IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED
29 December 2023 .....
DATE SIGNATURE

Date: 29 December 2023

CONSOLIDATED MATTERS:

Case number: 115176/2023

In the matter between:

FAIR TRADE INDEPENDENT TOBACCO ASSOCIATION NPC **First Applicant**

BEST TOBACCO COMPANY (PTY) LTD **Second Applicant**

CARNILINX (PTY) LTD **Third Applicant**

FOLHA MANUFACTURERS (PTY) LIMITED **Fourth Applicant**

HOME CUT RAG (PTY) LTD **Fifth Applicant**

PROTOBAC (PTY) LIMITED **Sixth Applicant**

and

THE COMMISSIONER FOR THE SOUTH AFRICA REVENUE SERVICE **First Respondent**

MINISTER OF FINANCE **Second Respondent**

("FITA")

Case no: 115375/2023

In the matter between:

BOZZA TOBACCO (PTY) LTD **First Applicant**
KASP TOBACCO (PTY) LTD **Second Applicant**
AFROBERG TOBACCO MANUFACTURING (PTY) LTD **Third Applicant**
AMALGAMATED TOBACCO MANUFACTURING (PTY) LTD **Fourth Applicant**
HARRISON TOBACCO (PTY) LTD **Fifth Applicant**
UNITED TOBACCO GROUP (PTY) LIMITED **Sixth Applicant**

and

THE COMMISSIONER FOR THE SOUTH AFRICA REVENUE SERVICE **First Respondent**

MINISTER OF FINANCE **Second Respondent**

FAIR TRADE INDEPENDENT TOBACCO ASSOCIATION NPC **Third Respondent**

BEST TOBACCO COMPANY (PTY) LTD **Fourth Respondent**

CARNILINX (PTY) LTD **Fifth Respondent**

FOLHA MANUFACTURERS (PTY) LIMITED **Sixth Respondent**

HOME CUT RAG (PTY) LTD **Seventh Respondent**

PROTOBAC (PTY) LIMITED **Eighth Respondent**

("BOZZA")

JUDGMENT

MINNAAR AJ:

INTRODUCTION:

[1] The applications before me concern two urgent applications, consolidated for hearing, launched by several tobacco product manufacturers. The application under case number 115176/2023 was launched by Fair Trade Independent Tobacco Association and five others ("FITA" / "the FITA application") and the other application, under case number 115375/2023, by Bozza Tobacco (Pty) Ltd and five others ("Bozza" / "the Bozza application") (collectively referred to as "the applications" / "the applicants").

[2] In both applications, the applicants seek urgent interdictory relief against the first respondent ("SARS" / "the Commissioner") preventing it from implementing Rule 19.09 ("the impugned rule" / "the new rule") promulgated under the Customs and Excise Act, 91 of 1964 ("the Customs Act").

[3] The urgent relief is sought pending the final determination of the review application launched by the FITA applicants in which they challenge the legality of the new rule ("the review application"). The review application was lodged by FITA on 25 November 2022 under case number 051433/2022 and same is pending before this court. Bozza delivered an

application to intervene in the review application and to be admitted as parties in the review application. The application to intervene is yet to be determined by the court.

[4] The impugned rule is published under sections 19, 60 and 120 of the Customs Act and requires registered licensees who manufacture or store tobacco products, such as the applicants, to allow SARS to install CCTV monitoring equipment at licensed customs and excise warehouses operated by tobacco product manufacturers (the warehouses).

[5] According to SARS, the new rule was introduced in an attempt to curb the illicit trade of tobacco products in the market which has resulted in a significant tax gap costing SARS and the fiscus approximately R7 to R8 billion every year. To address this tax gap, the new rule requires all warehouses to be monitored on a 24-hour basis using CCTV equipment.

[6] In the review application, FITA (and if so allowed to intervene, Bozza) contend that the introduction of the impugned rule is unconstitutional in that it is an unjustified violation of the right to privacy, dignity and property.

