having been called upon, neglects or refuses to do so. It is at this stage that the Commissioner most needs security".*[1]

[1] First National Bank of South Africa Ltd t/a West Bank v Commissioner, South African Revenue Service and Another 2001 (3) SA 310 (SPD) at page 3231. Though the decision of this case was reversed in the Constitutional Court in 2002 (4) SA 768 (CC), the essence of this civil debt collecting procedure remains intact.

[3] The interdict is sought, pending the final determination of the review and setting aside of the decisions by SARS' Commissioner; the relief set out in Part B. In particular, the applicant seeks in Part B, to have the decision of the Commissioner to file the debt management certified statement reviewed and set aside in terms of the Promotion of Administration Justice Act, 3 of 2000 ("*PAJA*"). Thus the hearing in open court was only for Part A of each of the two applications. I turn to state the background facts which are common to both applications.

***Background**:*

[4] Stated in generally, in terms of the South Africa law, a licensed trader in fuel, imports distillate fuel from abroad and on arrival it is delivered to a refinery and then stored it in a warehouse. Some of the fuel is distributed for sale locally in South Africa, and the other is exported. When the distillate fuel leaves the warehouse for export, it attracts an import duty for which the exporter is liable for payment to the respondent. Upon completion of the exportation, the exporter is entitled to claim

export duty refund from the respondent. The refund is paid in a set off against the import duty that the exporter is liable for.

[5] The exportation of distillate fuel is conducted on a continuous basis in a series of transactions. Each of these transactions; from purchase, collection from the refinery, road transportation to the port of entry/departure, up to the delivery of the consignment to the consignee in a foreign county, is recorded in a number of documents collectively referred to as acquittals.

[6] In the acquittals is a document referred to as CN2 (release for export), which, if properly executed, becomes proof that the consignment has lawfully left the borders of South Africa for delivery to the consignee in another country. As proof for the claims for refund, the exporter is legally obligated to keep in its possession and produce on demand by the respondent's inspectors, the acquittals for each of the transactions where a refund has been claimed.

[7] The applicant is a licensed trader in fuel, including its importation into South Africa; distribution and sales to outlets locally and exportation to the neighbouring countries in the southern Africa

region. The applicant informed the Court that its *modus operandi* for exportation was to sell distillate fuel to agents who allegedly arranged its road transportation across the border for delivery to consignees in the neighbouring countries. When the transaction is completed, the applicant lodged the claims for export refund which the respondent paid for by setting off on the import duty.

[8] The nub of the dispute between the applicant and the respondent in relation to the civil judgment which is the subject of these applications, is a consequent failure by the applicant to produce valid acquittals relating to some consignments stated in the letters of demand and the subject of the civil judgment. The respondent demands repayment or return of the amounts credited to the applicant which are not supported by proof that the export of fuel in fact occurred. The applicant wants to keep the amount of the export refund it received by credit, pending either completion of its internal investigation to uncover the documents or mounting a court challenge to the letters of demand and the civil judgment.

[9] On 23 January 2020, the respondent issued three Letters of *Intent* (LOIs), in which it gave the applicant notice of liability for

duty and forfeiture in various amounts of approximately R40,5 million. The liability was for 78 consignments of distillate fuel allegedly exported to Zimbabwe, without proper documentation. On 13 February 2020, the respondent issued 4 letters of *demand* to the applicant for payment of an amount of R37 751 091.80, based on alleged exportation of 73 consignments of distillate fuel. On 24 February 2020, the respondent issued a Final Demand and notice of institution of legal proceedings. On 16 March 2020, the respondent obtained the civil judgment in terms of section 114 of the Act, against the applicant.

[10] On the same date, 26 March, when the respondent obtained the civil judgment, its inspectors attended at the applicant's premises to execute on that judgment. On 17 March 2020 the applicant made a request to the respondent for an undertaking that the respondent should stay the execution on the civil judgment, pending the outcome of exhausting internal administrative appeals and a court review challenge.

