

SOUTH AFRICA / JUDGMENT

Clear Enterprises (Pty) Ltd v Commissioner for South African Revenue Services and Others (757/10) [2011] ZASCA 164; 83 SATC 136 (29 September 2011)

[2011] ZASCA 164

COURT

Supreme Court of Appeal

BEFORE

Ponnan, Cachalia, Leach, Wallis, Petse

CASE / FILE NUMBER

757/10

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 757/10

CLEAR ENTERPRISES (PTY) LTDAppellant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN

REVENUE SERVICESFirst Respondent

CROSS-BORDER ROAD TRANSPORT AGENCYSecond Respondent

CART BLANCHE MARKETINGThird Respondent

THE INTERNATIONAL TRADE

ADMINISTRATION COMMISSIONFourth Respondent

Neutral citation: Clear Enterprises (Pty) Ltd v SARS (757/10)

[2011] ZASCA 164 (29 September 2011)

BENCH: PONNAN, CACHALIA, LEACH, WALLIS JJA and PETSE AJA

HEARD: 2 SEPTEMBER 2011

DELIVERED: 29 SEPTEMBER 2011

CORRECTED:

SUMMARY: Appeal – s 21A(1) of the Supreme Court Act – power of court to dismiss appeal where judgment or order sought would have no practical effect or result.

ORDER

On appeal from: North Gauteng High Court (Pretoria)

(Murphy J sitting as court of first instance).

The appeal is struck off the roll and each party is ordered to pay its own costs.

PONNAN JA (CACHALIA, LEACH, WALLIS JJA and PETSE AJA concurring):

[1] On 2 September 2011 this appeal was struck off the roll in terms of s 21A of the Supreme Court Act 59 of 1959 and each party was ordered to pay its own costs. It was intimated when so ordering that reasons would follow. These are those reasons.

[2] Section 21(A)(1) of the Supreme Court Act 59 of 1959 provides:

'When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.'

The primary question therefore, one to which I now turn, was whether the judgment sought in this appeal would have any practical effect or result. It arises against the backdrop of the following facts.

[3] On 22 February 2007 and at Port Elizabeth, Mr Gideon van Loggerenberg, a senior customs and excise officer in the employ of

the first respondent, the Commissioner, South African Revenue Service (the Commissioner) detained two trucks — a Mercedes Benz and an ERF. On 23 April of the same year a similar fate befell a third truck, a Leyland DAF Rigid. All three trucks belonged to the appellant, Clear Enterprises (Pty) Ltd (Clear Enterprises), a Botswana based company. In detaining each of those trucks, Van Loggerenberg purported to act in terms of s 88(1)(a) read with s 87 of the Customs and Excise Act 91 of 1964 (the Act). Section 87(1) expressly provides that goods imported or otherwise dealt with contrary to the provisions of the Act are liable to forfeiture

'wheresoever and in possession of whomsoever found'. In turn s 88(1)(a) provides that certain persons may detain any goods at any

place for the purpose of establishing whether they are liable to forfeiture under the Act. And Paragraph (d) of s 88(1) authorises the Commissioner, in his discretion, to seize any goods liable to forfeiture under the Act. (See *Tieber v Commissioner for Customs and Excise* [1992] ZASCA 183; 1992 (4) SA 844 (A) at 847C-D.)

[4] Clear Enterprises launched two separate applications in the North Gauteng High Court against the Commissioner, as the first respondent,

the Cross-Border Road Transport Agency (the CBRT), a juristic person established in terms of s 4(1) of the Cross-Border Road Transport Act 4 of 1998 (CBRT Act), as the second respondent and Cart Blanche Marketing CC, a South African closed corporation as the third. No relief was sought against either the second or third respondents and neither participated in the proceedings either in this court or the one below. The International Trade Administration Commission of South Africa (ITAC), a juristic person established in terms of s 7 of the International Trade Administration Act 71 of 2002 (ITA Act), sought - but was refused - leave by the high court to intervene in the matter. That notwithstanding it continues to be cited as the fourth respondent. Needless to say it took no part in the appeal.

[5] The primary relief sought by Clear Enterprises in the first application was:

'1. The detention in terms of section 88(1)(a) of the Customs and Excise Act No. 91 of 1964 of a Leyland DAF 55 Rigid Truck with chassis number L156272, engine number 21288296, and registration number and letters B955ALU ("the vehicle") on 23 April 2007 at Port Elizabeth is declared to have been unlawful.

2. Alternatively to prayer 1 above, the continued detention in terms of section 88(1)(a) of the Customs and Excise Act No. 91 of 1964 of the vehicle is declared to be unlawful.

