IN THE HIGH COURT OF SOUTH AFRICA

DURBAN AND COAST LOCAL DIVISION **CASE NO: 8365/2003**

In the matter between:

ZAMEKILE LULU MNQAYI N.O.
(in her capacity as executrix of the estate late
GOODMAN MHLENGI MNQAYI) Applicant

and

THE COMMISSIONER, SOUTH AFRICAN REVENUE SERVICES, CUSTOMS AND EXCISE First Respondent

THE MINISTER OF SAFETY AND SECURITY Second Respondent

THE MASTER OF THE HIGH COURT: DECEASED ESTATES Third Respondent

THE INTERNATIONAL TRADE ADMINISTRATION COMMISSION Fourth Respondent

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JUDGMENT

delivered on: 6-7-05

VAHED AJ:

On 17 September 2003 this matter came before Levinson J. who granted an Order, *inter alia*, in the following terms:

> "1. That a *rule nisi* do hereby issue calling upon the respondents to show cause, if any, to this Honourable Court on or before 24 October 2003, why an order in the following terms should not be granted:

1.1 That the first and second respondents are ordered forthwith to return to the applicant a motor vehicle, a Toyota Hi-Ace, with the registration numbers and letters NT 8325.

1.2 That the first respondent be and it is hereby directed to pay the costs of this application, unless it is opposed by any of the remaining respondents, in which event of the costs are to be paid by all the respondents so opposing, jointly and severally.

2. That, pending the return day or any extension thereof the first and second respondents are interdicted and restrained from disposing of, alienating, or in any way encumbering the said motor vehicle."

The matter came before me on 11 March 2005, which was the extended return day of that *rule nisi*. After hearing argument, I reserved judgment and extended the *rule nisi* indefinitely pending the delivery of this judgment.

The background facts and circumstances are the following. The applicant, sues in her capacity as the duly appointed executrix in the estate of the late GOODMAN MHLENGI MNQAYI ("the deceased") who was her husband and who died on 31 March 2003. During his lifetime the deceased was the registered owner of a Toyota Hi-Ace motor vehicle being the registration letters and numbers NT 8325 ("the vehicle"). Upon the deceased's death the vehicle came into the applicant's possession in her aforesaid capacity. In due course she intended obtaining title in her name and operating the vehicle as a taxi.

The applicant discloses that the deceased purchased the vehicle from one FANYANA DLAMINI who in turn had purchased it from one NGIBA and puts up supporting affidavits from those two persons who confirm her allegations.

On or about 1 May 2003 the applicant delivered the vehicle to a panel beater for certain repairs to be effected. On 8 May 2003 the applicant was approached by Inspectors Shezi and Njilo, both policemen acting within the course and scope of their employment with the second respondent. The policemen informed the applicant that the vehicle was an imported one and requested that she produce an importation permit. She could not do so and in due course the vehicle was impounded.

The applicant was ultimately referred to the offices of the first respondent in Durban where she was interviewed by a MS B LOURENS who advised her that if she could not comply with section 102 of the Customs and Excise Act, Act 91 of 1964 ("the Act"), the vehicle would be seized in terms of section 88 (1) (c) of the Act, and handed to her an official Notice of Detention. She took of this to her attorney of record who made numerous unsuccessful attempts to make contact with LOURENS.

The applicant's attorney has filed an affidavit supporting the application and she takes up the applicant's story. The applicant consulted with her on 19 May 2003. On 28 May 2003 she wrote to the Durban offices of the first respondent marking that letter for the attention of LOURENS. She briefly recounted the history of the matter and, amongst other details, asked for the reasons and the basis for the seizure and detention of the vehicle. No response was received. Thereafter, and on 26 June 2003, the applicant's attorney wrote, enclosing a copy of her letter of 28 May 2003, to the Pretoria offices of the first respondent and copied that letter to the Durban offices. In

the letter of 26th of June the applicant's attorney also indicated that that letter was to serve as a notice in terms of the provisions of section 89 of the Act. The affidavits deposed to by the vehicle's predecessors in title, ie. the two owners before the deceased, also accompanied that letter.

