DELETE WHICHEVER
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

2012-03-16
DATE

SIGNATURE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

Case No: 41881/2006

In the matter between:

APPOLLO TOBACCO CC	**FIRST APPLICANT**
EXCLUSIVE TOBACCO PRODUCTS (Pty) Ltd	**SECOND APPLICANT**
HENDRIK FREDERIK DELEPORT	**THIRD APPLICANT**
CHRISTOPHER ARTHUR ILLSTON	**FOURTH APPLICANT**

And

THE SOUTH AFRICAN REVENUE SERVICES	**RESPONDENT**

JUDGMENT

MAVUNDLA, J.

[1] The third applicant is the sole member and consultant of the first applicant in whose behalf he is acting, as well as in his personal capacity. The fourth applicant is the director of the

second applicant in whose behalf he is acting, as well as in his own behalf.

[2] Both the first and second applicants are registered importers and exporters of cigarettes. They act as vendors and importe and distribute cigarettes on local market. The first applicant held a manufacturing warehouse licence which enabled it to manufacture cigarettes of Exclusive brand for export.

[3] The respondent is the Commissioner for South African Revenue Services appointed in terms of the South African Services Act, Act 34 of 1997 and is the Administrative Authority appointed to administer the Customs and Excise Act, Act 89 of 1991 (the VAT Act).

[4] The respondent per letter dated 8 November 2006 informed the applicants that he has taken a decision, which he conveyed to them, that, they have refused or failed to submit any evidence to prove proper compliance with Customs and Excise Act, Act 91 of 1964 (the Act) in respect of certain and by virtue of the

provisions of section 45(1)(b) of the VAT Act, held the applicants liable for the payment of an amount of R24, 405 809. 50 (Twenty Four Million Four hundred and five thousand, eight hundred and nine Rand and fifty cent). The respondent claimed jointly and severally from the applicants payment of the aforesaid amount.

[5] The applicants contended that the crux of the decision was to hold the first and second respondent in terms of Schedule 1 part 2(a) to the Customs an Excise Act and VAT in terms of the VAT Act on the basis that 11753 (Eleven Thousand Sven Hundred and Fifty three) master cases of Exclusive cigarettes were dealt with, contrary to the provisions of Customs Act. On this basis an amount of R24, 405 809. 50 (Twenty Four Million Four hundred and five thousand, eight hundred and nine Rand and fifty cent) is claimed from the third and fourth applicants in terms of Section 103 of the Customs Act.

[6] The applicants contend that on proper evaluation of the facts and documents relevant to this matter, the cigarettes, on a

balance of probabilities, were duly imported and/ or manufactured and distributed.

[7] The applicants brought in terms of rule 53, review application to have the aforesaid decision set aside[1]. They also sought a declaratory that:

"3. It be declared that no basis existed for the allegation that 11 753 master cases of Exclusive cigarettes were introduced in the local market;

4. It is declared no basis existed to claim any amount from the first and second applicants in respect of 11 753 master case of Exclusive cigarettes;

5 it us declared that no basis existed to hold the third and fourth applicants liable in terms of the provisions of section 103 of the Customs and Excise Act 91 of 1964 in respect of claims against first and second applicants based on 11 753 master case of Exclusive cigarettes.

6 It is declared that for the period January 2001 to June 2003 the first Customs and Excise and VAT Acts duly accounted for 6071 master case of Exclusive cigarettes."

[1] Prayers 1 and 2 of the notice of motion.

[8] The relationship between the applicants and the respondent has a chartered history, chronicled through voluminous documents spanning into approximately four (4) thousand pages, with extensive litigation under case number 20523/03 (AT11); under case number 19315/03 (AT12); an urgent application under case number 33012/03(AT 14); an application under case number 5918/2004 that served before Bertelsmann's J who withdrew the manufacturing licence of the first applicant; the present matter resulting in the decision by Prinsloo J.

