IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA CASE NO. 6083/2012

In the matter between:

MOHAMED ESSOP KADODIA Applicant

and

COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICES
(CUSTOMS AND EXCISE) Respondent

JUDGMENT

H A DE BEER AJ

[1] This is an application for rescission of a default judgment granted in favour of the Respondent against the Applicant. The parties are agreed that

the application is not brought in terms of the Uniform Rules of Court (Rules 42 and 31(2)(b)) and that the application is brought under the common law.

[2] The application was set down for hearing at the instance of the Respondent after the Applicant failed to deliver a replying affidavit timeously. The Applicant thereafter delivered his replying affidavit on 22 March 2013. The Respondent does not take issue with the late delivery of the Applicant's replying affidavit and the late delivery of the Applicant's replying affidavit is condoned.

[3] To the extent that the application has not been brought within a reasonable period of time, the Respondent similarly adopts a reasonable and pragmatic attitude and takes no issue.

[4] In order to succeed it is well established that the Applicant must establish the following: –

(a) He must give a reasonable explanation for his default.

(b) His application must be *bona fide*.

(c) He must show that he has a *bona fide* defence to the Respondent's claim which, *prima facie*, has some prospect of success.[1]

BACKGROUND

[5] The Applicant is a businessman who imports, inter-alia, tobacco products and cigarettes into the Republic of South Africa.

[6] The Respondent is an organisation of state tasked with the collection of customs duties and the enforcement of the Customs and Excise Act 1964 ("the Act").

[7] A trade agreement exists between Botswana, Lesotho, Namibia and South Africa (commonly referred to as the "BNLS countries") whose objective is to encourage trade between the member states by, inter-alia, relieving entities in these countries from paying customs duty when trading with one another. Any goods imported into the Republic of South Africa from these countries only attract value added tax (VAT) and no customs duty. It is significant to note that Zimbabwe is not a signatory to the trade

[1] Colyn vs Tiger Food Industries Limited trading as Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) at 9 F

agreement with the result that any importation and exportation of goods to and from that country attracts, inter-alia, customs duty.

[8] According to the Applicant, he wanted to import 70 cases of Remington Gold Cigarettes ("the goods") from Zimbabwe into the Republic of South Africa at the beginning of 2002. He sought the advice of two of the Respondent's employees, Messrs Hugo and Moodley who allegedly advised the Applicant that he should route the intended cargo into South Africa via Namibia thereby avoiding customs duty, the goods attracting only VAT.

[9] On 24 April 2002 when the Applicant sought to import the goods into South Africa from Namibia, the goods were seized at the Nakop Border Post and impounded in terms of Section 88(1)(a) read with Section 87 of the Act. The Applicant was notified of the detention of the goods in writing and acknowledged receipt of the notification on 24 April 2002 and was requested to comply with the provisions of Section 102 of the Act before 12h00 on 8 May 2002. Section 102 of the Act requires the seller of the goods to produce proof of payment of the duties payable.

[10] On 29 April 2002 the Respondent sent the Applicant a letter setting forth the fact that there had been an underpayment of customs duty and value added tax amounting to R171 731,01 and demanded payment thereof. The Applicant was furthermore notified of his rights under the Act. Although the letter was addressed to the Applicant at the address "646 Umbilo Street, Durban", which is, apparently, not the Applicant's correct address (the Applicant's correct address being 654 Umbilo Road, Durban), it is clear that the aforementioned letter was hand-delivered to the Applicant and came to his attention. The Applicant's counsel in argument tentatively sought to make something of the discrepancy in the addresses, however, nothing turns on this because it is clear that the Applicant actually received this letter and the other correspondence hereafter referred to.

[11] On 4 May 2002 the Applicant's attorney responded to the Respondent's letter dated 29 April 2002 and set forth the Applicant's version of events referred to above. In this letter the Applicant's attorney states-

> "Client (referring to the Applicant) realises that he has no option herein but to accept contraventions of the section you mention."

[12] The Applicant's attorney in the letter of 4 May 2002 proposes that the impounded goods be disposed of to "offset" the amounts claimed,

alternatively, that the goods be released to the Applicant to dispose of and thereafter to pay to the Respondent the full admitted debt from the amount realised.

[13] There was initially no immediate response to the Applicant's attorneys letter dated 4 May 2002. On 6 May 2002 the Applicant's attorney sent a reminder to the Respondent enclosing a copy of his letter of the 4 May 2002.

[14] On 15 May 2002 the Respondent replied to the Applicant attorneys letter 6 May 2002 and rejected the Applicant's proposals referred to in paragraph 12 above. The Respondent could not, in any event, accede to the Applicant's proposals because, in terms of Section 87 of the Act, goods irregularly dealt with are liable to forfeiture and in terms of the proviso to Section 87(1) of the Act –

> "Provided that forfeiture shall not affect liability to any other penalty or punishment which has been incurred under this Act or any other law, or liability for any unpaid duty or charge in respect of such goods.

