IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
495/2000

In the matter between:

TOYOTA SOUTH AFRICA MOTORS (PTY) LIMITED — **Appellant**

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE — **Respondent**

CORAM: HOWIE, FARLAM, MTHIYANE, BRAND JJA and HEHER AJA

Date heard: 18 March 2002

Delivered: 28 March 2002

Rebates under an export promotion scheme; whether "paid by the State" in terms of s 10(1)(zA) of the Income Tax Act.

J U D G M E N T

HOWIE JA

HOWIE JA

[1] This is an application for leave to appeal which was referred for argument in terms of s 21(3)(c)(ii) of the Supreme Court Act 59 of 1959. The applicant also seeks condonation of the lateness of the application.

[2] The applicant is a manufacturer, distributor and exporter of motor vehicles. In respect of the 1991 and 1992 tax years it claimed that certain amounts of which it had had the benefit in terms of an export promotion scheme were exempt from tax by reason of the provisions of s 10(1)(zA) of the Income Tax Act 58 of 1962. The respondent rejected that claim and disallowed the applicant's subsequent objection. The applicant then appealed unsuccessfully to the Transvaal Income Tax Special Court. (That appeal also involved other issues. Only the s 10(1)(zA) exemption is presently relevant.)

[3] When the applicant sought leave in terms of s 86A(5) of the Income Tax Act to appeal against the decision of the Special Court directly to this Court, the President of the Special Court refused it. Entitled then to appeal as of right to the High Court, the applicant was required to lodge a notice of appeal within 21 business days after receiving notice from the registrar of the Special Court under s 86A(10)(i)(a). In this regard s 86A(12) provides:

> "Such notice of appeal shall be lodged within the period [of 21 business days after notice] or within such longer period as may be allowed under the rules of the appeal court."

Applying the provisions of the subsection to the facts of this case, the time allowed for such lodgment was either until 28 August 1996 or within any longer period allowed under the rules of the High Court.

[4] No period is provided for in the Uniform Rules in so far as the noting of an appeal from the Special Court to the High Court is concerned. The

applicant's notice of appeal was therefore required to be lodged on or before 28 August 1996.

[5] On 14 January 2000 the applicant lodged a notice of appeal in the Transvaal Provincial Division. The notice was dated 2 November 1999.

[6] In the interim, however, affidavits for the purposes of an application for condonation of the applicant's non-compliance with s 86A(12) were exchanged. The founding affidavit was signed on 28 April 1999 and the respondent's opposing affidavit on 11 June 1999. When these papers were actually filed is not apparent from the record but steps in pursuit of the application and in prosecution of the appeal followed subsequently.

[7] In due course the condonation application came before the Court below (De Klerk, Mynhardt and Bertelsmann JJ). Writing for the Court, De Klerk J held that it was unnecessary to decide whether good cause for condonation had been shown because the claim for exemption in terms of

s 10(1)(zA) of the Income Tax Act was misplaced and the appeal therefore had "no merit". The application was dismissed with costs.

[8] On 25 October 2000 the Court below refused leave to appeal to this Court. In terms of the Supreme Court Act the applicant then had 21 days in which to bring the present application for leave. It was eight days late in doing so, hence the accompanying request for condonation.

[9] The first question for decision is whether it was, as contended in the respondent's heads of argument, not open to the Court below to grant condonation. Rightly, counsel for the respondent before us readily acknowledged the existence of features which point to an answer the other way. We are dealing here with non-compliance with a statutory provision laying down the time within which an appeal from the decision of the Special Court must be noted. It is of no practical assistance to seek to classify the provision as peremptory or directory. The enquiry is simply :

