



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

3929/2023

In the matter between:

HERON MAURITIUS LIMITED

First Applicant

HERON MARINE SOUTH AFRICA (PTY) LTD

Second Applicant

and

**COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICE**

Respondent

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.

.....
DATE

.....
SIGNATURE

JUDGMENT

POTGIETER J

INTRODUCTION

[1] The applicants launched urgent proceedings on 14 November 2023 relating to three vessels (tankers) that were utilised as more fully set out below in bunkering operations¹ in Algoa Bay, namely MT Avatar and MT Vemadignity that were both detained on 8 April 2023 and MT Vemaharmony that was detained on 21 June 2023 at the instance of the respondent (“the Commissioner or SARS”). The detentions were made in terms of section 88(1)(a)² of the Customs and Excise Act, 91 of 1964 (“the Act”) for possible violations of the Act. In all three instances, it was initially only the vessels themselves, excluding their cargo of bunker marine fuel (bunkers), that were detained. The vessels were allowed to continue operating but were prohibited from leaving the Territorial Waters of the Republic of South Africa.

¹ The following three concepts are relevant to the operations in question:

‘*bunkering*’ refers to the actual sale or supply of marine fuel also referred to as bunkers. The applicants sold marine fuel to foreign -going vessels passing through Algoa Bay on their onward journeys to foreign destinations. These vessels were basically re-fueling in Algoa Bay. The fuel was stored on board chartered tankers or bunker vessels based in Algoa Bay and was supplied by the bunker vessels, in designated areas within the Port through ship-to-ship (STS) transfers, to the foreign-going vessels for consumption in International Waters;

‘*self-bunkering*’ is the term used for the situation where the bunker vessel utilizes some of its cargo of marine fuel for self-propulsion by transferring the required volume of bunkers from its cargo compartments to the bunker compartment in its stern.

‘*resupply*’ occurs when the cargo of marine fuel onboard the chartered bunker vessels is resupplied or replenished in South African Waters by foreign-going supply vessels through a STS transfer either in a Port berthed alongside a pier or in an anchorage zone.

² The section provides as follows in relevant part:

“88. Seizure –

(1) (a) *An officer, magistrate or member of the police force may detain any ship ... or goods at any place for the purpose of establishing whether that ship, ... or goods are liable to forfeiture under this Act.*

...

(c) *If such ship ... or goods are liable to forfeiture under this Act the Commissioner may seize that ship ... or goods.”*

[2] The application is being opposed by the respondent.

[3] At the conclusion of the argument on behalf of the applicants, their counsel handed up a draft order in terms whereof the following relief is being sought:

“1. The time-period for notice to the respondent in s 96(1)(a) of the Customs and Excise Act, 91 of 1964 (as amended) (“the Act”) is reduced from one month to ten (10) calendar days in terms of s 96(1)(c) of the Act;

2. The respondent’s decision on 15 September 2023 in terms of s 88(1)(a) of the Act:

2.1 To amend the detention notices in respect of the vessels MT Avatar, MT Vemadignity, and MT Vemaharmony and to issue new detention notices in respect of the MT Intrepid and MT Sea Emperor; and

2.2 To detain the marine fuel onboard the aforesaid vessels; and

2.3 To impose the terms under paragraph 4 of the detention notices resulting in the suspension of the applicants’ bunker fuel operations in South African waters

is reviewed and set aside;

3. The respondent is directed to withdraw the detention notices of 15 September 2023;

4. *The respondent's failure to take a decision in respect of the first applicant's request in terms of s 93(1) of the Act to release the detained marine fuel onboard the MT Avatar, the MT Vemadignity, and the MT Vemaharmony, is reviewed and set aside;*

5. *The respondent's failure to take a decision is substituted with a decision that the marine fuel onboard the MT Avatar, the MT Vemadignity and the MT Vemaharmony be released, against the provision of a guarantee for security in a total amount of R99 756 735.61 (equivalent to the duties, levies and value-added tax on the fuel detained as contemplated by the respondent in the notice of intent pertaining to such fuel of 26 October 2023) on substantially the same material terms set out in annexure "RA.7" to the replying affidavit, pending the adjudication and finalisation of the dispute between the applicants and the respondent regarding the subject matter of the aforesaid notices of intent;*