3. The First Respondent is ordered, at its own cost, to immediately restore the vehicle into the Applicant's possession, alternatively to immediately permit the Applicant to remove the vehicle from the Westview State Warehouse, Port Elizabeth or wherever else the vehicle is presently detained by the First Respondent.'

And, that sought by it in the second was:

'1. First Respondent's seizure in terms of Section 88(1)(c) read with Section 87 of the Customs and Excise Act, 91 of 1964 (hereinafter referred to as "the Customs and Excise Act") on 23 May 2007 and at Port Elizabeth of the following vehicles (hereinafter referred to as "the vehicles") is reviewed and/or declared unlawful and set aside:-

1.1. Mercedes Benz truck with chassis number 385019251403982, engine number 35 395120 799399 and registration number and letter B 786 AKB; and

1.2. ERF truck with chassis number 68038, engine number 6BTA21085000 and registration number and letters B 540 AKU.

2. First Respondent is ordered, at its own costs, to immediately return the vehicles into Applicant's possession, alternatively to immediately permit the Applicant to remove the vehicles from the West View State Warehouse, Port Elizabeth or wherever else the vehicles are presently held by First Respondent;

3. In the event of First Respondent failing to either return and deliver the vehicles to Applicant or to enable or allow the Applicant to remove the vehicles as provided for in paragraph 2 above, the Sheriff or his lawfully deputy is duly authorised, empowered and directed to remove the vehicles from possession of First Respondent or wherever the vehicles may be found and to deliver the vehicles to the Applicant.'

[6] In each application Clear Enterprises, moreover, sought additional declaratory relief. In its amended form the orders sought

were:

'2. That the movement of a vehicle from a country within the common customs area into the Republic of South Africa (RSA) after such vehicle had been lawfully imported into such other country within the common customs area and such movement either:-

- a) being pursuant to a permit issued by the competent authority of such other country to a carrier as defined under Article 1(a) of the Memorandum of Understanding on Road Transportation in the Common Customs Area (promulgated by Proclamation 100 in Government

Gazette No 13576 on 18 October 1991 and hereinafter referred to as the "MOU"); or

- b) pursuant to an exception as provided for under Article VIII of the MOU; and
- c) inclusive of when transport is undertaken with such vehicle on a public road in the RSA involving the on and/or off loading of freight between two points within the RSA either by a foreign carrier in terms of an appropriate permit issued in terms of Section 31 of the Cross Border Road Transport Act, 4 of 1998 or without such permit by someone who is not a foreign carrier:-

2.1. does not attract import or export duties; and

2.2. is not regarded as goods imported into the Republic of South Africa as envisaged in the Customs and Excise Act, 91 of 1964, unless such vehicle is to be disposed of.

[7] Murphy J, who heard both applications, dismissed them but granted leave to Clear Enterprises to appeal to this court.

[8] For a fuller understanding of the matter and a better appreciation of the competing contentions of the parties it is necessary to record that the Republics of South Africa, Namibia and Botswana as also the Kingdoms of Lesotho and Swaziland, being members

of the Southern African Customs Union (SACU), are parties to certain SACU agreements. Two of those are relevant for present purposes. The first, which excluded Namibia, was entered into on 11 December 1969 (the 1969 SACU Agreement). It was subsequently superseded by what has been described on the record as a more sophisticated, re-negotiated agreement entered into on 21 October 2002 (the 2002 SACU Agreement). The 2002 SACU Agreement came into effect on 15 July

2004. Subsequent thereto certain additional understandings, which were to be read with and to form part of the SACU agreements, were reached amongst the government parties to the SACU agreements. On 18 October 1991 a Memorandum of Understanding (MOU) on road transportation in the common customs area was concluded between the states parties to the 1969 SACU agreement and was published as a Schedule to the Transport Deregulation Act 80 of 1988.

