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IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO. 13/2000

In the matter between:

JONATHAN PAUL STONER Applicant

and

SOUTH AFRICAN REVENUE SERVICES Respondent

JUDGMENT DELIVERED THIS 20TH DAY OF JULY 2000

HJ ERASMUS AJ:

The applicant is Jonathan Paul Stoner and the respondent is the South African Revenue Services. I shall refer to the parties as applicant and respondent respectively.

In his (amended) Notice of Motion, the applicant seeks an order in the following terms:

1. Declaring that the Applicant permanently changed his residence to South Africa in November 1998 for the purpose of Rebate Item

407.04 of Schedule 4 of the Customs and Excise Act No. 91 of 1964;

2. Declaring that the Applicant is entitled to qualify for Rebate Item 407.04 of Schedule 4 of the Customs and Excise Act No. 91 of 1964, as amended in respect of motor vehicle Lotus Elise VIN SCCGA 1117 WHC 31840;

3. Delivery of motor vehicle Lotus Elise VIN SCCGA 1117 WHC 31840;

4. In the alternative to prayers 2 and 3, ordering the Respondent to make a final determination whether the Applicant qualifies for Item 407.04 of Schedule 4 of the Customs and Excise Act No. 91 of 1964, as amended in respect of motor vehicle Lotus Elise VIN SCCGA 1117 WHC 31840 within five days of the date of this order;

5. Costs of suit;

6. Alternative relief.

The facts giving rise to the application are the following:

The applicant was born in the United Kingdom in 1968. In 1975 he came to South Africa with his parents. He has dual citizenship and holds both a United Kingdom passport and a South African passport.

In 1995 he decided to leave South Africa and to settle permanently in Europe. He spent some time in the United Kingdom where he worked for a British company, Cableway Software Limited. The company, of which he was a director, provided information technology services to Lufthansa in Frankfurt through a Swiss agent company called Talisman Software. He subsequently moved to Germany and settled in Frankfurt.

In September 1997 he bought the motor vehicle which forms the subject matter of this application. For convenience I shall refer to the motor vehicle as "the Lotus".

In 1998 he decided to return to South Africa as a permanent resident. He wanted to bring the Lotus with him and made inquiries in Cape Town as to what duties would be payable to bring the Lotus into the country. If significant duties were payable, it was his intention rather to sell the Lotus in the United Kingdom or in Germany.

During December 1998 the applicant visited Customs House in Cape Town he was referred to a customs official, Mr Tobie Mostert, who advised him on the steps he should take in order to qualify for full rebate on the import of the Lotus. The applicant followed Mostert's advice who in due course signed the necessary forms allowing the applicant to import the Lotus under rebate of duty. The applicant thereafter obtained an import permit for the Lotus. The vehicle was shipped from the United Kingdom and arrived in Cape Town on or about 22 February 1999. It was released to the applicant on the next day.

On 4 March 1999 the Lotus was detained by the respondent in terms of section 88(1)(a) read with section 87 of the Customs and Excise Act 91of 1964 as amended ("the Act"). Correspondence ensued between the applicant's attorneys and the respondent. The applicant was informed that the vehicle was detained because he does not qualify for the rebate of duty provided for in item 407.04 of Schedule 4 to the Act. In terms of the item a full rebate of duty is allowed in respect of a motor vehicle imported by a natural person for his or her personal or own use, who permanently changes his or her residence to the Republic. The dispute between the parties turns on the underlined words.

On 18 November 1999, "in a final effort to avoid litigation", the applicant's attorneys addressed a letter to the respondent which included an affidavit with substantially the same facts and annexures as those contained in the founding affidavit in these proceedings. In a letter dated 15 December 1999 the respondent re-iterated its view that the Lotus does not qualify for the rebate of duty provided for in item 407.04 of Schedule 4 to the Act. The letter continues:

> "Enclosed herewith is a copy of an information sheet pertaining to the rebate item in question for you information and scrutiny.
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> On receipt of acceptable official documentary evidence pertaining to:
>
> (a) your client's emigration from the Republic of South Africa;

Cont./.....

