

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN.

Case No: D2068/2022.

REPORTABLE

In the matter between:

Square Root Logistics (Pty) Ltd

Applicant

and

The Commissioner for the South African Revenue Services First respondent

The Minister of Finance Second respondent

Golden Star Enterprises (Pty) Ltd t/a Dynamic Freight Third respondent

Dynamic Freight Fourth respondent

Judgment:

Lopes J:

[1] The applicant, Square Root Logistics (Pty) Ltd, issued a vindicatory application against the Commissioner for the South African Revenue Services (SARS/the first respondent), the Minister of Finance (the Minister/the second respondent) and the third and fourth respondents, two companies to whom I shall refer as 'the tax debtors'. The application was delivered to me on Friday morning, and set down to be heard on Friday afternoon at 2:00pm. It consists of 451 pages. Urgent matters on which I was then working, had to be set aside at some stage so that I could attempt to get to grips with the application. Unsurprising, SARS and the Minister, having been given less than a days' notice (the certificate of urgency was signed on the 24th February 2022), had delivered a very brief answering affidavit.

[2] The subject matter of the application is some 50 motor vehicles, attached by SARS, which it believed were owned by the tax-debtors, and which were in the possession of the tax-debtors. The applicant, however, maintains that it is the owner

of the motor vehicles, and not the tax-debtors. That is why it brought this application, as a matter of urgency.

[3] The application was opposed by SARS and the Minister. Ms *M Ngqanda*, who appeared for them, took the preliminary point that the applicant had not complied with the provisions of s 96 of the Customs and Excise Act, 1964. The section reads:

'96. Notice of action and period for bringing action. – (1)(1)(a)(i) No process by which any legal proceedings are instituted against the State, the Minister, the Commissioner or any officer for anything done in pursuance of this Act may be served before the expiry of a period of one month after delivery of a notice in writing setting forth clearly and explicitly the cause of action, the name and place of abode of the person who is to institute such proceedings (in this section referred to as “the litigant”) and the name and address of his attorney or agent, if any.

(ii) Such notice shall be in such form and shall be delivered in such manner and at such places as may be described by rule.

(iii) No such notice shall be valid unless it complies with the requirements prescribed in this section and in such rules.'

. . .

(c) (i) The State, the Minister, the Commissioner or an officer may on good cause shown reduce the period specified in paragraph (a) . . . by agreement with the litigant.

(ii) If the State, the Minister, the Commissioner or any officer refuses to reduce or extend any period as contemplated in subparagraph (i), a High Court having jurisdiction may, upon application of the litigant , reduce or extend any such period where the interests of justice so requires.'

[4] Ms *Ngqanda* submitted that the provisions of s 96 were peremptory, and had not been complied with by the applicant, rendering its application fatally defective.

Condonation could only be sought after a request from SARS or the Minister, and their refusal to grant the request. Ms *Ngganda* relied upon the following:

- (a) In *Hisense SA Development Enterprise (Pty) Ltd v The Commissioner for SARS & Another*, a judgment of Fabricius J, heard on the 28th December 2011 under Case No: 77081/2011 in the North Gauteng High Court, Pretoria. The learned judge dismissed the application, because, inter alia, the applicant failed to comply with the provisions of s 96. As in this matter, the applicant merely sought condonation for the failure to comply with the section in its notice of motion. The learned judge stated:

‘In my view the failure to give proper notice in terms of the Customs and Excise Act is fatal,’

- (b) In *Boustred v Riol CC t/a Thrutainers & Another* an unreported judgment of the Cape High Court (Case No: 11509/13) heard on the 28th October 2014, Riley AJ, relying on *Hisense*, dismissed the applicants application to set aside customs dues on property which the applicant imported into the Republic, stating that the provisions of s 96 were peremptory.
- (c) In *Commissioner for the South African Revenue Service v Prudence Forwarding (Pty) Ltd & Another* (A406/14) [2015] ZAGPPHC 1104 (13 November 2015), the Court a quo had set aside the seizure of goods by SARS. Notice had been given to SARS of the applicant’s intention to apply for interim relief. That relief was then amended, but no notice in terms of s 96 was given in respect of the amended relief sought. The interim relief had become moot and the applicant sought to amend to review the decision of SARS. The Court held that as no notice was given, the jurisdictional conditions precedent for the application to be heard did not exist, and the application should have been dismissed. The full court accordingly dismissed the appeal.
- (d) In *Unitop Ultimate (Pty) Ltd v Commissioner of the South African Revenue Service* heard in the South Gauteng High Court, Johannesburg on the 23rd January 2016 under Case No: 42911/16, the applicant issued