what did the legislature intend? *Weenen Transitional Local Council v SJ Van Dyk*, Supreme Court of Appeal Case 399/2000 in which judgment was delivered on 14 March 2002, at pp 10-11). That the legislature did not intend non-compliance within the 21 business days referred to in s 86A(12) inevitably to have fatal consequences for an intended appeal is, in my view, clearly apparent. The noting period could be even longer if, as the lawgiver envisaged was possible, the rules of the relevant appeal court (either this Court or the High Court) so provided. And, of course, a rule-prescribed period may itself be extended (or non-observance of it condoned) if good cause is shown on due application. The expression "may be allowed" covers not only the period provided for in a rule but also any extension which the courts may grant. In the circumstances, therefore, the legislature must have intended the appellate courts to have the final say as to whether intending appellants could proceed with their appeals or not. The

fact that the provision of time to note an appeal from the Special Court to a High Court has been overlooked by the drafters of the Uniform Rules cannot detract from this conclusion. It would be illogical and unfair if non-compliance with the 21 business days time limit barred an appeal simply because of the rule-makers' oversight when the legislature clearly envisaged that an appellant who could resort to a rule-prescribed time limit, and the grant of condonation or extension for good cause shown, would be able to proceed.

[10] These conclusions based on interpretation are strengthened, of course, by the separate consideration that the High Court has inherent jurisdiction to govern its own procedures and, more particularly, the matter of access to it by litigants who seek no more than to exercise their rights. It has been held that this jurisdiction pertains not only to condonation of non-compliance

with the time limit set by a rule but also a statutory time limit: *Phillips v Direkteur van Statistiek* 1959 (3) SA 370 (A) at 374 G - *in fine*.

[11] The Court below therefore had the power to condone the applicant's non-compliance with the provision of s 86A(12) of the Income Tax Act.

[12] The next question is whether good cause for the grant of condonation was shown. The delay involved was well in excess of three years. The applicant's case in this respect was that the same legal issue was due to be covered by an appeal by another motor manufacturer and that an arrangement had been reached by a representative of the applicant and an employee of the respondent that prosecution of an appeal in the present matter would be held in abeyance pending the result of the other appeal. Judgment in that appeal was delivered on 2 September 1998. (The judgment is reported: *Nissan SA (Pty) Ltd v Commissioner for Inland Revenue* 1998 (4) SA 860 (SCA).)

[13] According to the applicant's papers the result of the *Nissan* matter caused numerous discussions over some months between motor manufacturers and the respondent. The applicant alleged that it was waiting to see if the outcome of these discussions would entail a concession by the respondent favourable to the applicant's stance on the present legal issue. When it became apparent that no such concession would be forthcoming the applicant requested the respondent to agree to an extension of the period in which its proposed appeal could be noted. Eventually, in April 1999, a representative of the respondent informed the applicant that the requested extension would not be agreed to.

[14] Counsel for the applicant frankly conceded, as he was bound to do, that on the record there was no explanation for the omission to lodge the notice of appeal between April 1999 and February 2000. What does appear from the record, however, as already mentioned, is that the founding

affidavit in the condonation application to the Court below was signed in April 1999 and the respondent's opposing affidavit signed in June 1999. Also as indicated before, it is not apparent when the application papers were filed or when the application was finally ripe for hearing. Conceivably, lodgement of the notice of appeal was withheld pending the outcome of the condonation application. One of the forms of relief sought in the application was an order extending the time within which to lodge the notice.

[15] What requires emphasis is that the applicant ought not to have left important matters of fact to inference when the circumstances clearly show that the requisite information to enable it to make direct assertions was within its knowledge. A party seeking condonation must, among other things, give a full and satisfactory explanation for whatever delays non-compliance has occasioned; an inadequate explanation could well bar the

grant of condonation: *Beira v Raphaely-Weiner and Others* 1997 (4) SA 332 (SCA) at 337 D-E.

[16] The respondent challenges some of the major factual allegations made by the applicant and queries in many respects the sufficiency of such explanations as the applicant has advanced. The submissions made by the respondent's counsel in this regard have undoubted force. However, in the view I take of the matter it is unnecessary to decide whether the applicant has shown good cause. To my mind the crucial question, bearing decisively on the proceedings both in the Court below and in this Court, is whether the proposed appeal has reasonable prospects of success.

