REPUBLIC OF SOUTH AFRICA

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: NO

DATE: 17 January 2024

SIGNATURE:

CASE No. 6012/21

In the matter between:

INTERNATIONAL VERSION TRADING AND PROJECTS (PTY) LTD Applicant

And

THE SOUTH AFRICAN REVENUE SERVICE Respondent

JUDGEMENT

Barit AJ

Introduction

[1] The application concerns an appeal lodged by International Version Trading And Projects (Pty) Ltd (the "Applicant") against the decision taken by the Commissioner for the South African Revenue Service ("SARS" / "The Respondent"). The essence of the application is an appeal in terms of Section 47(9) of the Customs and Excise Act 91 of 1964 ("the Act")[1] against the tariff determination made by SARS on 27 February 2019, that the Applicant entered goods under rebate item 311.12/60.01.01.04/49 in terms of Schedule 3, Part 1 of the Act, which goods do not qualify for the rebate. The application is an appeal de nova heard by a single judge.[2]

[2] The Applicant is International Version Trading And Projects (Pty) Ltd, a private registered and incorporated company in terms of the Company Laws of the Republic of South Africa. Its principle place of business being situated in Bloemfontein.

[3] The Respondent is the Commissioner for the South African Revenue Service, which is, in terms of Section 2 (1) of the Customs and Excise Act 91 of 1964. Its Head Office address being in Pretoria.

[1] Section 47(9)(a)(i) states: "The Commissioner may in writing determine the tariff headings, tariff subheadings or items of any Schedule under which any imported goods or goods manufactured in the Republic should be classified".
Section 49(e) further states: "An appeal against any such determination should lie to the division of the Supreme Court of South Africa having jurisdiction to hear appeals in the area wherein the determination was made, or the goods in question are entered for home consumption".
[2] *Pearstock (Pty) Ltd v The Commissioner for the South African Revenue Service* (Case 83481/18, 13 August 2020). Collis J herein stated at para 2: "In *Metnak (Pty) Ltd v Commissioner of Customs and Excise* 1983 (3) 892 (T) at 897B, it was held that a single judge sitting in motion court in the High Court having jurisdiction is competent to hear such an appeal".

[4] The Applicant, further, seeks an order that amounts of R1 113 000.00 and R322 000.00 which were deducted from the Applicant's bank account by SARS through the appointment of the Applicant's bank as an agent on 15 October 2019 and 11 December 2019 respectively, be refunded to the Applicant.

[5] SARS maintains that the goods have been incorrectly entered under the rebate item and consequently the Applicant does not qualify for the rebate.

[6] In terms of a Joint Practice Note dated 30 March 2023 both parties have raised preliminary issues for determination before the merits are considered.

[7] Under the heading of "Points in Limine", one aspect is the Applicant raising an issue in respect of section 96(1)(b) of the Act. The Applicant is seeking for the Court to grant an extension of the time period (in which the Applicant had failed to serve a process with respect to legal proceedings against the Respondents). Hence, an application by the Applicant for condonation of the lateness in terms of certain timelines.

<u>Background</u>

[8] The Applicant imports pile fabrics, which is the raw material used by the Applicant to manufacture certain goods, in the impregnated, coated, covered or laminated textile fabrics industries namely quilts. The substantive issues in dispute are whether the materials are admitted for use in connection with the production or manufacture of goods falling into a certain category and if there is a rebate in terms of the applicable customs duty.

[9] The Applicant is a registered “rebate user” in terms of Schedule 3 to the Act. The effect is that the Applicant has to follow certain provisions in the Act.

[10] Section 75(10)(a) requires the party who wishes to take advantage of the rebate to among other things, comply with the conditions which may be prescribed by the rules made under the Customs Act. Rule 75 sets out the requirements that an importer who wishes to obtain the benefit of a rebate of duty must satisfy. It includes the Rules relating to the inspection of premises. It also empowers the Commissioner to establish whether a rebate has been correctly claimed.

[11] The Respondent submits that goods are only eligible for entry under rebate of customs duty if the goods are entered in compliance with the statutory prescripts and for the use described in the relevant rebate item. Further, the Applicant has the duty to strictly comply with any of the requirements imposed by the Act.

Current Position

[12] Four points in limine have been placed on record. For practical purposes, these are either technical and/or take the matter no further. However, one is an application for condonation for lateness brought by the Applicant. The Respondent strongly opposes this application.

Application for Condonation

[13] If condonation is granted, the Court may then consider the merits of the Applicant’s appeal. Should condonation not be granted, the Court will not have

the necessary jurisdiction to hear the main application, which application would then be dismissed.

[14] There is a standard for considering an application for condonation. Numerous factors are considered (as will be seen from the cases referred to below), but the decision to grant condonation will always depend on the facts of the case.

