IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE: YES
Case number : 118/99

In the matter between :

THE CHAIRMAN OF THE BOARD
ON TARIFFS AND TRADE — Appellant

and

VOLKSWAGEN OF SOUTH AFRICA
(PTY) LTD — First Respondent
DIRECTOR-GENERAL : TRADE AND
INDUSTRY — Second Respondent

CORAM : Smalberger, Nienaber, Harms JJA, Mpati and Mthiyane AJJA

HEARD : 10 November 2000

DELIVERED : 30 November 2000

Summary: Customs and Excise Act 91 of 1964 - repeal of note 5(vi)(a)(ii) to rebate item 609.17 of Schedule 6 - effect thereof - whether right to approach the Board on Tariffs and Trade for a recommendation in terms thereof survived the repeal - s 12(2)(c) of the Interpretation Act 33 of 1957

JUDGMENT

NIENABER JA/

NIENABER JA :

[1] To the uninitiated the Customs and Excise Act 91 of 1964 ("the Act") is a labyrinthine piece of legislation. This case is concerned with one of its many provisions, note 5(vi)(a)(ii) to rebate item 609.17 of Schedule 6 to the Act (quoted below) and more particularly with the aftermath of its repeal.

[2] The first respondent (henceforth referred to simply as "VW") is a South African manufacturer and exporter of motor vehicles. In terms of Part 2 of Schedule 1 to the Act excise duty is leviable on motor vehicles manufactured in the Republic of South Africa. Section 75(1)(d) of the Act, however, allowed for a rebate or a refund (depending on the circumstances) on such excise duty for the purpose of the Export Incentive Scheme for the Motor Industry (Phase VI). The calculation of the amount of the rebate (up to a specified maximum) depends on the extent of the manufacturer's foreign currency earnings which would in turn depend on the volume of its exports of locally manufactured vehicles and component parts.

VW as a manufacturer was liable for excise duty but as an exporter it qualified for the rebate. But because the permitted rebate was subject to a ceiling any surplus to which it would otherwise have been entitled would have been of no value to it. To cater for that situation note 5(vi)(a)(ii) to rebate item 609.17 was enacted. It read:

> "ii) A customs and excise manufacturing warehouse may cede any specific amount of foreign currency earnings in respect of motor vehicles exported by such warehouse, as specified in a certificate issued by the Director-General: Trade and Industry, on recommendation of the Board on Tariffs and Trade, to other customs and excise manufacturing warehouses ..."

(For the purpose of the Act VW is defined as a customs and excise manufacturing warehouse. The Director-General referred to is the second respondent and the Board is the appellant, represented by its chairman. I shall refer to the appellant simply as "the Board".) A cession effected in terms of the note would entitle the cedent warehouse to whatever consideration it was able to negotiate for the cession and would entitle the cessionary warehouse to claim a corresponding rebate on the

excise duty otherwise payable by it.

[3] This note was deleted in its entirety with effect from 1 September 1995 when the Phase VI Scheme was replaced by the new Motor Industry Development Program.

[4] Prior to the repeal VW had applied for and was granted a rebate in respect of vehicles manufactured and exported by it. Likewise it applied for and was granted certificates permitting cessions of excess earnings.

[5] VW did not, however, enjoy the full extent of the rebates to which it was in fact entitled. This came about as follows. In order to calculate the amount of the rebates to which a manufacturer was entitled not only the foreign currency *earnings* from *exports* were taken into account but also the foreign currency *usage* i e the value of goods *imported* by the manufacturer. The latter was set off against the former. During May 1991 rebate item 609.17 was amended. There was a long-standing issue between certain of the manufacturers, of which VW was one, and the

Department of Finance, represented by the Commissioner of Customs and Excise ("the Commissioner") about its effect. It was whether *all* royalties and licence fees paid by a local manufacturer to its main licence holder overseas in respect of vehicles manufactured in South Africa under licence should be included in the amount of foreign currency usage or only such royalties as had "a value for customs duty purposes". The less the amount of royalties and licence fees to be included in the foreign currency usage, the greater the amount of foreign currency earnings available for the purpose of rebate and cession. VW took all reasonable steps at the time to ascertain the correct legal position regarding the payment of royalties and the consequent assessment of foreign currency earnings. Until 12 June 1996 the Commissioner continued to insist, notwithstanding the amendment, that *all* royalty payments be included in the calculation of foreign exchange usage, regardless of the dutiability thereof. It was put thus (and not denied) in a letter from VW to the Commissioner, dated 12 March 1997:

> "2. As you are aware an amendment was made to the notes of Item 609.17 in May 1991, which effectively implied that only royalties with a value for customs purposes should be included in the foreign currency usage for the calculation of the Phase VI rebate.
>
> 3. However, this amendment was not brought to the attention of affected manufacturers and Customs erroneously collected duty where royalty payments had been included in the accounts, irrespective of whether such royalties were properly dutiable in terms of s 67 of the Customs and Excise Act."

