IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
25/06/2015
DATE SIGNATURE

CASE NO: 64901/2013
DATE: 25/6/2015

IN THE MATTER BETWEEN:

FASTJET HOLDINGS (PTY) LTD (Reg. No 2011/010641) (formerly BLOCKBUSTER TRADING 53 (PTY) LTD)	**APPLICANT**
AND	
THE MINISTER OF FINANCE	**FIRST RESPONDENT**
THE COMMISSIONER OF SOUTH AFRICAN REVENUE SERVICE	**SECOND RESPONDENT**
THE CONTROLLER OF CUSTOMS AND EXCISE (O R TAMBO INTERNATIONAL AIRPORT)	**THIRD RESPONDENT**
THE CONTROLLER OF CUSTOMS AND EXCISE (ALBERTON)	**FOURTH RESPONDENT**
FODYA (PVT) LIMITED	**FIFTH RESPONDENT**

JUDGMENT

KOLLAPEN J:

1. The applicant seeks the following relief as against the first and second respondents:

i. *That the First Respondent, alternatively the Second Respondent, alternatively the First and Second respondents jointly and severally, be and are hereby ordered to repay to the Applicant the customs and excise duty of R 1 032 000 paid by the Applicant in respect of the importation of a consignment of cigarettes from the Fifth Respondent, comprising 800 cases Mega Blue 2's and 40 master cases Mega Blue 20's cigarettes, on or about 12 October 2012, alternatively 26 October 2012, such cigarettes having been first cleared and released for home consumption, and thereafter detained and seized by customs officials;*

ii. *That the First Respondent, alternatively the second respondent, and further alternatively the First and Second Respondents, be ordered jointly and severally to pay interest on the said amount of R 1 032 000 at the rate of 15,5% per annum,* a tempore morae, *from 26 October 2012, alternatively 7 November 2012, to date of payment.*

iii. *That the first and Second Respondents jointly and severally, be ordered to pay the costs of this application, on the attorney and client scale.*

2. The first to the fourth respondents oppose the relief sought.

Background

3. This is an application involving a claim for a refund / repayment of customs and excise duty paid by the applicant upon the importation of a consignment of cigarettes in October 2012.

4. The applicant and the fifth respondent concluded a written agreement on or about the 17th of October 2012 for the purchase of amongst others, a brand of cigarettes known as Mega. Amongst the conditions regulating the written

agreement between the applicant and the fifth respondent are those that relate to the specifications in respect of the cigarettes and they are:

4. SPECIFICATIONS

4.1 The Cigarettes are purchased for home consumption only in South Africa and must therefore bear the diamond stamp excise marking as required by the Customs Act.

4.2 The packaging of the Cigarettes must reflect the required health warnings in terms of the governing health and tobacco regulations.

4.3 The Cigarettes must not exceed the maximum permissible nicotine and tar specifications allowed for South Africa.

5. In addition the following warranties and guarantees were provided by the fifth respondent in the written agreement:

9.2 Fodya further warrants that the Cigarettes:

9.2.1 are free from any defects;
9.2.2 comply with the relevant health requirements applicable in Zimbabwe, and additionally any pre-shipment specifications as requested by Blockbuster;
9.2.3 are fit for consumption;
9.2.4 will be cleared for export to South Africa in compliance with the law.

6. It is common cause that following the conclusion of the agreement between the applicant and the fifth respondent, some 840 cases of Mega cigarettes constituting two million cigarettes, were purchased by the applicant and

imported into South Africa from Zimbabwe. All the cigarettes are of the same kind and type, except that the quantity per case differed. This resulted in the consignment of 840 cases being described as constituting:

(a) 40 cases (with 10 000 cigarettes per case); and

(b) 800 cases (with 2000 cigarettes per case).

In the end, nothing much turns on this difference in the quantity of cigarettes each case held.

7. The regulations relating to the packaging of cigarettes that are imported have their foundation in Section 54 of the Customs and Excise Act 91 of 1964 ('the Act') which gives the second respondent the power to prescribe rules with regard to the importation of cigarettes.

8. The rules referred to in Section 54(1) provide as follows with regard to packaging:

54.01 Subject to the proviso to section 54(1) no importer shall import any cigarettes into the Republic unless they are properly packaged in an unbroken and unopened container which contains ten, twenty or thirty cigarettes and bears a stamp impression determined in terms of section 54(2).