6. *The respondent is ordered to pay the costs of this application on the scale applicable between attorney and client, including the costs of three counsel."*

AMENDED DETENTION NOTICES

[4] On 15 September 2023 SARS issued amended detention notices in respect of the abovesaid three vessels now also detaining, *inter alia*, their bunkers and also issued new detention notices in respect of two further vessels, namely MT Intrepid and MT Sea Emperor. The latter two vessels do not feature in these proceedings since MT Intrepid departed South African waters prior to 15 September 2023 and MT Sea Emperor is in dry dock for repairs with no cargo on board. Importantly, the amended notices still

allowed the individual vessels to operate but '**only** if it conducts carriage of goods within the prescripts and in full compliance with the Act'.

[5] It is not in issue that the bunkering operations were terminated subsequent to receipt of the amended notices. The cause of the termination of the operations is in dispute between the parties. The applicants contended that this resulted from the terms of the amended notice which, contrary to the original notices that allowed the bunkering operations to continue without conditions, now required full compliance with the relevant legal prescripts as a pre-condition for the operations to continue. According to the applicants this is impossible to comply with until all the uncertainty surrounding the regulatory requirements applicable to their somewhat novel bunkering operations as well as the other outstanding issues between the parties such as the applicability of local tax levying laws, have been resolved. The applicants submitted that it was the terms of the amended notices that led to the operations being shut down. The respondent pointed out on the other hand that the amended notices simply required that the applicants should conduct their operations lawfully. It was contended that SARS cannot be party to allowing unlawful business to be conducted under its jurisdiction and that the operations were terminated because the applicants were unable to conduct their business lawfully. There is no need to decide this issue in the present proceedings. It is, however, worth noting, *en passant*, that there does appear to be some uncertainty concerning the regulation of the specific bunkering operations conducted by the applicants. This is apparent from the pre-litigation exchange of correspondence

between the parties. There is a *lacuna* in the Act and it appears also in the Rules, in that neither covers the type of operations that were conducted by the applicants.

[6] In fact, there is replacement legislation to address the shortcomings of the Act on the statute book notably the Customs Control Act, 31 of 2014, which has been assented to on 21 July 2014 but its date of commencement must still be proclaimed. This Act deals with a novel customs procedure relating to “*transshipment*” in Chapter 11. The latter entails “*the transfer of imported goods at a seaport ... from one foreign-going vessel ... to another*” [s 241(2)]. The customs procedure allows imported goods ‘*to be transferred at a customs seaport ... from the foreign-going vessel ... on which those goods were imported to another foreign-going vessel ... at that seaport ... on which those goods are to be exported from the Republic ... without complying with any export clearing formalities*’ [s 242(1)(a) & (b)]. This procedure, if operative, would arguably have applied to the Applicants’ operations. Needless to say, there are no comparable provisions in the current Act. Thus the *lacuna*.

[7] The Commissioner himself has on 11 December 2023 prepared draft amendments to the Rules promulgated under the Act, which were released for external comment and have yet to be approved. The amendments deal extensively with bunkering and the processes applicable to bunker fuel operators. Bunkering is defined as ‘*supplying distillate fuel to a foreign-going or coasting vessel for use as ship stores*’. The amendments also deal with the licensing and other requirements in respect of ‘*sea-based fuel levy goods special storage warehouses*’ which is defined as a storage

warehouse consisting of a storage vessel on sea. The latter is defined as ‘a vessel located at a designated place in relation to a harbour precinct and which is used as a warehouse for the receipt, storage and transfer of bulk distillate fuel for purposes of bunkering.’ The purpose of these amendments appears to be aimed at coming to terms with novel operations like those of the applicants which utilised tankers as floating storage facilities for fuel stocks that are sold to foreign-going vessels and supplied through STS transfers or transhipment within ports. However, none of these new provisions is operative and nothing further needs to be said thereanent. I now revert to the matters in issue in the application.