In the result VW made its initial assessments for the purpose of processing its applications for submission to the Board, preparatory to the issue of the requisite certificates by the Director-General, as if the amendment had not been effected. Indeed, as late as 31 August 1995 (the very date of repeal) the Commissioner wrote

> "You are informed that the full excise duty payable for the quarter 1 June 1995 to 31 August 1995 must be brought to account in the normal manner."

This meant in effect that VW's foreign currency earnings were reduced, resulting

in less excess foreign currency earnings being available to it for cession to other warehouses.

[6] In order to regularise matters in accordance with its own understanding of the true legal position in the light of the 1991 amendment VW on 12 March 1997, after the repeal of the note, wrote to the Commissioner requesting

> "permission to extract exports previously included in the quarterly Phase VI accounts of VW and to cede these to Mercedes Benz SA (Pty) Ltd ("MB") for inclusion in its accounts for the same quarters."

The letter proceeds:

> "6. In order to achieve the maximum rebate in the quarters for which royalties were declared, VW was required to include excessive exports, which would have been ceded to other manufacturers, if the royalty payments were correctly omitted.
>
> 7. We therefore propose that, in order to level the playing fields and place VW on the same basis as the other two manufacturers in this regard, the Commissioner grants permission for the relevant accounts to be historically amended in so far as:
>
> 7.1 permitting cessions to MB of excess exports which were included in accounts in order to compensate for the royalty

payments included therein,

7.2 granting a refund of duty with regard to accounts in which the maximum rebate was not achieved, and

7.3 granting time extension in order to amend these accounts from the date the mistake was made in May 1991, as was permitted for the other manufacturers."

What VW sought was permission to cede, notwithstanding the repeal of the provision allowing such cession, that part of its foreign currency earnings which, because of the erroneous view held by the Commissioner, it was previously obliged to commit to its own account in order to earn the maximum permissible rebate instead of having a greater surplus available for cession.

[7] The Commissioner responded on 3 April 1997 as follows:

> "Permission is granted for the cession of excess foreign currency earnings included in the excise accounts of Volkswagen of S.A. (Pty.) Ltd. to Mercedes-Benz of S.A. (Pty.) Ltd. retrospective to May 1991 provided the conditions stipulated in Note 5 (vi)(a) to rebate item 609.17 of Schedule No. 6 to the Customs and Excise Act are complied with and proof is produced that the so-called royalties are in fact not dutiable in terms of the said Act."

The Commissioner accordingly conceded the correctness of VW's standpoint, thereby releasing for *ex post facto* cession so much of VW's foreign currency earnings as had previously been consigned in the calculation of the excise duty payable. The amount thus made available for cession was in the order of some R20 million. Proof that royalties were in fact not dutiable in terms of the Act, as stipulated in the letter, was in due course produced.

[8] In terms of repealed note 5(vi)(a)(ii) such a cession could, however, only be effected after the issue of a certificate by the Director-General upon the recommendation of the Board. On 15 April 1997 VW accordingly approached the Board but on 30 July 1997 the Board resolved not to make a recommendation "as the BTT [the Board] would be required to execute powers in terms of legislation which is no longer applicable". In its letter to VW, dated 25 August 1997, it was stated that the Board had

> "come to the conclusion that there is no legal premise upon which the

> Board could perform the actions/powers that they are requested to perform with regard to the permit. The Board would in effect be required to execute powers in terms of 'legislation' which is no longer applicable."

[9] Despite further representations made by VW to the Board broaching both the correctness and the inconsistency of its approach, the Board at its meeting of 10 September 1997 refused to deviate from its previous stance and reiterated its refusal to support VW's application. This decision was conveyed to VW on 25 September 1997.

[10] VW thereupon launched the current proceedings in the Transvaal Provincial Division of the High Court against the Board as first and the Director-General as second respondent, to review the Board's refusal to consider VW's application on the merits. No specific relief was sought against the Director-General who abided the decision of the court and took no further part in either the proceedings in the court below or in this court.

