



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Reportable:	YES/NO
Of interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Appeal Case No.: A194/2019
(Court *a quo* case no.: 3544/2019)

In the matter between:

THE COMMISSIONER: SOUTH AFRICAN REVENUE SERVICE

First

Appellant¹

ABEL LEBOHANG TAU

Second Appellant

and

JOAQUIM ALBERTO OLIVERA FERREIRA ALVES

Respondent²

Coram: Jordaan, J, Mathebula, J *et* Opperman, J

Date of appeal: 1 June 2020. The matter was adjudicated on the Heads of Argument with authorisation of the court and by agreement between the parties.

Delivered: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 27 July 2020. The date and time for hand-down is deemed to be 27 July 2020 at 15h00.

Summary: Appeal - Section 16(2) of the Superior Courts Act 10 of 2013

ORDER

On appeal from Free State Division of the High Court, Bloemfontein (Mhlambi, J sitting as court of first instance). J.A.O.F ALVES versus THE COMMISSIONER: SOUTH AFRICAN

¹ First and Second Appellant will be referred to as "SARS"

² "Respondent"

REVENUE SERVICE and another: Case number 3544/2019, Judgment dated 26 August 2019.

1. The appeal is dismissed in terms of section 16(2)(a)(i) of the Superior Courts Act 10 of 2013.
2. Each party to pay its own costs, except the costs occasioned by proceeding with the appeal from the date of being notified of the Respondent's stance on 14 May 2020; which should be paid by the Appellants jointly and severally.

JUDGMENT

Opperman, J (Jordaan, J *et* Mathebula, J concurring)

[1] The appeal was initially against the orders of the court *a quo* authorising the return of a vehicle detained by SARS in terms of section 88(1)(a)³ of the Customs and

³ Section 88. Seizure —

- (1) (a) An officer, magistrate or member of the police force may detain any ship, vehicle, plant, material or goods at any place for the purpose of establishing whether that ship, vehicle, plant, material or goods are liable to forfeiture under this Act.
- (b) Such ship, vehicle, plant, material or goods may be so detained where they are found or shall be removed to and stored at a place of security determined by such officer, magistrate or member of the police force, at the cost, risk and expense of the owner, importer, exporter, manufacturer or the person in whose possession or on whose premises they are found, as the case may be.
- (bA) No person shall remove any ship, vehicle, plant, material or goods from any place where it was so detained or from a place of security determined by an officer, magistrate or member of the police force.
- (c) If such ship, vehicle, plant, material or goods are liable to forfeiture under this Act the Commissioner may seize that ship, vehicle, plant, material or goods.
- (d) The Commissioner may seize any other ship, vehicle, plant, material or goods liable to forfeiture under this Act.
- (2) (a)(i) If any goods liable to forfeiture under this Act cannot readily be found, the Commissioner may, notwithstanding anything to the contrary in this Act contained, demand from any person who imported, exported, manufactured, warehoused, removed or otherwise dealt with such goods contrary to the provisions of this Act or committed any offence under this Act rendering such goods liable to forfeiture, payment of an amount equal to the value for duty purposes or the export value of such goods plus any unpaid duty thereon, as the case may be.
- (ii) For the purposes of subparagraph (i) the value for duty purposes shall be calculated in terms of the provisions of this Act relating to such value whether or not the goods in question are subject to ad valorem duty or to a duty calculated according to a unit of quantity, volume or other measurement, as the case may be.
- (b) If the amount demanded is not paid within a period of fourteen days after the demand for payment was made it may be recovered in terms of the provisions of this Act as if it were a forfeiture incurred under this Act.
- (c) The provisions of this Act shall, in so far as they can be applied, apply *mutatis mutandis* in respect of any amount paid to the Commissioner or recovered in terms of this subsection, as if such amount were the goods in question and as if such amount had been seized under subsection (1).

