REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: A261/22
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
DATE: 26/3/24
SIGNATURE

In the matter between:

MAEMU MICHAEL RAMUDZULI Appellant

and

COMMISSIONER OF SOUTH AFRICAN REVENUE SERVICES First Respondent

SOUTH AFRICAN REVENUE SERVICES Second Respondent

MINISTER OF DEFENCE Third Respondent

Delivered: *This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date and for hand-down is deemed to be 26 March 2024.*

Summary: Appeal against the order of the Court below with leave from the Acting Judge. Condonation application for non-compliance with Rule 49(6)(a) remained unopposed. The gripe of the respondents pertaining to the appeal record was two-fold. Firstly, the respondents contend that they were not furnished with a complete index contrary to the provisions of Rule 49(7)(a) of the Uniform Rules. Secondly, the appeal record furnished contains exhibits; annexures having no bearing on the point at issue; and immaterial portions of lengthy documents without obtaining consent for the omission thereof contrary to Rule 49(9) of the Uniform Rules. In short, the respondents lament non-compliance with the Rules. That notwithstanding, this Court proceeded to consider the appeal.

The Court below dismissed the review application on two bases. Firstly, because the review lacked merits, and secondly, because the motion was incapable of being considered on affidavits. This Court takes a view that albeit the appeal cannot be upheld, the Court *a quo* misdirected itself by adopting two contradictory approaches. Where there is a dispute of fact in motion proceedings, two options avail themselves to a Court. It is either the application is dismissed on account of it not being capable of being resolved on affidavits or *mero motu* or on application by the applicant, refer the matter or portions thereof for oral evidence. Clearly, where the merits are determined, by implication, a Court was in a position to determine the motion on affidavits calling into aid the *Plascon Evans* rule.

Having dealt with the merits in the circumstances where the Rule 6(5)(g) procedure was available to the *Court a quo*, on appeal, this Court should only consider the dismissal on the merits as opposed to the dismissal on account of foreseeable dispute of facts. Generally, where a matter is dismissed within the contemplation of Rule 6(5)g), the merits of the dispute remain untouched. The dismissal of the matter within the contemplation of Rule 6(5)(g) is final in nature and thus appealable. However, the basis of the appeal will not be an error on the merits but an error in invoking the Rule in the circumstances

where the jurisdictional requirement – cannot be properly decided on affidavit – is absent.

The decisions of the respondents are not reviewable in law. The Court below correctly dismissed the application. The detention of the motor vehicle and the seizure of the goods was lawful and constitutional. The respondents afforded the appellant an *audi alteram partem* rule. Held: (1) The condonation sought is granted. Held: (2) The appeal is dismissed. Held: (3) The appellant must pay the costs of the appeal.

JUDGMENT

CORAM: MOSHOANA, J (KHUMALO, J AND LENYAI, J CONCURRING)

Introduction

[1] Before us is an appeal launched with leave from Acting Judge Skosana against his judgment and order delivered on 02 November 2021. The appeal is duly opposed by the first (Commissioner of SARS) and the second (SARS) respondents. In terms of the impugned judgment and order, Skosana AJ dismissed with costs the application launched by the appellant. Skosana AJ dismissed the application on two bases. Firstly, on its merits and secondly, in accordance with Rule 6(5)(g) of the Uniform Rules on account of the application being incapable of being resolved on affidavits.

[2] In this judgment, this Court shall consider (a) the unopposed condonation application; (b) the late objection to the appeal record on allegations of non-compliance with the Rules; (c) whether it was appropriate for Skosana AJ to gravitate to Rule 6(5)(g) when he had already dealt with the merits of the application; and (d) the issue of the correctness of the order dismissing the application on its merits with costs.

Pertinent background facts to the present appeal

[3] The appellant is Mr Maemu Michael Ramudzuli. On 19 October 2020, whilst travelling in his vehicle with registration letters and numbers F[...] 5[...] [...], a Toyota Hilux, the appellant was intercepted and or stopped by the patrolling members of the South African Defence Force (SANDF). It became common cause that at that time, the appellant was travelling with three passengers in his vehicle. A dispute that emerged before Skosana AJ was with regard to the identity of those three passengers. On the version of the appellant, those passengers were Mr Caison Mbedzi (a Zimbabwean national) and Mercy and Edward Munzhelele (South African nationals). On the respondents' version, those passengers were Edwin Dube, Rendani Ndou and Cecilia Mapumo, all Zimbabwean nationals, who later on were deported owing to the fact that they had been in South Africa illegally.

