DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.

/AM 26/11/04 DATE ..... SIGNATURE

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION

Case no. 17313/03

In the matter between:

MORGAN BRENT MARKETING CC. Applicant

and

THE COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICE Respondent

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JUDGEMENT

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LEGODI J

*I. INTRODUCTION*

This is an application in terms whereof the applicant is asking for:

1. The decision of the respondent to impose a penalty of R142 241-26 be reviewed and set aside.

2. The respondent be ordered to refund the amount of R142 241-26 together with interest thereon at the bank rate as it applied from time to time as from the 24th February 1999

to date of payment, to the applicant within seven days of the order.

3. Alternatively to prayer 2, that the matter be referred back to the respondent to reconsider the matter taking into account the fact that the goods were not subject to any import duty and or other mitigating circumstances.

4. That the respondent be ordered to pay the costs of this application.

*II. BACKGROUND*

5. On the 22nd February 1999 at a certain warehouse in Pretoria the applicant was in the process of sorting and repacking the coffee beans destined for Germany through Durban when the officials of the respondent arrived.

6. The consignment of coffee beans originated in Burundi and were to be transported by the applicant from Zambia to Durban to be exported sea freight to Germany.

7. The officials of the respondent scaled the warehouse and stopped the packing and export process, because applicant did not obtain a repacking letter from the Controller of Customs and Exercise in Pretoria prior to proceeding with the repacking.

8. The applicant is said to have been unaware that such letter was required as the goods were regarded to be still in transit.

9. On or about 24 February 1999 and in a DA70 form the applicant admitted guilt in terms of Section 91 of Act 91 of 1964 for having contravened the provisions of Section 18(8) and (13) of Customs and Excise Act 91 of 1964 read with Section 80(1)(c) and (10). In the same form the applicant further undertook to abide by the decision of the commissioner and pending such a decision paid R142 241-26 referred to in this judgment.

10. On the 26 February 1999 the applicant was requested by the respondent to make representations as to why penalty

in the amount of R142 241-26 should not finally be imposed.

11. On the 25 March 1999 the applicant made representations to the respondent in terms whereof it asked for the reimbursement of the total amount of R142 241-26 stating amongst others that:

11.1 They were not aware that a letter was required and that this was their first shipment.

11.2 The coffee did not belong to the applicant and that the applicant was only used as transport.

11.3 Payment of provisional penalty in the sum of R142 241-26 and vat caused a major cash flow problem to the applicant.

11.4 Forfeiture of R142 241-26 will cause a loss of foreign currency for South Africa and the los

employment opportunities and a major loss of revenue to the country as a whole.

12. On the 8th December 1999 the respondent wrote to the applicant in terms whereof the applicant was informed that it has been decided to impose the full amount lodged as a penalty and on the 20th December 1999 the penalty was confirmed.

13. On the 19th July 2000 the applicant wrote another letter to the respondent for leniency regarding the forfeiture of R142 241-26 and this was responded to in a letter dated the 31st July 2000 wherein it was indicated no grounds for leniency could be found.

14. On the 29th August 2000 the applicant wrote another letter to the respondent in terms whereof the applicant made further representations and the respondent reacted by informing the applicant that its request for reconsideration of the decision on the R142 241-26 was [illegible]

by the Commissioner of the South African Revenue Services and that the matter is regarded as closed.

15. On the 30th September 20002 the applicant made further other representations. On the 8th October 2002 an attorney acting on behalf of the applicant wrote a letter to the respondent in terms whereof further representations were made. This was responded to in a letter dated the 11th October 2002 wherein the applicant was informed that penalty review committee of the respondent decided to confirm the forfeiture.

16. On the 15th October 2002 a further letter was addressed to the applicant by the respondent in terms whereof the respondent indicated that in deciding to impose the penalty or confirm the penalty in the amount of R142 241-26, the penalty review committee took into account the fact that a time period of about four years had lapsed, that this was not a vat contravention, but a custom contravention and that the goods were irregularly dealt with as it was repacked in an unlicensed warehouse without customs

supervision and no prove could be provided that a repack letter was applied for.

17. On the 27th November 2002 another attorney on behalf of the applicant addressed a letter to the respondent in terms whereof the respondent was notified that the applicant was intending to institute review proceedings against the respondent and that the grounds for such a review will be based on the reasons furnished by the respondent in the letter dated the 15 October 2002, common law grounds and grounds provided for in the Promotion of Administrative Justice Act 3 of 2000.

18. During or about August 2003 the applicant then instituted these proceedings against the respondent.

*III. ISSUES RAISED*

19. The issues raised by this application as also submitted by Mr Vorster on behalf of the respondent are in my view as follows:

- Whether or not the founding papers disclose cause of action for the repayment of the amount in question?

- Whether or not the applicant has given a notice in terms of Section 96(1) of Act 91 of 1964 for the institution of these proceedings?