Excise Act 91 of 1964.⁴ As the events unfolded, section 16(2)⁵ of the Superior Courts Act 10 of 2013 came to the fore in that the issues might be of such a nature that the decision sought on appeal will have no practical effect or result.

[2] The sole issue is whether the court *a quo* correctly declared that SARS failed to finalise the investigations in terms of section 88 in reasonable time. The vehicle has, in the meantime, been seized again and forfeited to the State.

[3] The facts on the version of the Appellant are:

3.1 The Respondent, allegedly, owns a car rental company called Euro Fleet Services in Lesotho. The vehicle⁶ in issue is purported to be his property. He claims to rent it out for travel within Lesotho and sometimes to travel with between Lesotho and South Africa.

3.2 The Respondent was under the impression that “by virtue of the Southern African Union Agreement, whenever he travel between Lesotho and South Africa, he is not required to comply with any other requirements than producing his passport and having it stamped at the border post.”

3.3 The Respondent is and was ill-advised on the law. The applicable law is trite. I will not repeat it as the correct position was stated by the Second

(Section 88: Pending amendment: S. 88 to be repealed by s. 70 of Act No. 32 of 2014 with effect from the date on which the Customs Control Act takes effect in terms of section 944 (1) of that Act – date not determined. Date of commencement to be proclaimed)

⁴ “The Act”

⁵ Section 16. Appeals generally

(2) (a)(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

(ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.

(b) If, at any time prior to the hearing of an appeal, the President of the Supreme Court of Appeal or the Judge President or the judge presiding, as the case may be, is prima facie of the view that it would be appropriate to dismiss the appeal on the ground set out in paragraph (a), he or she must call for written representations from the respective parties as to why the appeal should not be so dismissed.

(c) Upon receipt of the representations or, failing which, at the expiry of the time determined for their lodging, the President of the Supreme Court of Appeal or the Judge President, as the case may be, must refer the matter to three judges for their consideration.

(d) The judges considering the matter may order that the question whether the appeal should be dismissed on the ground set out in paragraph (a) be argued before them at a place and time appointed, and may, whether or not they have so ordered—

(i) order that the appeal be dismissed, with or without an order as to the costs incurred in any of the courts below or in respect of the costs of appeal, including the costs in respect of the preparation and lodging of the written representations; or

(ii) order that the appeal proceed in the ordinary course.

⁶ Hereafter referred to as “the vehicle”; a second hand/pre owned Nissan Serena Station Wagon registered in Lesotho with registration number AF222.

Appellant, employed at SARS as the Operational manager: Customs Investigations, in his opposing affidavit as well as in Appellants' Heads of Argument.⁷

3.4 There was a joint operation road block on 25 April 2019 between SARS and the Traffic Department. They stopped the vehicle in the Ficksburg area. It was driven by and in the possession of one Ms Jansen, a South African citizen, that resides at Brooklyn farm Ficksburg.

3.5 The officials advised her, correctly so, that an import permit was needed when a South African citizen who resides in South Africa owns and/or drives a second hand vehicle. Ms Jansen failed to produce the required documents.

3.6 Ms Jansen informed them that she came into possession of the vehicle when she borrowed the vehicle from the Respondent. The vehicle was formally detained.

3.7 The Respondent now became involved. I quote verbatim from the affidavit of Ms Jansen:

Along the way I called Mr Alves whom had borrowed us the vehicle. We arrived at the municipality premises and SARS people or officials continued with the paper work after I was told that they are going to impound the vehicle. I was given a paper to sign and I remember I had just signed the first paper when Mr Alves arrived and took the paper I signed and cancelled where I had signed and stopped me from signing the second paper. He then took the motor vehicle keys which were still in my possession. After this I left with Mr Alves to his place

3.8 The documentation that was issued to Ms Jansen was the detention notice in terms of section 88(1) of the Act as well as a letter requesting documents in order to assist SARS to establish whether the vehicle was duly entered for importation. She was also accordingly informed of the right to make representations to the Commissioner on the issue. Neither Ms Jansen nor the Respondent complied or reacted then or later.