54.02 The dies for making the stamp impressions referred to in section 54(2) shall be made available by the South African Diplomatic Representative in foreign countries to suppliers of cigarettes in such countries on payment of an amount such representatives may require from time to time. Such dies shall be made so available on the condition that the damaged and worn out dies are returned to the Diplomatic Representative within seven days from the date of replacement of such dies.

9. The regulations relating to the standards for manufacture of Reduced Ignition Propensity ('RIP') cigarettes were promulgated under Proclamation No. R. 429 of 16 May 2011. Regulation 19 and 20 of the Regulations provide as follows:

> *19. All cigarettes manufactured in or imported into South Africa must comply with these regulations no later than 18 months from the date the regulations are published in the Gazette.*
>
> *20. No cigarettes that fail to comply with these regulations may be sold or offered for sale in South Africa, no matter when they were manufactured or imported, after 18 months from the date the regulations are published in the Gazette.*

10. Regard being had to regulation 20 above, it is common cause that the regulations came into effect on the 16th of November 2012 and that the cigarettes purchased from the fifth respondent did not comply with the RIP requirements, at least from the 16th of November 2012.

11. Following the purchase and importation of the cigarettes, the applicant paid duty on the cigarettes in the amount of R 1 032 000. It appears that the applicant made this payment on the 26th of October 2012 but that it was duly processed and received on the 7th of November 2012. The form completed for the refund application reflects the date of payment as being 7 November 2012.

12. The cigarettes were initially cleared by customs and released for home consumption, but thereafter they were seized and detained. The applicant's version is that on the 5th of November 2012 the 800 cases of Mega Blue 2 were detained and on the 16th of November 2012 SARS alleged that the cigarettes did not comply with Rule 54 and it threatened forfeiture.

13. A notice of seizure was issued on the 27th of November 2012 but was withdrawn on the 10th of December 2012. On the 28th of December 2012 a new notice of seizure was issued in respect of the 800 cases of Mega Blue 2, and on the 17th of January 2013 the 40 cases of Mega Blue 20 were also detained and later seized.

14. The cigarettes are still in the custody of the respondents and the stance of the applicant is that it lays no claim to the cigarettes. There are proceedings pending in this Court where the fifth respondent has sought relief to declare and set aside as unlawful the second respondent's seizure of the 800 cases of Mega Blue 2. Those proceedings are yet to be finalised.

The case for the applicant

15. The applicant's claim for a refund is brought in terms of section 76(2)(d) of the Act, alternatively enrichment, and further, alternatively, contract.

16. In advancing its case for a refund the applicant's stance is that the seizure and detention of the cigarettes was unlawful. The applicant contends that the packaging and stamp impression complied with the requirements of the Act and the rules promulgated thereunder.

17. In addition and with regard to the RIP requirements, the applicant's stance is that had the goods not been detained and seized, the applicant would have been able to sell all the cigarettes in question before the 16th of November 2012, which is the date the RIP regulations came into effect and as such would not have violated the RIP requirements.

18. Accordingly it contends that insofar as Section 76(2)(d) recognises that an application for a refund may be made by reason of 'the goods concerned

having been damaged, destroyed or irrevocably lost by circumstances beyond his control prior to the release thereof for home consumption', the goods in question were irrevocably lost by circumstances beyond the applicant's control. The applicant argues that 'irrevocably lost' is capable of meaning not only physical loss but also circumstances where a party is deprived of the benefit of the goods.

Does section 76(2)(d) cover situations where the goods are not physically lost but where a party is deprived of the benefit of the goods?

19. Section 76(2)(d) of the Act provides as follows:

> *'The Commissioner shall, subject to the provisions of subsection (4), consider any application for a refund or payment from any applicant who contends that he has paid any duty or other charge for which he was not liable or that he is entitled to any payment under this Act by reason of the goods concerned having been damaged, destroyed or irrevocably lost by circumstances beyond his control prior to the release thereof for home consumption.'*

20. In ***NATAL JOINT MUNICIPAL PENSION FUND v ENDUMENI MUNICIPALITY*** **2012 (4) SA 591 (SCA)** WALLIS JA summarised the present state of our law with regard to the interpretation of documents, including legislation, as follows:

> *'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in light of the*

ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

21. If one has regard to the language of the provision itself, it is clear that the section seeks to create a limited category of instances where a claim for a refund would lie and they all relate to the physical condition and existence, or otherwise, of the goods.