[4] Another dispute that arose before Skosana AJ was with regard to the place where the appellant was intercepted and or stopped. On his version, he was stopped at a road known as Malala Drift, which is within the borders of the Republic of South Africa. Further, on his version, his vehicle was in motion when the members of the SANDF approached him. On the version of the members of the SANDF, the vehicle was stationary, and his passengers were busy offloading goods and some of the goods were already offloaded and were lying on the ground. The appellant and his three passengers were arrested and taken to the SARS Customs offices at the Beit bridge border post by the members of the SANDF. On arrival, the SARS officials issued detention notices in respect of the vehicle and the goods. The SANDF members stated that the vehicle was found along the borderline whilst they were patrolling the South African border in Musina along the Limpopo River.

[5] Edwin Dube, one of the passengers, according to the members of the SANDF, confirmed that they (the passengers) did not have passports and that the intercepted goods were destined for Zimbabwe. On 21 October 2020, the appellant returned to SARS Customs at Beit Bridge and alleged that the goods were not destined for Zimbabwe and that they in fact belonged to his alleged passengers, the Munzheleles. It was on this day that the SARS officials issued him with a detention letter for the vehicle in terms of the provisions of section

88(1)(a) of the Customs and Excise Act 91 of 1964 (CEA). He was afforded an opportunity to provide certain documentation to assist in the investigations as to whether the vehicle is liable to forfeiture in terms of section 87 of the CEA. On 26 October 2020, Mercy Munzhelele, whom, on the appellant's version, was the owner of the seized goods, approached the SARS officials and she was equally issued with a section 88(1)(a) of the CEA notice letter. She was called upon to furnish certain documentation to assist in the section 87 of the CEA forfeiture investigations.

[6] The outcomes of the investigations were made known to the appellant on 28 October 2020. The appellant was informed of an intention to call for an amount of R48 437.50 in terms of section 93 of the CEA. He was at the same time afforded an opportunity to make representations by close of business on 11 November 2020. The appellant made use of the opportunity and made written representations. Subsequently, the appellant was given a condition to pay the amount levied in terms of section 93 of the CEA before the vehicle could be released from detention. The appellant ignored the demand. As a sequel, he was notified of the intention to seize the vehicle. He was given a further opportunity to make representations before a final decision could be taken to seize the goods. Indeed, such representations were made through Sikhala Attorneys, the appellant's attorneys of record.

[7] On 9 December 2020, a decision was communicated to the appellant to the effect that the Commissioner of SARS had decided to seize the vehicle as authorised by the provisions of the CEA. Aggrieved thereby, the appellant lodged an internal appeal. On 15 February 2021, the outcome of the internal appeal was communicated to the appellant. The appellant, still aggrieved, referred the dispute for Alternative Dispute Resolution (ADR) in terms of the CEA. The SARS officials informed him that the ADR process was unsuitable for the dispute. Ultimately, on 25 April 2021, the appellant launched an application that failed before Skosana AJ. It is for that reason that the appellant ended before us with, as mentioned, leave from Skosana AJ.

Analysis

[8] As indicated at the dawn of this judgment, four issues shall be dealt with in this appeal. The first of which is the condonation application issue, an issue I now turn to.

The condonation application

[9] Rule 49(6)(a) of the Uniform Rules provides that 60 days after the delivery of a notice of appeal, an appellant shall make a written application to the registrar of the division where the appeal is to be heard for a date for the hearing of such an appeal. The appellant before us failed to comply with the provisions of this rule. Owing to that failure, the appellant launched an application seeking condonation for such a failure. The application stands unopposed. The delay involved in this instance is for 15 days. Although minimal, this delay has been fully explained by the appellant. Thus, this Court is satisfied that the appellant ought to be indulged. Accordingly, the non-compliance is to be condoned.

