IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 3516/2018
Case Number: 10890/2017

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

E.M. KUBUSHI **DATE: 24-08- 2021**

In the matter between:

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Applicant

and

KEPU TRADING (PTY) LTD Respondent

JUDGMENT

KUBUSHI J

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 24 August 2021.

INTRODUCTION

[1] This is an opposed Consolidation Application instituted by the applicant, the South African Revenue Services, in terms of Rule 11 of the Uniform Rules of Court for the consolidation of two applications brought by the respondent Kepu Trading (Pty) Ltd, under case numbers 10890/17 and 3516/18, respectively.

[2] The application under case number 10890/17 is referred to as the "Retrospective Licensing Application"; and the application under case number 3516/18 is referred to as the "Direct Export Application". Both applications are collectively referred to in this judgment as "the two applications".

[3] The two applications have been instituted in terms of the provisions of the Customs and Excise Act 61 of 1964 (the "Customs Act").

[4] In the Retrospective Licensing Application, the respondent seeks an order declaring that it is entitled to a refund of the excise duty and fuel levy paid by it before it was licensed as a distributor of fuel in terms of the Customs Act and a further declarator for exemption for the said period.

[5] Whereas in the Direct Export Application, the respondent is claiming relief for a declaratory order that it is entitled to a refund of the excise duty and fuel levy it paid and a further declaratory order that the fuel to which the refund claim pertains was exported wholly and directly.

[6] The parties are in agreement that the Consolidation Application should be decided through a virtual oral hearing, conducted "live" on the appropriate

video-conferencing platform, as provided for in this Division's Consolidated Directives re Court Operations during the National State of Disaster issued by the Judge President on 18 September 2020.

FACTUAL MATRIX

[7] The relevant factual matrix set out hereunder is common cause between the parties and has been gleaned from the Joint Practice Note filed on behalf of the applicant and the respondent.

[8] In terms of the Customs Act the purchase and/or removal of fuel which has been or is deemed to have been entered for payment of excise duty and fuel levy, from the stocks of a licensee of a customs and excise manufacturing warehouse, attracts the payment of levies and excise duty referred to as duty as source ("DAS"). Payment of the said DAS is refundable if the purchased and/or removed fuel is subsequently duly delivered from the Republic for consumption to a purchaser in any other country of the common customs area or exported (including supplies as stores for foreign ongoing ships).

[9] In accordance with the provisions of the Customs Act, only a licensee of a custom and excise warehouse or a person licensed in terms of section 64 (F) read with section 60 of the Customs Act as a distributor of fuel ("LDF"), is entitled to the refund of DAS.

[10] The respondent was licensed by the applicant as an LDF on 16 March 2016 (the "licensing date"). Ordinarily, as an LDF, the respondent would have

been entitled to the refund of the DAS it paid for any fuel it purchased for consumption to any other country of the common customs area or that it exported including for any fuel it supplied as stores for foreign ongoing ships.

[11] However, the respondent commenced operating as an LDF before it was duly licensed by the applicant. Between the period 26 September 2015 to 16 March 2016 the respondent, without the requisite licence, purchased and obtained fourteen (14) consignments of fuel from Chevron South Africa (Pty) Ltd ("Chevron"), a duly licenced customs and excise manufacturing warehouse. The respondent, as expected, paid DAS on the said fuel, and delivered the requisite volumes of the fuel to ocean-going vessels.

[12] And again, between 11 February 2016 to 13 May 2016, the respondent purchased and obtained fuel from Chevron and paid the requisite DAS. Of this fuel, some volumes were purchased before the licensing date (that is, between 11 February 2016 and 16 March 2016), whereas the other volumes were purchased after the licensing date (that is, between 16 March 2016 and 13 May 2016). The volumes of this purchased fuel were delivered to ocean-going vessels between 18 March 2016 to 15 July 2016, which is a period falling after the licensing date.

[13] On 24 March 2016 the respondent requested the applicant to exercise its discretion in terms of section 75 (10) of the Customs Act to grant it the licence with retrospective effect from 26 September 2015, in order to cover the

fuel that the respondent purchased from Chevron and supplied to ocean going vessels before the licensing date.

