REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION - GRAHAMSTOWN

Case No: 1657/17
Matter heard: 21 June 2018
Judgment delivered: 28 August 2018

In the matter between:

LANGHOLM FARMS (PTY) LTD **Applicant**

and

THE COMMISSIONER GENERAL OF THE SOUTH AFRICAN REVENUE SERVICES **Respondent**

J U D G M E N T

SMITH J:

INTRODUCTION

[1] The applicant seeks and order declaring that it is entitled to claim diesel rebates under the Customs and Excise Act, No. 91 of 1964 ("the Act"), in respect of :

(a) diesel fuel it used in the course and scope of its registration as a "user" in terms of the Act, when Its trucks are refuelled at Summerpride Foods In East London;

(b) instances where it has hired transporting contractors on a "dry basis", (i.e. the diesel purchased by the contractor is for the applicant's account), and fuel had been purchased from the Bathurst Co-operative at Summerpride Foods, East London, for the purposes of transportation loading bins from Summerpride Foods to the applicant's farm; and

(c) the transport of the empty loading bins, used to transport pineapples from its farm to Summerpride Foods in East London, and to return the empty bins to its farms, such loading bins constituting "farming requirements" as defined in terms of the Act.

[2] The applicant initially also sought ran order declaring that it did not overcharge or submit excessive claims for diesel rebates in respect of April 2016. The relief was, however, abandoned by the applicant during the course of argument.

[3] The applicant is a duly incorporated private company which grown pineapples at its farm situated approximately 26 kilometres from Grahamstown, and adjacent to the road between Grahamstown and Port Alfred. The respondent is the Commissioner of the South African Revenue Services.

The Facts

[4] The applicant produces between 13 500 and 16 000 metric tons of pineapples annually, which it then sells to Summerpride Foods, East London, where it is processed into juice products for export. The Summerpride premises are about 147 kilometres from the applicant's farm. The applicant delivers the pineapples to Summerpride in its own trucks and in specially designed bins which are supplied by Summerpride Foods.

[5] The bins are specifically designed and constructed to facilitate loading in the fields where the pineapples are picked. The pineapples are then loaded into the bins which are placed into loading stations on the applicants' farm. The bins are thereafter loaded onto trucks and delivered to the Summerpride Foods' factory.

[6] Summerpride Foods only accepts pineapples loaded in the specially designed bins since the fruit is perishable and it is essential that it is delivered expeditiously to the factory.

[7] The pineapples are harvested by the applicant's employees on a shift basis and each shift can yield up to 60 metric tons of pineapples during the peak season. The applicant is thus reliant on the bulk produce bins being supplied to it on a continuous basis. The pineapples remain its property until delivered to the Summerpride Foods' Factory when it becomes the property of the latter.

[8] The applicant uses three of its own trucks to deliver the pineapples to the factory and to return the empty bins to its farm. After the trucks deliver the pineapples to the factory they fill up with diesel fuel at the Bathurst Co-op, which is located on the factory premises, before returning to the applicant's farm with the empty bins.

[9] As a rule the applicant uses only its own trucks to transport pineapples, and would only employ outside transporting contractors if for some reason its trucks are defective. It was forced to engage an outside contractor when one of its trucks was damaged in a collision on 30 April 2016. It then engaged the contractor on a "dry basis", namely that it would only pay for the fuel filled by the contractor once deliveries are made to the factory and the empty loading bins had been returned to its farm.

[10] The applicant is duly registered as a VAT vendor and as a recipient of diesel rebates in terms of section 59A of the Act. It is also common cause that the applicant falls within the definition of a "user" as provided for in terms of Schedule 6 Part 3 of the Act. It registered for diesel refund purposes as a farmer on 27 October 2015.

[11] The applicant contends that the loading bins are essential to its farming operations and accordingly qualify as "farming requirements" in terms of Schedule 6 Note 6(*h*)(iii)(*cc*)(B)(WW) to the Act. In terms of that provision the storage, packing or prevention of deterioration of farming products, if carried out on a farming property, are classified as own "primary production activities" in farming.

