REPUBLIC OF SOUTH AFRICA

NORTH GAUTENG HIGH COURT
PRETORIA
(REPUBLIC OF SOUTH AFRICA)

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

18/10/2013

CASE NO: 75670/09

CLEAR ENTERPRISES (PTY) LTD

APPLICANT

AND

THE INTERNATIONAL TRADE ADMINISTRATION COMMISSION

FIRST RESPONDENT

THE COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE

SECOND RESPONDENT

CROSS-BORDER ROAD TRANSPORT AGENCY

THIRD RESPONDENT

CARTE BLANCHE MARKETING CC

FOURTH RESPONDENT

JUDGMENT

BAQWA J

[1] This is an application for review arising out of the seizure of vehicles belonging to applicant by the first respondent in terms of the provisions of the International Trade Administration Act, 71 of 2002 (the ITA Act).

[2] Applicant seeks costs against first respondent or any other respondent opposing the application.

[3] Both the first and second respondents opposed the application but the application became of academic interest on 22 January 2013.

[4] As a result, only the issue of costs remains to be determined. Applicant seeks costs against first and second respondents whilst first and second respondents seek costs of the application to be awarded in their favour, such costs to include costs consequent upon the employment of two counsel.

[5] The approach in matters of this nature was settled in ***Jenkins v SA Boiler Makers, Iron and Steel Workers and Ship Builders Society 1946 WLD 15.*** The approach was reconfirmed more recently in ***Gamlan Investments (Pty) Ltd v Trillion Cape (Pty) Ltd 1996 (3) SA 693 CPD*** where it was articulated as follows:

*"**In Jenkins v SA Boiler Makers, Iron and Steel Workers and Ship Builders Society 1946 WLD 15**, the Court held that where a disputed*

application is settled on a basis which disposes of the merits except in so far as the costs are concerned, the Court should not have to hear evidence to decide the disputed facts in order to decide who is liable for costs, but the Court must, with the material at its disposal, make a proper allocation as to costs.

I would respectfully associate myself with the conclusion to which the Court came, and more particularly with the approach adopted by Price J at 17 where he states that:

> *'it seems to me to be against all principle for the Court's time to be taken up for several days in the hearing of a case in respect of which the merits have been disposed of by the acceptance of an offer, in order to decide questions of costs only.'*

The learned Judge goes on to state:

> *'I cannot imagine a more futile form of procedure than one which would require Courts of law to sit for hours, days, or perhaps weeks, trying dead issues to discover who would have won in order to determine questions of costs, where cases have been settled by the main claims being conceded.'*

The learned Judge adds at 18 that:

> *'When a case has been disposed of by an offer which concedes the main claim and the costs of the whole case have still to be decided, I think the Court must do its best with the material at its disposal to make a fair allocation of costs, employing such legal principles as are applicable to the situation. This is much to be preferred to laying down a principle which requires courts to investigate dead issues to see who*

would have won on such issues. In most such cases the litigators would be required to incur greater costs than those at stake.'

Costs, the learned Judge went on to point out, must be decided on broad general lines and not on lines that would necessitate a full hearing on the merits of a case that has already been settled. This approach is certainly to be commended. Costs, particularly at present, play a very important role in litigation and the presiding judicial officer should, in my view, discourage the incurring of unnecessary costs by making an appropriate order in this respect. A party must pay such costs as have been unnecessarily incurred through his failure to take proper steps or through his taking wholly unnecessary steps: see ***Herbstein and Van Winsen (op cit at 483); De Villiers v Union Government (Minister of Agriculture) 1931 AD at 214.***" (my emphasis)

[6] It is trite that the issue of costs is a matter within the discretion of the court which discretion is exercised taking into account the relevant facts.

See Oudekraal Estates (Pty) Ltd v The City of Cape Town and others 2010 (1) SA 333 (SCA) at 354 I -355 B.

[7] Applicant is the registered owner of the three vehicles in question.

[8] Second Respondent attached the Mercedes Benz and Erf vehicles on 22 February 2007 in terms of section 88 (1) (a) of the Customs and Exise Act 91 of 1964.

[9] On 23 April 2007 second respondent again attached Leyland vehicle in terms of section 88 (1) (a) of the Customs and Exise Act 91 of 1964.

[10] Subsequent to the detainment aforesaid all the relevant documents pertaining to the vehicles were provided to the second respondent.

[11] On 30 May 2007 second respondent again seized the Mercedes and Erf vehicles in terms of section 88 (1) (c) of the Customs and Exise Act.

[12] As a result of the continued detainment of the vehicles applicant caused two applications to be issued out of this court under case numbers 35978/07 and 51504/07 in which it sought second respondent's continued detainment of the Leyland vehicle and second respondent's seizure of the Mercedes and Erf vehicles to be set aside.

