IN THE HIGH COURT OF SOUTH AFRICA /ES

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 7743/2002

DATE: 4|4|2003

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED. ✓

3/4/2003 DATE

SIGNATURE

IN THE MATTER BETWEEN

HELLA SOUTH AFRICA (PTY) LTD APPLICANT

AND

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE RESPONDENT

JUDGMENT

BERTELSMANN, J

The parties

[1] The applicant is Hella South Africa (Pty) Ltd, a private company duly incorporated with limited liability in terms of the Company Laws of the Republic of South Africa with its registered office at Uitenhage. It carries on business as a manufacturer, distributor and exporter of motor vehicle components.

[2] The respondent is the Commissioner for the South African Revenue Service, appointed in terms of section 6 of the South African Revenue Service Act, Act 34 of 1997. He is cited herein in his official capacity.

The relief sought

[3] The applicant seeks to have a decision of the respondent reviewed. This decision was taken in terms of section 102 of the Income Tax Act, Act 58 of 1962. The applicant alleges that it overpaid taxes in respect of the years 1990 to 1994 according to assessments issued by the respondent. Applicant furthermore claims an order compelling the respondent to repay the alleged excess taxes levied, together with interest and further and/or alternative relief. Costs are sought only in the event of opposition.

[4] The respondent opposes the application.

The history of the matter

[5] The applicant has at all relevant times hereto been a manufacturer and exporter of motor vehicle components. This is not in dispute.

[6] During the years 1990 to 1994, the applicant was assessed for income tax.

[7] During this period, the applicant in its aforesaid capacity participated in the scheme which was known as Phase VI of the local content program of the Department of Trade and Industry.

[8] Component manufacturers for motor vehicles were not liable to excise duties, and could consequently not set off an excise account against their export credits according to Phase VI of the export incentive scheme.

[9] The component manufacturers were therefore granted the right to cede the export credits in terms of an agreement to motor vehicle manufacturers and the cessionary could then claim the export credits ceded as part of its export claim. Benefits thus received could be paid over to the component manufacturer.

[10] During the tax years 1990 to 1994, a total amount of R2 747 398,00 is alleged to have been earned by the applicant as export credits, which applicant ceded to motor vehicle manufacturers.

[11] The payments received in turn from the motor vehicle manufacturers were regarded as income, but were originally exempted from income tax.

[12] The exemption was granted in terms of a ruling by the Receiver of Revenue, Port Elizabeth, dated 7 June 1993. This ruling was withdrawn by the respondent on

16 February 1996, and additional assessments for the years 1990 and 1991-1994 were issued on 26 April 1996 and 1 July 1996 respectively.

[13] (The moneys which the applicant received from motor vehicle manufacturers and which applicant originally claimed to be exempt from tax, are not so, in the light of the decision of *Toyota SA Motors (Pty) Ltd v Commissioner for South African Revenue Services* 2002 4 SA 281 (SCA). I will deal hereinbelow more fully with this issue.)

[14] The applicant also claimed, during the same period, a refund of import duty on motor vehicle parts and accessories in terms of item 535 of Schedule 5 of the Customs and Excise Act, 91 of 1964 as amended. These are defined as follows:

> "Motor vehicle parts and accessories
>
> 01.00 Motor vehicle parts and accessories on which duty has been paid, provided locally manufactured parts and accessories not exceeding the value of the imported parts and accessories (excluding foreign currency usage) and which are of a kind subject to the same rate of duty has been exported by the importer of such parts and accessories."

[15] During the tax years 1990-1994, the applicant claimed refunds from the Department of Trade and Industry to the tune of R2 418 369,00.

[16] These, too, were rendered subject to tax when the Receiver of Revenue issued the additional assessments as aforesaid.

[17] 0n 15 March 1996 the applicant objected against the additional assessments on the grounds that the amounts set out above were exempt from income tax.

[18] Applicant also relied on the ruling by the Receiver of Revenue Port Elizabeth in support of the objection.

[19] The objection was disallowed in writing by the respondent on 15 July 1996, who in the same letter, also withdrew the original ruling of the Receiver of Revenue: Port Elizabeth.

