



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No. 360/08

THE COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICE

First Appellant

CHRISTINE FOUCHE

Second Appellant

CROCS INC

Third Appellant

v

MORESPORT (PTY) LTD

First Respondent

MAGISTRATE SAMUEL MAKU NO

Second Respondent

MR MOVER CC

Third Respondent

Neutral Citation: *SARS v Moresport* (360/08) [2009] ZASCA 63 (29 MAY 2009)

Coram: Nugent, Ponnann, Mlambo, Mhlantla JJA and Tshiqi AJA

Heard: 18 May 2009

Delivered: 29 May 2009

Updated:

Summary: Customs and Excise — Failure to disclose a defence contained in a letter in an *ex-parte* application, not fatally defective.

ORDER

On appeal from: High Court, (Pretoria) (Seriti J sitting as court of first instance.)

1. The appeal is upheld.
2. The order of the Pretoria High Court is set aside and substituted with the following order:

‘The application is dismissed with costs.’

JUDGMENT

TSHIQI AJA (Concurring: NUGENT, PONNAN, MLAMBO, MHLANTLA JJA):

[1] One of the main purposes of the Counterfeit Goods Act 37 of 1997 (‘the Act’) is to prevent the release of counterfeit goods into the channels of commerce in South Africa. Section 15(1) of the Act entitles an owner of intellectual property to apply to the Commissioner for Customs and Excise (‘the Commissioner’) for seizure and detention of counterfeit goods. The South African Revenue Services (‘SARS’) is empowered in terms of Sections 15(4) and 113(A)(1)(b)(i) of the Act to seize and detain counterfeit goods or suspected counterfeit goods imported into or entering South Africa (during a particular period) and calculated to infringe an intellectual property right. This entails securing the goods until such time as it has been determined whether they are counterfeit or not. The power ought to be exercised in terms of the Act and a customs officer may refuse to do so in circumstances where the request does not conform to the requirements of the Act which requires that:

'15 (3) The Commissioner must consider and deal with an application in terms of subsection (1) without delay, and must grant the application if satisfied on reasonable grounds—

- (a) that the goods claimed to be protected goods are *prima facie* protected goods;
- (b) that the intellectual property right, the subject matter of which relates to the protected goods, *prima facie* subsists; and
- (c) that the applicant *prima facie* is the owner of that intellectual property right.'

[2] The continued detention of the goods is achieved by means of a warrant obtained in terms of section 6(1), on an *ex parte* application before a judge or a magistrate of the court. This section deals with the provisions regarding the issue and execution of a warrant and provides:

'(1) The warrant contemplated in section 4(2) read with section 5(1) will be issued in chambers by any judge of the High Court or by a magistrate who has jurisdiction in the area where the relevant suspected act of dealing in counterfeit goods is alleged to have taken or to be taking place or is likely to take place, and will be issued only if it appears to the judge or magistrate from information on oath or affirmation that there are reasonable grounds for believing that an act of dealing in counterfeit goods has taken place . . .'

[3] This appeal concerns the issuing of such a warrant by magistrate Samuel Maku NO ('the second respondent'), in an *ex parte* application in the magistrate's court, Cape Town on 14 September 2006. The warrant authorised the seizure, removal, detention and collection of 5 015 pairs of beach sandals incorporating and embodying the Crocs copyright design to which Crocs Inc ('the third appellant') is the copyright holder. The first respondent (applicant in the court below) brought an application in the North Gauteng High Court (per Seriti J) for an order setting aside the warrant. The application succeeded. The appeal is brought with leave of the court below.

[4] The first respondent and the third appellant (the third respondent in the court below) have settled the issues in this appeal. The first and second appellants (being the first and the third respondents in the court below) persist with the appeal on the basis that the judgment of the court below has far-reaching consequences for the officials of the first appellant in the performance of their duties in preventing the proliferation of counterfeit goods into the channels of commerce in the country. This court has recognised the importance of similar matters to the first appellant and a

case has been made for the adoption of a similar approach in this instance.¹ Therefore although the dispute has since been settled, the issue is still a 'living issue' for the appellants such that it necessitates the exercise of the discretion by this Court.²

[5] The background leading to the issue of the warrant may be summarised as follows: On 20 June 2006 the third appellant lodged an application which was subsequently approved by the first appellant for 'a seizure of goods featuring, bearing, embodying or incorporating the subject matter of the Intellectual Property Right contained in the application or to which the subject matter of that right has been applied which was imported into or entered the Republic during the period 1 May 2006 to 30 April 2007'³ ('the application'). The application covered both the Crocs trademark and the design for what is known as Crocs Beach model shoes.