[11] The purpose of the undertaking sought by the applicant, somewhat changed, during the exchange of emails between the respondent and the applicant that occurred during 18 and 19

March 2020. Initially, the applicant mooted a request to the Commissioner to suspend payment of the debt and for the withdrawal of the civil judgment. the respondent summarily declined the request to withdraw the debt. Then the subject of suspension of payment was raised, which became the undertaking the respondent gave for the stay of execution, pending an application by the applicant for suspension of payment in terms of Rule 77H.03 of the Act. The undertaking was made on 19 March 2020.

[12] On 23 March 2020, the applicant launched the First Application, scheduled to be heard on 7 April 2020. the respondent was directed to file its answering affidavit on 26 March 2020, the same date on which the applicant filed an application for suspension of payment. On 31 March 2020, the applicant removed the application from the urgent applications court roll of 7 April 2020.

[13] The applicant's application for suspension of payment was rejected by a Committee of the respondent on 19 May 2020. Thus, the undertaking to stay execution on the civil judgment lapsed on that day. The applicant launched the Second

Application under case no. 22772/2020, dated 24 May 2020 and scheduled to be heard in the court of urgent applications on Tuesday 26 May 2020. the respondent had no later than 10h00 on Monday 25 May 2020, to file a notice to oppose and to file an answering affidavit, if any, on or before 17h00 on Monday 25 May 2020, with the applicant providing space for it to file a replying affidavit before 9h00 on Tuesday 26 May 2020.

[14] It seems from the records in the Second Application, that on Tuesday 26 May 2020, the Second Application was not heard in court. The records reflect that the Second Application came before Madam Justice Tlhapi, the following Tuesday 2 June 2020, where it applied for and was granted a postponement in order to deal with the respondent's answering affidavit. A two-week postponement was granted for the Second Application to be heard on Tuesday 17 June 2020. Madam Justice Tlhapi also granted the applicant an order interdicting the respondent from executing on the civil judgment, pending the hearing on 17 June 2020.

[15] Again the record does not reflect that the Second Application was heard in Court on 17 June 2020. Instead, the applicant

delivered two notices of set down. The first, in respect of the Second Application was dated Sunday, 15 June 2020, and the second in respect of the First Application, was dated Tuesday, 17 June 2020. Both cases were set down to be heard on Tuesday 23 June 2020. The Applications were allocated for hearing on video conferencing on 24 June 2020, where they both stood down for hearing in open court on 30 June 2020.

Urgency

[16] For reasons that follow in this judgment, regrettably it has become necessary to once again remind legal practitioners of the rules and directives applicable to the court of urgent applications in this Division. The urgent applications are regulated by Rule 6(12) of the Uniform Rules of Court. In particular, Rule 6(12) (a) and (b) which reads:

"(a) In urgent applications *the court or a judge may dispense with the forms and service provided* for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to it seems meet.

(b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, *the Applicant shall set forth explicitly the*

circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course." Own emphasis.

[17] In 1977, Coetzee J, in the matter of *Luna Muebel Vervaardigers v Makin and Another*[2], summed up the practice of this Division on urgent applications, at p 136D of the judgment thus:

"Far too many attorneys and advocates treat the phrase '*which shall as far as practicable be in terms of these rules'* , in sub-rule (a) simply *pro non scripto.* That this phrase deserves emphasis is apparent also from the judgment of Rumpff, J.A. (as he then was), in *Republikeinse Publikasies (Edms.) The Applicantk. V Afrikaanse Pers Publikasies (Edms.) The Applicantk.*, 1972 (1) SA 773 (A.D.) at p 782B. Once an application is believed to contain some element of urgency, they seem to ignore (*1) the general scheme for presentation of applications as provided for in Rule 6; (2) the fact that the Motion Court sits on Tuesdays through to Fridays; (3) that, for matters to be on this roll on any particular Tuesday, the papers must be filed with the Registrar by 12 noon on the preceding Thursday; (4) that the time of the day at which the Court commences its daily sittings is 10.00 a.m. and that, when it is adjourned for the day, the next sitting commences on the next day at 10.00 a.m."* my emphasis.

[2] 1977 (4) SA 135 (WLD).