(b) obtainment of permanent residents's (*sic*) status abroad; and

comment and where applicable, evidence on the fields marked on the enclosed information sheet, the matter will be considered".

The applicant responded by launching this application on 5 January 2000. The respondent's answering affidavit is sworn to by Alfrieda Labuschagne ("Labuschagne"), a Chief Customs and Excise Officer in the Section Special Investigations, Customs and Excise, Cape Town. She says that from February 1999 "to date hereof" (her affidavit bears the date 17 February 2000) she has conducted " a thorough investigation but through no fault of my own the investigation is not yet completed". As anticipated in her affidavit, leave was sought at the hearing to file a supplementary affidavit on further information obtained during the course of the investigation. Though I found it difficult to understand why the investigation of the matter should have taken more than a year, I allowed the affidavit to be filed on the basis that the further evidence was relevant and might take the matter further, that the further evidence was anticipated in the answering affidavit and that at least some of the further evidence became available after the answering affidavit had been filed. There was no opposition to the filing of a further "opposing affidavit" by the applicant.

In her supplementary affidavit, Labuschagne says that on 24 February 2000 she seized the Lotus in terms of section 88(1)(c) of the Act – up to that time the vehicle had only been detained in terms of section 88(1)(a) of the Act. In

order to protect his position under section 89 of the Act which imposes limitation periods ("vervaltermyne"), the applicant gave the respondent notice, in terms of section 89(1), of his intention to institute proceedings for the release of the Lotus and, in terms of section 89(3), instituted proceedings for the release of the vehicle by the issue of summons on 26 May 2000.

Mr Van Rooyen on behalf of the respondent contended that the only remedies available to an aggrieved party in the position of the respondent are:

(a) *The procedure provided for in section 89 of the Act.* The procedure under section 89 is available when goods have been seized under section 88 of the Act. The Lotus was seized in terms of section 88(1)(c) of the Act on 24 February 2000, ie after the respondent's answering affidavit in these proceedings had been filed. It was argued on behalf of the respondent that the provisions of section 89 became applicable after the seizure of the Lotus and that, consequently, the relief sought in prayers 1, 2 and 3 of the applicant's Notice of Motion cannot be granted in the absence of compliance with the provisions of section 89. In terms of that section, the owner of goods that have been seized who desires to claim the goods from the Commissioner, must give notice in writing within one month after the date of the seizure that he claims or intends to claim the goods, and must within ninety days of such notice institute proceedings in a court of competent jurisdiction for the release of the goods. In my view, the provisions of section 89 cannot have retrospective effect so as to render ineffectual proceedings that have already been instituted.

(b) *The procedure provided for in section 93 of the Act.* The section authorizes the Commissioner to direct that any goods detained or seized or forfeited under the Act be delivered to the owner thereof subject to payment of duties payable in respect thereof, of any charges which may have been incurred in connection with the detention or seizure or forfeiture and subject to such conditions as the Commissioner deems fit. The section further provides that if the owner accepts such conditions, he shall not thereafter be entitled to institute any action for damages on account of the detention, seizure or forfeiture. The section would appear to provide for "articles of capitulation" rather than a "remedy".

(c) *Review.* The third remedy, according to Mr Van Rooyen, available to an aggrieved party in the position of the respondent is that of review. That is so. The exercise of the respondent's discretion in terms of sections 87 and 88 of the Act is administrative in nature (*Deacon v Controller of Customs and Excise* 1999 (2) SA 905 (SE) at 916E). Procedurally, an application for review of administrative orders has to be brought under Rule 53. The applicant has here used the ordinary procedure prescribed by Rule 6 and asked for relief in the form of declaratory orders and an order for delivery of the Lotus. (On declaratory orders as a judicial remedy in review proceedings, see Baxter *Administrative Law* 689ff).