[11] The matter came before Van Dijkhorst J who granted an order in the following terms:

> "1. The decision of the Board on Tariffs and Trade that it was no longer empowered to make recommendations to the Director-General of Trade and Industry in terms of repealed note 5(vi)(a)(ii) to rebate item 609.17 of Schedule 6 to the Customs and Excise Act 91 of 1964 upon the applicant's application, is set aside.
> 2. Each party is to pay its own costs."

The appeal comes to this court with leave granted by it.

[12] The critical issue before this court is whether the repeal of note 5(vi)(a)(ii) disempowered and thereby precluded the Board from thereafter considering a recommendation to the Director-General which, as stated earlier, was a prerequisite for the issue of a certificate by the latter. The argument before this court turned in the main on the thrust of s 12(2)(c) of the Interpretation Act 33 of 1957 ("the Interpretation Act") which provides as follows:

> "Where any law repeals any other law, then unless the contrary

intention appears, repeal shall not -

(a) ...

(b) ...

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed.

(d) ...

(e) ..."

This provision, like many others in the Interpretation Act, is in conformity with the common law (cf *Bartman v Dempers* 1952 (2) SA 577 (A) at 582B-C). Repeal legislation is for the most part directed at matters future rather than matters past. Pre-repeal business must generally speaking be dealt with, unless a contrary legislative intention is apparent, as if no repeal had been enacted (cf *National Iranian Tanker Co v MV Pericles GC* 1995 (1) SA 475 (A) at 483I-J; *Minister of Safety and Security v Molutsi and Another* 1996 (4) SA 72 (A) at 88D; 97G-98B; *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission, and Others* 1999 (4) SA 1 (SCA) at 7A-E). This, incidentally, was also the Commissioner's own approach. On the day before the

repeal took effect, 31 August 1995, he issued, in response to prior representations made to him on behalf of VW, an instruction to the effect that all royalties had to be taken into account, thereby reducing the amount of foreign currency earnings accessible for cession during the preceding period.

[13] The Interpretation Act speaks of "accrue" and of "acquire". Different words in a statute when juxtaposed would normally connote different concepts. "Accrue" has been held to bear a narrower meaning than "acquire" (*Mahomed NO v Union Government (Minister of Interior)* 1911 AD 1 at 11). A right "accrues" when all the conditions for its existence in relation to the particular beneficiary are met (cf *Transnet Ltd v Ngcezula* 1995 (3) SA 538 (A) at 551E-F; 552E-G); a right is "acquired" when all the conditions for its existence are met and the particular beneficiary in addition avails himself of the statutory provision concerned by some individual action or effort on his part (*Mahomed NO v Union Government, supra*, at 9-11; *Rustenburg Platinum Mines Ltd v Motletlegi NO and Another* 1954 (2)

SA 597 (T) at 603C-H; *Dys v Dys* 1979 (3) SA 1170 (O) at 1173H-1175A); *Minister of Public Works v Haffejee NO* 1996 (3) SA 745 (A) at 754D-G). The section envisages a prior entitlement which was specific and not general, actual and not abstract, live and not hypothetical.

[14] What VW sought to implement was the right to cede its foreign exchange currency earnings to another warehouse. That right was implicit in note 5(vi)(a)(ii). Also implicit was the ancillary right to approach the Board for its recommendation upon which the implementation of the right to cede depended. The Board's recommendation was as such not a "purely procedural provision" (cf *Minister of Public Works v Haffejee NO*, *supra*, at 752A-753C; *Minister of Safety and Security v Molutsi and Another*, *supra*, at 90G-H). It was at the level of this ancillary right to have the matter considered by the Board that VW's quest for permission to cede its surplus foreign exchange earnings was impeded; and it is with that right and the Board's refusal to give effect to it that this case is primarily

concerned.