- Whether or not the applicant's claim for repayment has not been extinguished by prescription?

- Whether or not the review proceedings are not academic as the applicant will not be entitled to any relief for payment of R142 241-26.

*IV. LEGISLATION RELIED UPON*

20. Section 18(8) of the Customs and Exercise Act provides that goods removed in bond shall not be delivered or moved from the control of the Department at the place of destination in the Republic except upon duties entry according to the first account taken of such goods on

landing or on entry for removal in bond thereof or according to the contents of the packages containing such goods issued as reflected on the invoice issued by the supplier in respect of such goods and payment of any duty due including subject to the provisions of subsection 18 of Section 75, any duty due on any deficiency.

21. Section 18(1)(a) provides that no person shall without the permission of the Commissioner, divert any goods removed in bond or deliver such goods or cause such goods to be delivered in the Republic except into the control of Department at the place of destination.

22. Section 18(13)(b)(i) provides that not withstanding the provisions of paragraph (a) the commissioner may in such circumstances and subject to such conditions as he may prescribe by rule, permit goods in transit through the Republic or any class or kind of such goods to be delivered to any place approved by him for the purpose of sorting or repacking.

23. Section 18(13)(b)(ii) provides that the goods shall not be removed from such place to the place where they are destined to leave the Republic unless the duty on any deficiency has been paid to the controller.

24. Section 96(1)(a) provides that no process by which any legal proceedings are instituted against the state, the Minister, the Commissioner or an officer for anything due in pursuance of this Act, may be served before the expiry of a period of one month after delivery of a notice in writing setting forth clearly and explicitly the cause of action.

25. Section 96 (1)(b) provides that subject to the provisions of Section 89, the period of extinctive prescription in respect of legal proceedings against the state, the Minister, Commissioner or an officer on the cause of action arising out of the provisions of this Act, shall be one year and shall subject to the provisions of Section 95 A(7) begin to run on the date when the cause of action first arose.

26. Section 96(c )(1) provides that the state, the Minister, the Commissioner or an officer may on good cause shown reduce or extend the period by agreement with the litigant and upon refusal of such an extension the aggrieved party may approach the High Court for such an extension.

27. Rule 18.14 promulgated in terms of the Custom and Exercise Act provides that for the purposes of Section 18(13)(b):

(a) application for the sorting or repacking of goods in transit through the Republic shall be made to the controller in whose area of control such sorting or repacking is to be done and such application shall state the reasons therefore and the nature concerned and

(b) sorting and repacking shall be subject to such procedures and controls including the period within which any relevant consignment shall be sorted or repacked as may be specified by the controller.

## *V. DISCUSSIONS AND SUBMISSIONS*

28. During the hearing of this application the issues appear to have been narrowed by the applicant's abandonment of prayer 2 in terms of which the applicant asked for the refund of the money paid by applicant to the respondent or any part thereof. It was therefore submitted on behalf of the applicant that the issues relating to the notice in terms of Section 96(1)(a) and prescription in terms of Section 96 (1)(b) were no longer important or relevant. The applicant however submitted that it should still be entitled to the alternative prayer ordering the respondent to reconsider the applicant's representations.

29. In my view the issue of referral to the respondent for reconsideration cannot be divorced from the applicant's abandonment of prayer 2 for reimbursement and the allegation of non compliance with the provisions of Section 96.

30. Firstly the referral for reconsideration by the respondent is intended to ultimately have the money forfeited or any part thereof be refunded to the applicant. Secondly there will be no purpose at all to refer the matter for reconsideration particularly taking into account that such a decision ordering for a referral cannot be said to be in the public interest which requires a public policy to be clarified and restated. Thirdly the applicant as it would appear from the historical background of the case, made several representations to the respondent with a view to persuade the respondent to reconsider its decision to forfeiting the amount so paid by the applicant and the responses to all these representations were that forfeiture cannot be reviewed. Lastly the applicant's claim against the respondent has obviously prescribed for non-compliance with the provisions of section 96 referred to in this judgment and the respondent had already indicated to the applicant that the request for reconsideration cannot be considered favourably as amongst others long time had expired to justify any such reconsideration.

31. I am also of the view that the respondent would not legitimately be entitled to reconsider and order for a refund of the amount or any part thereof paid by the applicant in the face of obvious prescribed claim against the respondent. The submission on behalf of the applicant that the applicant would be entitled to reconsider the forfeiture would in my view be a futile exercise especially in the light of the fact that the respondent had already raised the issue of the long lapse of time as one of the grounds for turning down the applicant's request for a refund.

32. As regard the notice relating to the provisions of Section 96(1) (a), the applicant gave a notice of its intention to institute the present proceedings as set out in a letter dated the 27th November 2002 and addressed to the respondent and therefore the issue relating to the notice as required by the Act was not vigorously persisted with by Counsel for the respondent although such a notice was given after a long period of time. Be that as it may, the other issues raised remain important.