[20] The applicant failed to note an appeal against the disallowance of its objection, as would have been required by section 83(7)(a) of the Income Tax Act, which reads as follows:

> "Every notice of appeal shall be in writing and shall be lodged with the Commissioner within a period of thirty days after the date of the notice mentioned in section 81(4), or, if the Commissioner has in terms of the provisions of section 106(4) withdrawn the last-mentioned notice and sent it anew, the date of notice so sent anew."

[21] Section 81(4) of the Income Tax Act, 58 of 1962 ("the Act"), reads:

> "0n receipt of a notice of objection to an assessment the Commisioner may reduce or alter the assessment or may disallow the objection and shall send the taxpayer notice of such alteration, reduction or disallowance, and record any alteration or reduction made in the assessment."

[22] The applicant waited until 21 0ctober 1998, on which date its auditors sent a letter to the respondent, relying on the judgment of the Supreme Court of Appeal in *Nissan SA (Pty) Ltd v Commissioner for Inland Revenue* 1998 4 SA 860 (SCA).

[23] In the letter, it is claimed that the applicant "... was advised to accept the situation, pending the outcome of the various appeals concerning the matter which were about to be heard in the Tax Courts at that stage."

[24] The applicant then sought to invoke the provisions of section 102 of the Act and requested the Commissioner to authorize a refund of the tax overpaid as a result of an alleged misinterpretation and mistake committed by the respondent. The *Nissan* judgment was recorded in this letter as having held that export incentive payments under Phase VI were exempt from tax in terms of section 10(1)(zA).

[25] 0n 8 June 2001, the respondent refused the request on the basis that:

(a) the assessments were final in terms of section 81(5) of the Act as the objections were withdrawn;

(b) the assessments were final for purposes of section 102(1) of the Act, because of the fact that the applicant had failed to appeal against the disallowance of its objections; and

(c) the amounts referred to and claimed by the applicant were not amounts received from the state as was required by section 10(1)(zA) of the Act, as it read at the time.

[26] The applicant was advised during 0ctober 2001 that the respondent's decision not to refund the applicant was reviewable. The applicant's auditors wrote another letter to the respondent, informing him of the fact that the applicant intended to review his application, and requesting a reconsideration of the applicant's claim. 0n 8 November 2001, the respondent refused to do so.

[27] The review application was launched on 18 March 2002. 0n 25 September 2002, the applicant launched an application for condonation of its failure to launch the review within 180 days from the date that the respondent first refused the applicant's request for a refund of income tax, as required by section 7 of the Promotion of Administrative Justice Act 3 of 2000, which reads as follows:

"(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date ...

(a) ...

(b) on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons."

[28] The parties may agree, in terms of section 9 of the Administrative Justice Act, Act 3 of 2000, to extend the time period of 180 days, or the court may grant such an application where the interests of justice so require.

[29] The respondent has refused to agree to an extension of the time period.

[30] The court will consequently have to decide whether it is in the interest of justice to grant condonation for the late launching of the review.

The legal issues

(1) Is the applicant entitled to the claims arising from the export credits during the relevant tax years?

(2) Is the applicant entitled to the refunds in terms of the so-called item 535 drawback claims?

(3) If the answer to any of the aforegoing two questions is in the affirmative, is the applicant entitled to claim these sums by way of a review application?

0r, put differently,

(4) Is the review barred because of the applicant's failure to proceed with an appeal against the dismissal of its objections?

(5) Have the applicant's claims become prescribed, as the respondent contends on the papers?

(6) Has the applicant made out a good case and shown that it is in the interest of justice to grant condonation for the late filing of the review application?

(7) Has the applicant exhausted all internal remedies prior to launching the application?

Common cause issues

[31] By the time the application was argued, it was common cause between the parties that the applicant's claims in terms of the export credits ceded to motor vehicle manufacturers for the sum of R2 747 398,00 could not be upheld in the light of the decision by the Supreme Court of Appeals in *Toyota South Africa Motors (Pty) Ltd v Commissioner, South African Revenue Service* 2002 4 SA 281 (SCA). This leaves only the claim for a refund of the item 535 drawback claims in the sum of R2 418 369,00 for adjudication.

[32] It was also common cause that the applicant is barred from prosecuting an appeal to the Special Income Tax Court, because of the fact that the time for noting such appeal has lapsed.

[33] It is also common cause that the assessments have consequently become final.