[17] The amounts which the applicant seeks to have exempted from taxation are some R26 million in respect of 1991 and about R50 million in respect of 1992. Each of these amounts represents a portion of the total sum which the applicant, in its tax return for each of the years concerned, called

the "subsidy" granted to it "in terms of Phase VI of the local content programme of the Department of Trade and Industry". It alleged in the returns that the

> "subsidy is aimed at curbing the usage of foreign exchange in the motor industry, by way of import replacement and through exports".

It then proceeded to break down the total "subsidy" for each year into a large sum "relating to foreign exchange savings as a result of import replacement" and a smaller sum "relating to foreign exchange earnings as a result of exports". The two smaller sums (as indicated, they are now approximately R26 million and R50 million respectively) were claimed by the applicant as allegedly relating to exports and as exempt from tax in terms of s 10(1)(zA) of the Income Tax Act.

[18] Before issuing original assessments for the years in question the respondent informed the applicant in a written notification that certain

adjustments had been made in the calculation of the applicant's taxable income. In the notice the respondent referred to the yearly amount which the applicant called a "subsidy", as a "rebate" constituting "gross income". He indicated, however, that the two smaller sums claimed as exempt would indeed be exempted under s 10(1)(zA) and that the balance would be taxed. Original assessments were issued according to that view. Subsequently the respondent issued additional assessments subjecting the previously exempted amounts to tax. The appeal to the Special Court followed.

[19] S 10(1)(zA) as it read at the relevant time provided as follows:

> "There shall be exempt from tax -
>
> any amount by way of rebate or other assistance received by or accrued to or in favour of any exporter (as defined in s 11*bis*(1)) under any scheme for the promotion of financing of exports which is for the purposes of this paragraph approved by the Minister of Trade and Industry and Tourism with the concurrence of the Minister of Finance, as well as any amount (including any interest paid in terms of the General Export Incentive Scheme introduced with effect from 1 April 1990 and which is calculated in respect of any period falling after 1 April 1991)

> which is paid by the State, on or after 1 April 1990, under any such scheme: Provided that where the person entitled to claim such amount from the State has, under an agreement directly connected with the export trade carried on by him, agreed to pay the whole or any portion of such amount to any other person, the exemption under this paragraph shall also apply to the whole or such portion of such amount received by or accrued to such other person under the said agreement".

[20] It is common cause in the proceedings in this Court that the amounts now in issue did not involve any money actually having been paid out to the applicant by the State. It is also not in dispute that Phase VI of the local content program of the Department of Trade and Industry ("Phase VI") was a "scheme" to which s 10(1)(zA) refers.

[21] The enquiry, therefore, is whether the amounts in issue were "paid by the State" in any manner in which, in law, payment can effectively take place, and, if so, whether such payment was in terms of Phase VI.

[22] Counsel for the applicant argued that payment by the State took place by way of set off in one of two possible alternative ways. According to the main argument the amounts concerned constituted rebates of excise duty. Excise duty was a debt owed to the State by the applicant under the Customs and Excise Act 91 of 1964 in respect of locally sold vehicles and the rebate was a debt owed to the applicant by the State under Phase VI essentially in respect of exported vehicles. When, as was the case in practice, the rebates had the effect of reducing the applicant's excise duty liability, set off was the mechanism by means of which one indebtedness was reduced by the other. Set off being, in law, equivalent to payment, it followed that the State had paid the applicant the rebates.

[23] The alternative way in which set off occurred, in the applicant's submission, was as follows. Excise duty was, in reality, paid by the purchaser of a motor vehicle. The applicant, along with other motor

manufacturers, merely collected this duty from the buying public and, having accounted for it in a specially kept excise account, passed it on to the State. For this service the State allowed the applicant to be credited with, and to set off, the amounts in question which counsel said were payments by the State that were subject not to the Customs and Excise Act but to a completely separate arrangement.

[24] This alternative submission was advanced for the first time when the applicant's counsel argued in reply. It was based, he said, on what the respondent's leading counsel had described in his own address as being the procedures by means of which excise duty was imposed and recovered.