[15] The Applicant in its' condonation application is requesting an extension of the time period in Section 96 (1)(b) to the Act. Further, the Applicant raises the issue of extinctive prescription of one's liability for duty in accordance with the provisions of Section 44 (11) of the Act.

[16] Section 96 (1) (c) makes provision for the reduction or extinction of the time periods in sub-sections (a) (b) and provides:

> *(i) " The State, the Minister, the Commissioner or an Officer may on good cause show reduced periods specified in paragraph (A), or extend the period specified in paragraph (B), by agreement with the litigant.*
>
> *(ii) If the State, the Minister, the Commissioner or an Officer refuse to reduce or extend any period as contemplated in paragraph (I), a High Court having jurisdiction may upon application of the litigant reduce or extend any such period with the interests of justice so requires".*

Legal Principles

[17] In the case of *Van Wyk v Unitas Hospital,*[3] the Constitutional Court stated:

[3] *Van Wyk v Unitas Hospital* 2008 (2) SA 472 (CC) at 477 A-B.

"Whether it is in the interests of justice to grant condonation depends upon the facts and the circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and on other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and prospects of success" (my underlining).

[18] In the matter of *Grootboom v National Prosecuting Authority and Another* [4] it was stated:

"[22]… The standard for considering an application for condonation is the interests of justice. However, the concept 'interests of justice' is so elastic that it is not capable of precise definition … It includes the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success (my underlining).

[23] It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's

[4] *Grootboom v National Prosecuting Authority and Another [2014] BLLR 1 (CC).*

direction. Of great significance, the explanation must be reasonable enough to excuse the default" (my underlining).

[19] In the matter of *Melanie v Santam Insurance Co. Ltd* [5] the following was said:

> *"In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are inter-related: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, so of course that there are no prospects of success and no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus, a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate a long delay"* (my underlining).[6]

[20] That the prospects of success, play a critical role with respect to whether condonation should be granted or not, can be seen from the judgement of

[5] *Melanie v Santam Insurance Co. Ltd, (1962) SA 531 (A) at 532 C-F.*

[6] In *NUM v Council for Mineral Technology* (1999) 3 BLLR 209 L.C. at 211F-H, Myburgh JP stated with respect to "prospects of success", the following: "… without prospects of success, no matter how good the explanation for the delay the application for condonation should be refused".

Minister of Agriculture and Land Affairs v C.J. Ranse (Pty) Ltd.[7] Here, the Supreme Court of Appeal said:

> *"The prospects of success of the intended claim play a secondary role – "strong merits may mitigate fault; in the matter so no merits may render litigation pointless. The court must be placed in a position to make an assessment on the merits in order to balance that factor with the cause of the delay as explained by the applicant. A paucity of detail on the merits will exacerbate matters for a creditor who has failed to fully explain the cause of the delay. An applicant thus acts on his own peril when a court is left in the dark on the merits of the intended action, e.g. where an expert report central to the applicant envisaged claim is omitted from the condonation papers*" (my underlining).

[21] In Mulaudzi v Old Mutual Life Insurance Company (South Africa) Ltd,[8] it was stated:

> "In applications of this sort the prospects of success are in general an important, although not decisive, consideration. As was stated in *Rennie v Kamby Farms (Pty) Ltd*,[9] it is advisable, where application for condonation is made, that the application should set forth briefly and succinctly such essential information as may enable the court to assess an applicant's prospects of success.[10] This was not done in the present case: indeed, the application does not contain even a bare averment that the appeal enjoys any prospect of success. It has been pointed out that the court is bound to make an assessment of an applicant's

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[7] *Minister of Agriculture and Land Affairs v C.J. Rance (Pty) Ltd 2010 (4) SA 109 (SCA) at para 37*.

[8] 2017 (6) SA 90 (SCA) paras 34-35.

[9] [1988] ZASCA 171; 1989 (2) SA 124 (A) at 131E.

[10] *Moraliswani v Mamili* [1989] ZASCA 54; 1989 (4) SA 1 (A) at 10E.

prospects of success as one of the factors relevant to the exercise of its discretion,[11] unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration" (my underlining).

[22] The following, based on the case law, are some of the aspects:

(a) The extent of the delay;

(b) The cause of the delay.

(c) The nature of the relief sought.

(d) The reasonableness of the explanation for the delay.

(e) The effect of delay on the administration of justice and other litigants.

(f) The prospects of success.

(g) The importance of the issue to be raised.

[23] With respect to the first five factors above (a) – (e), they all concern the time f actor, that is, the delay. A number of aspects in casu emerge.

Firstly, there is a difference between the Applicant and the Respondent with respect to the extent of the delay. The Respondent contends that the Applicant's claim became prescribed by 8 March, 2020. However, the Applicant only instituted its application on 5 February, 2021. But, the Applicant is only requesting an extension of time from 7 March, 2020, until 20 September, 2020.