[34] The applicant also abandoned its claim for interest in the light of the decision in *CIR v First National Industrial Bank* 1990 3 SA 641 (A). This decision establishes the principle that the respondent cannot be in *mora* as regards payment until such time as this court has decided that there is indeed a duty to repay the sums received from the applicant.

[35] It is obviously common cause that the review is brought out of time if regard is had to the provisions of the Promotion of Administrative Justice Act, Act 3 of 2000.

[36] The parties are also *ad idem* that the respondent's decision not to allow a refund, is an administrative act and an administrative decision.

Is the applicant entitled in law to be exempt from tax on the item 535 drawback claims and the refunds paid by the Department of Trade and Industry?

[37] During argument, the question whether the refunds constituted payments by the state, as was required by the Statute at the relevant time was intensively debated.

[38] Initially, I inclined to the view that they were not, but a careful re-reading of the decision of *Toyota SA Motors, supra,* and the *First National Industrial Bank* matter, *supra,* has persuaded me that, in principle, the applicant could claim an exemption from tax on this ground. In the *Toyota* matter, on p291B-C, in para [34], HOWIE, JA (as he then was) says the following:

> "A clear distinction is drawn in these sections between rebates on the one hand and refunds and drawbacks on the other. (0ne of these sections is section 75 of the Act.) The latter plainly concerns situations in which, for example, an amount of duty has been paid when not due or is remitted and the respondent is liable for repayment. Rebates, on the other hand, are referred to as 'rebates of duty'. The *0xford English Dictionary* defines 'rebate' as 'a deduction from a sum of money to be paid, a discount; also, a repayment, drawback'. The Act's use of 'rebate' therefore conforms to the primary or main meaning of the word, namely a discount."

[39] In the *First National Industrial Bank* matter, the present respondent and the bank were at loggerheads about the question whether an autocard scheme was a credit

card scheme as defined then in section 1 of the Limitation and Disclosure of Finance Charges Act 73 of 1968, and therefore attracted stamp duty.

[40] The bank paid at the respondent's insistence under protest. Eventually, the bank obtained an order of court that the amount so paid had to be repaid. The issue then arose whether the bank's claim carried *mora* interest. NIENABER, AJA (as he then was) said in this respect on 652I *et seq*:

> "The Commissioner could not be in *mora* as regards repayment until such time as it was decided that a duty to repay existed. That was the very point of (the parties') understanding: that the money would only be refundable once it has been established (by a tribunal or by compromise) that the Commissioner misconstrued the statute and was obliged to repay the money. Any claim by the bank for repayment to be made prior to the determination of the dispute could be met by the Commissioner with the defence that such a claim would be premature and might yet prove to be idle."

[41] If the applicant has indeed received drawback claims which the respondent subsequently taxed, these payments were therefore in fact payments by the state.

[42] Consequently, the applicant is, in principle at least, entitled to claim whatever tax may have been paid in respect of these items.

Is the applicant entitled to proceed by way of review, or is such review barred by the provisions of the Income Tax Act and/or the applicant's failure to exhaust internal remedies or statutory remedies put at its disposal?

Could a review lie in respect of a claim which could have been enforced by way of the appeal procedure in terms of section 83 of Act 58 of 1962?

[43] The respondent's refusal to pay heed to the objection to the amended assessment I have referred to above, could, and the respondent argues, should have been dealt with by the Special Income Tax Court. The obvious failure to do so has the effect provided for in section 81(5) of the Act, namely the rendering of the assessments as final and conclusive.

[44] The present review is launched, according to the applicant, in terms of section 102(1) of the Act. This section provides the following:

> "**Refunds and set off.** - (1) Any amount paid by any person in terms of the provisions of this Act shall be refundable to the extent that such amount exceeds –
>
> (a) in the case where that amount was paid in respect of any assessment, the amount so assessed; or
>
> (b) in any other case, the amount properly chargeable under this Act."