[12] During October and November 2016 the applicant submitted various claims for diesel refund to the defendant for the period October 2015 to August 2016. On 18 November 2016 the respondent wrote to the applicant informing it of its intention to conduct a diesel refund audit covering the abovementioned period. The letter also stated that an inspection would be conducted on site, in order to facilitate *"efficient and effective"* inspection, and called upon the applicant to make available to it (within 21 business days), inter alia, detailed information regarding its business activities, financial statements, log books and proof of purchase of the assets used in the farming activities.

[13] The audit was completed by 1 February 2017 and the respondent thereafter issued a Notice of Intention to Assess on 13 February 2017. The said notice stated *iner alia;* that:

(a) the applicant's claims for rebates in respect of the fuel purchased at the Bathurst Co-op was denied since it does not comply with section 75(1C)(*a*)(iii) of the Act;

(b) the fuel used to return the loading bins to the applicant's farm is also not covered by the Act; and

(c) the applicant's claims for diesel rebates in respect of April 2016 are excessive.

[14] The notice then provides a summary of "intended liability" in terms of which the potential non-eligible purchases are stated to amount to R328 250.66, and extends the following invitation:

> **"Provision of time for response:**
> You are hereby afforded the opportunity to, by no later than close of business on 2017/03/13 to respond to the content of this letter and, in particular, to furnish the Commissioner such evidence and or submission as you may deem necessary in order to prove that the diesel were not dealt with contrary to, but in full compliance with the provisions of the C&E Act.**"**

[15] The notice also states the following:

> "Non-eligible usage
>
> In applying the statutory law, Schedule 6 Part 3 Note 6(*a*), (v), (x) and (*h*) of the C&E Act, the carting of the empty crates from Summerpride Foods to Langholm Farms do not qualify as a primary production activity.
>
> Furthermore in applying statutory law, section 75 (1C(a)(iii) of the C&E Act rebates may only be claimed on fuel delivered, stored and dispensed from the storage facilities located on the Langholm Farms (Pty) Ltd's premises.
>
> It is our intention to adjust the litres claimed for the delivery of the produce by the contractors to the Summerpride Foods (Pty) Ltd as well as the litres claimed for non-primary productions activities."

The applicant's contentions

[16] The applicant contends that the respondent's stance is premised on an erroneous interpretation of section 75(1C)(*a*)(iii) of the Act. That section reads as follows:

> "Notwithstanding the provisions of section 1(*a*) the Commissioner may investigate any application for a refund of such levies on distillate fuel to establish whether the fuel has been—
>
> (i) duly entered or is deemed to have been duly entered in terms of the Act;
>
> (ii) purchased in the quantities stated in such return;
>
> (iii) delivered to the premises of the user and is being stored and used or has been used in accordance with the purpose declared on the application for registration and the said item of Schedule 6."

[17] The respondent has apparently interpreted this provision to mean that the applicant can only claim rebates in respect of fuel that has been delivered to this farm and stored there. He was accordingly of the view that the applicant is precluded from claiming rebates in respect of fuel purchased at the Bathurst Co-op, regardless of whether or not it had been used in the

course and scope of applicant's farming activities, since the Co-op is located a distance from its farming property.

[18] The applicant further contends that the words *"delivered to the premises of the user and is being stored and used r has been in accordance with the purpose declared on the application for registration and the said item of Schedule 6"* and in particular the conjunction "or", denote an intention that it is the use of the duel that determines legibility and not where it has been purchased or is being stored. It contends that it is accordingly entitled to the rebate since the diesel had been used for the purposes declared in its registration in terms of Schedule 6 to the Act, namely for its farming operations.

[19] Regarding the return of the empty bins from the factory to its farm, the applicant contends that the distillate fuel used for this purpose qualifies as an eligible purchase in terms of Schedule 6 Part 3 of the Act. It asserts that the bins are "farming requirements" as defined by Schedule 6 to the Act since they are for *"primary production activities in farming, namely the packing or prevention of deterioration of farming products"*, such as packing or prevention of deterioration of the products having been carried out on its farming property.

[20] Schedule 6 Part 3 Note 6(*h*)(iv)(*cc*) to the Act provides that where farming products or farming requirements are transported by a contractor of the user, and the distillate fuel is supplied by the user on a "dry basis", the used may claim a refund in terms of item 670.04 in respect of the quantity of fuel actually used –

> "(A) where such farming products are transported from the farming property to the market or first point of delivery; or
>
> (B) the farming requirements are transported from the suppliers loading point to the farming property."

