



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

Case Number: **30959/2019**

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED: NO
- DATE: 17 March 2025
- SIGNATURE: **JANSE VAN NIEUWENHUIZEN J**

In the matter between:

CELL C (PTY) LTD

Applicant

and

**THE COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICE**

Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

Introduction

- [1] The applicant applies for an order to stay the main application and the interlocutory application in terms of rule 35(13) pending a decision of the Constitutional Court in the respondent's appeal in *Commissioner for the South African Revenue Service and Another v Richards Bay Coal Terminal (Pty) Ltd* with case number 1299/2021 ("the *Richards Bay* matter").
- [2] The application is opposed by the respondent.

Background

- [3] On 11 April 2018 the respondent withdrew a tariff determination and re-determined the product (Apple iPhone 6) under tariff heading TH 8517.20.10. The applicant launched the main application to set aside the re-determination and to replace it with a tariff determination under tariff heading TH 8571.62.90. The application is brought as both a review and a statutory appeal.
- [4] In terms of the notice of motion the respondent had to deliver the record of the decision within 15 days of the notice of motion. The respondent failed to deliver the record and on 2 March 2020, the applicant brought an application in terms of rule 30A to compel delivery of the record. The applicant would only be entitled to the record of the decision if the court had review jurisdiction in respect of tariff determinations made by the respondent.
- [5] The respondent contended that the court does not have review jurisdiction and opposed the application to compel the filing of the record. The application was heard by Tolmay J on 21 October 2021. Judgment was delivered on 10 March 2022 and Tolmay J declared, *inter alia*, and in view of the wide appeal afforded to the applicant in terms of section 47(9)(e) of the Customs and Excise Act, 91 of 1964 ("the Act"), that the court does not have jurisdiction to review the respondent's tariff determination
- [6] The applicant did not appeal the final judgment of Tolmay J.

Stay of proceedings

- [7] On 1 August 2023, the applicant launched the present stay of proceedings application.
- [8] The reason for the stay of the proceedings is the pending appeal in the Constitutional Court in the *Richards Bay* matter. The applicant explains that the same question of law which was decided by Tolmay J was considered by the Supreme Court of Appeal in the *Richards Bay* matter. On 23 March 2023 the Supreme Court of Appeal handed down judgment and reached a different conclusion than Tolmay J, namely that section 47(9)(e) of the Act does not exclude a taxpayer's right to review under section 33 of the Constitution.
- [9] The respondent lodged an appeal against the decision of the Supreme Court of Appeal to the Constitutional Court, which is the appeal that is still pending.
- [10] According to Petrus Erasmus ("Erasmus"), the deponent to the founding affidavit filed herein, the pending appeal in the *Richards Bay* matter has the following impact on the main application:

"21.2 If the Respondent's appeal to the Constitutional Court is successful, the Applicant cannot request the production of the record from the Respondent. However, if the appeal is not granted or is unsuccessful, the Respondent would be obliged to provide the Applicant with the record."

- [11] In its answering affidavit the respondent alerted the applicant to the fact that Tolmay J's judgement is not subject to an appeal and remains a final judgment in these proceedings until set aside on appeal.
- [12] In response Erasmus stated the following:

"3.5 The Applicant elected not to appeal Tolmay J's judgment as the Commissioner's appeal against the order by the court of first instance in

the Richards Bay matter compelling him to provide the record in terms of Rule 53, was pending at the time when Tolmay J's judgment was handed down. The Applicant was advised to rather await the decision of the SCA in the Richards Bay matter than to incur the costs of pursuing an appeal on the identical question which was pending before the SCA. I am aware that the Supreme Court of Appeal has confirmed that courts may exercise their inherent jurisdiction to stay proceedings where a similar matter is pending in another forum until proceedings have been completed and judgment is given."

Submissions and discussion

- [13] The applicant is correct that a court will exercise its inherent jurisdiction in terms of section 173 of the Constitution to stay proceedings where a similar action is pending in another forum until proceedings have been completed and judgment delivered.

- [14] In *Caeserstone SDOT-Yam Ltd v World of Marble and Granite 2000 CC and Others* 2013 (6) SA 499 (SCA), the court granted a stay of proceedings in the Western Cape High Court pending the determination of the same issues before a court in Israel. It is important to note that the issues in dispute were between the same parties and were still alive in the Western Cape High Court. No final determination had been made in respect of any of the issues in the Western Cape High Court. [Also see: *Mokone v Tassos Properties CC and Another* 2017 (5) SA 456 (CC).]

- [15] In the present matter, the question whether this court has review jurisdiction is not pending between the parties. The issue had been finally determined by Tolmay J.

- [18] The principle that a judgment is final until reviewed or set aside is trite. Mr Marcus SC, counsel for the respondent, referred to the recent Constitutional Court judgment in *Municipal Manager, OR Tambo Municipality v Ndabeni* 2023 (4) SA 421 (CC) in which the court confirmed the principle:

‘[23] Trite, but necessary, it is to emphasise this court's repeated exhortation that constitutional rights and court orders must be respected. An appeal or review — the latter being an option in the case of an order from the magistrates' court — would be the proper process to contest an order. A court would not compel compliance with an order if that would be 'patently at odds with the rule of law'. Notwithstanding, no one should be left with the impression that court orders — including flawed court orders — are not binding, or that they can be flouted with impunity.

[24] This court in State Capture reaffirmed that irrespective of their validity, under section 165(5) of the Constitution, court orders are binding until set aside. Similarly, Tasima held that wrongly issued judicial orders are not nullities. They are not void or nothingness, but exist in fact with possible legal consequences. If the judges had the authority to make the decisions at the time that they made them, then those orders would be enforceable.” (footnotes omitted).

- [19] It follows that whatever the Constitutional Court's finding in the *Richards Bay* matter may be, the finding will have no legal consequence in the present matter.
- [20] In the result, the applicant has failed to satisfy the court that a stay of proceedings will be in the interests of the parties, the court or justice and the application stands to be dismissed with costs.

ORDER

The following order is granted:

1. The application is dismissed with costs, including the costs of two counsel on scale C.


N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE HEARD:

24 February 2025

DATE DELIVERED:

17 March 2025

APPEARANCES

For the Applicant: Advocate Swanepoel SC
 Advocate Davids

Instructed by: Cliff Dekker Hofmeyer Incorporated

For the Respondent: Advocate Marcus SC
 Advocate Mbikiwa

Instructed by: VDT Attorneys