22. There is a logical connection in circumstances where goods may be damaged, destroyed or irrevocably lost; it is a connection that is physical in nature. In my view it would offend the ordinary logic and grammar of section 76(2)(d) to interpret the phrase 'irrevocably lost' as including the coming into operation of legislation which would prohibit the public disposal of a particular type of cigarette. To give 'irrevocably lost' the meaning the applicant contends for would render the scope and ambit of the section so wide that it would conceivably permit all types of claims for a refund. A person could be deprived of the benefit of the goods for a number of reasons outside his or her control, and to suggest that in every such instance a claim for a refund would be

possible under Section 76(2) would in my view, stretch the rules of interpretation to excessively impermissible levels and should be resisted.

23. On this basis I would accordingly conclude that the claim cannot be entertained under Section 76(2)(d).

24. However if I am wrong on the interpretation of Section 76(2)(d) and if it is so that 'irrevocably lost' is capable of the wider meaning contended for (in other words, deprived of the benefit of the goods) then the question that would arise is whether the deprivation was as a result of circumstances 'beyond the control of the applicant'.

25. This would require a consideration of the reasons for the detention and seizure. Mr van der Merwe SC for the respondents, urged the Court to refrain from embarking upon such an exercise for two reasons:

    i. Firstly the seizure and detention of the cigarettes was not an issue for determination and no relief was sought relevant to the lawfulness or otherwise of the detention and seizure; and
    ii. Secondly, another Court is currently seized with the determination of a dispute that includes the question of the lawfulness of the detention and seizure (the case of FODYA (PVT) LTD v MINISTER OF FINANCE AND ANOTHER (case number 41617/2013).

26. Mr Hatzenberg SC for the applicant, argued that this was a collateral issue which the Court was entitled to entertain and that the doctrine of *lis pendens* and *res judicata* were not applicable as the parties in these proceedings, and those in the other proceedings, are different and in addition the issue to be determined in those proceedings is different.

27. The proceedings to set aside the detention and seizure of some of the cigarettes involve different parties to those in the current dispute and any determination this Court is called upon to make with regard to the collateral issue as to whether there was a basis for the detention and the seizure will not be binding on another Court. Under those circumstances it would appear that the fact that the lawfulness of the detention and seizure has not been directly challenged in these proceedings and that that matter is indeed pending before another Court, cannot and should not stand as an insurmountable obstacle to this Court examining the circumstances under which the detention and seizure took place in order to assess whether it was under circumstances beyond the control of the applicant. As such I now proceed to do so.

Compliance or otherwise with section 54(1) and (2) and the rules promulgated thereunder

28. The applicant's stance is that the strip packaging in which the cigarettes were packed constitutes a container. The word 'container' is not defined in the Act but it is defined in the South African Concise Dictionary (2002) as 'An object for holding or transporting something'.

29. In the founding affidavit Mr Kajee on behalf of the applicant, describes the packaging as follows: 'All Mega Blue cigarettes are packaged in containers or packets which clearly display the diamond impression. That applied to the entire consignment of cigarettes'.
In addition he states: 'The cigarettes were packaged in boxes or containers which each contained 20 cigarettes. Inside each individual box or packet, there was however an unbroken strip of 10 sealed sachets, with each sachet containing 20 cigarettes. This is referred to as a so-called "strip package"'.

30. At the hearing of the matter a sample of the packaging that relates to the cigarettes in question was handed up for the purpose of demonstrating how the

seized cigarettes were packaged and whether such packaging complied with the rules promulgated by the second respondent. It consisted of a carton (with dimensions of 41 centimetres (length), 5 centimetres (height) and 10,5 centimetres (width)). Inside the carton there are strips, each consisting of 10 sealed sachets, with each sachet containing two cigarettes. Although the ten sachets are held together, there is perforation which allows for each sachet to be easily detached from the strip, without damaging the rest of the sachets in the strip. The detached sachet then exists independently of the strip. All the sachets can, in this manner, be detached from the strip and acquire a separate identity as a sachet of 2 cigarettes, as it were.

31. While a strip of 10 sachets would constitute a total of 20 cigarettes, each strip of 20 cigarettes was not packaged in boxes or containers which each contained 20 cigarettes. There was no 'individual box or packet' as Mr Kajee claims.

32. The argument that each strip of 10 sachets (20 cigarettes) constitutes a container would have merit if what Mr Kajee says in the founding affidavit, referred to earlier, was in fact the type of packaging used. On the contrary, the packaging made available and which I have described above differs considerably from that described in the founding affidavit – the essential difference being that each strip containing 20 cigarettes was not packaged in an individual box or packet.

33. It can hardly be said that a strip of 10 sachets on its own would collectively constitute a container – it might well be that each sachet could be said to be a container, but the strip of 10 sachets could hardly be that. It is simply a collection of 10 sachets.

