IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CONSOLIDATED MATTERS:

Case No. **115176/2023**
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED
SIGNATURE
DATE: 25 September 2024

In the consolidated matters between:

FAIR-TRADE INDEPENDENT TOBACCO ASSOCIATION NPC	First Applicant
BEST TOBACCO COMPANY (PTY) LTD	Second Applicant
CARNILINX (PTY) LTD	Third Applicant
FOLHA MANUFACTURERS (PTY) LTD	Fourth Applicant
HOME OF CUT RAG (PTY) LTD	Fifth Applicant
PROTOBAC (PTY) LTD	Sixth Applicant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES	First Respondent
MINISTER OF FINANCE	Second Respondent

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) LTD	Sixth Applicant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES	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) LTD	Sixth Respondent
HOME OF CUT RAG (PTY) LTD	Seventh Respondent
PROTOBAC (PTY) LTD	Eighth Respondent

This judgment is prepared and authored by the Judge whose name is reflected as such, and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 25 September 2024.

FIRST RESPONDENT'S APPLICATION FOR LEAVE TO APPEAL

RETIEF J

INTRODUCTION

[1] The first respondent [SARS] applies for leave to appeal to the Supreme Court of Appeal [SCA] alternatively to the Full Court of the Gauteng Division against the whole judgment and order handed down on 15 May 2024. In argument however, SARS only seeks leave to the SCA. In so doing, SARS seeks to appeal the order which grants as an interim interdict pending the final determination of a constitutional challenge in respect of Rule 19-09 relating to "the requirements in respect of the monitoring of certain customs and warehouses through CCTV equipment" published in terms of the Customs and Excise Act, 91 of 1964 in Government Gazette No.46648, dated 1 July 2022" [impugned rule].

[2] Fair trade Independent Tabacco Association NPC and Bozza Tobacco (Pty) Ltd oppose this application [collectively applicants].

[3] SARS brings this application of appeal without addressing whether the order itself is appealable and on a new point which it argues is novel and which was not placed before Court at the time of the hearing. The novel point, the thrust of its application for leave to appeal.

[4] To entertain the grounds for appeal would first require this Court to determine whether the order itself is appealable. SARS failed to address the appealability of an interim order nor challenged Fair-Trade Independent Tobacco Association NPC [Fair-Trade] argument and reliance on RTS Industries and Others v Technical Systems

(Pty) Ltd and Another,[1] and the Constitutional Court matter of the United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others,[2] in which the trite position was set out that an interim interdict is not appealable unless it is in the interests of justice. SARS failed to deal with the interest of justice and the grounds/factors it deemed necessary for this Court to consider regarding the order it made, when weighing and considering the interest of justice. The novel point, which is dealt with below, does not exonerate SARS's failure to entertain and raise the interest of justice enquiry pertains to the order this Court made as the novel point only relates to an order this Court should have made based on such novel point not argued before it.

[5] The order pertaining to the impugned rule, pending the final determination under case number 051411/2022, was intended to govern a situation in the interim, for a period, until the final determination of the constitutional challenge of the impugned rule was made by another Court. The order is therefore not final in effect nor sought on a final basis and, for that reason, the interim interdict does not become *res judicata*[3] vis-à-vis the constitutional challenge.

[6] Insofar as the order acts as an interim interdict as sought and granted and having considered, although not raised, the factors to be weighed whether it is in the interest of justice, this Court is not swayed. The reason does not only lie in the fact of the effect of the order and that the appeal would not, even on the oral submissions by SARS' own counsel, lead to a just and reasonable prompt resolution of the real issue between the parties, the order itself does not dispose of an issue or a portion of the constitutional challenge of the impugned rule, it merely pends the legal process (in this case the implementation of the impugned rule as effected by SARS), as far as reasonably possible as to limit the practical consequences of the challenged action.[4]

---

[1] [2002] ZASCA 64.
[2] [2002] ZACC 34; 2022 (12) BCLR 152 (CC); 2022 (1) SA 353 (CC) at par 42.
[3] **Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation and Others** [2017] ZASCA 134; [2017] 4 All SA 605 (SCA); 2018 (6) SA 440 (SCA) at par 19.
[4] **Pikoli v President and Others** 2010 (1) SA 400 (GNP).

[7] SARS in an attempt to bolster its grounds and to overcome the effect of the order relating to the impugned rule not being appealable, raises what it calls a novel point which was not canvassed or raised at the time of the hearing.

[8] The novel point appeared to be the highwater mark of the grounds for leave to appeal. In short, SARS argues that the Court has an obligatory duty under Section 172(1) of the Constitution, when it enquires into the validity of an act of parliament, that it must declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistencies. SARS's argument applied in context: if this Court is not asked to make such a declaration, it should have by the nature of the enquiry before it, and if it did not and then left the question for the Court hearing the main application, in the review application, to do so, it submits that in such circumstances, the *prima facie* right to privacy relied on by the applicants has not been established. In other words, it contends that until the legislation is set aside, the implementation thereof would be lawful, and the relief on an interim basis would be an unwarranted interference with the separation of powers, contrary to the rule of law. For this proposition SARS relied on the matter of Rudolph and Another v Commissioner of Inland Revenue and Another NNO.[5] [Rudolph matter].