an urgent application seeking, inter alia, condonation of its failure to comply with s 96. The applicant sought the release of 158 pieces of timber from SARS, so that it could protect the timber from the elements. The court, relying on *Highsense* and *Prudence*, held that the failure to comply with s 96 was fatal to the application.

- (e) In *Titan Helicopters (Pty) Ltd v The South African Revenue Service*, a judgment of the Western Cape High Court, heard under Case No: 6024/16 (reasons delivered on the 22nd July 2016), Saldanha J relied upon *Hisense* and *Boustred* in reaching the conclusion that the application was fatally defective because of a failure to comply with s 96. The learned judge stated:

The applicant did not seek to challenge the levying of any amount or assessment made in terms of the Custom and Excise Act. The applicant contended that its challenge was to the actions of the respondent who it claimed could not have been acting "in pursuance of the Customs and Excise Act." Counsel for the applicant submitted that the respondent had to show that the Customs and Excise Act applied to the recovery of the VAT debt and submitted further that the provisions of the Customs and Excise Act including sections 114 did not apply at all and therefore section 96 (1) of the Customs and Excise Act was not applicable. He added that an applicant for review could not be required to exhaust a remedy internal to an Act that was not applicable to the established facts of the matter merely because the respondent had wrongly believed the Act to be applicable to the matter. The applicant contended further that even if the respondent were to demonstrate that the Customs and Excise Act applied, that section 96 (1) could not be invoked to prevent the seeking and granting of urgent interim relief. If it were to be read in the manner suggested by the respondent, counsel for the applicant suggested that it would prevent the launching of applications for urgent relief entirely and that would be an unwarranted infringement of the applicant's rights to approach a court for urgent relief. Counsel for the respondent submitted and correctly in my view that the applicant,

whether, rightly or wrongly, had at all times made it clear that it was acting in terms of the Customs and Excise Act and therefore section 96 (1) had application. Moreover the section is no bar to seeking urgent interim relief insofar as the applicant would have been entitled to have requested the respondent to truncate the days and if unreasonably refused, such relief could have been sought from the court in the urgent application. In my view the application stands to be dismissed for the lack of the court having jurisdiction insofar as the applicant failed to have given notice to the respondent in terms of section 96(1) of the Customs and Excise Act.

[5] I have quoted the decision in *Titan Helicopters* extensively, because it deals with the very point raised in this application by Mr *Stokes* SC, who appeared for the applicant together with Mr *Kisten*. He submitted that as SARS had incorrectly attached the goods of a third party who was not the tax-debtor, SARS could not have purported to have acted in terms of s 114 of the Act, and therefore s 96 (1) was not of application.

[6] Mr *Stokes* relied on the judgments in *Mcangyangwa v Nzima* [1993] 3 ALL SA 837 (E), and *Lifman v Commissioner for South African Revenue* [2109 ZAWCHC] 67 (11 June 2019).

In *Mcangyangwa*, the plaintiff, instituted an action for damages suffered as the result of an assault upon him, allegedly by members of the South African Police. The applicant had failed to comply with the provisions of s 32 of the Police Act, 1958, requiring notice to be given within six months' of the cause of action arising. The learned Magistrate had drawn a distinction between something done '*in pursuance of this Act*' and something done within the course and scope of the employment of a member of the police force. Kroon J recorded his agreement with the concept that, depending on the nature of the act in question or the place where it is performed, a policeman may act in the course and within the scope of his employment without necessarily doing something in pursuance of the Act. The learned judge dealt with the situation where a police officer acts outside the boundaries of the Republic – within the course and scope of his employment, but not in pursuance of the Act,

because the Act is only valid within the boundaries of the Republic. The learned judge, however stated:

‘ . . . provided that a policeman is honestly purporting to go about his business as a policeman, and his act would otherwise be something done in pursuance of the Act, the unlawful or irregular nature of his act would not remove it from that category. I have no quarrel with that submission insofar as it relates to acts done by a policeman within the boundaries of the Republic . . . different considerations come into play where the act in question is done in another country . . . that would, however, be an example where such an act would constitute something done in pursuance of the Act’

The learned judge accordingly held that the provisions of s 32 were not applicable.

