IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) **REPORTABLE: YES / NO**
(2) **OF INTEREST TO OTHER JUDGES: YES / NO**
(3) **REVISED**

2016.06.10 M Mabuse

DATE **SIGNATURE**

CASE NUMBER: 18632/12, 36127/15

DATE: 10 June 2016

ANNIQUE HEALTH AND BEAUTY (PTY) LTD Applicant

V

COMMISSIONER OF SOUTH AFRICAN REVENUE SERVICES Respondent

JUDGMENT

MABUSE J:

[1] This matter conflates two related applications launched by the applicant against the Commissioner of the South African Revenue Services, the respondent. The first of these two applications was instituted in terms of the provisions of the Customs and

Excise Act No. 91 of 1964 (the Act) and its purpose was to challenge certain decisions taken by the respondent to raise *ad valorem* excise duties. For purposes of brevity, I will refer to this application as the first application. The purpose of the other application, launched under case number 36127/15 and which I will refer to as the second application, was to demand from the respondent repayment of a sum of R500,000.00 which the applicant had paid to respondent in accordance with the respondent's policy of *'pay-now-and-argue later'* in the first application and which amount the respondent did not pay back when or after it had retracted the decisions that the applicant was challenging in the first application.

[2] The first application was launched on 2 April 2012 while the second application was launched on 21 May 2015. Strictly speaking these two applications do not deal with identical issues but deal with substantially related issues in as much as the issues in the second application are rooted in the first application.

[3] The Court was required to decide two issues in these two matters. Those issues were firstly, who should be liable for the costs of the consolidated applications and secondly, from which date should interest in respect of the amount of R500,000.00 be payable. Alongside these two applications there was another application in which the respondent applied for condonation for the late filing and delivery of his heads of argument. This application was quickly dealt with by the parties when Mr Puckrin, counsel for the applicant, told the court that he was not going to stand in the way of Mr Vorster's argument. Without much ado the application is hereby granted. Mr

Puckrin also brought an application for the consolidation of the two applications. There was another application by the respondent to strike out paragraphs 8 and 17 of the applicant's replying affidavit in the condonation application. I do not deem it necessary to be detained by the said application as the decision I have arrived at did not take the said paragraphs into account.

THE FIRST APPLICATION

[4] By an amended notice of motion issued by the registrar of this Court the applicant seeks in this first matter an order in terms of which the respondent was ordered to pay the applicant's costs of the first application including costs consequent upon the employment of two counsel. The applicant is a company with limited liability registered as such in terms of the company statutes of this country and conducts business of manufacture in this country of certain cosmetic products which are excisable in terms of part 2 of section B of Schedule 1 of the provisions of the Act. The respondent is an organ of State charged with the administration of the provisions of the Act including the interpretation of the Schedules to the Act.

[5] On 17 January 2006 and 9 January 2007 the respondent conducted inspections at the premises of the applicant's predecessors, Forever Young. Such inspections were followed by audits during which the respondent requested the records of all of Forever Youngs' sales made in the period commencing on 1 January 2004 to 31 December 2005. Alleging that Forever Young had underpaid the *ad valorem* excise duty and furthermore that there appeared to be a contravention of s. 69 of the Act,

read with Rule 69.01, in a letter dated 19 January 2007, the respondent issued a notice of intention to raise a debt. It was stated furthermore in the said letter that from a schedule that had been attached to the said notice, there was excise duty shortfall in the sum of R1, 299, 714.78. With interest and penalty imposed in terms of s. 91 of the Act, the total amount payable came up to R1, 897, 583.48. Forever Young was requested to make submissions to the respondent why the amount so assessed should not be payable. It is contended by the applicant that the respondent had not, in the said notice, furnished Forever Young with any reasons why it had alleged that there had been a contravention of the provisions of the Act nor how the respondent had come to the conclusion that there had been an excise duty under payment.

[6] On 11 July 2007, Forever Young received a second notice of intention to raise a debt. The second notice of intent was for the audit period 1 July 2006 to 31 December 2006. The amount considered to have been underpaid by Forever Young by the respondent was the sum of R734, 498.00 and, including interest and penalty, the total assessment was R995, 247.00. No reasons were furnished for the misconduct nor for the conclusions arrived at by the respondent. Accordingly the total assessment in respect of the two notices of intent was R2, 892, 830.48. The respondent eventually furnished its reasons during the exchange of correspondence between the Forever Young's attorneys and the respondent's attorneys and that was done in particular on 30 July 2008.