[15] The initial question, then, is whether that right, in the unique circumstances of this case, accrued to VW prior to the repeal of the note. The circumstances are unique for the following reasons:

Factually and legally VW qualified to approach the Board, prior to the repeal of the note, for its recommendation in respect of the full complement of its excess foreign currency earnings, not only in respect of that portion for which permission to cede was duly granted in the past but also in respect of the surplus above that figure for which permission to cede was now sought - what for the sake of brevity I shall call "the super-surplus". The reason why VW did not initially ask for the Board's recommendation in respect of the super-surplus was the view then taken by the Commissioner that VW did not qualify for it. As was stated by the Board itself in its papers the assessment of the figures submitted by manufacturers for permission to cede any excess was based on what was described as "the honour system". In

those circumstances VW was honour-bound to comply with the Commissioner's directives on what, after all, was his area of concern. At the same time VW, in common with other manufacturers, pursued all efforts to persuade the Commissioner that his view as to the basis of calculation was wrong. Not to have deferred to the Commissioner while negotiations were pending would have been foolhardy on VW's part. The result was that VW was constrained to over-value and hence over-assess its foreign exchange usage, thereby reducing its foreign currency earnings figures which in turn reduced the excess (above the level required for the calculation of the maximum rebate) which would otherwise have been available to VW for cession to other warehouses. It was suggested in argument that VW should have sued the Commissioner before the repeal for a declarator rather than to follow his instructions as to the method of processing its request for permission to effect the cession. That, in my opinion, is to impose a counsel of perfection. The repeal after all supervened while the matter was still under

discussion with the Commissioner. Those discussions culminated in the Commissioner thereafter conceding the point and in stating that he was satisfied that for his part VW qualified for permission to cede the super-surplus in the amounts quantified by VW and approved by the Commissioner. It is, I think, fair to conclude that had it not been for the Commissioner's special insistence on how the surplus was to be calculated VW would have approached the Board prior to the repeal for its recommendation in respect of the entire amount for which, properly calculated, it qualified at the time; and that had it not been for the repeal the Board would have given the shortfall its full consideration after the Commissioner had changed his mind.

[16] What VW now sought to do after the Commissioner acknowledged that not all royalties had to be taken into account in calculating the surplus it sought permission to cede, was to rectify the pre-repeal position by seeking supplementary permission to cede what had now been determined to be the correct amount. As

such the permission sought went to the amount rather than to the entitlement. This is not, therefore, a situation where VW, never having applied for permission to cede its excess foreign currency earnings prior to the repeal, now seeks to do so for the first time after the event.

[17] Prior to the repeal VW had fulfilled all the requirements which in fact and in law entitled it to approach the Board for permission to make its recommendation in respect of the super-surplus; and from its side VW had taken all the steps realistically open to it to advance its request for permission to effect such a cession. After the repeal it remained, as it would have been before the repeal, a matter for consideration by the Board and the Director-General.

[18] Seen in this light the right to approach the Board for a recommendation in respect of the super-surplus in order that "the relevant accounts be historically amended" (see paragraph 6 above) accrued to VW prior to the repeal of the relevant note.

[19] There has been some suggestion that this conclusion might not be in conformity with the authorities. I do not think so. The facts of this case are unparalleled in any of the cases cited or that I have consulted. The conclusion is in line with the principles stated and developed in the decisions of this court commencing with *Mahomed NO v Union Government, supra*. There is one decision, not of this court, that I should perhaps mention as an exception to the rule. It is the Privy Council decision in *Director of Public Works and Another v Ho Po Sang and Others* [1961] AC 901 (PC); [1961] 2 All ER 721 (PC), a judgment that has been referred to twice in this court but never analysed or followed (cf *Gunn and Another NNO v Barclays Bank DCO* 1962 (3) SA 678 (A) at 684D-F; *Transnet Ltd v Ngcezula*, *supra*, at 552B-C). A building owner in Kowloon, Hong Kong, wished to develop a site. In order to do so he would have had to demolish an existing building in which there were tenants. That required, in terms of a certain statute, a rebuilding certificate from the Director of Public Works. As soon as the

Director gave notice of his intention to grant such a certificate tenants who would be affected by it could appeal to the Governor who had the final say in the matter. The building owner duly applied for a rebuilding certificate, the Director duly gave notice of his intention to grant it and the tenants duly appealed to the Governor. But before the Governor could give a decision the statutory provision governing the matter was repealed. In terms of the applicable Interpretation Ordinance the repeal of an enactment would not affect "any right ... acquired ... under any enactment so repealed". After the repeal the Governor gave his consent and the Director issued his certificates. The tenants sought a declarator that the Director after the repeal had no authority to do so. The Privy Council eventually found in favour of the tenants that the building owner, prior to the repeal, had no more than a hope that a certificate would be granted to him and hence that he did not acquire a right thereto. In my respectful opinion many of the *dicta* in the judgment are less than persuasive, the result is inequitable and, I would venture to suggest, contrary to the approach

of this court in *Mahomed NO v Union Government, supra,* and the decisions following it. Furthermore, the statutory provisions and facts under consideration in that matter differ materially from the present. In short, I disagree that the approach outlined in paragraph 18 hereof is in any way in conflict with our own authorities. In my opinion the repeal of the note accordingly did not disempower and preclude the Board from considering and deliberating about VW's application for permission to cede its super-surplus.