[25] To assess these contentions advanced on behalf of the applicant it is necessary to refer to some of the evidence before the Special Court and to the provisions of the Customs and Excise Act that are material to the issue under discussion. For convenience I shall, in what follows, refer to that

statute as "the Act" and although we are concerned with its provisions as they were at the relevant time I shall use the present tense in referring to them.

[26] Phase VI evolved as a result of a series of recommendations by the Board of Trade and Industry to the Minister of Finance and the Minister of Trade and Industry. The origin and purpose of Phase VI (and similar earlier schemes) were broadly described in the *Nissan* case at 866 G-I:

> "South Africa's foreign currency reserves were in need of preservation and strengthening. To that end various schemes to promote and/or finance exports were evolved in collaboration with the relevant departments of State. Motor industry manufacturers in particular were large consumers of foreign currency. The State set about encouraging them to reduce their foreign currency usage by using locally made components and to export vehicles and locally made components so as to earn foreign currency. This it did by providing incentives."

[27] The Board monitored the progress of Phase VI and the recommendations it made that are relevant to the present matter concerned

the provisions of the Act that relate to excise duty and rebates of excise duty. The rate of excise duty is laid down in Part 2 of Schedule 1 of the Act and rebate of excise duty in Schedule 6. In terms of s 2(1) of the Act the Minister of Finance is, through the respondent, in ultimate control of the administration of the Act and has the power under s 48(2) to amend Part 2 of Schedule 1 and, thereby, the excise duty rate, and the power under s 75(15) to amend Schedule 6 and thus alter the rebate rate. (For present purposes one need only refer to the situation applicable to motor vehicles. It is unnecessary to refer to items such as tooling, components or accessories.) It was accordingly for the Minister of Finance to implement the duty and rebate structures that were required by those of the Board's recommendations which the Minister of Trade and Industry approved in the interests of the economic success of Phase VI.

[28] The applicant manufactured its motor vehicles in a customs and excise warehouse. They were manufactured for home consumption (for sale locally within South Africa and the territories constituting the regional customs union) and for export. Subject to rebate of duty, all the vehicles manufactured were excisable goods.

[29] The provisions of s 37(1) of the Act are, as far as is relevant, the following:

> "In respect of any goods manufactured in a customs and excise warehouse there shall be paid, subject to the provisions of section *seventy-five*, on entry for home consumption thereof, duty at the undermentioned rates, namely -
>
> (a) ...
>
> (b) if such manufactured goods are liable to excise duty, the excise rate of duty applicable in terms of Schedule No 1 on such manufactured goods."

[30] In terms of s 44(2) of the Act liability for excise duty commences at that stage of the manufacturing process when the manufactured product has acquired "the essential characteristics of" and is "capable of use" as a motor

vehicle. Under s 44(8) the liability for excise duty is that of the manufacturer, owner, seller or purchaser of excisable goods, which liability continues until the goods have been entered for home consumption and the duty paid. In terms of s 114 the liability for the duty is a debt owned to the State.

[31] Nothing in the record or contended for in argument suggests that the excise duty payable in respect of motor vehicles manufactured by the applicant during the tax years in question was not paid or that it was paid by anyone other than the applicant itself.

[32] Despite the applicant's use of the word "subsidy" in its returns of income for those years, the Phase VI benefits to which it was entitled have, throughout the litigation, in all courts, been referred to as rebates.

[33] The matter of rebates is dealt with in s 75 of the Act. The heading to the section is "Specific rebates, drawbacks and refunds of duty". S 76 deals

with general refunds and s 77 provide for set off in specific limited circumstances.

[34] A clear distinction is drawn in these sections between rebates on the one hand and refunds and drawbacks on the other. The latter plainly concern situations in which, for example, an amount of duty has been paid when not due or is remitted and the respondent is liable for repayment. Rebates, on the other hand, are referred to as "rebates of duty". The Oxford English Dictionary defines "rebate" as "a deduction from a sum of money to be paid, a discount; also, a repayment, drawback." The Act's use of "rebate" therefore conforms to the primary or main meaning of the word, namely, a discount.