[18] The Gauteng Divisions still follows this practice. As it is demonstrated hereunder, the applicant in launching the two applications, ignored the practice directives of this Division.

[19] After receipt of the Letters of Intent dated 23 January 2020, the applicant wrote to the respondent requesting time to produce the required acquittals on which the claims for export refund were based. In fact, according to applicant's letter dated 20 December 2019, there is a history of communication between the parties since 22 October 2019. In the various letters and emails, the applicant requested time to produce the required documents by various dated, including 26 March 2020.

[20] These undertakings to deliver documents are confirmed in another letter written by the applicant's attorneys, dated 17 March 2020 and addressed to the respondent. This letter was written a day after the respondent's inspectors had visited the applicant's premises, and five days before the launch of the First Application. The letter stated the following in paragraph 6:

"6. The letters of demand did not specify any date by which the amounts demanded had to be settled. The provisions of Rule 77H.03 to the Act therefore apply and our client has until 26 March 2020 to submit an

internal administrative appeal of the letters of demand and to request suspension of payment of the amounts concerned. The letters of demand of 24 February 2020 and the judgment obtained by SARS on 16 March are therefore premature."

[21] I have elaborately set out the chronological order of events under ***background*** above, to provide context to the question of urgency of the applications. As stated above, the respondent on 19 March and in response to the applicant's request to stay execution of the civil judgment, agreed and undertook not to execute on the civil judgment, pending an application by the applicant to request suspension of payment. Thus at the time the applicant launched the First Application on 23 March 2020, seeking relief in the form of an interdict prohibiting the respondent from executing on the judgment, it had already secured an undertaking from the respondent not to execute, pending an application for the suspension of payment of the debt, which is part of exhausting internal remedies. The First Application was lodged before the application for suspension of payment of the debt.

[22] In terms of the notice of motion, the First Application was scheduled for hearing in two weeks (7 April 2020). The applicant nevertheless gave the respondent three days to file an answering affidavit (by Thursday 26 March 2020). As it turned out, on Tuesday 31 March 2020, seven days before the hearing, the applicant removed the application from the roll of 7 April 2020. It did not end there.

[23] Two and half months (the whole of April; the whole of May and two weeks into June 2020) after removing the First Application from the urgent court roll, the applicant, on Wednesday 17 June 2020, set the removed application down for hearing on the urgent court roll of Tuesday 23 June 2020. The applicant still contended that the First Application was urgent and persisted in the relief that the Court should dispense with the normal forms and service prescribed in the Rules.

[24] The Second Application, which repeated most of the relief sought in the First Application, was launched by the applicant on 24 May 2020 and scheduled to be heard in the court of urgent applications, two days later on Tuesday 26 May 2020. the respondent had no later than 10h00 on Monday 25 May 2020,

less than 24 hours, to file a notice to oppose and to file an answering affidavit, if any, on or before 17h00 on the same day Monday 25 May 2020, with the applicant to file a replying affidavit before 9h00 on Tuesday 26 May 2020.

[25] As it turned out, the respondent's answering affidavit was in volumes of pages. Not expecting such development, the applicant found itself having to approach court to ask for *a postponement*[3] for a period of two weeks, in order to prepare a replying affidavit. In effect, the applicant took three weeks before it set the matter down for hearing on 23 June 2020.

[26] The applicant, in launching the Second Application did not remotely comply with the practice directives of urgent court in this Division. In this regard I once again refer to the decision in the *Luna Meubel* supra, where the court illustrated the degrees[4] of urgency and the ascending order, to guide both practitioners and the courts. The degree of urgency invoked by the applicant

[3] It is not the practice of this Division to postpone an urgent application, for the simple reason that it was brought by way of urgency, which would naturally fall away or be hard to contend for later. When such application is raised at the instance of the parties, it is often to attempt to reach settlement. In such an event, it will stand down to a later date in the same week.
[4] At p137A-E.

in the Second Application, was such that in practice it is often resorted to in instances where there is an imminent threat to life. Such was not the case in these applications.

