IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case number : **507/98**

In the matter between :

THE COMMISSIONER FOR CUSTOMS & EXCISE APPELLANT

and

STANDARD GENERAL INSURANCE COMPANY LIMITED RESPONDENT

CORAM: **F H GROSSKOPF, HOWIE, PLEWMAN JJA, FARLAM and MPATI AJJA**

HEARD: **5 and 20 SEPTEMBER 2000**

DELIVERED: **29 SEPTEMBER 2000**

Customs Act 91 of 1964 - Whether s 99(5) is a limitation period. Applicability of s 13(1)(g) read with s 16(1) of the Prescription Act 68 of 1969 to a claim in terms of the Customs Act.

JUDGMENT

PLEWMAN JA:

[1] This appeal concerns two claims in respect of customs duties payable in terms of the Customs and Excise Act 91 of 1964 ("the Customs Act"). Appellant, plaintiff in the court *a quo*, is the Commissioner for Customs. Respondent, defendant in the court *a quo*, is an insurance company which secured the payment of the duties by a licensed clearing agent who cleared certain dutiable goods on behalf of an importer. The circumstances giving rise to these claims are explained hereafter. A number of entities are concerned and it will be convenient to refer to appellant as the "Commissioner" and respondent as "Standard General".

[2] The litigation was initiated by the Commissioner by issue of a summons on 7 June 1995. After the close of pleadings the parties stated a case in terms of Rule 33 for adjudication by the court *a quo*. The court (Flemming DJP) entered

judgment in favour of the Commissioner on one claim and dismissed the other. It is the latter order which is the subject of what I will call the main appeal while the order in relation to the former is the subject of what amounts to a cross-appeal. The decision is reported as *Commissioner for Customs and Excise vs Standard General Insurance Company Ltd* [1998] 4 All SA 46 (W). As appears from the judgment the summons included an additional claim which was postponed. The appeal does not concern that claim. The appeal is with leave granted by the court *a quo.*

[3] In terms of the Customs Act duty on imported goods is due at the time of such importation. The proviso to s 39(1)(b) permits the Commissioner to allow registered agents a deferment of such payments on conditions which he may determine. S 39(1)(b) provides as follows:

> "At the same time the said person shall deliver such duplicates of the bill of entry as may be prescribed or as may be required by the Controller and shall pay all duties due on the goods: Provided that the

> Commissioner may, on such conditions, including conditions relating to security, as may be determined by him, allow the deferment of payment of duties due in respect of such relevant bills of entry and for such periods as he may specify."

[4] A brief reference to the facts is necessary. A company, Gem Shipping, licensed in terms of s 64B of the Act, applied in August 1989 to the Commissioner for deferment of the payment of duties on goods cleared by it. The Commissioner acceded to its application subject to its providing security. Two agreements were concluded between the Commissioner and Standard General in terms whereof the latter was to provide security for the payment of duties by Gem Shipping. The sequence of events is not entirely clear. The first agreement is a suretyship dated 11 September 1989. The second a suretyship dated 28 October 1991. The second agreement is expressly linked to an agreement between the Commissioner and Gem Shipping entitled "Agreement in respect of liability for payment of duty and value added tax" (the deferment agreement (also) concluded on 28 October 1991). It is

thus apparent (as is unfortunately so often the case when resort is had to rule 33) that with the advantage of hindsight certain defects in the case stated and in the formulation of the questions posed for adjudication have emerged. The first agreement is a performance guarantee. It therefore only gives rise to an obligation of an accessory nature. The principal obligation arises in terms of the deferment agreement (which was concluded two years later). It is obvious that there must have been an earlier deferment agreement and that it is only by some process of novation or substitution that the parties can have arrived at what is the agreed fact namely that Standard General's obligation as surety secures the payment of duties under the (later) deferment agreement. Counsel for the parties were *ad idem* in their representations that this was the case and that the matter should be decided on this basis. While it seems that it is, in all the circumstances of this case, appropriate to supplement the statement of agreed facts in this way a warning is called for. Resort to the procedures of rule 33 calls for great care in the formulation of the statement

of agreed facts. Indeed, in so far as this Court is concerned, the provisions of s 21A of the Supreme Court Act 59 of 1959 underline the fact that rule 33 cannot be invoked to enlist the court's assistance for the adjudication of questions which do not dispose of an actual dispute or controversy between the parties. The facts must be stated accurately and the questions for adjudication must be correctly formulated. In the present case the formulation of the first question for adjudication came perilously near to raising a purely academic question. It is, however, no longer of relevance to this appeal. Happily the second question is wide enough to allow of a resolution of the real dispute. It reads as follows:

> "In the event of it being held that the principal incurred liability to Plaintiff for an importer in terms of Section 99 only, did Defendant's liability to Plaintiff cease in terms of Section 99(5), or was the running of prescription interrupted by Plaintiff filing a claim against the estate of the principal in terms of Section 13(1)(g) of the Prescription Act 68 of 1969?"