[35] For present purposes the only rebate provision in the Act to which it is necessary to refer is s 75(1)(d). Its relevant wording is this:

> "in respect of any excisable goods ... described in Schedule No 6, a rebate of the excise duty specified in Part 2 of Schedule No 1 ... in respect of such goods at the time of entry for home consumption thereof ... shall ... be granted to the extent and in the circumstances stated in the item in Schedule No 6 in which such goods are specified ..."

[36] As far as set off is concerned, s 77 permits the licensee of a customs and excise warehouse to set off a refund owed by the respondent against duty owed to the respondent but this entitlement is granted only in circumstances where the licensee has paid duty not due or has been granted refunds provided for elsewhere in the Act. None of those circumstances applies to the applicant.

[37] The evidence before the Special Court, including certain reports of the Board of Trade and Industry, shows without question that the Board's recommendations regarding rebates of excise duty in respect of locally manufactured motor vehicles were approved and implemented, resulting in

appropriate amendments, pursuant to Phase VI, of Part 2 of Schedule I, and of Schedule 6. Schedule 6 contains two particular provisions which are relevant. One (item 603.01) permits the full rebate of duty applicable to excisable goods when they are exported. The other (item 609.17) provides for the rebate of the excise duty payable in respect of new motor vehicles locally manufactured. In the circumstances there can be no question but that the rebates of which the applicant derived the benefit were rebates under the Act.

[38] After manufacture the finished vehicles were kept in the applicant's warehouse and on delivery from the warehouse they were entered for home consumption. In terms of s 37(1)(b) excise duty was then payable.

[39] In terms of Part 2 of Schedule 1 the excise duty rate was 40% of a vehicle's ex-factory price. In terms of item 609.17 of Schedule 6 the rebate was 50% of the "local content value". That value was the difference

between the ex-factory price of all vehicles removed from a warehouse during an excise quarter (three months) less the manufacturer's "net foreign currency usage" in that period. Such net usage was the difference between foreign exchange expended on imports and foreign exchange earned from exports. The maximum local content value that could be taken into account in calculation of the rebate was 75% of the ex-factory price. It followed that the maximum rebate was 37,5% of that price which, with duty at 40%, meant that, per vehicle, duty always exceeded rebate. Although this did not mean that in a particular quarter total rebates could not exceed total duty no such excess occurred in the two years under consideration which could be said to have led to an indebtedness on the part of the respondent vis à vis the applicant.

[40] It remains to mention that Phase VI was not a scheme having the ministerial approval referred to in s 10(1)(zA) of the Income Tax Act but

that is no impediment to the applicant because the *Nissan* case decided that the words "under any such scheme" referred to an export promotion scheme even if it did not have ministerial approval.

[41] Significantly, it was an agreed fact before the Special Court that the rebates involved in this case were not refunds of excise duty but "a mechanism for the administration of Phase VI." It is also pertinent to observe, as De Klerk J did in the judgment of the Court below, that a case might conceivably arise where an incentive called a "rebate" was paid to a manufacturer, in any manner in which payment could, in law, be effected, and that such payment would probably be exempt income. As the learned Judge said, that was not the position here. One might add that there would, in that instance, be no need to decide whether the payment was truly a rebate within the meaning of the Act.

[42] The applicant has, from before the Special Court proceedings to the present, persisted in referring to the amounts now in issue as rebates in respect of exports, or export rebates, or the export content of the rebates. Its counsel in this Court (who did not appear in either Court below) adopted that same approach as part of his main argument. In my view that approach is not well founded. The rebate provided for in item 609.17 of Schedule 6 is plainly the product of a number of factors, only one of which is export income. It is just as much dependent on foreign exchange expenditure and on the expenditure incurred in the purchase of locally made materials. It follows that it is erroneous to say that the rebate applies to or is derived from export earnings. In fact, the rebate serves to reduce the excise duty payable on non-exported vehicles.