[14] The applicant considered the application for retrospective licensing on 6 April 2016, and on the same day, informed the respondent that its application has been considered and denied. The respondent was informed that the effective date of licensing will remain 16 March 2016.

[15] On 20 May 2016 the respondent lodged an internal appeal against the applicant's decision not to change the licensing date from 16 March 2016 to 26 September 2015. And on 5 August 2016, the applicant handed down the appeal decision and refused: (a) to exempt the respondent, with retrospective effect, from having to be an LDF at the relevant times; and (b) to allow for the issue of a certificate or permit authorising a DAS refund to the respondent, notwithstanding its failure to be licensed as an LDF at the relevant time (the "Retrospective Licensing Appeal Decision").

[16] This resulted in the respondent launching the Retrospective Licensing Application under case number 10890/17, on 15 February 2017. In the said application the respondent seeks the following relief:

(a) A declaratory order that:

(i) the respondent is entitled to a DAS refund (upon the due submission of the relevant DAS refund applications) in terms of section 64F (2) (a) of the Customs Act read with

Rule 19A of the Rules promulgated in terms of the Customs Act;

(ii) the applicant is obliged, under section 75 (10) (a) and (b) of the Customs Act to retrospectively exempt the respondent from the requirement of having to be an LDF at the relevant time;

(iii) the applicant is obliged, in terms of section 75 (14B) (a) of the Customs Act to issue a certificate or permit authorising a DAS refund to the applicant, notwithstanding its failure to be licensed as an LDF at the relevant time; and

(iv) the review and setting aside of the Retrospective Licensing Initial and Appeal Decisions.

[17] Meanwhile, between 15 April 2016 and 17 May 2016 the respondent had submitted DAS refund claims to the applicant in respect of the DAS paid for the fuel purchased during the period 17 March 2016 to 14 May 2016 and exported during 18 March 2016 to 15 July 2016.

[18] On 31 October 2016 the applicant notified the respondent of its refusal of the DAS refund claims. The respondent appealed the decision and on 26 July 2017 the applicant disallowed the appeal

[19] Consequently, the respondent launched the Direct Export Application under case number 3516/18, on 22 January 2018, seeking the following relief:

(a) a declaratory order that it is entitled to a refund in terms of section 64F (2) (a) of the Custom Act read with Rule 19A of the Customs Act;

(b) a declaratory order that the fuel to which the refund claim pertains was exported wholly and directly; and

(c) an order reviewing and setting aside the Direct Export Application Initial and Appeal decisions.

[20] Pleadings in the two applications have closed and the parties have filed their respective Heads of Argument, in each application. The two applications are, therefore, now ripe for hearing.

[21] On 17 December 2020 the applicant brought an application for the consolidation of the Retrospective Licensing Application and Direct Export Application ("the Consolidation Application"), which the respondent is opposing.

THE APPLICANT'S ARGUMENT

[22] The submission by the applicant is that the two applications should be consolidated because the issues in the two applications pertain primarily to the interpretation of the provisions of section 64F (2) of the Customs Act. The contention is that if the two applications are heard separately by different courts, there is a real risk of contradictory judgments on the interpretation and application of the said section, being granted.

[23] By consolidating the two applications, the contention is that one court will be placed in a position to consider and rule on the interpretation of the relevant provisions of the Customs Act, which will eliminate the risk of different courts coming to different conclusions on the correct interpretation of the relevant provisions.

[24] A further submission is that the consolidation of these applications will assist in getting both matters enrolled and finalised expeditiously, thus, saving time, money and state resources.

THE RESPONDENT'S ARGUMENT

[25] The respondent in opposing the Consolidation Application, contends that the two applications are different, complex and contain detailed matters which involve distinctly different issues, and which fall to be determined on their own facts and with regard to different provisions of the Customs Act.

[26] According to the respondent, a consolidation of the two applications will not advance the interests of convenience, will result in significant prejudice to the respondent and is against the interests of justice, because it will inevitably result in the obfuscation of and distraction from the distinct key issues arising in each of the two applications.