Since the matter is, in my view, so capable of resolution certain other anomalies in

the stated case may also be ignored. Practitioners, however, would be well advised to pay heed to the aforegoing comments.

[5] The case must then be decided on the basis that the first agreement bound Standard General as surety and co principal debtor for payment of Gem Shipping's obligations in and up to an amount of R10 000. This is the agreement in respect of the claim which succeeded in the court *a quo*. The second agreement is also a suretyship undertaking by Standard General in favour of the Commissioner for the payment of duties under the deferment agreement by Gem Shipping in and up to the amount of R50 000. This was the agreement in respect of the claim which failed.

[6] In terms of the statement of agreed facts the Commissioner addressed a demand to Gem Shipping on 22 March 1993 claiming payments due, at what are termed "settle dates", for the periods 6 January 1993 to 5 February 1993 and 6 February 1993 to 5 March 1993. The total claim for duty, value added tax and

interest is the sum of R376 003,31. The letter also terminated the deferment agreement on the grounds of "non fulfilment" by Gem Shippings of its obligations thereunder.

[7] On 12 July 1993 the Controller of Customs and Excise Durban, representing the Commissioner addressed a demand to Standard General alleging default by Gem Shipping and claiming payment of the sums of R10 000 and R50 000 respectively in terms of the two suretyships. The amounts claimed by the Commissioner from Gem Shipping became due and payable, so the stated case records, on 14 February 1993. It is further recorded that Gem Shipping was provisionally liquidated on 6 May 1993 which order was subsequently confirmed.

[8] On 9 September 1994 the Commissioner, unbeknown to Standard General, filed a claim for an amount of R1 232 971,14 against the estate of Gem Shipping in terms of the Insolvency Act 1936 read with the provisions of the Companies Act 1973. The claim so filed included the amounts referred to in paragraph 5 above.

The final liquidation and distribution account in the liquidation of Gem Shipping had not been confirmed by the date of the issue of summons in June 1995. It was also agreed for the purposes of the questions framed for the court *a quo's* decision that prescription started running on 14 February 1993.

[9] The question for adjudication arose because a Special Plea of prescription was raised in the proceedings by Standard General based on the provisions of s 99(5) of the Act which are as follows:

> "(5) Any liability in terms of subsection (1), (2) or (4) (a) shall cease after the expiration of a period of two years from the date on which it was incurred in terms of any such subsection."

(This sub-section was introduced into the Customs Act in 1979 by s 12(b) of Act 110 of 1979.) What was debated in the court *a quo* was the question whether in the circumstances set out above the obligations of the principal debtor Gem Shipping and those of the surety Standard General had or could prescribe independently. However in this Court (as a result of queries raised by the Court itself) proceedings

took a different turn.

[10] As I view the facts the real question which arises is not that addressed by the court *a quo* but rather the question whether, in the light of s 99(5), Standard General was liable to the Commissioner at all after the lapse of two years following 14 February 1993. This issue arises for the following reasons. In our law there is a difference between limitation periods and prescription periods. The term "prescribe" (or in Afrikaans "verjaar") is a well known and juristically well understood term. So too is the concept of a "limitation or expiry period" (in Afrikaans a "vervaltermyn"). *President Insurance Co Ltd v Yu Kwam* 1963 (3) SA 766 (A) at 780E-781A. *Hartman v Minister van Polisie* 1983 (2) SA 489 (A) at 499-500. The topic has received considerable attention from academic writers commencing perhaps with the treatment thereof by De Wet and Yeats *Kontraktereg en Handelsreg* (originally) in the 2nd ed at p 203. See also Loubser *Extinctive Prescription* Chapter 10 at p 170. As the latter reference shows limitation or expiry

periods are encountered in statutes dealing with subjects as diverse, to mention but a few, as Compensation for Occupational Injuries and Diseases (Act 130 of 1993); Education and Training (Act 90 of 1979); Intelligence Services (Act 38 of 1994).