THE MATTERS IN ISSUE

[8] The application is aimed at reviewing and setting aside only the amended detention notices in respect of the three affected vessels and their cargoes of bunker fuel, thus in effect accepting the validity of the original detention notices which stand to be revived upon the amended notices being set aside. This part of the proceedings is referred to as the first review in the applicants’ heads of argument. The second review relates to the first applicant’s request in terms of section 93(1)³ of the Act made on 10 October 2023

³ The section provides as follows:

“93. Remission or mitigation of penalties and forfeiture. –

- (1) The Commissioner may, on good cause shown by the owner thereof, direct that any ship, vehicle container or other transport equipment, plant, material or other goods detained or seized or forfeited under this Act be delivered to such owner, subject to –
- (a) payment of any duty that may be payable in respect thereof;
 - (b) payment of any charges that may have been incurred in connection with the detention or seizure or forfeiture thereof; and
 - (c) such conditions as the Commissioner may determine, including conditions providing for the payment of an amount not exceeding the value for duty purposes of such ship vehicle

for the release of the marine fuel and all the vessels referred to in the amended detention notice of 15 September 2023 (which request peculiarly includes MT Intrepid which has since left South African waters). Despite the respondent's undertaking of 11 October 2023 to provide a response as soon as possible, this has as yet not been forthcoming. The applicants submitted that, even though no period has been prescribed for a response, the failure in this instance amounted to an unreasonable delay as envisaged in section 6(3) of the Promotion of Administrative Justice Act, 3 of 2000, which entitled them to obtain appropriate relief in these proceedings.

BACKGROUND

[9] The first applicant (Heron Mauritius) is a company incorporated in Mauritius, while the second applicant (Heron Marine) is a local company having its registered address in Gqeberha, Eastern Cape Province. The applicants have been conducting bunker marine fuel operations in the Port of Ngqura in Algoa Bay, Gqeberha since October 2020.

[10] Heron Mauritius supplied marine fuel, chemicals and lubricants to foreign-going vessels at the Port of Ngqura in conjunction with its service provider, Heron Marine. Heron Mauritius is the owner of the marine fuel which it bought from non-South African sources and stored aboard foreign vessels or tankers which are chartered by Heron

container or other transport equipment, plant, material or goods plus any unpaid duty thereon."

Marine, together with foreign Masters and crews, by means of time charters. The vessels were relocated to Algoa Bay to conduct the bunkering operations.

[11] Pursuant to a services agreement concluded by the applicants, Heron Marine provided comprehensive and independent bunker operations and services to Heron Mauritius at a fee. Furthermore, in terms of a marine fuel supply agreement, Heron Mauritius supplied the marine fuel used by the vessels chartered by Heron Marine (self-bunkering).

[12] Heron Marine conducted the bunker operations and services in accordance with bunkering licences granted by the National Ports Authority as approved by the South African Maritime Safety Authority allowing it to perform such operations, *inter alia*, in the Ports of Ngqura and Port Elizabeth (Gqeberha).

[13] Heron Marine provided high-level instructions to the chartered vessels from time to time to perform the bunker operation services. Apart from being responsible for supplying marine fuel through self-bunkering, Heron Marine was also liable for all local costs, agency fees, superintendent fees and inspection costs.

[14] It is common cause that the applicants neglected to register the bunkering operations with the relevant local regulatory and tax authorities. They made an *ex post facto* approach to SARS in 2022 (some two years after having commenced the operations) in an attempt to regularise the operations. SARS was unaware of the

operations up to that stage. The potential consequences of their neglect as well as the resultant outstanding obligations of the applicants are the subject of ongoing interaction between them and SARS. This does not require further attention in these proceedings which relate, as indicated, to a review of certain decisions and/or conduct of SARS relating to the detention of the vessels and fuel.

[15] On all accounts the bunkering operations were extensive in scope. Applicants' counsel indicated from the bar that it counted among the biggest of such operations world-wide. The estimated loss presently being suffered while the operations are interrupted is stated to amount to approximately R300 million per month. SARS has estimated that the loss of revenue suffered by the fiscus amounts to approximately R7 billion. Suffice it is to say that this unwholesome situation would in all likelihood have been averted, if the applicants had approached SARS for clarity and guidance prior to and not two years after the commencement of the bunkering operations.