[6] The subject matter of the warrant was a shipment of footwear purchased by the first respondent from Holey Soles Holding Ltd, Vancouver which arrived at Cape Town harbour in July 2006. On 19 July 2006, the second appellant, a customs officer employed by the first appellant, examined a container and discovered that the shoes inside were replicas of the Crocs shoes by virtue of their shape and general resemblance in design. After she confirmed that there had been compliance with section 15 (1) of the Act, by the third appellant, she detained the consignment and advised the third appellant's attorneys and the first respondent. Samples of the shoes were sent to the third appellant and in turn the third appellant's attorneys sent an affidavit confirming that the goods are indeed counterfeit.

[7] On 4 September 2006, the first respondent responded to correspondence from the third appellant's attorneys and disputed the third appellant's right to seek protection in terms of the Act. The letter also stated that the first respondent had a defence to the continued seizure of the goods. On 14 September 2006, the first

¹ *Commissioner, South African Revenue Service v Saleem* 2008 (3) SA 655 (SCA) at 662 (paras C-D).

² *Coin Security Group (Pty) Ltd v SA National Union for Security Officers* 2001 (2) SA 872 (SCA) at 875 (para 8); s 21A of the Supreme Court Act 59 of 1959.

³ Application to SARS to detain and/or seize counterfeit or suspected counterfeit goods, dated 20 June 2006 (Annexure 'ER 2').

appellant obtained a warrant from the second respondent in chambers. The letter dated 4 September 2006, from the first respondent, was not disclosed to the second respondent when the *ex parte* application was made. Consequent to the issuing of the warrant, the first appellant seized the goods on 3 October 2006.

[8] The first respondent applied for an order (amongst others) setting aside the warrant. The learned judge in the court below found that the defence raised by the first respondent in the letter was relevant and material and should have been disclosed to the magistrate. The learned judge consequently found that this failure was such that it rendered the warrant susceptible to be set aside. In coming to this conclusion the court below sought to rely on a decision of this court in *National Director of Public Prosecutions v Basson* in which Nugent JA stated the following: 'Where an order is sought *ex parte* it is well established that the utmost good faith must be observed. All material facts must be disclosed which might influence a court in coming to its decision, and the withholding or suppression of material facts, by itself, entitles a court to set aside an order, even if the non-disclosure or suppression was not wilful or *mala fide* (*Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348E-349B)'⁴

[9] In that decision and in subsequent decisions⁵ the courts have frowned upon the failure by the applicants in *ex parte* applications to disclose relevant and material facts and not the failure to disclose that the respondent claims to have a defence, as was the case in this matter. A legal representative presenting an application before the judge or the magistrate might have an ethical duty to bring to the attention of the judicial officer issues of law that might affect his or her decision, but that is another matter. This is clearly so, because at that stage the judge or magistrate is not required to adjudicate on the dispute on whether the goods are indeed counterfeit or not but merely to make a decision on whether there are reasonable grounds for believing that an act of dealing in counterfeit goods has taken or is taking or is likely to take place.⁶ I therefore accept the submission that at that stage of the proceedings the customs officer need only satisfy the judge or magistrate that a *prima facie* case exists and is not required to prove on a preponderance of

⁴ 2002 (1) SA 419 (SCA) at 428 para 21.

⁵ *Cometal-Mometal SARL v Corlana Enterprises (Pty) Ltd* 1981 (2) SA 412 (W).

⁶ *Shoprite Checkers (Pty) Ltd v The Commissioner for the South African Revenue Services and 3 Others* case no 1460/06 (CGHPD).

possibilities that the seized goods are indeed counterfeit. In this regard therefore the court below erred.

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

- (1) The appeal is upheld.
- (2) The order of the Pretoria High Court is set aside and substituted with the following order:

‘The application is dismissed with costs.’

Z L L TSHIQI
ACTING JUDGE OF APPEAL

APPEARANCES:

For Appellant: C E PUCKRIN SC
T KHATRI

Instructed by:

1ST and 2ND Appellant: The State Attorney
Pretoria

The State Attorney
Bloemfontein

3RD Appellant: Adams and Adams
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For Respondent: NONE