Late objection to the record of appeal on allegations of non-compliance.

[10] Rule 49(7)(a) of the Uniform Rules provides, amongst others, that the appellant shall file with the registrar a complete index and copies of all papers, documents and exhibits in the case except formal and immaterial documents. If documents are omitted, an agreement between the parties must be exhibited to the effect that omitted documents shall be handed later or an application for condonation of such an omission shall be made. Rule 49(9) deals with consent for omission of immaterial portions of the record, which consent must be signed by the parties to the appeal. On 24 October 2022, the respondents' attorneys of record addressed correspondence to the appellant's attorneys of record. Chiefly, they lamented non-compliance with the provisions of the above stated Rules. In specific terms, they complained that the record contains immaterial documents and the documents so included were confusing. They called upon the appellant to correct the record and exclude the immaterial documents. It is common cause that the appellant did not respond to the call. The respondents did nothing about this situation until on the day, counsel for the respondents, Mr Mothibi stood before us and implored us to strike the appeal off the roll. This Court did not entertain the request and indicated that the issue shall be dealt with in its judgment.

[11] Given the view taken at the end, it is unnecessary to canvass this issue any further. It suffices to mention that this Court proceeded to consider the appeal despite the imperfect record as contended for by the respondents.

Was it appropriate for Skosana AJ to dismiss the application on the basis of Rule 6(5)(g)?

[12] The provisions of Rule 6(5)(g) are only available when the jurisdictional requirements thereof have been met. Regard being had to the text of the Rule; it is available only where an application cannot properly be decided on affidavit. In an instance where a Court is faced with an application it cannot properly decide on affidavit, two discretionary courses are open for that Court; namely (a) dismiss the application or (b) make an order guided by justness and expeditiousness directing that oral evidence be heard on specified issues with a view to resolving any dispute of fact. The dismissal contemplated in (a) occurs as a result of a Court being unable to decide the application on affidavit. Once a Court is able to decide the application in the face of a dispute of fact, the same Court cannot symbiotically dismiss the application on the basis contemplated in (a). Dismissing an application on its merits implies that a Court was able to decide the application on affidavit. Resultantly, the possible dismissal on the strength of (a) disappears.

[13] Accordingly, in my view, it was inappropriate for Skosana AJ to have also dismissed the same application already dismissed on its merits on the strength of Rule 6(5)(g). For this reason, the order dismissing the application in accordance with the Rule is a *brutum fulmen*. An appeal against a dismissal order in accordance with the Rule is of no practical effect, since the application was decided on its merits, a demonstration that it was not incapable of being decided on affidavits. In terms of section 16(2)(a)(i) of the Superior Courts Act, when, at the hearing of an appeal, the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone. Counsel on behalf of the appellant spent a considerable amount of time before us seeking to persuade us that there was

no dispute of fact which could have ignited a dismissal within the contemplation of the Rule. That was an exercise in futility.

[14] I take the view though that there was indeed a dispute of fact. I express no view in so far as to whether the dispute of fact was genuine or not. It is unnecessary to do so. That there a dispute of fact was acknowledged by the appellant in his founding papers. However, the veritable question is whether such a dispute of fact was incapable of being resolved on affidavits? Generally, motion proceedings are not designed to resolve disputes of facts. Where a dispute of fact is anticipated, as it was in *casu*, motion proceedings are inappropriate. Thankfully, the *Plascon Evans* rule comes in handy. By applying the *Plascon Evans* rule, a Court is enabled to decide motion proceedings on affidavits even in an instance where a dispute of fact exists.

[15] In summary, the Rule 6(5)(g) route was unavailable to Skosana AJ since he actively closed that route by deciding the application on its merits. Appealing the dismissal on the strength of the Rule does not bring the appellant any practical results. For all the above reasons, an attack on the Rule 6(5)(g) dismissal is dismissed. Another consideration is that the fact that the application was also dismissed for reasons of the Rule only appears in the reasoning of Skosana AJ. It is trite that an appeal lies against an order and not the reasons for the order.[1] When regard is had to the order, there is only one order which dismisses the review application with costs. I take a view that when a Court dismisses an application within the contemplation of the Rule, its order must specify so, purely because in such circumstances, the merits of the application will remain untouched.