[43] As a reading of the relevant sections of the Act shows, liability for excise duty arises as soon as the manufacturing process reaches the stage

that the vehicle is usable as such. However the duty does not have to be paid at that stage. Nor is it established at that juncture what the duty indebtedness amounts to. In terms of s 37(1) it is only when the vehicle is entered for home consumption that the duty must, subject to the rebate afforded by s 75(1)(d), be paid. The effect of the latter provision is that the rebate is applied to the duty as it is at the time of such entry. The result of that application is that the duty is at once reduced. What is payable by the manufacturer to the State is the balance after such reduction.

[44] It is plain from this analysis that set off cannot have occurred. Set off requires, amongst other things, two reciprocally owed debts, both due and payable. When the rebate served to reduce the excise duty the applicant was not yet indebted to the respondent. Its indebtedness only arose after the rebate had taken effect. De Klerk J made this point. With respect, he was right.

[45] There is a further consideration to be borne in mind. The rebate in question is a privilege. It exempts a motor vehicle manufacturer from paying as much excise duty as everyone else has to pay who manufactures for home consumption. See in this regard HC Cronje, *Customs and Excise Service* 10-5; *BP Southern Africa Pty Ltd v Secretary for Customs and Excise* 1984 (3) SA 367 (C) at 376 A-B. Ordinarily, as already indicated, "rebate" within the meaning of s 75 of the Act, unlike "refund", does not signify a payment but a discount. It involves no implication that the respondent has any obligation to pay anything to a manufacturer. To interpret "rebate" as not merely entitling the manufacturer to a discount but as burdening the respondent with an indebtedness to make a payment, would be contrary to the principle that a provision conferring a privilege should be strictly construed. The privilege should not be extended in the absence of clear language justifying such extension: *Ernst v Commissioner for Inland*

Revenue 1954 (1) SA 318 (A) at 323 C-E. Entitlement to a rebate therefore did not, in the present case, impose an indebtedness on the State.

[46] Accordingly, the main argument advanced on the applicant's behalf cannot succeed.

[47] As for the alternative argument, the arrangement contended for is one whereby motor manufacturers collect excise duty, in effect as agents for the State, and retain part of their recoveries as payment by the State for that service. According to counsel's concession this arrangement was divorced from any possible foundation in the Act and there is also no evidence to show any possible connection with Phase VI. If the rebate granted under the Act read with Phase VI exists quite separately, and it is the rebate which provides the desired export incentive, the "agency commission" arrangement could have no conceivable bearing on promoting exports or reducing foreign exchange expenditure. If, however, the argument was intended to invite the

conclusion that the arrangement contended for was an additional incentive or that it actually replaced the rebate-based incentive there was simply no evidence to support such conclusion. Accordingly, assuming in the applicant's favour that payment pursuant to the arrangement was indeed payment "by the State" it is difficult to see how it could be found to have been payment under an export promotion scheme as required by s 10(1)(zA) of the Income Tax Act.

[48] In any event, the existence of the arrangement contended for was not a feature of the applicant's case at any prior stage of this litigation. It was never even investigated, much less proved. Essential to the success of the argument would be evidence showing, among other things, that the amounts in issue in these proceedings represented excise duty paid to the applicant by purchasers of its newly manufactured vehicles and retained by it as "agent's commission". Having regard to the terms of s 37(1)(b) of the Act, it is not

feasible to imagine that such evidence was ever available. If it was, it was never presented in the Special Court. The alternative argument must also fail.

[49] For all these reasons it follows that the amounts in issue were not "paid by the State" within the meaning of s 10(1)(zA) of the Income Tax Act.

[50] The proposed appeal to the Full Court has no prospects of success. Nor, for the same reasons, do either of the applications now before us. Strictly, it is sufficient to dismiss the application for condonation but, essentially, the argument before us concerned the legal question central to the prospects of a successful appeal. In the circumstances it is appropriate to dismiss the application for condonation and the application for leave to appeal.

They are so dismissed, with costs. Such costs will include the costs of two counsel.

CT HOWIE
JUDGE OF APPEAL

CONCURRED:

FARLAM JA
MTHIYANE JA
BRAND JA
HEHER JA