3.9 The vehicle was not in possession of the Respondent at this stage. It was detained by SARS. The Respondent took the law into his own hands and according to his own version "I took the vehicle and drove to my residence".

⁷ Record pages 60 to 81.

- 3.10 A charge was then laid against the Respondent for theft by the Appellants under Ficksburg CAS 405/04/2019.
- 3.11 On 3 May 2019 the Respondent was arrested and detained at the Ficksburg Police Station. He appeared in the Magistrate's Court in Ficksburg on 6 May 2019 and was released on bail. However, a colonel of the South African Police Service, Colonel Phasha made arrangements with the Respondent's erstwhile attorney, Mr Snyman, for the Respondent to surrender the motor vehicle to the South African Police Service.
- 3.12 The vehicle was now held by the South African Police Service because it was an item relevant to a charge of theft. The vehicle was held by the South African Police Service for approximately two and a half months; from 6 May 2019 until 24 July 2019.
- 3.13 On 24 July 2019 the criminal case of theft of the motor vehicle was withdrawn against the Respondent upon which the South African Police Service returned possession of the vehicle to SARS and not to the Respondent.
- 3.14 The Respondent then launched the urgent application *a quo* on 7 August 2019.
- 3.15 To reiterate, the car was released on 24 July 2019. The urgent application was launched on 7 August 2019. The order of the court *a quo* was given on 26 August 2019. Leave to Appeal was granted on 19 September 2019
- 3.16 On 27 September 2019 SARS gave notice to the Respondent of the findings in the investigation and their intent to forfeit it to the State.
- 3.17 On 14 October 2019 SARS notified the Respondent of the final forfeiture of the vehicle to the State.
- 3.18 The notice of forfeiture now raises the question whether in terms of section 16(2) "the issues are of such a nature that the decision sought will have no practical effect or result."

[4] It is imperative to put the issues in perspective. The order *a quo* ruled that *further and continued detention* of the vehicle by SARS is unreasonable, arbitrary and therefore unlawful, it was ordered that the vehicle be returned within 48 hours of the order of the court and SARS was ordered to pay the costs of the application. (Accentuation added)

- [5] The relevant findings of the court based on the facts presented were:
- 5.1 The Respondent had *locus standi* because he had “sufficient and direct interest in the proceedings” not because he was in possession of the vehicle.
 - 5.2 The vehicle was lawfully confiscated and later lawfully detained by the SAPS and SARS respectively.
 - 5.3 The unambiguous and explicit finding of the court was that SARS delayed the investigations to establish whether the vehicle is liable to forfeiture under the Act to such an extent that it impeded the right of the Respondent in terms of section 25⁸ of the Constitution, 1996.
- [6] It is important to emphasise what the court *did not* find.
- 6.1 The court did not find that the detention of the vehicle was illegitimate, unreasonable or arbitrary but for the *further and continued detention* after the order *a quo*.
 - 6.2 The court did not find any illegal conduct perpetrated by SARS or any of their officials nor by the SAPS or any of their officials.
 - 6.3 The court did not rule that the conduct of the Respondent was proper and legal or condoned it in any manner. The effect of the ruling of the court *a quo* does not exclude criminal prosecution of the Respondent.
 - 6.4 The court did not rule against any future action by SARS to seize and order forfeiture of the vehicle in accordance with the law and to serve justice and the administration of justice.
- [7] The relief sought by the Appellants is that the orders granted by the court *a quo* be set aside and substituted with one that the application to be dismissed with costs. The Respondent to be ordered to pay the Appellants costs, including where applicable, costs consequent upon employing costs of two counsel.
- [8] Respondent opposed the appeal on two primary grounds: “In the main, that this appeal be dismissed with costs for mootness; and in the alternative, that this appeal be dismissed with costs on the merits.”