[21] The applicant accordingly asserts that the fuel used to deliver the pineapples (i.e. the farm products) to the Summerpride Factory in East London and to return the empty bins (i.e. the farming requirements) to its farming property are both eligible uses, qualifying for rebate, wither if the transport has been with its own vehicles or through the use of a transport contractor on a "dry basis".

[22] The applicant contends that since the respondent has given notice of his intention to reject the claims in respect of the fuel purchased at the Summerpride factory and those relating to the return of the bins, for the reasons stated in the Notice of Intention to Asses, a real dispute exists between the parties. Furthermore, the respondent has also given notice that it intends to claw back diesel rebates and interest already claimed and paid, thus the declared intention to assess the respondent in the sum of R328 245.12.

[23] The applicant asserts that it has attempted in vain to persuade the respondent that his stance is based on an erroneous interpretation of the relevant provision. It is therefore of the view that an internal appeal would not serve any purpose since it is clear that the respondent has no intention of entertaining any other views regarding the interpretation of the statute. The applicant has also annexed to its papers numerous confirmatory affidavits from other farmers who claim that they are in the same predicament.

The respondent's contentions

[24] The respondents contends that although the relief sought by the applicant is framed in the form of declarator, it in essence seeks a review or appeal of a decision which it anticipates the respondent will take in the future.

[25] According to the respondent the applicant has not proved that it is entitled to a refund of the distillate fuel in terms of the Schedule 6 to the Act, and had merely selected certain grounds on which it anticipates the refunds would be refused, and on the assumption that it is entitled to such refund. The application is thus intended to forestall an investigation by the respondent in terms of the Act.

[26] The respondent also asserts that the relief sought by the applicant will unavoidably have the effect of preventing him from making a determination regarding the former's eligibility to claim the rebates, and will improperly usurp the administrative functions of the respondent.

[27] The respondent contends furthermore that the application is also premature for the reason that it requires the court to pronounce on an issue before the respondent has investigated or made any final decisions regarding the validity of its claims. The court will thus be required to pronounce on a future or contingent right or obligation, since there is no existing dispute between the parties.

[28] In additions, the respondent contends that:

(a) It is investigating who controls the fuel sold at the Bathurst Co-op and whether or not levies has been paid on the fuel that had been sold by it, since a refund can only be made once the levies had been paid to SARS;

(b) The applicant has failed to provide proof to the respondent's satisfaction that the fuel had in fact been used on the applicant's trucks;

(c) The applicant has failed to produce to produce log-books or supporting documentation relating to the purchase of the fuel as required by the Act; and

(d) The bins used to load and transport pineapples are not "farming equipment', since they have open tops, the pineapples are not wrapped or packaged when placed in the bines, and they do not prevent the deterioration of the fruit.

The Law

[1] In terms of section 21(1)(*c*) of the Superior Act, No. 10 of 2013, the court has the power:

> "(*c*) In its discretion and instance the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding such a person cannot claim any relief consequential upon the determination"

[2] An existing dispute is not a prerequisite for the court to exercise its jurisdiction in terms of that section. All that is required is that there must be an interested party in order for the declaratory order to be binding. (*Ex Parte Nell* 1938 TPD 21)

[3] Declaratory orders are useful legal and since they have the advantage of allowing the courts to provide clarity regarding legal issues while leaving it to the relevant organs of state to decide how the law should best be observed. (*Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC), at para. 108)

[4] The statutory obligation of a taxpayer to pay regardless. of a resort to legal challenge of an assessment does not oust the power of courts to grant interim or declaratory relief. In *Metcash Trading Ltd v Commissioner for South African Revenue Services* 2001 (1) SA 1109 (CC), the Constitutional Court held that the provisions of section 36 of the Value-Added Tax Act, 89 of 1991, which provides that the obligation to pay or recover tax is not suspended by an appeal or decision of a court of law unless the Commissioner so directs, does not oust the court's jurisdiction to consider interim declaratory orders pending the resolution of an application to review or set aside an assessment.