URGENCY:

[7] Rule 6(12) provides, *inter alia*, that the Court may dispose of urgent applications at such time and place and in such manner and in

accordance with such procedure as to it seems meet. The circumstances that an applicant avers render a matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course must, in terms of Rule 6(12) (b), be set forth explicitly in the supporting affidavit.[1]

[8] The requirements under Rule 6(12)(b) are peremptory, and mere lip service will not suffice.[2] A proper explanation must be provided as to why an applicant should be regarded preferential treatment to be heard in the urgent court as opposed to having to join the queue in the normal course.

[9] An applicant to make out a case that such an applicant will not obtain substantial redress in due course. In this regard, it was stated by Tuchten J in *Mogalakwena Municipality v Provincial Executive Council, Limpopo* 2016 (4) SA 99 (GP) at paragraph 64:

"It seems to me that when urgency is in issue the primary investigation should be to determine whether the applicant will be afforded substantial redress at a hearing in due course. If the applicant cannot establish prejudice in this sense, the application cannot be urgent. Once such prejudice is established, other factors come into consideration. These factors include (but are not limited to): whether the respondents can adequately present their cases in the time available between notice of the application to them and the actual hearing; other prejudice to the

[1] *IL&B Marcow Caterers v Greatermans SA* 1981 (4) SA 108 (C) at 110
[2] *Luna Meubel Vervaardigers Eiendoms Beperk v Makin & Another (trading as Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 137F - G

respondents and the administration of justice; the strength of the case made by the applicant; and any delay by the applicant in asserting its rights. This last factor is often called, usually by counsel acting for respondents, self-created urgency."

[10] It is trite that an applicant should make out his case in his founding affidavit. In neither of the founding affidavits before me, any specifics are provided relating to the absence of substantial redress in due course. It is common cause that the review application is pending. If all parties adhere to time limits in the delivery of the answering- and replying affidavits, and heads of argument, the review application may be heard within the foreseeable future. It is practice that the office of the Deputy Judge President may be approached for a special allocation on a preferential date and nothing prevents the parties hereto from seeking such an allocation.

[11] In the FITA founding affidavit, the applicants state that they have little choice but to institute this urgent application to interdict and restrain SARS from installing the CCTV at their premises pending the outcome of the review application and the consequences of the applicants not receiving an appropriate interim remedy would be dire. No satisfactory explanation is provided as to why the FITA applicants should be granted preferential treatment in this urgent court and why they cannot wait to be entertained in the normal course when the review application is heard.

[12] In the Bozza founding affidavit, the only reference to the absence of substantial redress in due course is an allegation, without substantiation, that the applicants will not be able to obtain redress in the ordinary course. No convincing grounds are provided as to why they cannot await the outcome of the review application.

[13] It is stated in the Bozza founding affidavit that the first respondent is far from finalising the implementation of the new rule and the installation of CCTV cameras in all of the licensed cigarette manufactures manufacturing sites. On their own version, regarding the SARS notice, dated 16 October 2023 (dealing with the implementation of the CCTV systems) it is stated that there is no indication of how long it will take for the physical installation and activation of the CCTV cameras to be completed. An estimate is given that it would take approximately seven months to complete the installation process. It is clear that there is no imminent risk of exposure to Bozza and on their analysis, the installation will, on all probabilities, only be finalised after the review application has been adjudicated.

[14] According to the letter from SARS, dated 16 October 2023, the installation can also only take place after engagement between SARS' project team and each of the applicants. This is to ensure that upcoming installations are timeously scheduled and that the pre-installation engagements on health and safety requirements are coordinated and discussed before the commencement of the installation of the CCTV

equipment. Pre-planning site visits still need to be scheduled, and conducted, before any work can be done on the installations.

[15] All of this will take time and the time it will take will be available to the parties to have the review application adjudicated. There is no imminent threat to any of the applicants herein and they do not stand to be prejudiced at this stage. The applicants will obtain substantial redress in due course when their review application is heard.

[16] Apart from the absence of substantial redress in due course, the applicants need to explain why the applications are of such urgent nature that it deserved a hearing in the urgent court.