[45] Subsection (2) adds the following provisions:

"The Commissioner shall not authorize a refund under subsection (1)(b), where –

(a) that amount was paid in accordance with the practice generally prevailing at the date of the payment; or

(b) the refund as claimed by that person –

(i) after a period of three years after the end of that year of assessment, in the case where-

(aa) that amount constitutes an amount of employees' tax deducted or withheld during any year of assessment from the remuneration of that person under the provisions of the Fourth Schedule;

(bb) that person's income for that year of assessment consisted solely of remuneration as defined in the Fourth Schedule; and

(cc) that person was not required under any provision of this Act to furnish a return of income for that year of assessment and did not render such a return during the period of three years since the end of that year of assessment; or

(ii) in any other case, after a period of three years from the date of the official receipt acknowledging such payment or where more than one such payment was made, the date of the official receipt acknowledging the latest of such payments."

[46] The applicant relies on the provisions of this section and argues that a failure by the Commissioner to pay a refund under circumstances such as the present is reviewable.

[47] The parties are *ad idem* that the terms of section 102 of the Act are substantially similar to those of section 95 of Act 41 of 1917. This section was considered in *Crown Mines Ltd v Commissioner for Inland Revenue* 1922 AD 91. On p100, INNES, CJ discusses the scope of the section and its application to a question of law:

> "The dispute here relates to a question of law, and in the absence of such consideration as fraud, the taxpayer would, apart from sec. 95 be without remedy. It was in view of that position that the clause in question was inserted. And its terms clearly reveal the mind of the lawgiver. The intention was to leave such a case in the hands of the Commissioner; he is empowered to authorize a refund, but only if it is proved to his satisfaction

that there has been a payment in excess of the amount properly chargeable. His judgment is to be the sole test. The language used is not intended to give effect to a legal right; and it is wholly inconsistent with the idea that the taxpayer is entitled to demand anything except that the Commissioner shall consider his case. Having considered it, his decision is final."

[48] On p101, the judgment continues:

"... the question of a refund has been left by the statute to the judgment of the Commissioner, and (that) the court cannot interfere with the result of a due expression of such judgment. ... But it was argued that he had no authority to interpret the statute. But how else could he discharge the function entrusted to him? He has no right to authorize a refund until satisfied that there has been a payment 'in excess of the amount properly chargeable under this Act'. He must, therefore, ascertain what that amount is – a process which necessarily involves an interpretation of the statute. Nor is there any ground for holding that he disregarded any express provision of the Act; his attention was drawn to section 38, and even if he misinterpreted it, that would not prove that he disregarded it. I can find nothing to show that either procedurally or otherwise he disregarded any express statutory provision."

(My underlining.)

[49] The decision confirms that the Commissioner's judgment on the former section 95, and therefore also of the present section 102(1) can be reviewed on common law grounds. This means that, if the respondent has *bona fide* interpreted the law and has reached a wrong conclusion as to the correct interpretation of the Act, his decision is not subject to review on that ground alone.

[50] This view of the law was endorsed in *Commissioner for Inland Revenue v City Deep Ltd* 1924 AD 298. The headnote reads as follows:

> "Where under section 95 of the Income Tax Act 41 of 1917 the Commissioner for Inland Revenue has refused to authorize a refund to a taxpayer of any tax overpaid, the court will not interfere with his decision even if it be wrong in law provided he has formed his opinion *bona fide* and there is no decision of a competent Court of law to the contrary."

[51] In *Stroud Riley & Co Ltd v Secretary for Inland Revenue* 1974 4 SA 534 (ECD) the court added the observation that, once the Commissioner is satisfied that an amount was paid in excess of the amount properly chargeable under the Income Tax Act, the Commissioner is bound as a matter of duty, to authorize the refund to the taxpayer.

[52] From the facts I have recorded above, it is clear that the applicant seeks, in the first instance, a review of the respondent's decision on an issue which is clearly a matter of law. This is indeed common cause, and Mr Truter on behalf of the applicant did not contend the contrary.

[53] He submitted, however, that, since the advent of the Constitution, the court was entitled to consider the merits, including questions of law, on review, even if these had been determined finally in respect of the assessments by the application of section 81(5) of the Act.

[54] The applicant further contends that, in spite of the express provisions of the Income Tax Act regarding appeals to the Special Income Tax Court and even if a taxpayer had failed to proceed after the rejection of an objection to an assessment, as in this case, to the Special Income Tax Court on appeal, and from that court on appeal to the ordinary High Court having jurisdiction, a review on the same grounds that would have been advanced in the Special Income Tax Court was still possible.