[7] In a letter dated 22 September 2008 the respondent confirmed the amount set out in the two aforementioned notices of intent to raise the debt and stated that the duty should be brought to account. In the said letter the respondent furnished the following reasons:

"A 25% discount was granted to their clients which are NOT ALLOWED in terms of section 69.

In terms of Rule 69.01(a)(i)(c) which was published on 06 September 2006 in the Government Gazette NO. 23801 the 55% is the only discount granted by the Commissioner.

Your client however did not adhere to these in that they went further and gave their customers an extra 25% thus claiming more than 55% from the Commissioner. The ad valorem excise duty must be calculated on the selling price and the 25% discount granted to you're their client should not be considered when calculating ad valorem excise duty.

Rule 69.01 provides as follows:

> *(b) that all particulars in respect of any discount, credit or any other information which relates to the invoiced price of the goods reflected on such invoice shall be fully and completely set out on such invoice which invoice shall indicate the full and final price of such goods.*

Therefore your client did not adhere to the provisions of Rule 69.01 of the Customs and Excise Act.

The inspection was then followed by an Audit of your client's books on 07 June 2006 whereby we audited your client's books from a period of 01 January 2004 to 31 December 2005.

AUDIT RESULTS WERE AS FOLLOWS

The audit which was conducted for the period 01 January 2004 to 31 December 2005 resulted in an underpayment amounting to R1, 897, 583.00.

EXPLANATION

The underpayment identified during audit was due to the 25% deduction which was granted to your client's customers.

The audit which was conducted for the period 01 January 2006 to 31 December 2006 resulted in an underpayment amounting to R995, 247.00

EXPLANATION

The underpayment of R995, 247.00 was identified by the very same operation which took place in the above explanation."

[8] Eventually undercover of a letter dated 20 May 2009, the respondent furnished the schedules reflecting the calculations that had led to the amounts which the respondent considered as underpayments. In the same letter dated 20 May 2009 the respondent pointed out that the final letter of demand would follow shortly thereafter.

[9] On 7 July 2010 following the submissions that the applicant's attorneys had made, the respondent directed a letter to the applicant's attorneys. The letter stated, among others, that:

"This office is convinced that after due consideration of your representation, Rule 69.01(a)(i) of the Customs and Excise Act 91 of 1964 has been contravened in that deductions (commissions) amounting to 25% from the invoice price was granted to Forever Young's agents (clients) which in terms of Rule 69.01 is not allowed."

A demand was made in the said letter that the total due must be brought to account on/or before 30 July 2010 at the office of the Controller, on failure of which the matter would be referred to the respondent's debt collectors for further attention.

[10] On 2 September 2010, in anticipation of challenging the respondent's determinations and the consequent debt by following internal administrative appeal and in accordance with the policy of the respondent of "pay-now-argue-later", the applicant paid a sum of R500, 000.00 to the respondent.

[11] On 14 September 2010 the applicant noted an internal appeal against the decisions of the respondent. In a letter by the respondent dated the 4 May 2011, the applicant was informed that its appeal against the decisions of the respondent were unsuccessful. The applicant was invited to submit to the respondent a fully completed DA52 and any necessary annexure within 30 days from the date of the said letter for the matter to be taken through the Alternative Dispute Resolution (ADR) in terms of s 77 of the Act.

[12] On 14 October 2011 the applicant has served the respondent with a notice in terms of s 96(1)(a) of the Act of its intention to institute legal proceedings. On 14

December 2011, the applicant augmented its ground of appeal. On 2 April 2012 the applicant launched its first application. In the original notice of motion, the applicant sought certain declaratory and compelling orders. The papers are not clear as to the date on which the amended notice of motion was served. What is clear though is that it was ready by the 31 March 2012 to be served. I am prepared to accept that the amended notice of motion was part of the papers served on the respondent. On 26 April 2012 the respondent delivered its notice of intention to oppose the first application. On 6 July 2012 the respondent withdrew his determinations and his letter of demand. The effect of such a withdrawal was that the determinations made by the respondent and the debt that constituted the target of the applicant's appeal fell away. The reason for proceeding with the appeal disintegrated with the respondent's withdrawal of his determinations and letter of demand.