[5] And in *Family Benefit Friendly Society v Commissioner of Inland Revenue and Another* 1995 (4) SA 120 (TPD), at 124D–126E, Van Dijkhorst J held that when courts consider whether to exercise their discretion in favour of granting a declaratory order, considerations of public policy comes into play. But the learned judge also cautioned that courts should guard against situations where such orders are sought in order to *"short circuit the procedural provisions of the Act"*, since in such an event:

> "… there is danger that courts may be flooded with cases wherein entrepreneurs seeks certainty about their tax liability before embarking on new venture or schemes. The commissioner would be in an invidious position if he is forced to defend every tentative opinion he expressed in a court of law; (at 126D)"

[6] In *Shells's Annandal Farms (Pty) Ltd v Commissioner South African Revenue Service* 2000 (3) SA 564 (CPD), the dispute related to whether the proceeds of an expropriation was subject to VAT, and the Commissioner had initiated the dispute with a series of threatening

correspondence. The Commissioner had also issued a notice warning that he was contemplating raising interest and penalties in terms of section 39 of the Value Added Tax, and had invited the taxpayer to advance reasons why the penalties should not be imposed. An argument was also advanced on behalf of the Commissioner by approaching court for a declaratory order. Davis J nevertheless found that the dispute was a real one and that the disputed liability for VAT as accordingly an appropriate subject for a declaratory order.

Discussion

[7] Mr Peter SC, who appeared for the respondent, argued that the relief sought by the applicant amounts to an anticipatory review or appeal in respect of a decision which had not yet been taken. The respondent has merely given notice of intention to deal with claims for rebate in a certain manner and has invited representations from the applicant regarding his *prima facie* views expressed in the Notice of Intention to Assess. No final decision has yet been taken in this regards. The application is thus premature since the matter is not yet ripe for hearing.

[8] Is the relief sought by the applicant premature? In my view not. The respondent's Notice of Intention to Assess is prefaced by a declaration to the effect that:

> "The purpose of this letter is to inform you of the status and *Prima facie* findings of our inspection to establish whether the use of diesel was contrary to the provisions of the Customs and Excise Act, 91 of 1964 (the C & E Act) to afford you the opportunity to respond thereto and to advise you of the steps that will be taken after receiving your response."

[9] It is this statement that the respondent relies on for his contention that the application is premature. According to the respondents, that statement is clearly indicative of the fact that the respondent's views were preliminary and that he had not yet taken a final decision regarding the applicant's eligibility to claim the rebate.

[10] There notice indeed state that the commission's view that the distillate fuel was that the subject of the investigation was not an eligible purchase as provided by Note 6 to Part 3 of Schedule 6, was a *prima facie* one. However, the respondent's contention in this regard nevertheless loses sight of the fact that his statutory powers do not extend to pronouncing on the proper construction of the relevant provisions of the Act, but rather to investigate and decide whether or not the claims fall within the provisions of the Act, properly construed. Where in a case such as this, a dispute arises as to the proper interpretation of a statutory provision; it is the prerogative of the courts to pronounce on the issue. I accordingly do not agree with the proposition that the respondent's views regarding the meaning of section 75(1C)(*a*)(iii) amounts to the exercise of an administrative discretion or power.

[11] The question arises as to which re-fuelling options are included in section 75(1C)(*a*)(ii), and in respect of which the applicant would be entitled to claim diesel rebates.

[12] The respondent's *prima facie* view based on his view that *"the carting of the empty crates from Summerpride Foods to Langholm do not qualify as a primary production activity and in terms of section 75*(1C)(*a*)(iii) *of the Act",* and that rebates could only be claimed in respect of fuel delivered, stored, and dispensed from storage facilities located on the applicant's farm.

[13] Our law regarding the interpretation of documents, including statutes, was summarized as follows by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA), at paragraph 18:

> "The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in documents, be it legislation, some other statutory instrument or contract, having regard to the context provided by reading the particular provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in light of the ordinary rules of grammar and syntax, the context in which the provision appears; the apparent purpose to which it is directed in the material known to these responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective and not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusiness-like results or undermines the apparent purpose of the document."