⁸ Section 25. (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

[9] The Appellant opposed the claim of mootness on the basis that the decision on appeal will have practical effect and the interest of justice demands that the appeal be entertained due to the nature and interest of the case, the importance of the case and the complexity of the issue. In addition:

The Appellants submits that in the event of the mootness point being upheld, that there should be no order as to costs. This submission is made on the basis that SARS was obliged to pursue the matter further and had to seize, failing which it would later have been precluded to do so on the basis that it did not act within reasonable time.

[10] This brings me to the law applicable to section 16(2) of the Superior Courts Act. The Appellant sketched the position in law accurately when they stated that:⁹

The rationale behind a court normally refusing to entertain an appeal unless there is an existing or live controversy, is because courts are loathed to furnish to the parties advisory opinions on legal questions. No matter how interesting but, even if a case is moot, mootness is not an absolute bar to the justifiability of disputes in the appeal. Even if an appeal is moot a court will nonetheless entertain the appeal if the interests of justice so require. In this context the court exercises a judicial discretion. In exercising the judicial discretion, the court will consider various factors, including whether the outcome of the appeal may have some practical effect to the parties, and the importance of the case not only to the parties involved, but also to others.¹⁰

[11] The judgment *a quo* did not amend the law in any form or manner. It merely, on the facts that prevailed, found the period of the detainment of the vehicle for investigations to have been delayed to such an extent that it affected the section 25 - constitutional right of the Respondent. The issue is not significant to the extent that it will have any future effect on the law or the administration of justice and application thereof and the matter is not complex. I am thus satisfied that a 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.

⁹ Paragraph 5, page 4 of their Supplementary Heads of Argument on Mootness.

¹⁰ Harms D, *Civil Procedure in the Superior Courts*, Last Updated: March 2020 at B49.35C Mootness <https://www.mylexisnexis.co.za/Index.aspx> on 1 July 2020. National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs 2000 (2) SA 1 (CC), Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Limited and Others (CCT195/19) [2020] ZACC 5; 2020 (6) BCLR 748 (CC) (24 March 2020) at paragraph 47, The President of the RSA v DA & Others (664/17) [2018] ZASCA 79 (31 May 2018), Independent Electoral Commission v Langeberg Municipality 2001 (3) SA 925 (CC), Education, Legal Aid of South Africa v Magidiwana and others 2014 ALL SA 570 SCA and Road Accident Fund v Faria 2014 (4) All SA 168 SCA.

[12] As to costs, I am of the view that the Appellants caused the matter to become moot. This was pointed out to them by the Respondent's attorney but they chose to proceed with the matter. An equitable order at this stage will therefore be that each party to pay its own costs, except the costs occasioned by proceeding with the appeal from the date of being notified of the Respondent's stance; which should be paid by the Appellants jointly and severally.

[13] **ORDER**

1. The appeal is dismissed in terms of section 16(2)(a)(i) of the Superior Courts Act 10 of 2013.
2. Each party to pay its own costs, except the costs occasioned by proceeding with the appeal from the date of being notified of the Respondent's stance on 14 May 2020; which should be paid by the Appellants jointly and severally.

M OPPERMAN, J¹¹

I concur

A.F JORDAAN, J

I concur

M.A MATHEBULA, J

¹¹ *Electronically send and therefor unsigned; signed judgment available in file: Registrar of the Free State High Court, Bloemfontein.

APPEARANCES

On behalf of Appellant

Instructed by:

Advocate MP van der Merwe SC

Advocate WN Mothibe

Gildenhuis Malatji Inc.

Groenkloof

Ref: R VENTER/R

SHAMOUT/01885537

c/o Honey Attorneys

Bloemfontein

Ref: 130615/Jean/BM JONES

On behalf of Respondent

Instructed by:

Advocate M.S. Mazibuko

MC Radebe Attorneys,

c/o Ramothello Attorneys

Bloemfontein

info@mcrattorneys.co.za

radebe@mcrattorneys.co.za

Ref: J ALVES / SARS / APPEAL