[11] *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein & others* [1985] ZASCA 71; 1985 (4) SA 773 (A) at 789 C.

Secondly, the Applicant is placing blame with respect to the delay on their legal representatives. First, there was Rick Ismail Attorneys but this resulted in their services being terminated, with no date of termination being given. The Applicant claims to having later attempted to contact Rick Ismail Attorneys but without success. New attorneys (a second attorney firm) during or about May, 2019 were appointed, namely "Mr Bernet Motlhamme" of Duncan Rothman Attorneys in Kimberley. However, 'they erroneously addressed a letter' to a wrong party and the Applicant was 'not happy with this'. As a result, during or about June, 2019 a third set of attorneys, namely, Francois Crous of Diepenaar & Crous Attorneys in Bloemfontein was appointed. They, according to the Applicant, engaged with SARS. However, as the Applicant states 'it then became apparent to me that due to the complexity of the matter, the Applicant required a representation with the necessary tax expertise to deal with the matter'. Hence, the Applicant moved on to a fourth set of representatives. The Applicant states:

> *'During or about July, 2019 the Applicant engaged the services of Mr Khulani Dhumazi of K-Capital Advisory (Pty) Ltd, and Dhumazi Incorporated … Mr Dhumazi filed what appeared to be a suspension of payment on 10 July 2019. He also filed an internal administrative appeal on 05 September 2019 which application was not compliant with the Act, in that it was brought out of time and not in accordance with section 77H or the Rules published in relation thereto, but rather it appears to having been brought in in terms of the Tax Administration Act, 28 of 2011'*.[12]

[12] Para 32-33 of Applicant's founding affidavit.

The Applicant then goes on to state that: "On 20 January 2020 SARS addressed a letter to Mr. Dumazi informing him that the internal administrative appeal could not be considered due to the fact that it was lodged out of time and that the only available recourse to the applicant was to make an application in terms of Section 96 of the Act".[13]

[24] The contentions with regard to the legal representatives being blamed, is both vague and embarrassing. It lacks much detail, goes nowhere and other than throwing blame all over appears to be a summation list of misadventures with legal representatives.

[25] A case, where an attorney's action was dealt with concisely is the American matter of Schleiger v Schleiger, where it was stated: "… The attorney will have implied authority in regards to the general conduct of litigation to do or take all steps or actions which are necessary or incidental to the orderly prosecution , defence or conduct of litigation or court proceedings".[14] This accords with the Appellate Division case of Saloojee and Another NNO v Minister of Community Development where the Appellate Division stated: "There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence …".[15]

[13] At para 34.
[14] 137 Colo. 279 (Colo. 1958) 324 P.2d 370.
[15] 1965 (2) SA 135 (A) at 141C.

[26] In *High School of Ermelo and Others v The Head of the Department and Others*,[16] the Court stated:

> "… care must be taken not to create an impression that an application for condonation is a mere formality … the explanation for the delay is not reasonable; the cause thereof was gross ineptitude on the part of the applicants legal representatives".

[27] The Applicant attempted to use the COVID-19 pandemic as an additional reason for the delay. However, the Respondent contended that the Applicant's claim became prescribed on 7 March 2020, before South Africa was placed on hard lockdown, due to the pandemic, on 26 March 2020.[17]

[28] With respect to the delay factor the dicta of Grootboom v National Prosecuting Authority and Another states:

> "Of great significance, the application must be reasonable enough to excuse the default".

Simply put, the explanation of the Applicant in the present matter is just not reasonable enough to have any merit.

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[16] [2007] ZAGPHC 165; [2008] 1 All SA 139 (T) at para 95. See also *Mulaudzi v Old Mutual Life Insurance Company (South Africa) Ltd* 2017 (6) SA 90 (SCA) at para 26: "A full, detailed and accurate account of the causes of the delay, and their effects must be furnished so as to enable the court to understand clearly the reasons and to assess the reasonability".

[17] Respndent's Heads of Argument at para 29.

The Prospects of Success

[29] From the decided cases it can be seen that the granting of condonation (after other factors pertaining to condonation have been taken into account), relies on the prospects of success in the main application. This in turn, depends on the merits of the case. In the dicta of Minister of Agriculture and Land Affairs v CJ Ranse (Pty) Ltd[18] the Supreme Court of Appeal stated "No merits may render litigation pointless", and in *Melanie v Santam Insurance Co Ltd*[19] it was stated that if there are "no prospect of success … [there is] no point in granting condonation" (my underlining). Hence it is important to look at the facts pertaining to the main action.

[30] It is a requirement of the Act that to acquire a rebate of Customs Duties the Applicant has to show it has met all the requirements prescribed by the Act.