[14] And in *S v Toms*; *S v Bruce* 1990 (2) SA 802 (AD), at 807H-I, the then Appellate Division (per Smallberger JA) held that where the language of a statute is clear and unambiguous effect must be given thereto unless to do so:

> "…would lead to absurdity so glaring that it would never have been contemplated by the Legislature or where it would lead to a result contrary to the intention of the Legislature, as shown by the context or by such other considerations as the Court is justified in taking into account."

(cf: *Randburg Town Council v Kirksay Investments (Pty) Ltd 1998* (1) SA 98 (SCA), at 107 B–D)

[15] The *prima facie* view expressed by the respondent that the section, properly interpreted, means that rebates may only be claimed on fuel delivered, stored and dispensed from facilities located on the applicant's farm is in my view patently wrong. Mr *O'Halloran,* who appeared for the applicant, has correctly argued that the clear and unambiguous language of that section, an in particular the use of the conjunction "or", compels the construction that the Commissioner may investigate claims for a rebate on levies in respect of the use of distillate

fuel in order to establish whether the fuel has been either:

(i) delivered to, stored on the applicant's farming property; and

(ii) used for the purpose declared on the application for registration, namely for farming purposes.

[16] The respondent's construction of the said section in order to preclude the applicant from claiming rebates in respect of the fuel purchased at the Bathurst Co-op, where such fuel had been used for farming purposes or the transport of farming requirements, is thus patently wrong. The respondent clearly has no power to exclude claims in respect of distillate fuel legitimately used for farming purposes, regardless of whether the fuel had been stored or dispensed. His powers are limited to an investigation and pronouncement regarding the eligible use of the distillate fuel. It is thus not surprising that in these proceedings the respondent has not taken issue with the construction contended for by the applicant.

[17] An order declaring the proper construction of that section will accordingly not anticipate any findings or assessments which the respondent is empowered to make under the act, neither will it have the effect of preventing him from investigating the legitimacy of the claims or whether the prescribed fuel levies had been paid to SARS, as his prerogative in terms of the Act.

[18] The issue as the whether or not the loading bins qualify as "farming requirement" in terms of Schedule 6 to the Act is, however, not that simple. The respondent asserts that he has not yet been able to investigate properly whether the loading of the pineapples into the bins constitute "packing", or that they are necessary to avoid deterioration of the pineapples. This exercise will be a factual as much as a legal undertaking.

[19] In my view for this court to declare that the applicant will be entitled to claim the rebates in respect of the fuel used to transport the empty bins to its farm (and of necessity that the bins constitute "farming requirements") will amount to a usurpation of the respondent's power to investigate the validity of the claims. Whether or not the bins, by virtue of their unique design features and se contended for by the applicant, qualify as "farming requirements", is a matter, which the respondent is entitled to investigate properly before deciding whether or not to allow the claims. However, as I have already found, on a proper construction of the relevant provisions, the applicant is entitled to the rebate if the distillate fuel had been used for the transport of "farming requirements' from the Summerpride factory to its farm. I am accordingly of the view that the nature of the declaratory relief sought by the applicant in respect the transportation of the bins will indeed be premature and will improperly usurp the respondent's statutory powers. I am accordingly not inclined to exercise my discretion in favour of granting declaratory relief in the form sought by the applicant in this regard.

[20] In the result of the following order issues:

It is hereby declared that:

(a) Section 75(1C)(*a*)(iii) of the Customs and Excise Act, No. 91 of 1964 as amended, is to be interpreted and is properly interpreted, that diesel fuel used in the course and scope of the registration of the applicant as user, is eligible for diesel rebate claims under the Customs and Excise Act when the applicant's trucks are refuelled at the Bathurst C-op at Summerpride Foods in East London.

(b) In instances where the applicant hired transport contractors on a dry basis, i.e. without diesel, the diesel purchased being to the account of the applicant, that the diesel fuel purchased from the Bathurst Co-op at Summerpride Foods in East London for purposes of transporting pineapples to or of farming requirements from Summerpride Foods in East London to the applicant's farming property, such diesel purchases are eligible for diesel rebate under the Custom and Excise Act, No. 91 of 1964 as amended.

(c) The respondent is ordered to pay the cost of the application.

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J.E. SMITH

JUDGE OF THE HIGH COURT

Appearances

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Counsel for the Respondent	:	Advocate Peter SC
Assisted by	:	Advocate Magano
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