Furthermore, Section 91(4) of the Act provides-

"Nothing in this Section shall in any way affect liability to forfeiture of goods or payment of duty or other charges thereon."

[15] The Act provides in chapter XA for various dispute resolution mechanisms by way of internal appeal and alternative dispute resolution procedures. The Applicant did not avail himself of any of these remedies and this is not surprising in the light of him having admitted liability for the amount of the Respondent's claim.

[16] The matter then went dormant for a period of some five years during which time neither party appears to have taken any further steps.

[17] Then on 3 July 2007 the Respondent sent a final demand for payment of the outstanding duties, VAT and penalties to the Applicant. In the demand the Applicant's attention was drawn to Section 114(1)(a)(ii) of the Act which empowers the Respondent to file a statement with the Registrar of the High Court and obtain a judgment in terms thereof. The Applicant's counsel pointed out that the final demand was again sent to the incorrect address (646 Umbilo Street, Durban), however, nothing turns on this because the Applicant actually received the letter and his attorney responded thereto.

[18] On 27 August 2007 the Applicant's attorney acknowledged receipt of the final demand referred to in paragraph [17] hereof and enclosed the earlier letter of 4 May 2002 in which the Applicant acknowledged liability and made various settlement proposals.

[19] No response from the Respondent was immediately forthcoming and on 18 September 2007 the Applicant's attorney wrote a reminder to the Respondent requesting a response.

[20] On 19 September 2007 the Respondent responded to the Applicant's attorneys letter 18 September 2007 and set forth various steps that had to be taken with regard to the selling of the goods which included the taking of judgment, the issuing of a Warrant of Execution and the sale of the goods.

[21] Thereafter during the period 1 October 2007 to 21 November 2007 correspondence was exchanged between the Applicant's attorney and the Respondent which does not take the matter any further.

[22] The matter then again went dormant for a period of some four and a half years until 14 June 2012 when the Respondent lodged a statement in terms of Section 114(1)(a)(ii) of the Act with the Registrar the High Court

and obtained judgment against the Respondent. This then prompted a further exchange of correspondence and the launching of the present application on 28 August 2012.

GOOD CAUSE

[23] The Applicant contends that the application is *bona fide* because he acted on the advice of the Respondent's employees in routing the goods through Namibia. The Respondent's employees apparently denied giving such advice, however, even if it is accepted in the Applicant's favour that he acted *bona fide*, this does not amount to a *bona fide* defence to the claim, more particularly in view of the Applicant's unequivocal admission that he owes the Respondent the amount claimed.

[24] The Applicant's contention is that he has a *bona fide* defence to the claim because, had the Respondent responded promptly to his suggestions as to a resolution of the matter, he would have paid the (admitted) amount and no judgment would have been taken against him. In the court's view there are several insurmountable difficulties in the Applicant's path, the first of which is that the Respondent unequivocally rejected the Applicant's settlement proposals on 15 May 2002. The ball was in the Applicant's court

to resolve the matter and in the light of the Applicant's admission that he owes the amount claimed and the unequivocal rejection of the Applicant's settlement proposals by the Respondent on 15 May 2002, the Applicant cannot blame the Respondent for and rely on the lengthy delays between 15 May 2002 to 3 July 2007 and from 21 November 2007 to 14 June 2012.

[25] As was correctly pointed out by the Applicant's counsel, it is a misnomer to categorise the Applicant's settlement proposal (i.e. that the goods be sold and that the price realised be "set off" against the admitted debt) as "set off" because the Applicant has not raised any "claim" against the Respondent. In any event, any alleged "claim" cannot be set off against a claim by the State as a matter of law.[2]

[26] The object of rescinding a judgment is to "restore a chance to air a real dispute".[3] In this matter there is no dispute.

[27] In the light of the aforegoing, the court is of the view that the Applicant has not made out any defence whatsoever to the Respondent's claim, which is admitted, and it follows that the application must be dismissed.

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[2] Schierhout vs Union Government 1926 AD 286 at 291
[3] Saphula v Nedcor Bank Limited 1992 (2) SA 76 at 79 C

ORDER

[28] The application is dismissed with costs.

H A DE BEER, AJ

5/4/13.

Appearances

For the Applicant	:	Mr Gunase
Instructed by	:	Severaj Inc
For the Respondents	:	Mr T G Madonsela
Instructed by	:	Strauss Daly Inc
Date of Hearing	:	2 April 2013
Date of Filing of Judgment:		5 April 2013