- [9] According to Clear Enterprises, the three trucks were imported into the Republic of Botswana. Each landed at Durban and was then transported to Botswana in bond. Being second-hand trucks, like others in its fleet, there they were repaired and refurbished before being licensed and registered in its name. Clear Enterprises asserts that its trucks enter the Republic of South Africa from time to time, which, so the assertion goes, is permissible in terms of the SACU agreements and the MOU. Moreover, according to Clear Enterprises, despite not necessarily always being required, permits in accordance with the provisions of s 31 of the CBRT Act are also obtained in respect of its trucks that enter South Africa.
- [10] According to Mr Van Loggerenberg, who deposed to the answering affidavit on behalf of the Commissioner in each matter, a certain Mr Eric Muller and Ms Michelle Airey are the controlling minds of various juristic entities including Clear Enterprises. He states that Clear Enterprises' explanation and justification for the presence of these three as well as various other trucks in the Republic of South Africa is fictional. Rather, so he asserts, the explanation advanced by Clear Enterprises is a subterfuge designed to conceal a scam devised and implemented by Mr Muller and Ms Airey to import used trucks into South Africa in breach of the provisions of both the Customs and Excise Act and International Trade Administration Act. Mr Van Loggerenberg complains that the trucks were imported into the Republic of South Africa without the provisions of those two Acts being complied with 'and for the purpose of avoiding the payment of duty and defrauding the fiscus'. He states that in terms of paragraph 1(b) of Notice Number R3, published in the Government Gazette Number 25873 of 2 January 2004, the Minister of Trade and Industry has declared that no second-hand or used goods may be imported into the Republic of South Africa except by virtue of an import permit issued in terms of s 6 of the ITA Act. ITAC, the authority responsible for the issuing of permits required in terms of s 6 of the ITA Act, has decided that no permits for the import of second-hand or used vehicles should be issued. Accordingly, so Mr Van Loggerenberg asserts, Mr Muller and Ms Airey's solution to the conundrum was to establish juristic entities such as Clear

Enterprises in other SACU member states. Each of those juristic entities was then used as a front to import used trucks into the

common customs union and then invoking the SACU Agreement and the MOU those trucks were driven into South Africa where they were used locally on a permanent basis.

[11] On 16 October 2007 all three of the trucks were seized by ITAC in terms of s 4(1)(g) of the ITA Act from an employee of the Commissioner, the Controller of Customs in Port Elizabeth. The seizure by ITAC predated the filing of replying affidavits by Clear Enterprises in the two applications. The matter was argued before Murphy J during October 2008 and judgment was handed down on 3 August

2009. And yet in all of that time neither the parties nor the court below appeared to appreciate that the controversy which occupied them may not have been an existing or live one. For, plainly, after the seizure of the vehicles by ITAC the primary relief initially sought by Clear Enterprises, namely, the return of the vehicles, had become

academic. Thus after heads of argument on the merits of the appeal had been filed, this court addressed a directive to the parties

calling for further heads and informing the parties that at the outset of the hearing of the appeal they would be required to address

argument on the preliminary question of whether the appeal and any order made thereon would within the meaning of s 21A have any

practical effect or result.

[12] Courts should and ought not to decide issues of academic interest only. That much is trite. In *Radio Pretoria v Chairman, Independent Communications Authority of South Africa* 2005 (1) SA 47 (SCA) this court expressed its concern about the proliferation of appeals that had no prospect of being heard on the merits as the order sought would have no practical effect. It referred to *Rand Water Board v Rotek Industries (Pty) Ltd* 2003

(4) SA 58 (SCA) at para 26 where the following was said:

'The present case is a good example of this Court's experience in the recent past, including unreported cases, that there is a growing misperception that there has been a relaxation or dilution of the fundamental principle . . . that Courts will not make determinations that will have no practical effect.'

[13] In the further heads of argument and affidavits filed by the parties to address the preliminary point raised we were advised that Clear Enterprises has launched an application against ITAC in the North Gauteng High Court during December 2009 in which both the Commissioner and ITAC are cited as respondents. It seeks an order that the seizure by ITAC of all three vehicles be reviewed and set aside and also for certain declaratory relief pertaining to the interpretation of inter alia the MOU as read with the relevant SACU agreements. That application has been opposed by both the Commissioner and ITAC. The parties to the present appeal have agreed

that that application should be stayed pending the outcome of this appeal. Why that course was adopted is lost on me. We are not

concerned in this appeal with the same issue as will occupy the attention of the high court in that application.

[14] The parties urged upon us that, notwithstanding the seizure of the trucks by ITAC, we should nonetheless entertain the appeal. By that they meant that although the primary relief could no longer be granted we should nonetheless proceed to consider the merits of the declaratory relief sought. Broadly stated two reasons were advanced: first, that there are a number of other pending matters and in all of them 'the questions of law to be determined therein, are to a greater or lesser extent similar (in certain instances even identical) to those to be determined in the present appeal'; and, second, should Clear Enterprises in due course succeed in the pending review application against ITAC in the high court 'same would be an empty judgment, should [this] Court not hand down a judgment in this appeal, as the seizure by [the Commissioner] would then simply remain'. The second issue should perhaps be disposed of first in order to clear the way for a consideration of the main issue in this appeal. I shall do so briefly.

[15] As to the second issue: The parties misconceive the position. The employees of the Commissioner who had possession of the three vehicles voluntarily parted with such possession on being served with a seizure notice by ITAC. The Commissioner's *ius retentionis* thus terminated with that loss of possession. If in due course the seizure by ITAC is set aside by the high court in the pending

application, possession of the vehicles shall not, without more, revert to the Commissioner. That disposes of the second issue.