33. Regarding the submissions that the applicant's papers as they stand did not disclose the cause of action, it was submitted by Mr Vorster on behalf of the respondent that if there are absent from the founding papers such facts as would be necessary for determination of the issue in the applicant's favour, on objection that the application does not support the relief claimed is sound. (SEE Hart V Pinetown Drive-In Cinema (PTY) LTD 1992 (1) SA 464(D) at 469 C-E, Swissborough Diamond Mines (PTY) LTD V Government of the Republic of South Africa 1999 (2) SA 279(T) at 323 G-I).

33.1 The applicant with the apparent intention to have the goods seized or attached by the officials of the respondent, released, made admissions and undertaking to the effect that it had contravened the provisions of Section 18(8) and (13) of Act 91 of 1964, and that it will abide by any decision that the commissioner might take and that it was pleading guilty in terms of Section 91. The applicant before the institution of the present proceedings was invited by the respondent to make

representations against the forfeiture of the amount paid, the applicant made several representations to the respondent which were responded to, and lastly the applicant did not in no uncertain terms allege that the respondent committed an irregularity. All of these considered together, do not establish a cause of action particularly considering the payment of the money coupled with admission of guilt and undertakings by the applicant. To find otherwise will in my view defeat the purpose for which the money was paid and the release of the goods by the respondent.

34. This now brings me to consider the merits of the review proceedings and what the applicant hopes to achieve out of the present review proceedings. A party seeking to have any judicial, or quasi judicial or administrative decision or judgment be reviewed and set aside must show that an irregularity has been committed which renders the decision or judgment unfair.

35. The applicant in essence both as regard prayer 1 and prayer 2 in the alternative wishes to have the amount paid or part thereof be refunded to the applicant once the decision forfeiting the amount paid as penalty is reviewed and set aside. This in my view will be academic as also submitted by counsel on behalf of the respondent. The claim against the respondent has prescribed for non compliance with the provisions of Section 96. The review and setting aside of the decision without any order in terms of prayer 2 will serve no purpose. The applicant abandoned prayer 2 seeking an order for refund. Referral to the respondent for reconsideration of its decision to forfeit the amount will neither assist the applicant as the matter has prescribed and therefore even if one was to resort to the alternative to prayer 2, this would still not help. Prayer 1 cannot stand alone, otherwise such an order in terms of prayer 1 will be academic. Should prayer 1 be set aside and later the applicant attempts to recover the money so paid, his claim will be defeated by prescription. I am therefore satisfied that the review

proceedings are of academic nature taking into account the facts of the case.

36. The applicant is having more than one difficulty in this case. Any review proceedings should not be unduly delayed before the institution thereof. In the instant case the applicant cause of action arose during December 1999 when a decision was taken to confirm the provisional penalty imposed in terms of Section 91 of Act 91 of 1964. The applicant elected to make several representations instead of proceedings to have the decision reviewed and set aside by the court. In my view there has been undue delay in launching the present application to review the decision of December 1999 or 15 October 2002. Be that as it may, the merits of the application will still be overriding consideration.

37. No statutory period is prescribed within which proceedings for review must be brought, but they must be brought within reasonable time. Where it is alleged that the applicant did not bring the matter to court with

reasonable time, it is for the court to decide firstly whether the proceedings were in fact instituted after the passing of unreasonable time, secondly if so, whether the unreasonable delay ought to be overlooked and thirdly the court exercises a judicial discretion taking into account consideration of all the relevant circumstances. In my view regarding the instant case the merits of the case should be considered in deciding whether or not to find in favour of the applicant despite the long delay. The applicant's initial contention appears to have been that it contravened no provisions of Section 18. This contention was not pursued at the hearing of this matter and in my view rightly so, because firstly the applicant admitted that it contravened the provisions of Section 18 and secondly it was conceded at the hearing that the goods in question were goods removed in bond as intended to in Section 18. Lastly, the amount so forfeited is within the limit as determined by the Legislation taking into account the value of the goods in question.

38. The goods in question once having entered the Republic were taken to unlicensed warehouse in Pretoria instead of being placed under the control of the officials of the respondent. This in my view amounted to a diversion as prohibited by the Act. In Pretoria warehouse the goods were unpacked and repacked without permission or supervision of the respondent in direct contradiction of the provisions of Section 18.

39. The respondent would in terms of the relevant provisions of the Act have been entitled to detain the goods subsequent to the contravention of Section 18. However with clear understanding of its actions the applicant decided to pay provisional admission of guilt and also admitted that it contravened the provisions of the Act and also undertook to abide by any decision of the Commissioner and in a way by so doing induced the respondent to release the goods. I therefore can find no merits in the review proceedings instituted by the applicant.

*VI. CONCLUSION*

I therefore conclude by making the order as follows:

a) The application is dismissed.

b) The applicant to pay costs of the application and such costs to include costs of the two counsels on behalf of the respondent.

LEGODI M.F.
Judge of the High Court

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