The Merits of the appeal

[16] The appellant, in his notice of appeal, raised a barrage of grounds, 28 of them to be exact. Most of them are a repetition and are with respect poorly articulated. In terms of section 19(d) of the Superior Courts Act, what is

[1] *Absa Bank Limited v Mkhize and Two Similar Cases* [2013] ZASCA 139; [2014] 1 All SA 1 (SCA); 2014 (5) SA 16 (SCA) at para 64.

required of this Court to do is to either confirm, vary or set aside the decision of Skosana AJ. The review that was launched and dismissed by Skosana AJ was predicated on grounds that were haphazardly pleaded in the founding papers. In the present constitutional era, there are two judicial review pathways. The first pathway is the one known as a PAJA review. The other one is known as a legality review. PAJA review is available against administrative actions, whilst the legality review attacks the lawfulness and the rationality of the decision. A PAJA review is broader than a legality review. It is not clear from the appellant's founding papers whether he presented a PAJA or a legality review.

[17] Howbeit when the defence of the appellant is taken to its logical conclusion, he seeks to suggest that the provisions of the CEA invoked by SARS and its Commissioner were not legally available to them. Differently put, in invoking those provisions that saw the seizure and forfeiture of his vehicle and the goods, the respondents acted unlawfully. Of course, there can be no doubt that there was an exercise of public power. Legality requires a functionary to exercise powers that a functionary statutorily has. Undoubtedly, the CEA accords SARS and its Commissioner powers of detention, seizure and forfeiture. Thus, there can be no question of exercising powers that they do not have. On the version of the appellant, on the day in question, he was indeed approached by members of the SANDF. It is common cause that the SANDF patrols the borders of South Africa in order to prevent entry to and departure from the country at places that are not designated for entry and departure.

[18] On his own version, where the appellant was encountered, it was within the borders of the Republic of South Africa and allegedly some 35 kilometres away from the borderline. If this version of the appellant was accepted, it would have meant that the SANDF were patrolling at an area where they are not supposed to patrol. One of the persons arrested on that day, Mr Dube, confirmed that they were destined to a place where Zimbabwean nationals exit and enter South Africa illegally. According to Dube, the goods confiscated by the SANDF members were destined to Zimbabwe. It is so that the appellant alleges that Dube was not one of his passengers.

[19] For this Court, the difficulty with this allegation is that when the appellant gave a 'detailed' explanation of what happened on the day in question, he failed to state that the Munzheleles were his passengers. In his explanation, he named the Munzheleles as persons who requested him to assist in carrying the goods from Musina to Malale village. When he narrated the stop by the soldiers, he suddenly refers to the Munzheleles as two passengers and not by names. He serendipitously offered a reason as to why he took the Malala Drift road. He said it was a short cut to arrive at Malale village. Impliedly, had he not taken the short cut, he would not have encountered the members of the SANDF. Tellingly, this unlooked-for reason simply suggests that he was heading towards the guarded borderline. In some of his statements, he mentioned that the members of the SANDF encountered him 500 meters after the Malala Drift turn off. Logically, it can only be in the borderline area where one can encounter the patrolling members of the SANDF. Purely on application of the *Plascon Evans* rule, the version of the respondents was correctly accepted by the Court a *quo*. It was not far-fetched. It must be so that the appellant was encountered in the borderline vicinity.

[20] It also must be so that the passengers on the day in question were not the Munzheleles. On the appellant's own version, the members of the SANDF asked for the Identification Documents (ID) of the passengers and they provided them with those. Strangely, the detention notices issued on the day in question do not bear any of the Munzheleles' details. On the version of the SANDF members, the passengers encountered by them were illegally in South Africa and had to be deported. Surely the Munzheleles, as South Africans, could not have been deported. It must be so, as argued by Mr Mothibi, appearing for SARS and its Commissioner, that the Munzheleles were by fabrication placed on the scene after the event. Undoubtedly, only Mercy Munzhelele visited the SARS offices at Beit Bridge on 26 October 2020 under the guise that she was the owner of the seized goods. Surprisingly this owner of the goods was not party to the application before Skosana AJ. On the probabilities, considering the version of the appellant, if Mercy was ever involved, her involvement and that of Edward ended at Musina when they requested the appellant to assist in carrying the goods for them. They certainly

did not travel with the appellant and when the appellant was stopped, on his own version, by the members of the SANDF, they were not there.