[13] At the time of commencing of the applications against second respondent, and unbeknown to the applicant, first responded had seized all three vehicles on 16 October 2007 in terms of section 41 (g) of the International Trade Administration Act 71 of 2002 (The ITA Act). The seizure notices had been handed to representatives of the second respondent but not forwarded to applicant.

[14] Section 41 (g) of the ITA Act provides that an investigating officer may in certain circumstances and in compliance with certain requirements at any reasonable time:

"(g) seize any such goods, any book or document that may afford evidence of any offence in terms of this Act."

[15] The first time applicant gained knowledge of first respondent's seizure of the vehicles was during August 2008 in respect of the Leyland vehicle and on 19 December in respect of the Mercedes Benz and Erf vehicles.

[16] The two applications against second respondent were argued from 7 to 10 October 2008 before my brother Mr Justice Murphy with judgment being handed down on 3 August 2009 dismissing both applications.

[17] An application for leave to appeal the said judgment was lodged by applicant and leave was granted to appeal to the Supreme Court of Appeal on 5 October 2010.

[18] Prior to the application for leave to appeal being argued before Murphy J, second respondent seized the Leyland vehicle on 19 February 2010 notwithstanding seizure of the same vehicle by the first respondent on 16 October 2007.

[19] The appeal in matters 35978/07 and 51504/07 came before the Supreme Court of Appeal on 2 September 2011 but were struck off the roll with each party having to pay its own costs.

[20] The main reason for the decision by the Supreme Court of Appeal is apparent from paragraph 15 of the judgment handed down therein:

> *"[15] As to the second issue: The parties misconceive the position. The employees of the Commissioner who had possession of the three vehicles voluntarily parted with such possession on being served with a seizure notice by ITAC. The Commissioner's jus retentionis thus terminated with that loss of possession. If in due course the seizure by*

ITAC is set aside by the High Court in the pending application, possession of the vehicles shall not, without more, revert to the Commissioner. That disposes of the second issue."

[21] At the time of the judgment by the SCA having been handed down, the application to have first respondent's seizure of the vehicle in terms of section 41 (g) of the ITA Act had already been instituted and was a "pending application".

[22] The effect of the SCA judgment was that SARS had to re-commence its investigation into the trucks by going *de novo* through the administrative process.

[23] On 3 May 2013 and after going through the process second respondent re-seized the three trucks from ITAC and applicant was duly notified of such seizure.

[24] The legal consequence of the aforegoing was that by application of the SCA judgment ITAC's seizure was no longer in effect and as a result this application had become moot.

[25] The applicant however, persisted with its attitude that the merits of the application be adjudicated which called for the respondents to prepare and deliver answering papers dealing with the merits.

[26] In order to avoid further costs and based on the fact that applicant had failed timeously to institute legal proceedings to review ITAC's seizure and the judgment of my brother, Mr Justice Mabuse dismissing applicant's application

for extension of the 90 days period specified by Murphy J within which to institute it's envisaged review application, ITAC through the State Attorney proposed that the application be withdrawn, each party to pay its own costs.

[27] Respondent's Counsel, Advocate Meyer SC submits that due to applicant's failure to comply with the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and the order of Murphy J the application was stillborn.

[28] One needs to examine the validity or otherwise of this submission by analysing the relevant PAJA provisions.

[28.1] Section 7 (1) of PAJA provides as follows:

> "7 ***Procedure for judicial review***
>
> *(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) *where no such remedies exist, 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."*

[28.2] Section 9 (1) and (2) provides as follows:

"9 Variation of time

(1) The period of-

(a) ...

(b) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period, by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.

(2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require."

[29] In terms of these provisions, applicant had therefore to prove that he had attempted to arrange an extension by agreement with the other party and that this endeavour was unsuccessful or alternatively that the interests of justice call for the said period to be extended.

[30] From the papers before me it is evident that applicant never endeavoured to get the respondents to agree an extension of time for filing its review application: The application for condonation would accordingly for that reason be premature or defective.

[31] The requirements regarding "the interests of justice" were laid out in the Constitutional Court case of **Van Wyk Unitas Hospital & Another(Open Democratic AdviceCentre as *Amicus Curiae)* 2008 (2) SA 472 (CC)** as follows:

"This court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success."