[13] On 13 July 2012 the respondent delivered its answering affidavit which, according to the respondent, raised only technical issues. In the said answering affidavit, deposed to by one Marlese Booysen (Booysen), a post clearance inspector in the respondent's office, submitted that the issues relating to the relief sought by the applicant in prayers 1, 2 and 3 of the notice of motion, had become academic by reason of the fact that the relevant letters of assessment (demands) and the value determination upon which they were based were withdrawn on 6 July 2012. In the last paragraph of the said answering affidavit the said Booysen stated that:

"As far as the costs are concerned, the respondent tenders the cost of this application up to and including the date of "Annexure F", being 6 July 2012. Any further cost which may be incurred thereafter ought to be borne by the applicant."

For record purposes Annexure **"F"** was a letter dated 6 July 2012 written by the respondent to the applicant's attorneys of record. It reads as follows:

"In order to address the representations made by you in the notice delivered in terms of the provisions of section 96 of the Customs and Excise Act, No. 91 of 1964 ("the Customs Act") as well as to investigate and provide you with an opportunity to address certain additional facts which came to light in Notice of Motion read with the affidavits deposed to by Ernest Jacques Du Toit and Renette Josling filed in case number 18632/12, I hereby withdraw my letters of assessment (demands) dated 22 September 2008, 7 October 2008, and 7 July 2010 in terms of the provisions of section 3(2) of the Customs Act.

Yours sincerely

Commissioner of South African Revenue Services"

[14] Despite the fact that he had withdrawn the value determination and the debt, the respondent still refused or neglected or failed to refund the amount of R500,000.00 that the applicant had paid in terms of the respondent's "pay-now-argue-later" policy. Still the respondent gave no reasons why he failed or neglected or refused to refund the said amount within a reasonable time after 6 July 2012. To exacerbate matters, the respondent failed to pay any interest on the said amount. It is the applicant's case that it was the respondent's refusal to refund the said amount of R500, 000.00

that led to the launch of the proceedings in the second application. The applicant states that the respondent waited until the applicant had brought the second application before tendering payment of the refund. The respondent refunded the said sum on 23 September 2015 according to the applicant's version or on 25 September 2015, according to the respondent's version but still failed to pay interest on the said amount.

THE SECOND APPLICATION

[15] In the second application, the applicant sought the following order against the respondent:

"1. Directing the respondent to pay the amount of R500, 000.00 which the applicant paid to the respondent under protest on 10 September 2010, together with interest thereon, at the prescribed rate of interest, from 6 July 2012 to date of payment;

2. Declaring that the applicant has fully discharged its liability to the respondent in the respect of ad valorem excise duties for the period 1 January 2014 to 31 December 2016; and

3. That the applicant be ordered to pay the cost of this application, including the cost of two counsel; and

4. Further and alternative relief."

[16] The applicant contends that as the result of the withdrawal of the letters of demand and the determination, referring to the first application, the relief sought in the

pending litigation has essentially become academic and the payment of R500, 000.00 which was made on 2 September 2010 by the applicant to the respondent was made *sine causa* and falls to be repaid by the respondent to the applicant. Ever since the withdrawal of the letters of demand on 6 July 2012 and despite further considerations of documents by the respondents no additional letters of demand or determination have been made by the respondent.

[17] The withdrawal of the letters of demand occurred on 6 July 2012, three months after the founding affidavit in the pending litigation was served and 5 days before the applicant's application was due to be heard in the unopposed motion court. The consequence of the respondent's withdrawal of the letters of demand are, among others, that the sum of R500, 000.00 which was demanded by the respondent on the strength of the decision contained in the letter of demand and paid by the applicant on 2 September 2010 under protest was not due to the respondent and stands to be refunded to the respondent. The applicant submits on that basis that the R500, 000.00 should be repaid to it by the respondent as there is no legal justification for its retention by the respondent.

[18] While Mr. Puckrin, counsel for the applicant, submitted that the two applications should be consolidated, as one application and that an order of costs be made accordingly, Mr. Vorster, counsel for the respondent, on the other hand, submitted though that the two applications should be kept apart and an order in each one of them be made by this Court. He argued that keeping the matters apart will make the

matters easy for the taxing master. While the Court will accept Mr. Puckrin's application for the consolidation of the two matters which was merely an ad-hoc solution for the purposes of hearing the matters, the Court will accept Mr. Vorster's proposition that separate orders be made in respect of each of the matters as a plausible solution for purposes of taxation.