[27] In the same seminal case of *Luna Meubel supra*, the court commences the judgment with the following observation:

"Undoubtedly the most abused Rule in this Division is Rule 6 (12) …"

[28] I agree with the sentiment expressed in that case as quoted above. There are further two important factors which had a bearing on the question of urgency in both these applications.

[29] Firstly, it is apposite to state that from 15 March 2020, and consequent to the outbreak of the coronavirus (COVID-19) pandemic, South Africa had declared a state of national disaster in terms of the Disaster Management Act 57 of 2002 (DMA). The urgent court in this Division was continuously inundated with urgent applications challenging the Regulations published in terms of the DMA. Added to these, were urgent applications relating to gender-based violence; custody and safety of minors. The Minister of Justice and Correctional Services, the Chief Justice and the Judge President of the Division, all issued

directives prioritising the adjudication, in the urgent application courts, of the court challenges on the category of the applications referred to above. Apart from non-compliance with the rules and practice directives, the applicant's duplicated applications were an abuse of the court time.

[30] Secondly, the civil judgment whose execution the applicant wants to interdict, is not based on an ordinary tax liability, where the tax payer is expected to pay. It is based on a liability to *repay or return* some of the amounts of export refunds claims, which were credited to the tax payer (the applicant in this case), in instances where the applicant either submitted invalid acquittals or is unable, at the stage of demand, to prove that fuel was in fact exported to Zimbabwe.

[31] Thus, the applicant prays to this Court that while it conducts a search for the proper acquittals and simultaneously pursuing litigation against the respondent, in effect it must continue to keep in its possession the credits it obtained from the export refunds, some of which were based on irregular documents and others for which there is no proof that fuel was exported.

[32] While the applicant has the right to pursue litigation against the respondent, I find no justification for the relief sought in Part A of both applications. The applicant has an option to pay the amount stated in the civil judgment, which on the basis of the bank statements submitted to the respondent, is able to do so. There is therefore an alternative remedy available to the applicant.

[33] Further, upon discovering the required valid acquittals and proof that the fuel alluded to in some transactions was in fact exported, the applicant may lawfully lodge export refund claims for these transactions. The contention by the applicant that should it repay the export refund, it will not recover the interest when proof of export is found, is without merit.

[34] The applicant is not lawfully entitled to claim, receive and keep any export credit, without being in possession of the correct and valid acquittals to prove and justify the export refund claim or that the export of fuel did in fact occur. The credit of the export refund claims for which no proof of export exist, was never due to the applicant. It will only be due when such proof of export is submitted to the respondent. There can therefore be no question

of retrospective loss of interest and thus prejudice, should the interim interdict not be granted.

[35] Seen in this context, as well as having regard to the conspectus of the evidence in this case, I am not persuaded that Part A in the two applications should succeed. In particular, the applicant failed to prove that the First and Second applications are urgent. Due to the non-compliance with the rules on urgent applications in this Division, the urgency prayed for in both application is self-serving and contrived. Further, the applicant in either application has not succeeded to prove that it will suffer any prejudice, in that it can afford to repay the amount claimed. Such payment will be recoverable in the event the required valid acquittals are produced. Therefore, the balance of convenience favours the dismissal of Part A of the First and Second Applications.

[36] As regards the costs, these should follow the result.

I make the following order:

1. Part A of the First Application under case no. 19955/2020 is dismissed.

2. The applicant is ordered to pay the costs of the application to the respondent, including reserved costs of previous appearances and costs of two counsel.
3. Part A of the Second Application under case no. 22772/2020 is dismissed.
4. The applicant is ordered to pay the costs of the application to the respondent, including reserved costs of previous appearances and costs of two counsel.

Judge SP Mothle

Judge of the High Court

Gauteng Division, Pretoria.

For the applicant in both applications

AP Joubert SC, Assisted by LF Laughland

Instructed by ENSAfrica, Sandton, Johannesburg.

For The respondent in both applications

J Peter SC, Assisted by M Meyer.

Instructed by McRobert Attorneys, Pretoria.

Delivered. This judgment was handed down electronically by circulation to the parties' representatives by email and will be released on SAFLII. The date and time for hand down is deemed to be 10h00 21 July 2020.