[9] For purposes of this judgment, it shall not be necessary, in my view, to traverse the entire voluminous documents, neither is it necessary, on second thought, to deal with the Bertelsmann J and Prinsloo J decisions. The relevance of Prinsloo J decision handed down on 28 August 2009 is the order that:

"1. The application to strike out is dismissed;

2. The defence flowing from the Promotion of Administrative Justice Act, 3 of 2000, is dismissed;

3. The defence of *res judicata/* issue *estoppel* is dismissed;

4. The application for the relief set out in prayer *1, 2, 3, 4, 5,* and 6 of the motion is postponed sine die.

5. The respondent is ordered to pay the costs, which will include the costs flowing from the employment of two counsel."

[10] Subsequent to the judgment of Prinsloo J, the respondent withdrew its decision which was the catalyst to this matter[2]. The withdrawal was conveyed to the applicants per letter dated 20 August 2010. The consequence of the withdrawal by the respondent of its decision, was that prayers 1, 2, 3, 4, 5 of the notice of motion have become moot. The applicants, however, are pressing with the remaining prayer 6, seeking an order that:

"It is declared that for the period January 2001 to June 2003 the first Customs and Excise and VAT Acts duly accounted for 6071 master case of Exclusive cigarettes."

[11] The applicants contended that prayer 6 was not moot nor abstract. It was submitted on behalf of the applicants that the respondent decided that the applicants did not account for the 11 753 master cases of exclusive cigarettes, the evidence

[2] Decision per letter dated 8 November 2006.

reveals that they accounted for 6071 master cases. They further averred that respondent was still holding about 154 master cases of cigarettes which are belong to them[3]. They further contend that they have the right to possess and to be restored with such 154 master cases and that therefore, they have an interest over the said master cases. It was further submitted on their behalf that their right to these 154 master cases was not affected by time bar, because it is a continues right to such property. It was further submitted that the applicants rely on their right to have the 154 master cases restored to them to found the jurisdictional requirements of s19(1)(iii) of the Supreme Court Act. It was further submitted that their right to be restored of the 154 master cases was not time barred.

[12] It was submitted on behalf of the respondent that the effect of the withdrawal of its decision made even prayer 6 academic and abstract. It was further submitted that granting prayer 6

[3] Paginated page 43 para 8.40.

would be of no practical consequences because the applicants' right to any refund, was time barred.

[13] The parties are *ad idem* that prayer 6 sought by the applicants is by its nature a declaratory order. It is trite that a court can grant a declaratory order in term of 19(1)(a)(iii) of the *Supreme Court Act* 59 of 1959].[4]

[14] In the matter of *Shoba v OC, Temporary Police Camp, Wagendrift Dam; Maphanga v OC, SAP Murder & Robbery, Pietrmaritzburg,*[5] Corbertt CJ stated that:

"Generally speaking, the Court will not, in term of s 19(1)(a)(iii), deal with or pronounce upon abstract or academic points of law. An existing or concrete dispute between the parties is not a prerequisite for the exercise by the Court of its jurisdiction under this subsection, though absence of such dispute may, depending on the circumstances, cause the Court to refuse to exercise its jurisdiction in a particular matter (see *Ex Parte Nel* 1963 (1) SA 754 (A) at 759-760B. But because it is not the function of the Court to act as an adviser it is a requirement of the exercise of jurisdiction

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[4] S19 of the Supreme Court empowers the High Court in terms of subsection "(1)(a)(iii) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or a contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination".

[5] 1995 (4) SA 1 (AD) at 14F.

under this subsection that there should be interested parties upon whom the declaratory will be binding (Nell's case, at 760B-C) In Nel's case, *supra* as 759A-B, Steyn CJ referred to with approval to the following statement by Watermeyer JA in *Durban City Council v Association of Building Societies* 1942 AD 27, at 32 with reference the to identically worded s 102 of the General Law Amendment Act 46 of 1935:

"The question whether or not an order should be made under this section has to be determined in two stage. First the Court must be satisfied that the applicant is a person interested in an existing future or contingent right or obligation", and then if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it.'"