[20] That conclusion effectively disposes of the appeal. I propose nevertheless to add a word about VW's ultimate right to cede. That right was conditional. The conditions (the recommendation of the Board and the certification by the Director-General) were extraneous to and independent of the efforts of VW. At the outset VW had to establish the factual foundation for a right to cede i e a foreign currency earnings excess. That was the area of concern of the Commissioner. Thereafter VW had to approach the Board. The Board's area of concern was doubtless the

policy considerations it was enjoined to apply in terms of the Board on Tariffs and Trade Act 107 of 1986. Finally VW had to obtain a certification from the Director-General. There is in my opinion, in the peculiar circumstances of this case, much to be said for the approach that once VW had fulfilled the factual preconditions for its claim (a foreign currency earnings excess) and had applied to the Board for its appraisal, as VW had in fact done, it had "acquired", for the purpose of s 12(2)(c) of the Interpretation Act, a right, albeit a conditional one, which had to be considered on its merits by the Board. As has been stated earlier VW's current offensive, properly analysed, is to correct, with retrospective effect, the calculation in respect of the amount (in line with the adjustments approved thereto by the Commissioner) it now wishes additionally to cede. It is to the difference in the amounts recommended earlier and the amounts for which a recommendation is now sought, that the Board will be called upon to apply its own policy judgment in accordance with the behests of the Act which governs its functions. The fact that

a repeal of the enabling section had in the meantime intervened should not, in my opinion, debar VW from advancing its claim to the Board.

[21] In my opinion the court *a quo* was accordingly right in its conclusion that the decision of the Board (that it was no longer empowered to make a recommendation to the Director-General) should be set aside. VW, so we have been informed from the Bar, does not insist on costs being awarded to it on appeal.

[22] The following order is made:

"The appeal is dismissed."

.....
P M NIENABER
JUDGE OF APPEAL

Concur :

Smalberger JA
Mthiyane AJA

HARMS JA:

[1] The appeal should in my judgment succeed and the reasons that follow should be read against the backdrop of Nienaber JA's judgment. Some repetition is unfortunately unavoidable.

[2] A useful starting point is the object of the applicant ("VW"): it wishes

to cede certain foreign currency earnings to Mercedes Benz SA (Pty) Ltd ("MB") for consideration; MB can apply the ceded earnings in reducing its own foreign currency usage; a reduction in foreign currency usage leads to an increase in foreign currency earnings; the larger the foreign currency earnings, the greater the excise duty rebate.

[3] The right to cede was contained in note 5 (vi)(a)(ii) of rebate item 609.17 in Schedule 6 of the Customs and Excise Act 91 of 1964 which was in these terms:

"a customs and excise manufacturing warehouse [VW] may cede any specific amount of foreign currency earnings in respect of motor vehicles exported by such warehouse, as specified in a certificate issued by the Director-General: Trade and Industries, on recommendation of the Board on Tariffs and Trade, to other customs and excise manufacturing warehouses [MB]."

[4] The application to the Board on Tariffs and Trade ("the Board") for a recommendation was made by VW after the repeal of the note.

[5] The Commissioner of Customs and Excise is the functionary charged with the administration of the Act and is in that regard subject to the control of the Minister of Finance (s 2(1)). The Act imposes further duties and confers obligations upon the Director-General: Trade and Industry ("the Director-General") and these are to be performed by him personally or under his delegation, control or direction (s 3A(1)). An independent body, the appellant Board, established under Act 107 of 1986, not only advises the Minister of Trade and Industry under that Act but also has certain assigned duties in terms of, at least, Schedule 6. Further advisory functions in terms thereof have been entrusted to another board, that of Trade and Industry. Since export incentive schemes and industrial development programs are primarily the concern of the Department of Trade and Industry, it is understandable - as is apparent from a reading of Schedule 6 - that its functionaries and advisory bodies should have an important role to play in relation to rebates and refunds connected with these programs.