The relief sought by the applicant, though in the form of declaratory orders, seems in effect to be tantamount to the relief afforded by a superior Court in the exercise of its so-called review jurisdiction. If so, the fact that the relief was sought by way of application in terms of Rule 6 is not a procedural barrier to the grant of the relief sought by the applicant under Rule 6. The

provisions of Rule 53 are not peremptory. The following words of Eloff DJP (as he then was) in *S v Baleka and Others* 1986 (1) SA 361 (T) at 397*in fin* – 398A were cited with approval by Kriegler AJA (as he then was) in *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) at 661H:

> "Rule 53 was designed to facilitate the review of administrative orders. It created procedural means whereby persons affected by administrative or *quasi*-judicial orders or decisions could get the relevant evidential material before the Supreme Court. It was not intended to be the sole method by which the validity of such decisions could be attacked."

In the latter case it is pointed out that the differences between Rules 6 and 53 are minimal, and are designed to afford an applicant for review access to the record of the proceedings which he or she seeks to bring under review. That consideration does not apply in the present case. In *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A)at 662G it is pointed out –

> "Such benefits as it (Rule 53) may confer on a respondent, in contradistinction to those ordinarily enjoyed by a respondent under Rule 6, are incidental and minor. It confers real benefits on the applicant, benefits which he may enjoy if and to the extent needed in his particular circumstances"

(See also *Motaung v Mukubela and Another NNO* 1975 (1) SA 618 (O)at 625F).

There are numerous decisions in which the validity of administrative decisions were considered in proceedings initiated by notice of motion under Rule 6 (see, for example, *Motaung v Mukubela and Another NNO* 1975 (1) SA 618 (O); *S v Baleka and Others* 1986 (1) SA 361 (T); *Administrator, Transvaal, and Others v Traub and Others* 1989 (4) SA 731 (A); *Adfin (Pty)Ltd v Durable Engineering Works (Pty)Ltd* 1991 (2) SA 366 (C) at 368E--H; *Administrator, Natal, and Another v Sibiya and Another* 1992 (4) SA 532 (A); *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A).) In the circumstances the argument advanced on behalf of the respondent amounts to mere formalism.

The applicant's case is that the respondent's investigation and final determination are fundamentally flawed in that they are based on a mistake of law. The respondent builds its case on a number of inter-related provisions.

Section 75(1)(b) of the Act provides:

> "Subject to the provisions of this Act and to any conditions which the Commissioner may impose –
>
> (a) ..... ;
>
> (b) any imported goods described in Schedule No. 4 shall be admitted under rebate of any customs duties applicable in respect of such goods at the time of entry for home consumption thereof to the extent stated in, and subject to

compliance with the provisions of the item of Schedule No. 4 in which such goods are specified".

In terms of Item 407.04 for Schedule 4 to the Act full rebate of duty is allowed in respect of --

"One motor vehicle per family, imported by a natural person for his or her personal or own use, who permanently changes his or her residence to the Republic and –

(i) provided the vehicle so imported is the personal property of the importer and has personally been owned and used by him or her –

(a) for a period of not less than 12 months prior to his or her departure to the Republic ....."

The respondent says that whether or not they constitute "conditions" as envisaged in section 75(1)(b) of the Act, the Commissioner has imposed requirements in respect of the rebate in Item 407.04 by way of an "information sheet", a copy of which was annexed to the respondent's letter to the applicant dated 15 December 1999 referred to above. The respondent says that to qualify for the rebate in terms of Item 407.04, a South African resident has to comply with the three requirements set out in paragraph 1 of the information sheet.

In paragraph 2 of the information sheet it is made clear that South African citizens taking up temporary residence in a foreign country, irrespective of the period involved, do not qualify for the rebate.

In terms of paragraph 4 of the information sheet, the documents to be produced to the Commissioner by returning South African residents include proof of emigration from the Republic as well as proof of permanent residence obtained abroad.

Mr Burger, who appeared for the applicant, contended that the requirements set out in the information sheet are not "conditions" imposed in terms of section 75(1)(b) of the Act. And if they are not "conditions" as envisaged in the section, there is no legal basis for the requirements. He says that there is no evidence that the Commissioner had any hand in preparing the information sheet, nor any evidence that the conditions were published in the Government Gazette or in any other official publication. The Act does not prescribe any formalities with which the Commissioner has to comply when imposing conditions. The information sheet is an official document that emanates from the respondent. For the purposes of this judgment I shall accept that formally the conditions or requirements have been imposed in proper form by the Commissioner.