[9] The Court was then invited to consider what Goldblatt J stated as the trite principle of law, namely that before an interim interdict can be granted, the applicant must establish that he has at the very least a *prima facie* right which requires protection. In this regard the learned Judge referred to Setlogelo v Setlogelo.[6] The learned Judge was then of the view that because SARS in this matter had acted lawfully in terms of the powers granted to them by an existing Act of parliament, the applicants had failed then to establish a *prima facie* right.

[10] SARS's premise and reliance on the Rudolph matter is misplaced. The *prima facie* right to privacy was established as a direct result of the manner in which SARS was acting whilst performing its tasks afforded to it in terms of the impugned rule. SARS did not follow the exact prescripts of the impugned rule in the exercise of the powers afforded to it in terms of the regulations to the Customs and Excise Act. 91 of

[5] 1994 (3) SA 771 (W).
[6] 1914 AD 221.

64. The point now raised, whether novel or not is misplaced and the interim interdict was granted with the intention not to interfere with the ultimate decision that the Court would make in a final determination (declaration of the constitutionality of the impugned rule). SARS has never raised issue that the order itself interferes with the final determination of the ultimate constitutional challenge in the review proceedings.

[11] At the stage the order was made, it was not obligatory for the Court to make a finding of the lawfulness of the impugned rule. This is so not only because no such relief was sought at the time but, by granting interim relief only, this Court foresaw the possibility that the successful party in the main application, whether SARS or the applicants, would be in a position, at that time, to receive adequate and effective relief by another Court. Such adequate and effective relief preserved, at this stage, by not disturbing the lawfulness or unlawfulness of the impugned rule. SARS therefore must fail on the relevance and application of ground, whether novel or otherwise.

[12] As regards the remaining points, this Court has considered the arguments, re-looked at its reasoned judgment and is of the opinion that SARS has not met the threshold of Section 17(1)(a)(i) or (ii) of the Superior Courts Act 10 of 2013.

[13] As regard to costs, SARS complains that it is trite when interim relief is sought that costs follow the main application and that another court may very well come to their aid insofar as an unfavourable cost order was granted against them. Such order SARS argues is final in nature.

[14] This SARS once again seeks without reference to a provision of the Superior Courts Act, 10 of 2013 which clearly indicates at Section 16(2)(a), that an order which has no practical effect or result, the appeal should be dismissed on that ground alone and that, with reference to any consideration of costs, such can only be heard if exceptional circumstances exist. No exceptional circumstances were raised nor argued by SARS in this matter by way of its application nor in argument by its counsel. In consequence no factors raised by SARS are evident to considered thereby validating the need for this Court to grant leave on the aspect of costs.

[15] Of significance a factor to be considered is that SARS, when the matter was initially heard in the urgent Court, notwithstanding the interim nature of the order, did not request costs to be reserved if the relief granted, it sought costs if struck from the urgent roll and was awarded costs when the matter was eventually struck for lack of urgency. This occurred notwithstanding that the merits were not entertained, that matter could and was re-enrolled on the normal opposed roll for adjudication. For all these reasons, this ground must fail.

[16] As to costs there is no reason why the costs should not follow the result.

[17] In the premises the following order:

17.1. The application for leave to appeal is dismissed with costs, including the costs of two counsel, where so employed, to be taxed on scale B.

L.A. RETIEF
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

Case number: 115176/2023

For the Applicants: Adv T Ramogale
Cell: 064 082 7723
Email: ramogale@group621.co.za

Instructed by: Matlala K Attorneys Incorporated
Tel no: 010 449 9705/061 531 4038
Email: kmatlala@matlalakinc.co.za

For the First Respondent: Adv J Peter SC
Email: johnpeter@law.co.za

Instructed by:	Ramashu Mashile Twala Attorneys Tel no: 011 444 3008 Email: gcwali@rmtattorneys.africa

Case number: 115375/2023

For the Applicants:	Adv. V. Maleka SC Cell: 083 260 0790 Email: mamokete@thulamelachambers.co.za Adv. B.D Stevens Cell: 076 584 5095 Email: brookstevens@lawcircle.co.za
Instructed by:	Morgan Law Inc Tel no: 010 020 6838 Email: ryan@morganlaw.co.za angela@morganlaw.co.za
For the First Respondent:	Adv J Peter SC Email: johnpeter@law.co.za
Instructed by:	Ramashu Mashile Twala Attorneys Cell: 011 444 3008 Email: gcwali@rmtattorneys.africa
Date of hearing:	16 September 2024
Date judgment delivered:	25 September 2024