[6] The Commissioner does not (or, at least, did not in this case) assess customs duty. According to the evidence, the payment of duty was based upon an honour system and motor manufacturers such as VW paid duty on the basis of their own assessment of their liability. The views of the Commissioner relating to the interpretation of the Schedule and, more particularly, in relation to foreign currency usage (where the problem arose in this case) and the right to cede them, are legally irrelevant. Notes 4 (iii) and 5 (vi), for instance, make it clear that the responsibility relating to the method and basis of calculation and verification of foreign currency usage is that of the Director-General. When the Commissioner purported to grant conditional "permission" to VW to cede the foreign currency earnings in contention, he was acting beyond his competence.

[7] In order to cede, VW required three things: (a) the necessary foreign currency earnings, (b) a recommendation of the Board and (c) a certificate issued by the Director-General. During the period May 1991 to 31 August 1995 VW was

from time to time possessed of "surplus" foreign currency earnings. On three occasions it applied for the necessary Board recommendation in respect of specified amounts and specific cessionaries, and these applications were successful. On 15 April 1997, nearly eighteen months after the repeal of the cession provision, VW applied to the Board for its recommendation in relation to the amounts and periods in contention. Because of the repeal, the Board held the view that it did not have the necessary competence to deal with the matter.

[8] VW, well aware of the Board's view, launched the present proceedings. In order to succeed, it had to make out a case that, in the terms of s 12 (2)(c) of the Interpretation Act 33 of 1957, it had at the time of repeal an "accrued" or "acquired" right. The founding affidavit is devoid of any attempt to allege or prove the existence of such a right and the judgment of Van Dijkhorst J (whose reasoning VW's counsel did not adopt) also does not deal with the issue. The reason for the failure on behalf of VW is to be found in its approach to the matter namely that "legislation can only be applied as it existed at the time of payment of the account", presumably for excise duty. In argument before us the submission was different, namely that VW had taken steps to avail itself of the right to cede by earning foreign currency or alternatively that the relevant provision of the Interpretation Act does not apply to tax matters (something the present case is not).

[9] Turning to the cause of its failure, VW stated that *it* "erroneously" included certain excluded royalty payments in its returns of foreign currency usage. In the application to the Board it had already stated that the amendment had not been brought to the attention of motor manufacturers and that the Commissioner erroneously collected duty where royalty payments had been included (by VW) in the accounts. Had they been correctly omitted, VW would have ceded the excess. In the answering affidavit the Chairman of the Board stated that he did not know whether the inclusion had been in error; the response thereto does not take the matter further.

[10] What makes the case unique or unparalleled in the judgment of Nienaber JA, is the erroneous view held by the Commissioner about the calculation of royalties in determining the foreign currency usage. I have already come to the conclusion that it is an irrelevant consideration, but in any event, my assessment of the facts differs from his. Admittedly, in the founding affidavit the deponent did state that the Commissioner specifically notified manufacturers that all their royalty payments had to be included in their accounts. This was, however, done on the last day of the life of the provision by letter of 31 August 1995 and then only in relation to the last quarter (1 June to 31 August 1995). It needs to be mentioned that the excise returns and payments are done on a quarterly basis and that the amount VW wishes to cede in respect of this quarter is but R312 934,00. In reply, VW pertinently stated that it acted on *this* specific letter in the calculation of the net foreign currency usage. There is no evidence of any previous ruling by the

Commissioner and, since the manufacturers were unaware of the provision until an unknown date, there could not have been any ruling before such a date. It was in this context that the Board alleged that VW had paid duty on its own assessment of its own liability, an allegation that has to be accepted for purposes of the case. Further, in reply, VW repeated the allegation baldly made in the founding affidavit that it had taken all reasonable steps to ascertain the correct legal position. In response to a specific allegation in the answering affidavit that VW did not state what steps it took at the time and whether they were reasonable, VW vaguely referred to discussions which culminated in a letter of 12 June 1996 and representations as evidenced in the letter of 31 August 1995 which has already been dealt with. No dates or particulars are given. Having failed to respond to a direct invitation to provide the facts, VW can hardly rely on a benevolent interpretation of its affidavits. Furthermore, since it is not alleged that an application to the Board was dependent upon a ruling or certificate from the Commissioner, there is no reason why WV upon becoming aware of the 1991 amendment, was prevented from applying. Litigation was not required. The Commissioner, faced with a cession based upon a certificate from the Director-General, has to grant the rebate.