[27] The respondent, submits, further that the argument by the applicants that the two applications raise the same issues of statutory interpretation or application, such as would give rise to the spectre of two courts in the same division reaching conflicting decisions, is without merit. The respondent

concedes that the legislation to which the two applications pertains does include section 64F of the Customs Act. The respondent, nevertheless, denies that section 60 of the Customs Act is an issue in the two applications and argues that even though each application involves the entitlement of a refund of DAS, this, however, according to the respondent, is only peripherally true of the Retrospective Licensing Application, where there has not yet been an application for a refund.

LEGISLATIVE FRAMEWORK

[28] Rule 11 of the Uniform Rules of Court provides for the consolidation of separate actions where "*it appears to the court convenient to do so*".

[29] The author, *Erasmus,*[1] provides the following exposition to the phrase "*it appears to the court convenient to do so*',[2] which I find apposite in the circumstances of the matter before me:

> "The paramount test in regard to consolidation of actions is convenience. It has been held[3] that the word 'convenient' connotes not only facility or expedience or ease, but appropriateness in the sense that procedure would be convenient if, in all the circumstances of the case, it appears to be fitting and fair to the parties concerned. The overriding consideration is that of convenience of the parties, of witnesses and last but not least, of the court.[4]

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[1] Erasmus: Superior Court Practice Vol 2 page D1-133.
[2] As appears in Uniform Rule 11.
[3] Qwelane v Minister of Justice and Constitutional Development 2015 (2) SA 493 (GJ) at 497D-F.
[4] Rail Commuters' Action Group v Transnet Ltd 2006 (6) SA 68 (C) at 68B.

> Convenience of actions will in general be ordered in order to avoid multiplicity of actions and attendant costs.[5] In *Nel v Silicon Smelters (Edms) Bpk*, convenience was found, *inter alia*, in the fact that (i) the consolidated prosecution of the case would reduce costs and expedite the proceedings; (ii) there would be one finding concerning a factual dispute involving a number of parties and (iii) the plaintiffs various claims arising from the same cause of action would be heard in one action."

[30] The court in *Silicon Smelters,* went further *to* explain the purpose of consolidation as mainly for the court to determine issues which are the same in one matter in order to avoid the multiplicity of hearings on the same issue.[6] Thus, the requirement for consolidation, as in *Silicon Smelters*, is a demonstration of substantial similarity of issues.

DISCUSSION

[31] It is common cause between the parties that; the determinative issues of a consolidation application are those relating to convenience and prejudice. The parties are agreed that the two applications both involve aspects of section 64F of the Customs Act, which contains the definition of an LDF for customs purposes and the entitlement of a licensed distributor to a refund of DAS paid on the purchase of fuel when this fuel is duly delivered and exported.

[32] There is no dispute between the parties that in respect of the Retrospective Licensing Application the applicant's powers and duties in relation to DAS refunds relates to where the respondent failed to hold a licence,

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[5] 1981 (4) SA 792 (A) at 801D and 802B.
[6] At p802B – C.

as an LDF, at the time of the transactions underlying that Application; and that the transactions relevant to the Retrospective Licensing Application fell prior to the respondent's date of licensing as an LDF; and, further, that the DAS refund claims relevant to the Retrospective Licensing Application have not yet been lodged.

[33] As far as the Direct Export Application, is concerned, the parties are common cause that the relevant transactions relate to fuel sold by the respondent, as an LDF, after the Licensing Date; and, that the relief sought in the Direct Export Application relates to the applicant's refusal of the respondent's Direct Export Application DAS Refund Claims (submitted in respect of the DAS paid on the transactions underlying that Application).

[34] In that sense, I am in agreement with the respondent's argument that it would not be convenient to have the two applications consolidated. In light of the decision in *Silicone Smelters*, it not convenience alone as explained in the *New Zealand* case and as explained by *Erasmus*, that is the deciding factor. In addition to convenience, the circumstances of the case must be such that primarily the issues, emanating from similar facts, are the same. Logically, it would not be convenient to have two separate matters, without similar issues, to be heard together.