[32] Regarding the granting of condonation where the merits have become moot the court commented as follows:

"*[29] It is by now axiomatic that mootness does not constitute an absolute bar to the justiciability of an issue. The court has a discretion whether or not to hear a matter. The test is one of the interests of justice. A relevant consideration is whether the order that the court may make will have any practical effect either on the parties or on others. In the exercise of its discretion the court may decide to resolve an issue that is moot if to do so will be in the public interest. This will be the case where it will either benefit the larger public or achieve legal certainty.*

[30] If the only hurdle that the applicant had to surmount was mootness, the position would have been entirely different. Here the applicant has to surmount two hurdles, the first being the inordinate delay coupled with a lack of a reasonable explanation for the delay. Mootness is but one of the factors that must be taken into consideration in the overall balancing process to determine where the interests of justice lie. It assumes a particular significance in this case where there was an inordinate delay of some 11 months and the absence of a reasonable

the directions setting out the time limits. In some cases litigants did not comply with the time limits or the directions setting out the time limits. In some cases litigants either did not apply for condonation at all or if they did, they put up flimsy explanations. This non-compliance with the time limits or the rules of court resulted in one matter being postponed and the other being struck form the roll. This is undesirable. This practice must be stopped in its tracks." (Our emaphasis).

Applicant's delay was for 16 and 24 months respectively. The reasons offered were the inavailability of their senior counsel who had an acting appointment and waiting for Murphy J's judgment which also had to be studied and considered before consulting with counsel.

[33] Counsel for respondents submits and I accept that these reasons, cumulatively would account for a period of approximately a month. I am not persuaded that applicant's inordinate delay would be justified by the explanation given by the applicant. Accordingly, I conclude that applicant failed to make out a case for condonation or extension of time in terms of section 9(2) of PAJA. Applicant ignored the very clearly stated time limits in PAJA. The explanation proffered does not cover the whole period of non compliance and fails to offer sufficient detail in that regard. The relief sought in prayer 1 of the notice of motion would therefore not have been granted.

[34] Regarding the *exceptio res judicata*. The principle is founded in public policy which requires that litigation should not be endless and on the requirements of good faith which does not permit of the same thing being demanded more than once. Applicant's counsel submits and I accept that the principle applies only in relation to the Leyland vehicle only.

[35] Murphy J's order reads as follows:

"1. *The application for intervention is dismissed;*

2. *The costs of the application are reserved for determination by the Court hearing the application for review of the intervening party's decision to seize the trucks, should the applicant not bring an application to review that decision within ninety (90) days of today then the intervening party may set the matter down for determining the costs order.".(my emphasis)*

[36] In his judgment Murphy J further explains as follows:

"Accordingly, I dismissed the application for intervention but reserved the costs of the application for intervention for determination by the court hearing the application for review of ITAC's decision to seize the trucks. In the event that the applicant not bringing an application to review decision within 90 days of the order the intervening party may set the matter down for determining the costs. As I have just explained, the reasoning for that order was that ITAC had no further interest in the present application other than the question of costs which I consider will be best dealt with after determination of the lawfulness and reasonableness of ITAC's conduct in relation to the seizure of the Leyland truck.".

[37] It is patent from Murphy J's judgment that unless the envisaged application was instituted within 90 days, there would be no application and the "lawfulness and reasonableness of ITAC's conduct in relation to the seizure of the Leyland truck" would not be ruled upon by any court. In that event ITAC would be able to set the matter down for determination of costs.

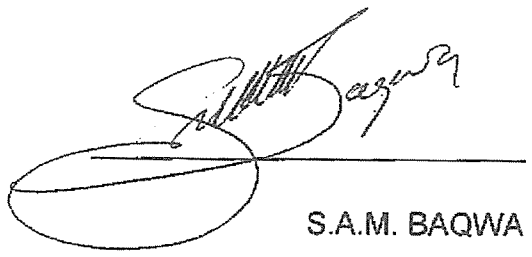
[38] For the applicant to have been successful with the application it would have had to succeed first with the application for condonation and extension of time.

[39] Applicant, in the absence of such condonation would not have succeeded with its application.

[40] The issues involved in this case were quite complex and the documentation to be dealt with fairly voluminous. It was accordingly quite prudent to employ the services of two counsel.

[41] In the circumstances, taking into account the facts and the law, I am of the view that the applicant has failed to make out a proper case and the following order is made:

1. Applicant is ordered to pay the costs of the respondents, such costs to include the costs consequent upon the employment of two counsel.



S.A.M. BAQWA

JUDGE OF THE HIGH COURT

FOR THE APPLICANT	ADV: J UYS
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	011 463 1511
FOR THE RESPONDENTS	ADV: J A MEYER (SC)
	ADV: L G KILMARTIN
INSTRUCTED BY	THE STATE ATTORNEY
	012 309 1513
DATE OF HEARING	15 OCTOBER 2013
DATE OF JUDGMENT	18 OCTOBER 2013