Mr Burger further contended that in the conditions or requirements he imposed, the Commissioner equated the *facta probanda* with the *facta probantia*. The rebate applies to any natural person who permanently changes his or her residence to the Republic. The *factum probans* is therefore permanent change of residence to the Republic. Proof of

permanent change of residence to the Republic logically entails proof of prior permanent residence in another country. A person formerly permanently resident in the Republic who wishes to return as a permanent resident to the Republic, will have to provide proof of an intermediate period of permanent residence elsewhere.

The two characteristic elements of "permanent residence" are (a) *de facto* residence, and (b) an intention that the residence shall be permanent (see *Mathebula v Ermelo Municipalty and Another* 1955 (4) SA 443 (T) at 445C). The duration of the residence is not conclusive. Residence of a very short period would be sufficient if the Court is satisfied that the intention that the residence should be permanent has been shown (see *Mathebula v Ermelo Municipalty and Another (supra)* at 445A).

The requirements set out in the information sheet deal with: (i) immigrants, ie non-South Africans who wish to take up permanent residence in the Republic; and (ii) "South African residents who originally emigrated from the Republic, obtained permanent resident status abroad, and thereafter return". The latter category has to comply with the following three requirements set out in paragraph 1 of the information sheet:

(a) emigration from the Republic;
(b) the acquisition of permanent resident status abroad; and
(c) a permanent return to the Republic.

It is made clear in the information sheet that a South African who does not comply with all three of the above requirements does not qualify for the

rebate. Compliance with the three requirements is also insisted upon in the respondent's letter of 15 December 1999.

In the answering affidavit deposed to by Labuschagne, the respondent admits that the applicant "was entitled to work in Germany by virtue of being a citizen of a European Union country" and the "it was not necessary for him to obtain permanent resident status in Germany in order to work there". The respondent, however, insists that if the applicant "elects not to obtain official documentation from the authorities in the United Kingdom and Germany to prove that he obtained permanent resident status in any of those jurisdictions, he does so at his own peril". The insistence upon "acceptable official documentary evidence pertaining to the acquisition of permanent residential status" pervades the respondent's affidavits.

The respondent insists on something which the applicant has repeatedly said he cannot do: as the holder of a British passport he was and is entitled to reside permanently in the United Kingdom or any member country of the European Union. He cannot "obtain permanent resident status", much less official documentation that he has obtained such status. The respondent has imposed and unreasonably insists upon compliance with a condition which cannot possibly be complied with by a person in the position of the applicant.

While the "acquisition of permanent resident status" may afford proof, perhaps conclusive proof, of an intention to reside permanently in a particular country, it is not the only manner in which permanent residence can be proved. In so far as the respondent imposed upon returning South

Africans an exclusive manner of proof of permanent residence abroad, it has fettered its discretion by an unwarranted adherence to a rigid principle. In this regard Human J stated in *Computer Investors Group Inc and Another v Minister of Finance* 1979 (1) SA 879 (T) at 898C--E:

> "Where a discretion has been conferred upon a public body by statutory provision, such a body may lay down a general principle for its general guidance, but it may not treat this general principle as a hard and fast rule to be applied invariably in every case. At most it can be only a guiding principle, in no way decisive. Every case that is presented to the public body for its decision must be considered on its merits. In considering the matter the public body may have regard to a general principle, but only as a guide, not as a decisive factor. If the principle is regarded as a decisive factor, then the public body will not have considered the matter, but will have prejudged the case, without having regard to the merits".

(The passage is cited with approval in *Body Corporate of the Laguna Ridge Scheme No 152/1987 v Dorse* 1999 (2) SA 512 (D) at 518H--519A). The respondent has elevated the guidelines set out in its "information sheet" to hard and fast rules to be applied invariably in every case.