[35] It is evident that the two applications pertain to significantly different legal issues and arise from materially different facts.

[36] The relief sought in the Retrospective Licensing Application is premised on particular aspects of section 64F read with either section 75 (10) (a) and (b), or with section 75 (14B) (a) of the Customs Act, which permit or require the exemption of the respondent from having been a licensed distributor during the relevant period for the purposes of being entitled to a DAS refund in due course (provided there is proper submission of the relevant DAS refund applications).

[37] The relief sought in the Retrospective Licensing Application is preliminary to the Applicant's submission of the relevant DAS refund applications. The relief sought in the Retrospective Licensing is so that the respondent can, in due course, submit and claim a refund of the DAS it has paid in terms of section 64F (2) of the Customs Act. It is only after the respondent succeeds in obtaining confirmation that its failure to hold a licence during the time of the relevant export transactions is not fatal to a claim for a DAS refund, and there remains an obligation and/or the capacity for the applicant to repay the duty with which it was unjustifiably enriched, that the relevant underlying DAS refund applications would become pertinent.

[38] As such, the relief sought in the Retrospective Licensing Application is in respect of particular aspects of sections 75 and 64F of the Customs Act and does not relate to any general interpretation of sections 60 (1) or 64F of the Customs Act. Sections 75 (10) and 75 (14B) are the ones that are central in this application, and do not arise at all in the Direct Export Application.

[39] In contrast, the relief sought in the Direct Export Application relates directly to the applicant's assessment of and decisions to refuse the submitted DAS refund claims, that is, those claims which the respondent has already submitted for a refund of the DAS it has paid in terms of section 64F (2) of the Customs Act in respect of fuel exported after the licensing date.

[40] The grounds on which the applicant has refused the submitted DAS refund claims are fundamentally concerned with the respondent's alleged failure to wholly and directly and/or duly export the relevant fuel, and to prove that 'actual physical export' occurred. As such, the issue sought to be determined here is whether the relevant fuel had been wholly and directly and/or duly exported as against whether the said DAS falls within the definition of section 64F of the Customs Act.

[41] The respondent is correct, to the extent that the purchase date of the fuel could be an issue in the Direct Export Application, it can only relate to a portion of the total DAS payment in dispute, and cannot be a primary issue as regards the purchase date of the exported fuel, which is the bulk of the transactions subject to the Direct Export Application.

[42] Moreover, the purchase date of the fuel was never one of the grounds on which the applicant rejected the submitted DAS refund claims. It is, therefore, irrelevant to the review of the underlying decisions in this Application.

[43] The Direct Export Application, as correctly argued by the respondent, does not involve licensing *per se*. Instead, it relates to what is required for due delivery or export of fuel by a licensed distributor.

CONCLUSION

[44] Once I have determined that the two applications deal with substantially separate issues, then it is not convenient to consolidate, due to the fact that there is actually no situation of a multiplicity of actions. The question of prejudice falls off as well.

COSTS

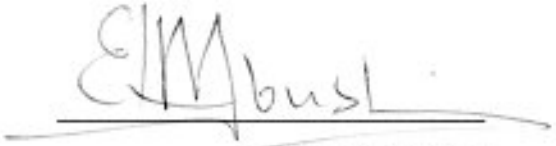
[45] It is trite that costs in matters of this nature follow the successful party. The parties have each sought a cost order inclusive of the cost of two counsel in the event of either of them succeeding. The respondent as the successful party is consequently entitled to be awarded costs which costs ought to be inclusive of costs of two counsel.

ORDER

[46] In the circumstances the following order is granted:

1. The Application for Consolidation is dismissed.

2. The applicant is ordered to pay the costs of the application including the costs of two counsel.



E.M KUBUSHI

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearance:

Applicant's Counsel	: **ADV A MEYER SC**
	ADV K MAGANO
Applicant's Attorneys	: **GILDENHUYS MALATJI**
Respondent's Counsel	: **ADV M JANISCH SC**
	ADV A PIENAAR
Respondent's Attorneys	: **WEBBER WENTZEL**
Date of hearing	: **09 June 2021**
Date of judgment	: **24 August 2021**