[31] Based on the available detail the following is pertinent, and also serves as an overview relating to the merits.

[32] The Applicant states (in its' supplementary replying affidavit):

> "*SARS, after an inspection of the applicant's premises and manufacturing process, informed the applicant that the correct item under which it should be registered as a rebate user was rebate item 311.12".*

[18] *Minister of Agriculture and Land Affairs v C.J. Rance (Pty) Ltd 2010 (4) SA 109 (SCA) at para 37*.
[19] *Melanie v Santam Insurance Co Ltd* (1962) SA 531 (A) at 532.

In the Respondent's responding affidavit (29 September 2022 at para 20), it states:

> "*It is patently incorrect that the applicant did not request to be registered under Rebate Item 311.12".*

The Respondent further states:

> "The contention in the replying affidavit (of the applicant) is in stark contrast to what has been set out in the founding affidavit (para 41) where the applicant states that it applied for approval as a rebate user under item 311.12".

In the heads of argument of SARS (para 11), it is stated:

> "As specifically pointed out in SARS' supplementary affidavit the applicant itself elected the Tariff Heading as well as the Rebate Item in its application. It was not on SARS direction or request".

[33] The main issue, is whether certain items imported by the Applicant met the requirements under a particular tariff heading and consequently would not have attracted certain charges (as imposed by the Respondents).

[34] The Applicant was <u>subjected to an audit</u> in terms of the Act.

The audit revealed certain factors namely that:

(a) That import clearances for the products invoiced as "man made power fabrics" declared under Tariff heading 6001.92 (7) of Schedule 1 Part 1 of the Customs and Excise Tariff being incorrectly entered under rebate Schedule 3 Part 1. Four Customs Duties were rebated

in terms of Schedule 3 Part 1 of Customs and Excise Tariff Rebate Item 311 12/60.01.01.04/49.

(b) The Applicant kept "Disney branded Character blankets" in a rebate store that had not been entered under the provision of Schedule 3, Part I, of the Customs and Excise Tariff without permission from the Controller. Thus, as maintained by the Respondent, a contravention of Rule 75.10 of the Act.

(c) The Applicant also failed to maintain a stock record as prescribed by Rule 75.14 of the Act.

(d) The rebate book and documents were not readily available upon the visit at the premises.

(e) Requisition slips were not issued from the stock ordered from the retail store.

(f) The goods were not arranged and marked as required by the Rules to the Act, in contravention to Rule 75.14 and Rule 75.15 of the Customs and Excise Act.

[35] The Applicant did respond as follows to the factors as listed from the audit.

(a) The Disney blankets consisting of approximately 43 bales were placed in error in the rebate warehouse at a time when the other warehouse was full.

(b) The special stock record books had been ordered but delivery time was approximately two weeks.

(c) All the information required by SARS was readily available to SARS on an excel spreadsheet, though not in the prescribed book.

(d) The excel spreadsheets were sent by email to SARS.

(e) The Applicant informed SARS that all the information SARS required was readily available should same be requested.

[36] Though the Applicant attempted to justify the non-compliance with the Rules of the Customs and Excise Act, the best that can be said is that they were not convincing.

Summing Up

[37] The reasons given by the Applicant for the delay in this matter were considered. At the same time the reasons as stated by the Respondent in opposing the Application were taken into account. To succeed in this application for condonation, the Applicant has to furnish factors that will weigh in the Applicant's favour. In the Application before this Court, two matters of importance stand out. These are, firstly, the cause and extent of the delay, and, secondly, the prospects of success.

[a] Reliance and blame placed by the Applicant on his various attorneys' alleged conduct is unsatisfactory. The same applies to the attempt by the Applicant to blame COVID-19.

[b] The Applicant has found itself in conflict with SARS with respect to the goods (i.e. the material) and its use, and, further, has disregarded numerous SARS requirements. The Applicant has not shown anything which would be in favour of a chance of success with respect to the case.

[38] On the two relevant factors, the delay, as well as the prospects of success, the Applicant has failed to convince the Court of any reason as to why condonation should be granted.

[39] I am satisfied that the Commissioner did not err and the decision of the Commissioner cannot be assailed .

[40] In the result condonation is not granted, and it follows that the entire application must be dismissed.

[41] I make the following order:

The Application is dismissed with costs.

BARIT A J

Acting Judge of the High Court
of South Africa
Gauteng Division, Pretoria

Date of Hearing: 11 APRIL 2023
Date Judgement Delivered: 17 JANUARY 2024

APPEARANCES

For the Applicant:	Adv. L.F. Laughland Instructed by Shepstone And Wylie Attorneys
For the Respondents:	Adv. Kollapen Instructed by Mothle Jooma Sabdia Inc. Attorneys for the Respondents