[16] This matter has, however, been fundamentally affected by events that occurred shortly before it was heard on 8 February 2024. On 6 February 2024, the respondent filed a second supplementary affidavit deposed to by an official Mr Parbhookumar Moodley who also deposed to the answering affidavit. The latest affidavit indicated that SARS had come to the conclusion that the relevant goods had been irregularly dealt with and took the decision to seize the three vessels as well as their cargoes of marine fuel in terms of section 88(1)(c) of the Act. Seizure notices to this effect were accordingly issued on 5 February 2024. Copies of such notices are annexed to the

affidavit. The deponent contended that the detention of the vessels and fuel has now been superseded by the seizure. He averred that the detention notices were thus no longer operative, that the decisions to detain the vessels and fuel no longer have any practical effect, and the amendment of the detention notices was similarly academic. This raises the issue of mootness to which I now turn.

MOOTNESS

[17] It is trite that the issue of mootness arises when a matter no longer presents an existing or live controversy. The principle that courts will ordinarily decline to adjudicate academic issues or matters where the judgment or order sought will have no practical effect or result, is one of long standing.⁴ The Constitutional Court held that:

‘A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.’⁵

[18] There are two stages to mootness analysis: first, is the case in fact ‘moot’? and second if so, is it nonetheless in the ‘interests of justice’ to hear it? It is well settled that in the context of appeals, mootness does not constitute an absolute bar to the justiciability of an issue. Appellate courts have a discretion conferred by section

⁴ In *Geldenhuys & Neethling v Beuthin* 1918 AD 426 at 441 Innes CJ said:

‘After all, Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important.’

⁵ *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000(2) SA 1 (CC) para 21.

16(2)(a)(i) of the Superior Courts Act, 10 of 2013, where there are sound reasons for this, to entertain a matter despite it being moot. This, however, does not apply to a High Court or a court of first instance. The Supreme Court of Appeal (SCA) indicated in *Solidariteit Helpende Hand NPC v Minister of Cooperative Governance and Traditional Affairs*⁶ that:

'It must be borne in mind that s 16(2)(a)(i) of the Superior Courts Act confers a discretion on a Court of Appeal to hear an appeal notwithstanding mootness. Therefore, when a court of first instance has determined that the subject matter of litigation has ceased to exist before judgement, it has no jurisdiction to entertain the merits of the matter. Only an appeal court has a discretion to hear an appeal notwithstanding mootness.'

[19] The same court said in *Minister of Justice and Correctional Services v Estate Late Stransham-Ford*⁷ that:

"The appeal court's jurisdiction was exercised because 'a discrete legal issue of public importance arose that would affect matters in the future and on which the adjudication of this court was required'. The High Court is not vested with similar powers. Its function is to determine cases that present live issues for determination."

[20] It follows that the High Court is not vested with a discretion to hear a matter despite it being moot. Accordingly, the first issue for determination in this regard is whether the

⁶ (104/2022) [2023] ZASCA 35 (31 March 2023) para18.

⁷ 2017(3) SA 152 (SCA) para 25.

present application is moot. If so, *cadit quaestio*. Plainly, this court has no residual discretion to hear the matter regardless.

[21] In my view, the seizure notices rendered the present proceedings relating principally to the amended detention notices, academic and therefore moot. I agree with the submission of the respondent that the seizure notices superseded the amended detention notices which have effectively fallen away. Any relief relating to the amended detention notices will have no practical effect. The seizure notices are not being challenged in these proceedings.

[22] I am fortified in this view by the decision of the SCA in *Commissioner for the South African Revenue Service & Others v Dragon Freight (Pty) Ltd & Others*⁸ which dealt with a similar situation where goods were initially detained in terms of section 88(1)(a) of the Act and subsequently seized in terms of section 88(1)(c) of the Act. The decision to seize (the impugned decision) was reviewed and set aside by the High Court which ordered the immediate release of the goods. SARS successfully took the matter on appeal to the SCA. The judgement of the SCA dealt as follows with the effect of the seizure on the detention of the goods:

[41] The high court reviewed and set aside SARS' decision not to release the 19 containers and ordered SARS to immediately release those containers and the goods held in them. This order should not have been granted because the decision to detain the goods had been overtaken by the impugned decision.

⁸ [2022] ZASCA 84 (17 June 2022)

...