[55] Reliance was placed in this regard on the oft quoted passage in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others*, 2000 2 SA 674 (CC):

"The interim Constitution which came into force in April 1994 was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law. That is not to say that the principles of common law have ceased to be material to the development of public law. These well established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development. But there has been a fundamental change. Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution, which defines the role of the courts, their powers in relation to other arms of government and the constraints subject to which public power has to be exercised ..."

[56] The same passage was quoted by KRIEGLER, J in *Metcash Trading Ltd v Commissioner, South African Revenue Service, and Another* 2001 1 SA 1109 (CC) at [41] p1133H and further. Dealing with the Value Added Tax Act, Act 89 of 1991, which contains provisions similar to section 83 of the Income Tax Act, he continues at [43]:

"0nce the Commissioner has disallowed an objection an aggrieved vendor can appeal such decision. What section 36 clearly does not do is place any impediment in the way of such an appeal, either to the Special Court or

from its decision to an ordinary court of law. The crucial point, however, is that the section expressly does not preclude a disgruntled vendor against whom an assessment has been made from resorting to a court of law for whatever other relief that may be appropriate in the circumstances. Although the Act vests jurisdiction to vary or set aside assessments – and other decisions by the Commissioner – in the Special Court in the first instance (and prescribes the avenue for further consideration of the case by the ordinary courts thereafter), there is nothing in section 36 to suggest that the inherent jurisdiction of a High Court to grant appropriate other or ancillary relief is excluded."

[57] The procedure provided for in section 36(1) of the Value Added Tax Act was furthermore expressly held, at [47], (the appeal to the Special Court) to meet the criteria of section 34 of the Constitution. Access to the court is not restricted thereby, albeit circumscribed. (The act has since been amended, but the amendments do not affect the above conclusions.)

[58] Mr Truter argued, however, that this court had the power in terms of section 102(1) of the Act to review an incorrect assessment, even if the special procedure had not been followed and the assessment had become final and conclusive.

[59] I specifically enquired from Mr Truter whether it was the applicant's case that the advent of the Constitution had changed the law in respect of reviews of

administrative decisions to such an extent that a wrong decision on the merits, ie an error of law, was *per se* a sufficient ground to interfere with such an assessment on review. After some hesitation, Mr Truter conceded that this was not the case, but that one or other of the common law grounds for review still had to be present to justify interference on review.

[60] In the applicant's founding affidavit, it is alleged that the respondent acted arbitrarily, *mala fide* or to further an improper purpose when he refused a refund. The grounds for the applicant's refusal to exercise his powers in terms of section 102 – alternatively the grounds upon which he held that there had not been an excess payment of tax - are contained in annexure "I", his letter dated 8 June 2001. It reads in part as follows:

> "2. According to my records the company initially objected against the assessments that were issued. These objections were subsequently withdrawn. According to the provisions of section 81(5) whenever an objection has been withdrawn the assessments will become final."

The applicant, in charging that the respondent acted arbitrarily, *mala fide* or in the furtherance of an improper purpose, attacks this ground on the basis that this reason "... has however no bearing on the discretion which the respondent has to exercise under section 102(1) of the Act and illustrates the state of mind of the respondent, ie that he did not exercise any discretion at all."

[61] I find it very difficult to understand this reasoning. Clearly, the respondent considered the provisions of section 102(1) and came to the conclusion that once an assessment had become final and undisputed, there was no room for the argument – absent any new facts – (which do not exist in this case) that there had been an overpayment of tax.

[62] The respondent's letter continues in para 3:

> "If this is the situation the issue then arises as to whether these assessments are also final for purposes of section 102(1). This is in the event of the request for a refund being based on virtually the same grounds as that of the original objection. Meyerowitz on *Income Tax*, paragraph 33.9: 'And if he does not appeal, effectively the assessment becomes final because he is left without remedy against the Commissioner.' (Also refer to Meyerowitz on *Income Tax*, 34.5.)"

This second reason is attacked on the basis that it is alleged to show that the respondent did not apply his mind. It amounts to a restatement of the first ground of attack. It is clearly without merit.