The question to be determined is whether the applicant has prior to his return to South Africa in November 1998 in fact resided in the European Union with the intention that such residence should be permanent. The most important facts adduced by the applicant in his endeavour to demonstrate

his intention to become a permanent resident of the United Kingdom and of Germany are the following:

(1) He sold the house he owned in Table View -- the house was not sold immediately because of the depressed state of the market at the time. It was eventually sold in September 1997.

(2) On 16 June 1995 the applicant wrote to the Director of Home Affairs in Cape Town that he intended to emigrate and requested to be notified of any official procedures he needed to follow.

(3) On his departure form at the airport he indicated that he was emigrating from the Republic.

(4) His accountant advised the respondent on 19 February 1997 as follows:

> "Please note that the abovementioned taxpayer is currently residing in Germany and has been resident as such since July 1995 and therefore application is now made for his removal from the role of taxpayers with effect the tax year commencing March 1996 since any income he is earning in Germany is not subject to any South African taxes and his South African sourced income is entirely insignificant."

(5) In the United Kingdom, he registered with the Epsom and Ewell Borough Council for the payment of council tax for the period of 27 July 1995 to 27 December 1995

(6) He registered on 11 January 1996 with the Office for Statistics, Elections and Registration of Residence of the City of Frankfurt, Germany. In the application form he indicated that he is changing his permanent place of residence to Frankfurt and that he is not retaining his previous residence in London. The applicant resided in Frankfurt up to the time that he decied to return to South Africa as a permanent resident.

(7) He worked for Lufthansa in Frankfurt from 2 January 1996 to 4 April 1998. As indicated above, the British company, Cableway Software Limited, of which the applicant was a director, provided information technology services to Lufthansa through a Swiss company called Talisman Software.

(8) During 1998 the applicant contemplated moving to New Zealand and during August 1998 he shipped two pallets of "personal effects" from Hamburg to Auckland.

(9) The move to New Zealand did not go through and the applicant decided to return to South Africa. He arrived on 24 November with the intention of changing his residence permanently to South Africa.

The respondent avers that the "undisputed facts and circumstances" set out in the answering affidavit show on the probabilities that the applicant did not change his residence permanently when he left the Republic. The respondent has laboriously gathered a mass of material which is, at best, of marginal relevance, but mostly of no consequence at all in relation to the question of the applicant's residence. The following are examples of the facts and circumstances on which the respondent relies:

(1) *The applicant sold his house more than two years after he had left the Republic.* In his founding affidavit, the applicant pointed out that the house was not sold immediately because of the depressed state of the market at the time. The important fact is, that the house was sold.

(2) *The applicant had South African sourced income on which he paid income tax and in his accountant's letter of 19 February 1997 to the respondent it is implied that he still had a South African sourced income, although insignificant.* I fail to understand why the existence of South African sourced income, and the payment of tax on such income, negatives an intention to take up permanent residence in another country.

(3) *The applicant did not follow the prescribed procedure to be deregistered as an income tax payer and as a result he was never deregistered.* The applicant says that he is not aware of any such prescribed procedure. Again, I fail to understand why

failure to deregister in proper form as an income tax payer should indicate that the applicant intended to remain resident in South Africa. In any event, there is his accountant's letter of 19 February 1997, which may or may not comply with the prescribed procedure, in which application is made for his removal from the roll of taxpayers.

(4) *The applicant was registered with the Cape Metropolitan Council for the purposes of conducting a business in the Council's area of jurisdiction since January 1995 and has not been deregistered since then.* The applicant's failure to inform the Cape Metropolitan Council that he intended to emigrate and his failure to to deregister with the Council is of no consequence. It is, however, not without interest, and significance, that according to the accountant of the Cape Metropolitan Council, the applicant's last payment of levies to the Council was made on 20 July 1995 (ie at about the time when the applicant was departing from the Republic) and that he owes the Council an amount of R2420.35 in respect of arrear levies. Failure to deregister was clearly nothing more than an oversight on the part of the applicant or his accountant.

(5) *The applicant never renounced his South African citizenship.* The simple answer is that there is no need for the applicant to renounce his South African citizenship. He is entitled to retain his South African citizenship and passport where-ever he may be resident. The fact that he retained his South African identity

document is equally irrelevant to the question of his residence. It can, in passing, be remarked that it was never suggested that the applicant, who was admittedly permanently resident in South Africa prior to 1995, should have renounced his British citizenship.