[11] In my judgment, these facts are not unique. Even if unique, that fact could at best be relevant in the context of a determination of whether the provisions of the Interpretation Act do not apply because an intention contrary to s 12 (2)(c) appears from the repealing law. That is not VW's case.

[12] It is next necessary to determine on which "right" VW relies. During argument counsel for VW expressly disavowed any reliance upon the right to cede. In other words, he accepted that the right to cede in terms of the note was not acquired and did not accrue to VW before the repeal. The concession was rightly made if regard is had to the tests formulated by Nienaber JA in par 13. Since the whole object of the present exercise is to cede the foreign earnings, this disavowal ought to be the end of VW's case.

[13] Another conceivable accrued right is the "ancillary right to approach the Board for its recommendation" to the Director-General, a right not persisted in during argument but the cornerstone of the judgment of Nienaber JA. In this context regard should be had to par (e) of s 12 (2) of the Interpretation Act, a provision complementary to par (c). For the sake of convenience, both are quoted:

"(2) Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not -

(a) . . .

(b) . . .

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or

4. . . .

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced . . . as if the repealing law had not been passed."

Steyn CJ, in dealing with the relationship between the two paragraphs, said:

"It is apparent that sec. 12 (2) does not purport to preserve any claim to an investigation, legal proceeding or remedy as an independent right or privilege, but only in relation to another right or privilege acquired or accrued, or to an obligation or liability incurred under the law repealed, and merely as ancillary to and as a means of establishing and enforcing such a right, privilege, obligation or liability. The primary enquiry in the present case is not, therefore, as to the accrual of a right of action or other legal remedy, but as to the accrual of a right which the creditors became entitled to pursue, through the liquidators, by the institution of legal proceedings."

(*Gunn and Another NNO v Barclays Bank DCO* 1962 (3) SA 678 (A) 684B-D.)

To my mind the right to approach the Board amounts to a "right" to an investigation leading to a recommendation. It does not differ in kind from the right to institute proceedings in a particular forum, the subject of *Minister of Public Works v Haffejee NO* 1996 (3) SA 745 (A).

[14] From another angle, the right to approach the Board may be regarded as "the power to take advantage of an enactment", something which, according to the classical exposition in *Abbott v The Minister for Lands* [1895] AC 425 (PC) 431 adopted in *Mahomed v Union Government* 1911 AD 5 at 10 *in fine*, cannot properly be deemed a "right accrued".

[15] In conclusion, it is necessary to consider whether VW had "acquired" a conditional right, a matter dealt with in par 20 of Nienaber JA's judgment. In this regard my evaluation of the factual premise of the judgment is different. I have already dealt with the supposition that "VW had to establish the factual foundation for a right to cede i e a foreign currency earnings excess", that it "was the area of concern of the Commissioner" and that the certification from the Director-General "would presumably follow as a matter of course". The finding, perhaps tentative, that VW "had applied to the Board for its appraisal" before the repeal overstates the evidence as I understand it. VW, in the present instance, made its application in respect of seven out of sixteen excise quarters over the period 1 September 1991 to 31 August 1995. There is documentation which indicates that in relation to three of the seven quarters VW had made applications to the Board, but nothing further. One of these did not concern MB and the other two included proposed cessions to other motor manufacturers. VW's application can therefore in a very limited respect be regarded as an application to correct or adjust a calculation. In any event, I find it difficult to envisage how conditional rights can be regarded as vested rights. The mere fact that they are conditional ought to disqualify them from having been acquired. In *Rustenburg Platinum Mines Ltd v Motletlegi NO and Another* 1954 (2) SA 597 (T) the mine had an option to purchase certain mineral rights which it had not exercised when the repealing provision became effective. As a result of the repeal, the mine was prohibited from purchasing these rights. The option, which in a sense gave rise to a conditional right, was not enough. Cf *Browne v*

Incorporated Law Society of Natal 1968 (3) SA 535 (N) 540D-H. The judgment in *Director of Public Works and Another v Ho Po Sang and Others* [1961] AC 901 (PC) is to a similar effect and, on my reading, in conformity with the test laid down by Nienaber JA in par 13. See also Wiechers *Administratiefreg* 2nd ed p 65-68. If the result appears to be inequitable, it is because only acquired or accrued rights are protected upon repeal of a statute and not lesser expectations and hopes.

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L T C HARMS
JUDGE OF APPEAL

AGREE:

MPATI AJA