[19] Now, as a starting point, the respondent has conceded that he is obliged to pay the applicant's costs of the two applications and interest on the said amount of R500,000.00. This, however, is a qualified concession in respect of both the costs of the two applications and interest on the said amount. With regard to the costs that relate to the first application, the respondent is prepared to pay such costs of the applicant's costs only up to and including 6 July 2012, despite the fact that he filed a document called an answering affidavit with numerous annexures after 6 July 2012; that costs incurred by either party after 6 July 2012 should be borne by the applicant and that such costs should include the costs of two counsel. The respondent proposition to pay the costs of the first application only up to 6 July 2012 is, in my view, not a plausible one. The respondent, as I indicated earlier, delivered an answering affidavit after 6 July 2012 despite the fact that he withdrew his determinations and a letter of demand on 6 July 2012. Surely it is only proper that he carries, among others, the costs of the said answering affidavit. It is of supreme importance to point out that the applicant did not deliver any further papers after the delivery of the answering affidavit. An appropriate, in my view, is that the respondent should bear the costs of the first application.

[20] With regards to the second matter the respondent is prepared to pay interest on the amount of R500,000.00 at the rate of 9.5% per annum reckoned from 26 May 2015, which is the date on which a copy of the second application was served on him and 25 September 2015 which is the date on which it is contended by the respondent that the amount of R500,000.00 was refunded to the applicant; the respondent is prepared to pay the costs of the second application up to and including 17 July 2015 and that the costs occasioned to the respondent by the prosecution of the application by the applicant after 17 July 2015 should be paid by the applicant and that such cost should include the cost consequent upon the employment of two counsel.

[21] On the two issues raised in paragraph 3 supra, the applicant's view is that the Court should grant an order in terms of which the two applications are consolidated; that the respondent is directed to pay interest at the legal rate of interest in the said sum of R500, 000.00 from 2 September 2010 to date of refund which is 23 September 2015; that the respondent should pay interest on the unpaid interest calculated from 24 September 2015 to date of payment. On the question of cost the applicant's position is that the respondent should carry the legal cost incurred by the applicant in respect of both motion proceedings including the cost of two counsel.

[22] The applicant does not accept the concession made by the respondent in which the respondent accepted liability for the cost incurred by the applicant between 26 May

2015 to 6 July 2015 and from 26 May 2015 to 25 September 2015. Clearly the applicant does not accept the period over which interest is calculated by the respondent. Mr. Puckrin relied on the provisions of s 1(1) of the Prescribed Rate of Interest Act 55 of 1975 ("the PRI Act"). The said s 1(1) provides as follows:

"If a debt bears interest at the rate at which the interest is to be calculated is not governed by any other law or by an agreement or a trade custom or in any other manner, such interest shall be calculated at the rate contemplated in (2)(a) as at the time when such interest begins to run unless a court of law, on the ground of special circumstances relating to that debt, orders otherwise.

(2)(a) For the purposes of subsection (1), the rate of interest is the repurchase rate as determined from time to time by a South African Reserve Bank, plus 3.5% per annum."

[23] Furthermore he relied on the case of **Lodhi 5 Properties Investments CC and Others vs Firstrand Bank Limited (2015) 3 ALL SA 32 (SCA) at paragraph 23** where the Court had the following to say:

"On the question of interest it seems to me that the appellant's argument misconceives the nature of the interest sought here – that it was not based on the enforcement of a contractual and undertaking but rather on Lodhi 5's default. It is trite that a party which has been deprived of the use of its capital for a period time has suffered a loss which, in the normal cause of events, will be compensated by an award of mora interest. The term 'mora' simply means delay or default; interest a tempore morae constitutes the damages that flow naturally (without the need to

place the debtor in mora) from the contract itself by reason of a debtor having failed to perform a contractual obligation within the agreed time."

[24] Finally Mr. Puckrin placed reliance on **Crooks Brothers Limited vs Regional Land Claims Commissioner for the province of Mpumalanga and Others (2013) 2 ALL SA 1 (SCA)** in particular the following passage and submitted that the said case made a distinction between two types of *mora* interest and *mora ex rae*:

"When the contract fixes the time for performance, mora (mora ex re) arises from the contract itself and no demand (interpellatio) is necessary to place the debtor in mora. In contrast, where the contract does not contain an express or tacit stipulation in regard to the date when performance is due, a demand (interpellatio) becomes necessary to put the debtor in mora. This is referred to as mora ex persona ... the purpose of mora interest is, therefore, to place the creditor in the position that he or she would have been in had the debtor performed in terms of the undertaking. Here a demand (interpellatio) was necessary to place the respondents in mora."

