REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 236/03
Reportable

In the matter between:

THE DIRECTOR-GENERAL: DEPARTMENT OF TRADE AND INDUSTRY **FIRST APPELLANT**

THE MINISTER OF TRADE AND INDUSTRY **SECOND APPELLANT**

and

SHURLOCK INTERNATIONAL (PTY) LIMITED **RESPONDENT**

CORAM: HARMS, FARLAM, MTHIYANE, NUGENT JJA et VAN HEERDEN AJA

HEARD: 2 MARCH 2004

DELIVERED: 25 MARCH 2004

SUMMARY: General Export Incentive Scheme Guidelines (Revision 2) – whether exporter must repay an incentive payment if original documents listed in para 3.9 of Scheme Guidelines cannot be produced within five year period thereafter.

JUDGMENT

FARLAM JA

[1] The issue for decision in this appeal is whether, upon a proper interpretation of Revision 2 of the General Export Incentive Scheme Guidelines (which became effective on 1 October 1992), an exporter whose claim for payment of an export incentive under the Scheme had been checked and paid by the Department of Trade and Industry and who is unable subsequently within the five year period provided for in the Scheme Guidelines to furnish the original documents listed in paragraph 3.9 thereof will automatically forfeit his right to the earlier payment.

[2] The scheme, which I shall hereinafter call GEIS, was introduced as a State prerogative. It was designed to encourage the export of certain goods in order to generate foreign currency income for the country. The essential features of the original export incentive scheme introduced by the Department of Trade and Industry and of GEIS, which replaced it, have been considered by this Court in *Dilokong Chrome Mines (Edms) Bpk v Direkteur-Generaal, Departement van Handel en Nywerheid* 1992 (4) SA 1(A) and *South African Co-operative Citrus Exchange Ltd v Director-General: Trade and Industry and Another* 1997 (3) SA 236 (SCA). In both of these cases (the *Dilokong Chrome* case at 22E and 32A-C and the *Co-operative Citrus* case at 239F) it was pointed out that the scheme has *pro tanto* the force of legislation and must be interpreted in the same manner.

[3] The paragraph to be interpreted in this case is paragraph 3.11, read with paragraphs 3.9 and 3.10.

These paragraphs read as follows:

'3.9 The following documentary evidence in substantiation of claims is required: Bill of Entry for Export (DA550 or DA25 or DA28 as the case may dictate), Declaration in Regard to Foreign Exchange Proceeds (F178), Bill of Lading (or Air Waybill) and Commercial Invoice. Of these documents, certified copies of the DA550 (or DA25 or DA28) and the F178 must be submitted with claims. The original copies of all the above-mentioned documents must be kept available for inspection by the Department for a period of at least five years. The Department may, however, request the submission of any further export documents such as the Commercial Invoice and/or the Bill of Lading (Air Waybill) at any time, if it so desires.

3.10 The Department will check all claims and make a determination as regards the amount of the claim.

3.11 The decision by the Director-General as to the eligibility of any product for benefits under the General Export Incentive Scheme as well as the determination of the amounts of the incentives will be final and conclusive. Nothing in this document shall be construed as an offer open to acceptance constituting any contractual or in fact any other obligation or any enforceable right against the Department. The Director-General may at any time conduct a full-scale investigation to verify any information furnished by a claimant. If the Director-General is satisfied that the claim was based on false information or that the claimant has furnished misleading information, he may disallow the claim and recover the full amount paid out to the claimant. Interest on bona fide overpayments will be levied at the rate prescribed in terms of section 1(2) of Act No. 55 of 1975.'

[4] The Department of Trade and Industry became liable in June 2000 to pay the respondent, an exporter, an amount of R387 644 as its export incentive under the scheme for the period 1 January 1997 to 11 July 1997.

It refused to pay this amount to the respondent because, so it contended, the respondent was obliged to repay to it sums totalling R106 422, which had previously been paid as export incentives (plus interest thereon) to the respondent in respect of the periods from July 1992 to December 1992 and from January 1993 to June 1993. The respondent instituted an action in the Transvaal Provincial Division of the High Court against the Director-General of the Department and the Minister of Trade and Industry claiming payment of the amount of R387 644 plus interest and costs. The appellant defended the action. They admitted that the respondent became entitled to payment of the amount claimed but averred that the department's indebtedness to the respondent in this amount was extinguished by set-off. The defence of set-off was based on the allegation that the respondent owed the Department the amount of R1 066 422 to which I have referred above. The first appellant also brought a counterclaim against the respondent for R678 778, being the balance of the amount of R1 066 422 (after deduction of the respondent's claim of R387 644) which he alleged the respondent owed to the department.

[5] The first appellant's contention that the amount of R1 066 422 was repayable to the department was based on the fact that the documents which the respondent was obliged to keep for five years were lost when it moved offices at some stage after the export incentives in question were paid. Although the first appellant originally averred also that he was

satisfied that the respondent had furnished misleading information in respect of the claims, this contention was abandoned before the trial commenced. (At no stage was it alleged that the respondent's claims had been based on false information.)