[17] Where an applicant sits on its hands or takes its time to bring an urgent application, such urgency is self-created, unless an acceptable explanation is provided for the full period applicable to the urgency of the application (*Roets NO and Another v SB Guarantee Company (RF) (Pty) Ltd and Others* (36515/2021) [2022] ZAGPJHC 754 (6 October 2022).

[18] Litigants cannot ignore pending infringements in the hope that it will not be implemented and then, when reality knocks on the door, rush to the urgent court for relief. Where an application has become urgent owing to circumstances for which the applicant is to blame, the court should not assist such an applicant with urgent relief (*Schweizer Reneke Vleis Mkpy (Edms) Bpk v Die Minister van Landbou en Andere* 1971 (1)

PH F11 (T). Self-created urgency should not be countenanced (*Black Shash Trust v Minister of Social Development and Others (Freedom Under Law Intervening)* 2017 (3) SA 335 (CC) at paragraph 36).

[19] As early as 1 July 2022, all of the applicants were aware that SARS intended to promulgate the impugned rule, which would lead to SARS implementing the rule. There is no reason why the applicants could not have then, launched the present application or soon after 1 July 2022 when SARS gave notice that the impugned rule would come into effect from 1 August 2022.

[20] On 27 July 2022, the FITA applicants' attorney addressed a letter to SARS to seek an undertaking that the Rule will not be implemented. SARS was requested to provide such an undertaking by 16:00 on Friday 29 July 2022. SARS was informed that should no such undertaking be provided, the court will be approached on an urgent basis. No undertaking was provided by SARS yet the FITA applicants elected not to seek urgent interim relief.

[21] FITA took no action until 25 November 2022 when FITA launched the review application. Up and until this urgent application, no steps were taken to obtain urgent interim relief pending the outcome of the review application. Instead, FITA waited for almost a year after the review application was launched before the urgent application was brought.

[22] Much like the FITA applicants, the Bozza applicants could have brought this application any time after the new rules came into effect. They elected not to act with any haste at that stage.

[23] In their replying affidavit, the Bozza applicants contend that *"[a] litigant to a dispute cannot approach the Court for an interdict until there is a reasonable apprehension of harm. As such, knowledge of the intended implementation gave rise to not only the right to seek an interdict, but also urgency."* I agree with SARS' submission that this contention is flawed.

[24] It is trite that before an interim interdict is granted, an applicant must have a reasonable apprehension of irreparable and imminent harm should the order not be granted. The harm must be anticipated. It must not have already taken place (*Tshwane City v Afriforum and Another* 2016 (6) SA 279 (CC) at paragraph 55).

[25] When the new rule came into effect it was clear that SARS was entitled to implement the new rule. This was underscored when the applicants expressly requested but were not provided, with undertakings that SARS would not implement the new rule. This was all that was required to establish the alleged apprehension of harm relied upon by the applicants.

[26] In a letter, dated 7 July 2023, by the attorney for the first- to fourth applicants in the Bozza application, it is recorded that the attorney held instructions to, "*seek an interdict against SARS to prevent the implementation and enforcement of the new rule pending the final adjudication of the challenge to the validity thereof*". This statement is preceded by the statement that SARS had made it clear that "*it would proceed to implement and enforce the new rule and has conducted site visits*" at the applicants for that purpose.

[27] What followed on 17 July 2023 were notices in terms of section 96 of the Customs Act from the Bozza applicants that specifically foreshadowed urgent interdictory relief.

[28] On 7 August 2023, the attorney for the first- to fourth applicants (in the Bozza application) equally threatened SARS, in the absence of an undertaking not to implement the new rule, that they shall proceed with immediate urgent legal proceedings to obtain an interdict against the implementation of same.

[29] Despite the aforesaid, the Bozza applicants waited until 7 November 2023 to launch their application.

[30] The only explanation proffered by the applicants is that there was no reasonable apprehension of harm until they received the implementation notices in October 2023. Given the above chronology,

the clear indications from SARS at all times that it intended to implement the new rule and the absence of an undertaking which was expressly sought, this explanation does not bear scrutiny.