On 1 July 2003 one Schade from the first respondent's Pretoria offices made telephonic contact with the applicant's attorney and asked for a copy of the Notice of Detention that LOURENS had handed to the applicant. The applicant's attorney attended to this that same day. On 3 July 2003 the applicant's attorneys received a letter from the Pretoria offices of the first respondent acknowledging receipt of her letter of 26 June. No mention was made of the telefax of 1 July. On 7 July 2003 the applicant's attorneys received a letter from the Durban offices of the first respondent acknowledging receipt of her letter of 26 June. Although that letter indicated that it was sent by one CRYSTAL EBRAHIM, who described herself in the body of the letter as the Case Officer, the letter was signed by EBRAHIM, under the designation, Anti-Smuggling Officer and also by one F ESSOP under the designation, Senior Anti-Smuggling Officer. In that letter EBRAHIM indicated to the applicant's attorney that she would "be personally following up on this case, and as soon as [she had] clarity on the background check of this vehicle" she would be making contact with the applicant's attorney as to progress.

When nothing was forthcoming the applicant's attorney wrote again on 22 July 2003 to both the first respondent's Pretoria and Durban offices. This application was threatened.

On 24 July 2003 the applicant's attorney received a telefax from the Pretoria offices of the first respondent acknowledging receipt of her letter of 26 June and advising that certain pages of the affidavits sent therewith were missing. In that letter the applicant's attorney was advised "to take heed of the available remedies to protect [her] client's interest".

On 25 July 2003 EBRAHIM wrote to the applicant's attorney indicating that certain investigations were being made with Toyota SA (i.e. the motor manufacturer) after which the matter would be handed over to Schade for a decision to be made. On 11th of August 2003 the applicant's attorneys received a further telefax from EBRAHIM advising that the Department of Trade and Industry and the first respondent's legal section were conducting a further investigation. During this time a person from the offices of the first respondent in Pretoria who identified himself only as Wesley telephonically advised the applicant's attorney to proceed with this application. This application was launched on 11 September 2003 with no further communication taking place in between.

The first respondent has filed an opposing affidavit deposed to by LOURENS. Much, if not all, of the background sketched by me above is either not in dispute or is admitted by LOURENS. The essence of the opposition is as

follows. According to LOURENS the vehicle was one of 15 used or second-hand motor vehicles imported into South Africa from Japan by a concern known as KDG Auto Exports (Pty) Ltd ("Auto Exports"). Those vehicles arrived at Durban harbour on 14 December 1999, and were destined for immediate export into Africa. In other words, that consignment, including the vehicle, was not intended for local consumption. If they were intended for local consumption the importer would have had to be in possession of an import permit and would have had, in addition thereto, to pay import duty thereon. None of this was done with regard to the subject vehicle according to LOURENS.

In fact, according to LOURENS, Auto Export were previously investigated by the first respondent's special investigation unit which found that Auto Export had diverted used motor vehicles, intended for export into Africa, into the local market. As a result of that investigation, and in a settlement arrived at between the first respondent and Auto Export, the amount of R2,7 million was paid to the first respondent by Auto Export, who in addition undertook to export those vehicles which had been diverted into the local market.

LOURENS then took issue with the notice in terms of section 89 of the Act issued by the applicant's attorneys because she (LOURENS) claimed that the vehicle had not been seized but merely detained. She contended that only a seizure in terms of section 88 (1) (c) of the Act would require the issue of a notice in terms of section 89. She went on to indicate that this application was totally unnecessary and that the applicant's proper recourse was to approach

the first respondent in terms of section 93 of the Act which provided, on, *inter alia*, good cause shown, for the vehicle to be released to the applicant.

On 22 January 2004 the applicant filed a replying affidavit and the matter came before Combrinck J for argument as an opposed matter. Combrinck J. appears to have taken the view that LOURENS appeared to be suggesting that there were reasonable prospects of an application in terms of section 93 of the Act being successful and suggested that that avenue was worthy of exploration. He therefore adjourned the matter and extended the *rule nisi* to 14 May 2004 and granted the following further orders:

> "1 That the first respondent is ordered to receive the applicant's representations, and to give consideration thereto in terms of section 93 of Act 91 of 1964, and thereafter to inform the applicant, in writing, within 30 days from receipt of such representations, as to its decision together with reasons therefor.
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> 2 That the applicant is given leave to supplement its papers, insofar as is necessary and to move for appropriate additional or alternative relief, in consequence of the outcome of the events in paragraph 2 above."

That application was duly filed with the first respondent on 1 April 2004. The first respondent purported to consider those representations and declined to exercise the discretion foreshadowed in section 93 of the Act because, so the response said, by then the fourth respondent had entered the picture and seized the vehicle in terms of section 41 (g) of the International Trade Administration Act, 71 of 2002. A copy of the Seizure Notice issued by the fourth respondent was attached to the response which indicated that that seizure took place on 19 September 2003 and that it was communicated to LOURENS that very same day who released the vehicle to the fourth respondent. I pause to mention that at that stage the fourth respondent was

not a party to these proceedings. It is significant also to mention that those events occurred prior to LOURENS deposing to the first respondent's answering affidavit in these proceedings. Why she did not disclose that fact in the answering affidavit is not explained, yet at the same time she significantly claimed that no seizure had taken place in terms of the Act.