34. Finally, and to the extent that the applicant's case is that the 10 sachets constitute a container of 20 cigarettes as contemplated in Rule 54, this is called

into serious question by the marking on the carton which was, on the applicant's version, meant to house the containers of 20 cigarettes.

35. The carton is boldly marked with the words '2's PACK' which appear on the bottom right hand corner of the carton when it is viewed from above. This compellingly suggests that its contents consisted of packs or containers of 2 cigarettes. If it was a carton holding containers of 20 cigarettes, the marking would most likely have said '20's PACK', which it is not, and understandably so. For these reasons, the argument that the packaging complied with Section 54 read with the Rules is unsustainable.

36. The applicant, in support of its contentions relative to packaging, sought to place reliance on a letter dated 14 August 2006 from the second respondent to Masters International Tobacco Manufacturing (Pty) Limited, approving strip packaging. On this basis the applicant sought to argue that the kind of 'strip packaging' *in casu* was approved by the second respondent as long ago as 2006.

37. This consent was given to Masters International some six years before the importation by the applicant of the cigarettes relevant to these proceedings. While the consent related to strip packaging, there is no evidence that that packaging was identical in form to the packaging used for Mega Blue 2. Further, it was an approval given following a specific request and after an application.

38. For these reasons I would hesitate to construe the approval to Masters International to mean that general approval to use strip packaging was given – to do so would be to ignore the provisions of Section 54(2)(a) and the Rules promulgated thereunder, all on the basis of a single letter of approval under circumstances which may well be different to those that prevailed in relation to these proceedings.

39. In addition and insofar as Section 54(2)(a) requires a stamp impression to be made on the containers, there was no such stamp impression on the packaging that was placed before the Court, assuming of course that they constituted containers, which I have already determined they did not.

40. For these reasons it must follow that the cigarettes in question did not comply with the requirements of the Act as read with the rules promulgated thereunder as they were not packaged in an unbroken and unopened container containing 10 or 20 or 30 cigarettes. In addition the stamp impression which is required in respect of imported cigarettes was not present on the packaging of the cigarettes. Accordingly there appear to be justifiable reasons for the seizure of the cigarettes on account of non-compliance with Section 54, read with the Rules promulgated thereunder.

The reduced ignition propensity ('RIP') regulations

41. While it is common cause that the cigarettes were liable for detention and seizure after 16 November 2012 when the regulations became effective, the question is whether their detention between the period 7 November 2012 and 15 November 2012 was justified?

42. It is clear that sale of the cigarettes would have been illegal from 16 November 2012. The applicant's stance is that their detention prior to the 16th of November 2012 was not justified as, firstly, the regulations had not taken effect then, and secondly, it contends that it would have sold all the cigarettes before the 16th of November 2012.

43. I have some difficulty with this submission in the absence of any details being advanced as to how it would have been possible for the applicant to have sold 2 million cigarettes in the course of about a week. Under such circumstances

their detention, which would have been legal from 16 November 2012, would have been justified from the 7th of November 2012 in the absence of any indication by the applicant as to how 2 million cigarettes could have been sold in the period of one week.

44. In this regard I pause to mention that the RIP regulations are for the public benefit. Releasing a consignment for home consumption under circumstances when their sale would become illegal quite imminently would not only be irresponsible but would violate the spirit of the Regulations. On the contrary, the detention of the cigarettes on the 5th of November 2012 for these reasons would appear to have been justified.

45. Therefore it must follow that even if the applicant is able to bring its claim within the provisions of Section 76(2)(d) it could hardly be said, for the reasons given, that the goods were irrevocably lost for reasons outside the control of the applicant. The requirements relevant to packaging and the RIP regulations were matters that fell within the ability and control of the applicant to fulfil by ensuring compliance therewith. The detention and seizure was thus not on account of reasons outside the control of the applicant and Section 76(2)(d) cannot be invoked.

Unjust enrichment

46. Mr van der Merwe SC, for the respondents, argued that there was no basis for the claim and in doing so pointed out that there was no reference at all to a claim based on enrichment in the founding affidavit and that the only reference to a claim being based on enrichment was to be found in a single sentence in the replying affidavit. It was, he pointed out, not the case the respondents were required to meet and he urged the Court not to consider the claim of enrichment on this basis.

47. Mr Hartzenberg SC, for the applicant, took the stance that even if it was not precisely articulated, the factual basis for a claim based on enrichment was dealt with and fully canvassed on the papers and accordingly was before the Court.