[44] The power to detain and the power to seize are discrete administrative acts, which require two separate decisions. Detention is a temporary assertion of control over the goods, which does not necessarily result in any seizure with a view to ultimate forfeiture. The stated purpose of the power to detain in s 88(1)(a) of the Act, is to establish whether the goods are liable to forfeiture. The provision thus enables SARS to examine or secure the goods, pending an investigation to establish whether they are liable to forfeiture, as happened in this case. It is only once it has subsequently been established that the goods in question are liable to forfeiture, that SARS may then seize the goods. Put differently, seizure flows from detention if liability for forfeiture is established. The decision to detain the goods is then overtaken by a new decision to seize.

...

[46] The high court conflated the decision to detain the goods with the subsequent impugned decision. In so doing the court failed to appreciate that once the impugned decision had been taken, the separate issue of detention was rendered moot. The fate of the goods then had to be decided with reference to s 88(1)(c) of the Act and not s 88(1)(a).'

(own emphasis)

[23] With regard to the issue of mootness referred to in paragraph [46] of the judgment, the SCA referred with approval to the decision of the full bench of the Free State Provincial Division in *The Commissioner: South African Revenue Service & Another v Joaquim Alberto Olivera Ferreira Alves*⁹ which also concerned relief relating to the

⁹ [2020] ZAFSHC 123 (dated 27 July 2020) para 11.

detention of a vehicle which was subsequently seized and forfeited to the State in terms of Section 88 of the Act. That court held as follows:

'I am satisfied that the decision on the merits of the appeal will have no practical effect and the matter became moot when the Appellants seized the vehicle as being subject to forfeiture.'

[24] In the comparable matter of *Clear Enterprises (Pty) Ltd v The Commissioner for the South African Revenue Services*¹⁰ certain vehicles of the appellant were at first detained and later seized by SARS in terms of Section 88 of the Act. The same vehicles were subsequently seized by another State entity, namely the International Trade Administration Commission of South Africa (ITAC). The appellant brought two applications in the High Court, the first relating to the detention and the second to the seizure of the vehicles by SARS. The primary relief sought related to the return of the vehicles. The SCA said the following in this regard:

'And yet in all of that time neither the parties nor the court below appeared to appreciate that the controversy which occupied them may not have been an existing or live one. For, plainly, after seizure of the vehicles by ITAC the primary relief initially sought by Clear Enterprises, namely, the return of vehicles, had become academic.'¹¹

CONCLUSION

¹⁰ (757/10) [2011] ZASCA 164 (29 September 2011).

¹¹ At para 11.

[25] For the above reasons, this application is moot and falls to be dismissed on this ground. I decline the request of the applicants to nonetheless deal with the merits of the matter even if it is found to be moot. It is in any event not competent as a court of first instance to accede to the request in circumstances where the matter is moot.

[26] Insofar as the issue of costs is concerned, I take into account that the respondent has delayed the seizure decision literally until the eve of the hearing. At that stage, most of the costs with regard to the hearing had already been incurred. There is no explanation why it was not possible to take the seizure decision earlier at least at a stage which would have left the applicants sufficient time to consider the further conduct of the matter and limit the costs being incurred. In my view, the applicants cannot be criticised for the decision to proceed with the hearing in the circumstances and they should not be mulcted in costs for having done so. In any event, the matter has been disposed of on a preliminary point and it cannot be said that the applicants were unsuccessful on the substantive issues. I am similarly not persuaded by the applicants' submission that the respondent should be ordered to pay punitive costs due to its averred stratagem to sabotage the application by holding back until the eleventh hour on issuing the seizure notices. In my view, neither party should be burdened with the costs of the application.

ORDER

[27] In the result the following order is made:

- (a) the application is dismissed;
- (b) each party is ordered to pay its own costs.

D.O. POTGIETER

JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicants: Adv CE Puckrin SC, Adv PA Swanepoel SC, Adv CA Boonzaaier and Adv MN Davids, instructed by Cliffe Dekker Hofmeyer Inc., c/o Joubert Galpin Searle, 173 Cape Road, Mill Park, Gqeberha

For the Respondent: Adv J Peter SC, instructed by MacRobert Incorporated, c/o Goldberg and De Villiers Inc, 13 Bird Street, Central, Gqeberha

Date of hearing: 08 February 2024

Date of delivery of judgment: 27 February 2024