In any event, and only after the first respondent had filed its response to the application in terms of section 93 of the Act was the fourth respondent, on its own motion, joined in these proceedings. Subsequently the fourth respondent filed an opposing affidavit raising the defence foreshadowed in that response.

Thereafter the applicant filed a further affidavit taking issue with all that had unfolded in the interim.

That was the state of the matter when it came before me on 11 March 2005.

When the matter was called, Ms Singh, who appeared for the first, second and fourth respondent's, abandoned the contention that the fourth respondent had an interest in the matter and further abandoned any defence raised by the fourth respondent. She was wise in that regard because the fourth respondent's opposition was underpinned by the International Trade Administration Act, 71 of 2002, which came into force 1 June 2003, and which she conceded was not retrospective in its operation. The provisions of that Act were therefore not applicable to the facts of this case.

Ms Singh confined the matter to the case presented by the first respondent in that the answering affidavit deposed to by LOURENS. She sought to argue that LOURENS had in fact effected a seizure in terms of the Act. It will be recalled that LOURENS expressly disavowed seizing the vehicle. That argument cannot be sustained.

However, and if that argument were to be entertained, it would have to be rejected because for a seizure to take place there had to be a valid cause giving rise thereto. At the time that LOURENS dealt with the vehicle in the previous dispute with Auto Exports had been settled and the requisite import duties, penalties and value added tax had been paid to the first respondent. In other words all of that was legally and lawfully claimable for a vehicle to be imported for local consumption had been received by the first respondent. Mr Stokes, who appeared for the applicant, argued that the matter ended there, and that thereafter the vehicle was lawfully within the borders of South Africa. That, he contended was the net and logical result of the settlement achieved between Auto Exports and the first respondent. Although not expressly dealt with by Mr Stokes, he implied in that argument that the failure of Auto Exports to thereafter remove the vehicle beyond the borders of South Africa did not constitute a breach of any of the provisions of the Act, but rather constituted a breach of one of the terms of the written settlement agreement between Auto Export and the first respondent, which would then entitle it proceed with its contractual remedies in terms of that agreement. That argument achieves force when regard is had to what precisely the applicant was called upon to do when she received notification from LOURENS. That notice called upon her,

in terms of section 102 of the Act, to provide proof that the requisite import duty had been paid in respect of the vehicle. She was required to do nothing more, and nothing less. The settlement between Auto Export and the first respondent provided ample proof of that fact.

However, and if I am wrong in that regard, there remains the question as to whether or not the first respondent has properly applied it is mind in terms of section 93 of the Act. It will be recalled that rather than exercising an independent discretion, based on the facts of the matter, the first respondent sought refuge with the intervention of the fourth respondent and the defence of raised by it. Indeed, and subsequent to filing the response to the application in terms of section 93 of the Act, the first respondent, under his hand personally, filed yet a further affidavit again the raising as a bar to the exercise of his discretion the defence raised by the fourth respondent.

The defence raised by the fourth respondent, and indeed, it's very intervention in these proceedings, has been jettisoned by Ms Singh. What then do I make of the first respondent's purported reliance on a defence that has been justifiably abandoned by its Counsel? To my mind, it is clear that the first respondent had no option but to favourably consider the section 93 application. In a vain attempt to avoid doing so the matter was brought to the attention of the fourth respondent, and its intervention was invited.

The Order made by Combrinck J. on 14 May 2004 gave the applicant leave to supplement its papers and to seek such additional relief as may be required

as a result of the section 93 processes. In accordance with that Order I have been asked to review and set aside the first respondent's decision in that regard. It is not in dispute that I have the power to do so.

It will serve no purpose to again remit the matter to the first respondent for the exercise of his discretion afresh and it is trite that I can substitute my discretion for his if remitting the matter would serve no other purpose but delay. I accordingly arrive at the conclusion that, if I am wrong on the first point, the first respondent ought nevertheless to have exercised his discretion in the applicant's favour. I accordingly review and set aside that decision and replace it with one allowing for the release of the vehicle to the applicant.

In the result I confirm the *rule nisi* with costs, such costs to include all orders for costs previously reserved in the matter. In addition I order that, to the extent necessary, that confirmation applies equally to the fourth respondent and that the order for costs is to operate jointly and severally as against the first and fourth respondents.