48. Whatever the merits or otherwise of the competing arguments may be, one of the requirements the applicant would have to prove in an enrichment claim is that the enrichment was unjustified.
(See ***KUDU GRANITE OPERATIONS (PTY) LTD v CATERNA LTD*** **2003 (5) SA 193 (SCA))**

49. For the reasons already given with regard to the justification for the detention and seizure of the cigarettes, it could never be said that if there was any enrichment it was of the kind that was unjustified and under these circumstances and even if the Court was properly seized procedurally with a claim for enrichment, it was destined to fail.

50. There would in my view be no basis for a claim based on unjustified enrichment.

Contract

51. The claim for a refund which is premised on contract is founded upon correspondence between representatives of the applicant and one Mr Julio Sabu, a senior manager at the Alberton Customs Compliance Centre of the second respondent.

52. Following the submission of an application for a refund, the matter was followed up by staff of the applicant in order to ascertain what the status of the refund application was. On 9 May 2013 Mr Sabu in an e-mail to one Zain Aboobaker of the applicant advised as follows:

'Kindly accept my apology for the late response as I was out of office attending to other business. We have made follow-up on this matter. Your claim is included on the batch that due to be paid out next week Thursday, the 16th.'

53. On 18 June 2013 a similar communication was sent by Mr Sabu to Mr Jasat, the current attorney of the applicant.

54. The stance of the applicant is that it accepted these various undertakings to refund the duty paid and that arising out of such acceptance, the respondents are bound in contract to honour the agreement arrived at – namely to refund the duty that was paid.

55. Mr Sabu, while admitting that he authored the two e-mails to which reference has been, made attempts to provide an explanation for what occurred. He states that at the time, the second respondent was in the process of modernising its systems to deal with refund claims with a view to moving away from a manual system to an electronic system

56. The applicant's claim was submitted manually but was also recorded on the electronic system and he states that the impression could have been created from the electronic system that the claim was approved which is what prompted the e-mails regarding payment. In brief, his stance is that an error on the system led him to believe that the application for a refund was approved. In support of this he attaches the form that records that the claim for a refund was refused as well as a supporting affidavit by one Ms Mogotsi, the team leader who dealt with the claim. Finally, Mr Sabu points out that as a senior manager he did not deal with individual forms or applications but that his role was supervisory in nature.

57. When one has regard to the explanation offered, while it may be said that Mr Sabu could have been more careful and conscientious when he communicated with representatives of the applicant about the refund application, on the other hand, the explanation offered is not unreasonable and is not inconsistent with the stance taken relevant to the refund. In this regard the second respondent had on the 7th of May 2013 and the 9th of May 2013 written to the applicant with regard to the seizure of the cigarettes and those letters clearly suggest that the second respondent stood by the seizure of the goods. Under such circumstances it is certainly inexplicable how Mr Sabu could on the same day (the 9th of May 2013) author an e-mail indicating that a refund will be made except if it was a genuine error, which he says it was.

58. In addition, Mr Sabu's e-mails are brief, they do not deal with the merits of the refund application but simply state that payment will be made. Given that he was not dealing with the application himself and that those who dealt with it were clearly of the view that the application for a refund had been rejected, logic and common sense militate against the suggestion that Mr Sabu was communicating an informed position when he authored the e-mails, or that the e-mails evidenced an unconditional undertaking to pay.

59. My view is that having regard to the facts in their totality, the explanation that the e-mails were based on an error is indeed plausible. In addition, I would be concerned if the respondents were to be held to the e-mail as constituting an undertaking when objectively, there could be no basis in law for a refund as I have already found.

60. In my view it cannot be said that there was a true meeting of the minds when the contract the applicant relies upon was allegedly entered into. Genuine error would have prevented consensus and the claim based on contract must accordingly also fail.

ORDER

61. In the circumstances the application is destined to fail and I make the following order:

- The application is dismissed with costs, including the costs of senior counsel.

N KOLLAPEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

64901/2013
HEARD ON: 18 MAY 2015
FOR THE APPLICANT: ADV. C J HARTZENBERG SC and ADV. S JASAT
INSTRUCTED BY: JASAT AND JASAT ATTORNEYS (ref: 01/F062001/FJ:NE)
(correspondents – RIAAN BOSCH ATTORNEYS (ref: RJ0046))
FOR THE 1st, 2nd, 3rd, and 4th RESPONDENTS: ADV. M P VAN DER MERWE SC
INSTRUCTED BY: THE STATE ATTORNEY (ref: C Cory/7451/2013/Z39)