[21] The appellant was the only applicant at the Court *a quo*. Clearly, his interests lie on the fine imposed and the subsequent seizure of his vehicle. He has no interest in the seized goods since, on his own version, the goods belonged to the Munzheleles. In his notice of motion, he sought an order for the return of the goods to the Munzheleles. A huge reliance was placed on the judgment of the Supreme Court of Appeal in the matter of *CSARS v Saleem (Saleem).*[2] As a departure point, *Saleem* does not support the case of the appellant. Additionally, it dealt with goods which were allegedly imported from China and seized. The decision of the Court *a quo* in *Saleem* which found that the seizure was unlawful was set aside on appeal. In terms of section 87(2)(a) of the CEA, any vehicle used in the removal of goods liable to forfeiture shall likewise be liable for forfeiture. On the facts of this case, there is no dispute that the goods that were meant to be exported to Zimbabwe were transported in the appellant's vehicle. Thus, in terms of the law as set out in section 87(2)(a), the vehicle of the appellant was liable to forfeiture. There is no doubt that the goods were destined to be exported outside South Africa illegally as contemplated in section 87(1) of the CEA.

[22] The contention that the goods were destined for Malale village is nothing but a version concocted and fabricated after the seizure. It was a version meant to diffuse the attention of SARS and its officials. Regard being had to the place of detention – in the vicinity of the borderline – the probabilities are that the goods were destined to leave South Africa at a place not designated for entry and departure. The argument that the vehicle and the goods were detained unlawfully was correctly rejected by the Court *a quo*. The appellant, in his founding papers, alleged that he was advised of what the Constitutional Court in *Masetlha v President of the Republic of South Africa (Masetlha)*[3] stated. Seemingly, his gripe for the lack of *audi alteram partem* right relates to the

[2] [2008] ZASCA 19; [2008] 3 All SA 104 (SCA); 2008 (3) SA 655 (SCA).
[3] [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 at para 75.

unavailability of the ADR proceedings to him. The *audi alteram partem* principle finds application where an adverse decision affecting rights and legitimate expectation of a person is to be taken. The ADR process is an internal remedy made available for resolution of disputes. It is an internal process of SARS which the appellant had no right to. If the dispute referral to that body is unsuitable, it cannot be said that the rights of the appellant were adversely affected. He still made use of Court proceedings as directed by SARS officials. Accordingly, there is no legal basis that the impugned decision, which relates to the imposition of the penalty and the forfeiture of the vehicle and the goods, was taken without due regard to the *audi alteram partem* rule.

Conclusions

[23] In summary, the detention of the goods and the vehicle were not unlawful. Additionally, the imposition of the penalty and the ultimate forfeiture of the seized goods and vehicle were not unlawful. The decisions to impose the penalty and ultimately the forfeiture of the seized goods and vehicle are decisions which comply with the principle of legality and are not susceptible to review on any recognisable legal grounds. Those decisions were taken after compliance with procedural fairness. Accordingly, the appeal is bound to fail. The Court *a quo* did not err when it dismissed the review application with costs.

[24] For all the above reasons, I make the following order:

Order

1. Condonation sought by the appellant is granted.

2. The appeal is dismissed.

3. The appellant to pay the costs of this appeal.

GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

N KHUMALO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA
(I agree and it is so ordered)

M LENYAI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA
(I agree and it is so ordered)

APPEARANCES:

For the Appellant:	Mr N G Mihlanga
Instructed by:	Sikhala Attorneys Inc, Roodepoort
For the Respondents:	Mr WN Mothibi
Instructed by:	Gildenhuys Malatji Attorneys, Groenkloof
Date of the hearing:	28 February 2024
Date of judgment:	26 March 2024