[63] The final paragraph of the respondent's letter dealing with the reasons of his refusal to consider a refund in terms of section 102 is paragraph 4:

"A refund may only be made if it is proved that any amount paid was in excess of the amount chargeable under the Act. I am of the opinion that the amounts that were paid to the abovenamed company were not amounts received from the state as is required by section 10(1)(zA) of the Act. Your request for a refund can, therefore, not be sustained."

[64] Applicant charges that the respondent did not only misinterpret section 10(1)(zA) of the Act, but also ignored important provisions thereof, indicating that the respondent did not apply his mind to the relevant issue. It is further argued after the provisions of this section have been quoted that the respondent has by implication conceded that the requirements of section 102(1) and 10(1)(zA) of the Act have been complied with except for the requirement that the amounts had to be received from the state.

[65] While there may be a case to be made out that the drawback claims were in fact paid by the state, as I have held *supra*, the suggestion that the respondent did not apply his mind properly to the interpretation of the relevant provisions of the statute is untenable. The very answer I have quoted clearly indicates that the respondent considered the provisions of the Act and came to a conclusion which may be wrong in law in respect of a part of the claim, but which cannot be attacked as having been *mala fide* or based on ulterior motives or on arbitrary action.

[66] The applicant has consequently failed to establish the existence of a proper ground for review.

[67] Nor do the applicant's problems end there. From the above quotations of the *Metcash* judgment, it is clear that, while the avenue of an appeal to the Special Court is still open, the merits of the assessment, or the correctness of an objection thereto, cannot be attacked by way of a review, other than possibly on the grounds of urgent interim relief. In this regard it is clear that the legislature has seen fit to provide a special statutory remedy for appeals against the rejection of objections to assessments, which, once the matter has been considered by the Special Court, may be taken on appeal to the ordinary courts, and which consequently must be followed. Mr Puckrin argued that the creation of the Special Court by statute amounted to an "internal remedy as contemplated in section 7(2)(a) read with subsection (2)(c) and 7(1)(a)" (of the Promotion of Administrative Justice Act, Act 3 of 2000).

[68] I am uncertain whether a special statutory procedure could be described as an internal remedy. However, the *Metcash* decision provides ample authority for the proposition that the special procedure has to be followed in cases where objection is made to an assessment.

[69] In the light of the aforegoing, I conclude that the applicant is unable to review the respondent's decision, in the absence of a recognized ground for review and

because of the failure to follow the prescribed statutory procedure of objection and appeal against its dismissal.

[70] This really disposes of the matter.

[71] Although the issue of prescription was raised, Mr Puckrin SC on behalf of the respondent did not press the point. Prescription clearly could not arise on these facts.

[72] In as much as the argument could carry any weight that the Receiver of Revenue's ruling in regard to the refunds referred to above constituted a general practice, I need merely record that it was virtually common cause during argument that there was no evidence of such practice having been followed anywhere else in the Republic of South Africa until such time as the respondent withdrew the local Receiver's ruling.

This leaves the issue of

Condonation.

[73] The Promotion of Administrative Justice Act allows and authorizes a court to extend the period of 180 days referred to in section 7 where the interests of justice so require.

[74] The explanation which the applicant offers for the not inconsiderable delay in launching this review application basically amounts to an assertion that both the applicant and its auditors and attorneys were unaware of the provisions of the Act and of the fact that it had come into operation.

[75] This allegation is unsupported by any evidence by the auditors or the attorneys and does, in any event, not cover the entire period of delay which occurred.

[76] Had it not been for Mr Puckrin's generous concession on behalf of the respondent in abandoning its opposition against the granting of condonation, I would have been of the view that no good cause was shown and no evidence was adduced upon which the court could have come to the conclusion that it was in the interests of justice to grant condonation. In the light of the aforegoing, it is in any event clear that it is not in the interests of justice to grant condonation as the applicant's application on the merits has no chance of success.

Costs

[77] I have already recorded that the applicant has made serious allegations of *mala fides* and ulterior motives against the respondent, on facts which are so flimsy that they constitute no basis for these serious charges at all. The respondent has asked for a special costs order in the light of this fact should the application be unsuccessful. There is ample authority for such an order. The

application is dismissed with costs on the scale of attorney and client, such costs to include the costs consequent upon the employment of two counsel.

E BERTELSMANN
JUDGE OF THE HIGH COURT

7743-2002