[31] There are additional facts relevant to the first and second applicants in the Bozza application:

a. They only applied for and were granted their licences after the impugned rules came into effect. They were fully aware of the new rules when they applied for their licenses and agreed to be bound by them. These facts were not disclosed in the Bozza applicants' founding papers.

b. Having applied to be licensed based on the new rule, and without reserving their rights to challenge the rule when they made their applications, they have waived their right to challenge the rule.

c. Alternatively, they could have sought to challenge the rule after they acquired the licenses, and coupled their challenge with urgent relief, but they did nothing for several months after they were licensed.

d. In addition, SARS has attempted to implement the rule at the first- and third applicants' (in the Bozza application) premises earlier in 2023:

e. On 20 February 2023 SARS informed the third applicant that it intended to visit its warehouse to conduct an assessment for purposes of installing the CCTV equipment. The third applicant requested SARS to provide it with an undertaking to suspend the

implementation pending the review application. No undertaking was provided, and yet the third applicant took no steps until this application was launched.

f. Attempts were made to implement the rule at the first applicant's premises on 20 and 21 June 2023 too. The first applicant refused to give the SARS officials access to its warehouse.

[32] These facts were also not disclosed in the applicants' founding papers, and no explanation for this has been provided in reply.

[33] There is no doubt that SARS has never given the impression, or created the expectation, that it would not implement the rule. On the contrary, SARS actively took steps to do so.

[34] There is no explanation for why the Bozza applicants did not act sooner before they launched their application on 7 November 2023.

[35] It is further highly improbable that the applicants, in both applications, would not have been aware of the installation of the CCTV systems at British American Tobacco and Gold Leaf in February 2023.

[36] As the Court held in *Reelin Investments (Pty) Ltd v Transnet SOC Limited and Others* (7438/2022) [2022] ZAGPJHC 215 (5 April 2022) at paragraph 30:

"In the context of judicial review, where reasonable haste is always required, an applicant does not have the luxury of waiting for its best case before it should take steps to protect its position, particularly when it ultimately proceeds by way of urgency in an effort to interdict the administrative action against which it complains".

[37] I am in complete agreement with the submission by SARS that the applicants have not proceeded with reasonable haste. On the contrary, there is an inordinate and unexplained delay.

[38] In *Dynamic Sisters Trading (Pty) Limited and Another v Nedbank Limited* (081473/2023) [2023] ZAGPPHC 709 (21 August 2023), Adams J stressed that urgent applications should be refused in cases when the urgency relied upon was clearly self-created (as in this matter), that consistency is important, and that legal certainty is a cornerstone of a legal system based on the rule of law.

[39] Given the substantial delay in launching both applications and the absence of an adequate explanation, the applicants have failed to meet the peremptory requirements necessary for the grant of urgent relief.

COSTS:

[40] SARS seeks the costs of three counsels, one of whom is senior counsel.

[41] Since the implementation of the Rule, it was clear that no undertakings will be provided by SARS not to proceed with the installation of the CCTV system. SARS proceeded to incur costs to obtain the systems and as such was fully entitled to oppose this application vigorously to protect its interest. I can see no reason why SARS should not be entitled to the costs it seeks.

ORDER:

Consequently, I make the following order:

1. Both applications are struck from the roll due to lack of urgency.

2. The applicants, jointly and severally the one paying the other to be absolved, to pay the costs of the applications, which costs to include the costs of three counsel, one of whom is senior counsel.

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Minnaar AJ

Acting Judge of the High Court

Gauteng Division, Pretoria

Heard on	: 12 December 2023
For the Applicants in FITA	: Adv. T Ngcukaitobi SC
	: Adv T Ramogale
	: Adv A Ngidi
Instructed by	: Matlala K Incorporated
For the Applicants in Bozza	: Adv. A Meyer SC
	: Adv B Stevens
Instructed by	: Morgan Law
For the First Respondent:	: Adv K Pillay SC
	: Adv M Maddison
	: Adv M Musandiwa
Instructed by:	: Ramushu Mashile Twala Incorporated
Date of Judgment	:29 December 2023