[25] Quite clearly what the above passage mean is that there are two different scenarios referred to in the passage. The first scenario is where a contract stipulates the time for performance and the second scenario is where the contract does not fix performance time. Where a party is required to perform on an agreed date by the terms of the contract such a party is automatically in *mora* if he fails to do so. In this scenario, interest would become due and payable immediately when the party that is

obliged to pay fails to pay and becomes in *mora*. This first scenario takes place where time in a contract is of essence.

[26] The passages above fully explain the second scenario. Where the contract contains no express or tacit stipulation with regard to the time of performance, a demand becomes necessary to put the debtor in *mora*. This principle applies in all instances even where there no contract is involved. In order to put a party that has to perform in *mora*, it is necessary that a demand in one way or the other be made. Where there is no contract, like the instant case, it is important that a demand to perform be made by the party in order to put the other party in *mora*. This is the approach adopted by Mr. Vorster, counsel for the respondent. This seems to be the law in this country. First of all it is clear that the case of **Crooks Brothers vs Regional Land Claims** ***supra*** demonstrates that point. In my view, on 6 July 2012, when the respondent abandoned its assessment the respondent became the debtor in respect of the sum of R500,000.00 while at the same time the applicant became its creditor. The respondent became obliged to refund the same amount but unfortunately no time for such refund was fixed. It is a requirement of *mora* that the debtor, in this case the respondent, should have failed to refund the money timeously. The mere fact that the sum of R500, 000.00 was due by the respondent to the applicant, did not necessarily mean that the respondent was in *mora* for failing to refund the said sum between 6 July 2012 and 25 May 2015. Timeous performance presupposes certainty as the time for performance. Accordingly the respondent could only fall into

mora when a definite time for performance had been fixed by the applicant making a demand. If the debtor could not have known when to perform there is no *mora*.

[27] The case of **CIR v First National Industrial Bank Limited 1990(3) SA 641 AD** on which Mr Vorster relied in support of his argument best illustrates that *mora* interest would only start to run when payment was duly demanded when it it had the following to say at page 654E-F:

"Leaving aside other perhaps contentious aspects of that judgment (cf De Vos 1968 THRHR 111), one principle it does reaffirm is that mora in respect of a liquidated money debt would run from the date when payment was duly demanded (f 285D-G, 287B)."

[28] Mr. Puckrin argued that demand for payment of money was made by a compromise or by an appeal lodged by the applicant against the decisions of the respondent in terms of s 96 of the Act. For two reasons there is no merit in this argument. The first is that compromise, as Mr. Puckrin argued, did not contain a demand for the refund of the said amount nor did it result in an agreement between the parties for the refund of the said amount. The second reason is that the noting of an appeal in terms of s 96(1) of the Act did not constitute a demand for payment of the required money. I am prepared to accept that the only valid demand to the respondent to refund the money was the second application. A copy of the said application served by the sheriff on the respondent on 26 May 2015 constituted, in my view, a valid demand by the applicant to the respondent for the refund of the aforementioned

amount. The demand for refund for the sum of R500, 000.00 is contained in the first prayer of the relevant notice of motion. The respondent only came into *mora* on 26 May 2015 which is the date on which a copy of the second application was served on him and continued to be in *mora* up to 23 or 25 September 2015, which was a date on which the said amount was repaid by the respondent to the applicant.

[29] Consequently I am of the view that no interest was recoverable by the applicant from the respondent before refund of the said amount of R500, 000.00 was demanded by the applicant from the respondent.

Accordingly the following order is made:

In respect of case number 18632/12:

1. The respondent is hereby ordered to pay the costs of the application which costs shall include the costs consequent upon the employment of two counsel.

In respect of case number 36127/2015

1. The respondent is hereby ordered to pay interest on the amount of R500, 000.00 at the legal rate from 26 May 2015 to 23 September 2015.
2. The respondent is hereby ordered to pay the costs of this application up to 17 July 2015. Such costs shall include the costs consequent upon the employment of two counsel.
3. The costs occasioned to the respondent by the prosecution of the application by the applicant after 17 July 2015 are to be paid by the applicant, such costs to include the cost of two counsel where so employed.

P.M. MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicant:	*Adv. C Puckrin (SC)*
	Adv. N. Nxumalo
Instructed by:	*Werksmans Attorneys*
Counsel for the respondent:	*Adv. JP Vorster (SC)*
	Adv. L Sigogo
Instructed by:	*The State Attorney*
Date Heard:	*6 June 2016*
Date of Judgment:	*10 June 2016*