(6) *The applicant's pattern of travelling to and from the Republic has not changed since his return to South Africa in November 1998.* Details of the applicant's travel record over a period of a number of years were obtained from the Department of Home Affairs. The applicant is a frequent traveller between Europe and South Africa. His links with Lufthansa gave him access to cheap air travel while resident in Europe. He used this facility for regular visits to his father who is resident in South Africa. Since his return to South Africa, he has travelled to Europe for contract work.

(7) *The address given on the applicant's registration with the authorities in Frankfurt and on the receipt for the purchase of the Lotus, differs from that indicated on the application for importation of the Lotus.* The applicant gives a very simple explanation: he stayed at the same address, Carl Barthelweg 1, 60598, Frankfurt, for the whole time that he resided in Germany. The application for importation of the Lotus is dated 9 January 1999, after the applicant's return to South Africa and the address given is that of a friend that he used in Germany.

There is much else in similar, irrelevant vein in the respondent's affidavits. Two further random examples will suffice. The respondent says (i) that there is no telephone record of the applicant at 5 Dorset Court, Bridge Road, Epson, the address at which he was registered for council tax with the Epson and Ewell Borough Council; and (ii) the applicant makes no mention of furniture, equipment and other movables that he owned in England and Germany and the Bill Of Lading relating to the Lotus also reflects no such movables (as has been noted, in August 1998 the applicant shipped two pallets of "personal effects" from Hamburg to Auckland, New Zealand).

The only bit of telling information unearthed by the respondent is the applicant's application dated 2 May 1996 for a new South African passport. The applicant gave an address in Cape Town as his "residential address" and "postal address". He says that the address he gave was that of his father that he had often used to avoid forwarding and loss of mail. In answer to the question, "What is the purpose of your journey?", the applicant said "work". In answer to the question, "State period of intended absence", the applicant wrote "9 months". The applicant does not explain this answer which may be due to the way in which the questions in the application form are phrased. As is evident form the question, "What is the purpose of your journey?", the form is not designed to cater for a South African who is permanently resident in another country.

The following considerations are in my view decisive of the case:

(i) Prior to and upon his departure from South Africa, the applicant indicated unequivocally that he intended to emigrate. The contemporary indication of his intention, long before the purchase of the Lotus and the dispute surrounding it, must needs weigh heavily in favour of the applicant.

(ii) After his departure he took up residence in member countries of the European Union, first in England for a while and thereafter in Germany.

(iii) In taking up such residence, he again evinced an intention that the residence should be permanent. In both countries he registered with relevant authorities. In his application form for residence in Frankfurt he indicated that he is changing his permanent place of residence to Frankfurt and that he is not retaining his previous residence in London.

The applicant has shown that prior to his return to South Africa in November 1998 he had in fact resided in the European Union with the intention that such residence should be permanent.

He is, therefore, entitled in terms of Item 407.4 of Schedule 4 of the Act to a full rebate of duties in respect of the Lotus. The detention and subsequent seizure of the Lotus was unlawful. The applicant is entitled to the declaratory orders that he seeks, to delivery of the Lotus and to an order of costs.

Cont./.....

The following orders are made in accordance with prayers 1, 2 and 3 of the Notice of Motion:

(a) It is declared that the applicant permanently changed his residence to South Africa in November 1998 for the purposes of rebate Item 407.04 of Schedule 4 of the Customs and Excise Act No 91 of 1964;

(b) It is declared that the applicant is entitled in terms of rebate Item 407.04 of Schedule 4 of the Customs and Excise Act No. 91 of 1964 to a full rebate of duties in respect of motor vehicle Lotus Elise VIN SCCGA 1117 WHC 31840;

(c) The respondent is ordered to deliver motor vehicle Lotus Elise VIN SCCGA 1117 WHC 31840 to the applicant;

(d) The respondent is ordered to pay the applicant's costs.

HJ ERASMUS, AJ