[15] In this regard, it is apposite to cite the matter of *Trinity Asset Management (Pty) Ltd v Investec Bank Ltd*[6] where Japhta JA said:

"Although the granting of a declaratory order is discretionary it can be granted only upon a judicial exercise of the discretion. There can be no proper exercise of such discretion if essential elements of a declaratory are not fulfilled. In Cordiant *Trading CC v Daimler Chrysler Financial Services* (Pty) Ltd 2005 (6) SA 2005 (SCA) 205 ([2006] 1 ALL SA 103), this Court said:

[6] 2009 (4) SA 89 (SCA) at 106 G-106B.

'Although the existence of a dispute between the parties is not a pre-requisite to subsection [s 19(1)(a) of the Supreme Court Act 59 of 1959], at least there must be interested parties on whom the declaratory order would be binding.

(T)he two stage approach under the subsection consists of the following. During the first leg of the inquiry the Court must be satisfied that the applicant has an interest in an "existing, future or a contingent right or obligation". At this stage the focus is only upon establishing that the necessary condition precedent for the exercise of the Court's discretion exists. If the Court is satisfied that the existence of such conditions has been proved, it has to exercise this discretion by deciding either to refuse or grant the order sought. The consideration of whether or not to grant the order constitutes the second leg of the inquiry."

[16] In the matter of *Family Benefit Friendly Soc v Commissioner for Inland Revenue*[7] the Court stated that:

"The question whether or not relief should be granted under

"6. When a Court has to determine whether it should exercise its discretion in favour of a declaratory order consideration of public policy come into play. In matter like the present one it is a weighty consideration that the Commissioner for Inland Revenue is placed in and invidious position. He is requested for a ruling which he is not obliged to give. He gives an opinion *ex gratia*. Should it be favourable the taxpayer is free to approach the Court to hear the dispute, and then there is a danger that the

[7]1995 (4) SA 120 (TPD) at 124F-125B.

Courts may be flooded with cases wherein entrepreneurs seek certainty about their tax liability before embarking on new schemes."

[17] The interest which the party has, must be a real and direct interest, not merely abstract, or financial or commercial. There must be a right or obligation which becomes the object of inquiry, be it existing, future or contingent but it must be tangible than merely a *spes*, hope in a right or merely anxiety or possible obligation.[8]

[18] It is not in dispute that before the decision that raised the applicants' chagrin was taken, they were afforded an opportunity to motivate why an adverse decision should not be taken against them[9]. The applicants, through their legal representative chose not to address the issue sought from them, thus leaving the respondent, in my view, with no choice but to make the decision, as was done. Where a tax payer is requested by the respondent to furnish certain information that resort within the privy of the former, he can ill afford not to

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[8] Vide *Family Benefit Friendly Soc v Commissioner for Inland Revenue (supra)* at 125A.
[9] Vide paragraph 5.5 paginated page 12; AT5(1) paginated page 69.

oblige and later call foul; *vide S v Ziegler*[10]. In my view, the decision of the applicant was properly taken, regard being had to the applicants' obduracy.

[19] In so far as the applicants premise their right to claim on the 154 master cases of cigarettes, it is not in dispute that the respondent did a determination of what they must pay as far back as in 2006. The relevant master cases were already a matter of dispute between the parties as far back as in 2004, if not earlier in 2003. It is more than six years that these master cases of cigarette are in the possession of the respondent. Their claim for refund should have been received by the respondent within 2 years from the date of appropriation[11]. There is no evidence placed before this Court to show that the applicants have initiated a claim for refund. The applicants' right to claim is time barred because there was no claim lodged for refund made within 5 (five) years in terms of s44 of Value-Added Tax Act No 89 of 1991, or 2 (two) years in terms of terms of or section 76B of Customs and Excise Act 91 of 1965.

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[10] 1968 (2) SA 231 (TPD) at 233D-234C.
[11] 3M South Africa v CSARS [2010] 3 ALL SA 361 (SCA) at 369d-370b.

I am therefore of the view that the applicants have not met the first leg of the two stage test and their case must on this basis fail.