[11] A question which often arises (as it does in this case) is whether and to what extent such provisions are to be reconciled with the Prescription Act. What is called for in each instance is a determination of the intention of the legislature in enacting the particular limitation or expiry period. The debate revolves around the provisions of s 10 and, in the main, s 16 of the Prescription Act. The enquiry is whether the provisions of chapter III of the Prescription Act being, in summary, the provisions governing the suspension of the running of prescription or delay in the completion thereof can be invoked.

[12] This can no doubt often be a matter of serious and difficult debate but in the present case there can, in my view, be little doubt that s 99(5) is inconsistent with the application to the debt of provisions in chapter III of the Prescription Act.

Appellant's counsel, in arguing the proposition raised in the question for adjudication, sought to rely on the provisions of s 13(1)(g) of the Prescription Act and to contend that the running of prescription of the debt to the Commissioner had in the circumstances set out above been delayed.

[13] The argument was that in terms of s 16(1) the general provisions of the Prescription Act are to apply to "any debt" arising after its enactment. This is so, of course, only if the provisions of the Prescription Act are consistent with those in the other act with which one is concerned. S 16(1) provides as follows:

> "**16. Application of this Chapter. -**
> (1) ..... [The] provisions of this chapter shall, save in so far as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of a debt, apply to any debt arising after the commencement of this Act.
> (2) ....."

Reference was made in this regard to decisions such as *Standard General*

Insurance Co Ltd v Verdun Estates (Pty) Ltd and Another 1990 (2) SA 693 (A); *Hartman v Minister of Polisie* (*supra*) and *Road Accident Fund v Smith NO* 1999 (1) SA 92 (A) and to the manner in which consistency or inconsistency was established in particular cases.

[14] I am not persuaded that the inquiries undertaken in such cases provide assistance in the present matter. One is not in this case concerned with an Act which prescribes a specific period within which a claim must be made or an action instituted, nor with one laying down pre-conditions to the institution of proceedings (such as the giving of notice). Nothing can demonstrate the inconsistency of, for example, the delaying provisions of the Prescription Act, with s 99(5) more clearly than the words "liability ... shall cease". Counsel for the Commissioner urged that cessation of liability was exactly what occurred when, under the Prescription Act, a debt was extinguished. The crucial difference, however, is that with prescription, liability can extend beyond the period laid down in s 11 of the Prescription Act.

Here such extension is impossible. S 16 therefore provides no reason for reading s 99(5) otherwise than literally.

[15] There is guidance to be had from the Customs Act itself that this is the sense in which the words "liability ..... shall cease" must have been intended by the legislature. These words in s 99(5) can be contrasted with the phraseology of s 96 where one finds the words "the period of extinctive prescription" used in relation to actions against the Commissioner. What is seen is then a deliberate change of wording which leads to the conclusion that s 99(5) was intended to have effect as an expiry term.

[16] One is left, it is true, to wonder precisely what the motivation was for the introduction of ss (5) which operates against the Commissioner. I have been unable to trace a discernible object from the legislative history. It seems that the amendments made in 1979 did in some measure affect and extend the liability of agents but this offers no clue as to why ss (5) was introduced. In the result the ss

must simply be examined in its own terms with what appears to me to be an inescapable conclusion. It is a limitation or "vervaltermyn". If the principal debtor Gem Shipping's liability ceased the accessory obligation of Standard General also ceased.

[17] *Mr Meyer,* counsel for the Commissioner, conceded that if the section is so read no claim lay on either contract. It is a conclusion to which one is inevitably driven. It follows that the court *a quo's* order in relation to the R10 000 claim was incorrect and that the appeal in relation to the R50 000 claim must fail.

[18] In summary the result is that Standard General has succeeded on both the appeal and cross-appeal. In practical terms this means that paragraph 3 of the learned deputy judge president's order is (apart from a typing error therein) upheld but paragraph 4 must be altered. Paragraphs 1 and 2 seem not to be affected while the effect of paragraph 5 is not clear. The order I make is the following:

(1) The appeal in respect of the claim for R50 000 fails and the cross-

appeal in respect of the claim for R10 000 is upheld.

(2) Paragraphs 3, 4 and 5 of the court below's order are set aside and there is substituted therefor an order that the plaintiff's claims are dismissed with costs.

(3) The appellant is to pay the costs of the appeal.

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C PLEWMAN JA

CONCUR:

F H GROSSKOPF JA)
HOWIE JA)
FARLAM AJA)
MPATI AJA)