[7] Mr *Stokes* also referred me to paragraph 16 of *Lifman*, which records that SARS cannot exercise any power other than that conferred on it by law. I accept that as a correct statement of our law.

[8] The problem which faces the applicant is that it did not attempt to comply with the provisions of s 96. The fact that SARS may have attached goods not belonging to a tax-debtor, does not mean that it was not acting pursuant to the Act. It purported to act in terms of s 114. If, in doing so, it acted incorrectly, that does not, in my view, take the act of SARS outside the ambit of it being ‘in pursuance of the Act’. The provisions of s 96 are jurisdictional and procedural in nature, and determine the process to be adopted when an application is to be brought against SARS. If SARS incorrectly attached goods belonging to the applicant, and not the correct tax-debtor, the applicant is obliged to follow the process laid down in the Act, including giving SARS the requisite notice. The process is laid down to enable SARS to investigate claims made against it. The provisions of s 96 are jurisdictional pre-conditions to bringing an application. In my view, *Mcangyangwa* does not assist the applicant. The Police Act is clearly inoperative outside the boundaries of the Republic. The applicant’s application does not get to the argument about the identity of the tax-debtor – that is the cause of action relied upon by the applicant, and it would be putting the cart before the horse to decide that issue at the outset, because it relies on evidence establishing ownership, and in respect of which SARS or the Minister

may wish to dispute. Only once the correct procedural steps are followed, does this court have the jurisdiction to hear the argument – that has not happened. I prefer the logic in the decisions referred to by Ms *Ngqanda*, with which I am in respectful agreement.

(9) It is necessary for me to comment on the manner in which this application was brought. I agree with the submission of Ms *Ngqanda* that the matter is not of the type of application which warrants the urgency claimed. Matters of urgency are able to be set down on several days' or a weeks' notice, (and this demonstrates very clearly why a notice in terms of s 96 is required). A certificate of urgency, issued by an officer of the court, who will be able to argue the urgency, cuts through the normal waiting period for applications. The period of waiting, however, must be thoughtfully and appropriately calculated by the person issuing the certificate. An unfortunate practice has arisen in this division of matters being brought for reasons not as urgent as their certificates suggest. This application is a very good example of what I have referred to above.

[10] Even though this matter is of a vindicatory nature, which may almost always be classified as urgent, this matter did not warrant the sort of urgency relied upon by the applicant. In my view it was an abuse of legal process. Life and death, or extreme prejudice warrants such urgency that a matter cannot wait for the next day or for a few days'. The cases in this regard are clear, and it would serve no purpose for me to repeat them. Divisions of the High Court would simply be unable to function efficiently if work is continually interrupted by unnecessarily urgent applications being brought. Our rules and practice directives anticipate and include urgent applications as part and parcel of the daily functioning of the High Court. They do not envisage applications such as this one being heard on such short notice. The applicant's legal representatives are no doubt aware that a court would not easily have granted an order for the return of all the vehicles, when it was opposed, and SARS and the Minister would clearly require time to investigate, and to depose to answering affidavits. To deal with the application properly SARS and the Minister could not have been expected to do so in a day. The prejudice to the applicant– the possibility of used vehicles standing outside and potentially exposed to theft, could have been catered for by the hiring of a few security guards, the cost of which would have been

insignificant given the values involved, and which could have been recovered in due course.

[11] In the circumstances I make the following order:

‘The application is dismissed with costs, such costs to include those consequent upon the employment of two counsel, where used.’

Lopes J

Date of hearing: 25th February 2022.

Date of judgment: 28th February 2022.

For the applicant: A Stokes, with him RR Kisten (instructed by Pather & Pather Attorneys).

For the first and second respondents: M Ngqanda (instructed by The State Attorney).