[20] Assuming for a moment that the applicants have made a case to pass the muster in respect of the first leg, which is not conceded, I must then decide whether I should exercise my discretion in their favour. Once the respondent withdrew his determination, the order 6 prayed for becomes academic. The respondent cannot go back and determine any liability of tax to be paid on the relevant master cases because its right to do so is also time barred and it would be unreasonable for the respondent to attempt to make a fresh determination[12]. Besides there is no indication that the respondent still wants to determine any taxation in respect of these master cigarettes for the period January 2001 to June 2003. Equally so granting an order for refund of the 154 master cases, will be of no great moment because the applicant's right is also time barred.

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[12] Vide3M South Africa v CSARS (supra) at 372h.

[21] It is apposite to cite from the matter of *Eagles Landing Body Corporate v Molewa NO*[13] where the Court said:

"Should the orders sought be granted, that might be a moral victory for the applicant, but nothing more. The practical status quo would remain. The required tangible or justifiable advantage in relation to the applicant's position with reference to an existing, future or contingent right would not flow from the grant of the declaratory orders sought. *Adbro Investment Co Ltd v Minister of Interior and Others* 1961 (3) SA 283 (T) at 285."

In the event I were to grant an order in favour of the applicants, such an order will come to naught, for the reasons stated herein above. Consequently, I find that the circumstances of this case do not warrant that I should exercise my discretion in their favour. In the premises, for this reason as well, the applicants, case must therefore be dismissed with costs.

[22] The aspect of costs, requires some clarification. The applicant, on 16 January 2012, filed a notice in terms of Rule 28, indicating their intent to amend certain prayers of notice of motion. The respondent filed his notice of objection to the intended amendment on 30 January 2012. At the

[13] 2003 (1) SA 412 (T) at 432.

commencement of the matter before me, counsel for the applicants placed it on record that they are no longer proceeding with the amendment and is withdrawn. No tender for costs was made.

[23] When a party invites his opponent to a dual, which invitation is accepted, thereafter the former has a second thought and withdraws the invitation, for whatever reason, he must tender the costs occasioned by the invitation. He cannot be heard to say that the other party has not been inconvenienced by the invitation and therefore he need not tender costs occasioned by the invitation. He must be mulcted with the costs attendant to such withdrawn matter.

[24] Similarly, *in casu*, the applicants withdrew the intended notice of amendment after the respondent had already filed on 30 January 2012 a notice of objection, as well as an affidavit to oppose the grant of the amendment. The withdrawal was only done at the commencement of the hearing in court. Obviously, the respondent attended court anticipating to engage in a dual

regarding the envisaged amendment. There must have been preparation in that regard as well. In my view, the applicants are liable for all the costs of the respondent attendant to the then envisaged amendment and its subsequent withdrawal in court. The applicants are also liable for the respondent's costs attendant to the dismissal of their application.

[25] The respondent was ordered by Prinsloo J to pay the applicants' costs, inclusive of the costs flowing from the employment of two counsel. That order was handed down on 28 December 2009. Until this stage the applicants are the successful parties. However, beyond this point they are unsuccessful, but the respondent is the successful party.

[26] The respondent in his heads of argument pointed out to the applicants that costs on attorney and client scale will be sought because, after the withdrawal of the determination, they should not have proceeded with the matter. I am however not persuaded that this punitive costs as prayed for by the respondent should be granted. The issue that was to be

canvassed was not a simple one. The applicants were within their rights to seek the guidance of the Court in that regard. The costs of all the parties shall be computed on party and party scale, with the cut off point in respect of the applicants being the 28 December 2009, thereafter being the starting point to date in respect of the respondent's costs.

[27] In the result I make the following order:

1. That the application is dismissed with costs on party and party scale;
2. That the costs of respondent shall include the costs occasioned by the withdrawal of the notice of amendment;
3. That the parties in computing their respective costs, shall have regard to paragraphs "[25] and [26]" of this judgment.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

HEARD ON THE	:	06 MARCH 2012
DATE OF JUDGMENT	:	16 MARCH 2012
APPLICANTS ATT	:	THYS CRONJé
APPLICANTS ADV	:	B. PRETORIOUS
DEFENDANT`S ATT	:	STATE ATTORNEY PRETORIA
DEFENDANT ADV	:	J.A. MEYER S.C.