[16] Turning to the first: Not all of the cases pending before the high court involve the same parties. To the extent that they concern different parties any declaratory order that issues can hardly be binding on those other parties. Moreover, each of the pending applications involves different vehicles. The fallacy in the approach of the parties is that they assume, erroneously so, that what confronts us is a discrete point of statutory construction. It is not. It is first and foremost a fact-based enquiry. Any interpretive exercise to be undertaken will be inextricably linked to the facts. And, it is trite that every case has to be decided on its own facts. That is particularly the case where, as here, the one party contends that the facts advanced by the other are a 'sham', 'fictional' and a 'stratagem' to circumvent the applicable legislation. It follows that efforts to compare or equate the facts of one case to those of another are unlikely to be of assistance. For, as we well know, parties frequently endeavour to distinguish their case on the facts from those reported decisions adverse to their cause. Moreover, absent an undisputed factual substratum, it would be extremely difficult to define the limits of the declaratory relief that should issue.

[17] Simply put, whatever issues do arise in the pending matters none of them are yet 'ripe' for adjudication by this court. To borrow from Kriegler J in *Ferreira v Levin NO & others*; *Vryenhoek v Powell NO & others* 1996 (1) SA 984 (CC) para 199:

'The essential flaw in the applicants' cases is one of timing or, as the Americans and, occasionally the Canadians call it, "ripeness". That term has a particular connotation in the constitutional jurisprudence of those countries which need not be analysed now. Suffice it to say that the doctrine of ripeness serves the useful purpose of highlighting that the business of a court is generally retrospective; it deals with situations or problems that have already ripened or crystallised, and not with prospective or hypothetical ones. Although, as Professor Sharpe points out and our Constitution acknowledges, the criteria for hearing a constitutional case are more generous than for ordinary suits, even cases for relief on constitutional grounds are not decided in the air. And the present cases seem to me, as I have tried to show in the parody above, to be pre-eminent examples of speculative cases. The time of this Court is too valuable to be frittered away on hypothetical fears of corporate skeletons being discovered.'

[18] Although expressed somewhat differently and in the different context of constitutional adjudication where 'ripeness'

has taken on a particular meaning, both the principles and policy considerations articulated by Kriegler J resonate with the jurisprudence of this court. Thus in *Coin Security Group (Pty) Ltd v SA National Union for Security Officers & others* [2000] ZASCA 137; 2001 (2) SA 872 (SCA) para 9, Plewman JA quoted with approval from the speech of Lord Bridge of Harwich in the case of *Ainsbury v Millington*

[1987] 1 All ER 929 (HL), which concluded at 930g:

'It has always been a fundamental feature of our judicial system that the Courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved'.

In a similar vein, in *Western Cape Education Department v George* 1998 (3) SA 77 (SCA) at 84E, Howie JA stated:

'Finally, it is desirable that any judgment of this Court be the product of thorough consideration of, inter alia, forensically tested argument from both sides on questions that are necessary for the decision of the case.'

And in *Radio Pretoria* (para 44), Navsa JA said:

'Courts of appeal often have to deal with congested court rolls. They do not give advice gratuitously. They decide real disputes and do not speculate or theorise (see the *Coin Security* case (supra) at paragraph [7] (875A-D)). Furthermore, statutory enactments are to be applied to or interpreted against particular facts and disputes and not in isolation.'

[19] In effect what the parties are seeking is legal advice from this court. But as Innes CJ observed in *Geldenhuis & Neethling v Beuthin* 1918 AD 426 at 441:

'After all, Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important.'

In *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC) para 21 footnote 18, the Constitutional Court echoed what the learned Chief Justice had stated over eight decades earlier when it said:

'A case is moot and therefore not justifiable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.'

The cumulative consequence of all the factors that I have alluded to is that no practical effect or result can be achieved in this case. For the foregoing reasons the appeal was struck off the roll.

[20] That leaves costs. On 7 July 2011 the Registrar of this Court directed the attention of both parties to the provisions of s 21A and enquired whether the appeal was being persisted in. Undeterred both parties filed additional heads of argument and affidavits intimating that they persisted with the appeal. That was the stance adopted before us in argument as well. Neither was an unwilling participant in the appeal. Moreover, the point which was held to be decisive of the matter was raised by the court and not one of the parties. In those circumstances it was deemed appropriate that each party be ordered to pay its own costs.

V PONNAN

JUDGE OF APPEAL

APPEARANCES:

For Appellant: I J Zidel SC

J C Uys

Instructed by:

Eugene Marais Attorneys

Bryanston

Symington & De Kok

Bloemfontein

For 1st Respondent: J A Meyer SC

L G Kilmartin

The State Attorney

Pretoria

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