[6] At the trial there remained two issues for determination, *viz.*

(a) whether the payments made to the respondent in respect of the claims for the two periods referred to in para 4 above were provisional payments which were conditional upon the claims being capable of verification; and

(b) whether the automatic consequence of the respondent's having lost the relevant documents and thus being unable to furnish them to the department on request was that the department became entitled to recover the amounts paid to the respondent in respect of its claims for the said periods.

[7] The trial came before De Vos J, who rejected both of the contentions advanced on behalf of the appellants and gave judgment in favour of the respondent in the amount claimed. The present appeal is against that judgment.

[8] Counsel for the appellants contended that upon a proper interpretation of the GEIS Guidelines a claimant's entitlement to payment of an export incentive is conditional upon compliance with its obligation to keep for verification purposes the prescribed documents and that the respondent, having lost the documents in question before a full-scale

investigation as envisaged by paragraph 3.11 had been conducted, was not entitled to retain the benefit of the payments received, which (so it was contended) were provisional. In developing this submission counsel contended that the Guidelines envisage a two-phase process of determination by the department of an exporter claimant's entitlement to the incentive. The first phase, which is conducted in terms of paragraphs 3.9 and 3.10, culminates in what was described as a provisional determination, which is followed by a provisional payment. The provisionality of the determination and of the subsequent payment falls away and the initial determination and payment become final either on the effluxion of the five year period referred to in paragraph 3.9 or when a full-scale investigation under paragraph 3.11 leads to the verification of the claim.

[9] Counsel conceded that neither the provisionality of the initial determination and the subsequent payment nor the conditionality of a claimant's entitlement to an incentive were expressly stated in the Guidelines but he submitted that they were a necessary inference from the Guidelines. When asked to formulate what precisely the necessary inference was, he said that it read as follows: the entitlement to the incentive is conditional upon compliance by the claimant with the obligation imposed upon the exporter in the third sentence of paragraph 3.9. This obligation he contended was a mandatory obligation. It followed, so he submitted, that a mere failure on the part of the exporter

to keep the necessary original documentation led automatically to forfeiture of the entitlement even if certified copies were available and/or a full-scale investigation to verify the entitlement was still possible.

(As a fact copies of all the necessary documents were not available and a full-scale investigation to verify the entitlement was not possible. This is, however, not relevant in the present matter because the correctness of counsel's submission has to be tested in the context of cases where copies are available and where a full-scale investigation is possible. It is also only fair to the respondent to record that the appellants accepted that the respondent had acted *bona fide* at all times and that the loss of the documents in the present case does not give rise to any sinister inference.)

In my opinion it is not possible to draw the necessary inference for which counsel contended.

[10] On the face of it there is no expressly stated sanction for a failure on the part of an exporter to keep the necessary documents but it hardly needs stating that such a failure may well give rise, in appropriate cases, first to a suspicion and thereafter satisfaction on the part of the first appellant that a claim was either based on false information or that misleading information had been furnished. If the first appellant were so satisfied, then the necessary jurisdictional fact for the invocation by him of his power to disallow a claim and recover the full amount that had been paid would be present. It is significant in my view that the first appellant's power to disallow a claim and to recover what was paid was

expressly made subject to the presence of one or other of the jurisdictional facts I have mentioned. It is clear, however, from the wording used that, even if one or other of those jurisdictional facts were present, the first appellant still had a discretion as to whether he would use his power to disallow a claim. On the other hand, if counsel's argument is correct, the mere failure of an exporter to keep the necessary original documents (even if such failure were due to a factor entirely beyond his control, such as a fire at his premises, and even if the missing documentation could be reconstructed and/or a full scale investigation still be conducted) will lead automatically to a forfeiture of the claim, which would be a very harsh result indeed.

[11] I cannot see the necessity to draw such an inference from the wording of the Guidelines nor do I see any necessity to read in the word 'provisional' in paragraph 3.10 before the word 'determination.' After all, the determination in paragraph 3.10 was intended to follow the submission of certified copies of the bill of entry for export and the declaration in regard to foreign exchange proceeds and the department had the full right, while checking a claim and before making a determination, to request the submission of any further export documents. It is true that claims were provisional in the sense that they were subject to disallowance by the appellant, but on the plain wording of paragraph 3.11 the power of disallowance was made expressly subject, as I have said, to the presence of one or other of the jurisdictional facts stated,

neither of which is present in this case.

[12] In the circumstances I am satisfied that the contentions advanced by counsel for the appellants cannot be accepted and it follows that the appeal must fail.

[13] The following order is made:

The appeal is dismissed with costs, including those occasioned by the employment of two counsel.

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IG FARLAM
JUDGE OF APPEAL

CONCURRING
HARMS JA
MTHIYANE JA
NUGENT JA
VAN HEERDEN AJA