



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 35255/2018

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
<i>12.12.2021</i>	
DATE	<i>[Signature]</i>
	SIGNATURE

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICE

APPLICANT

And

SAMSUNG ELECTRONICS SOUTH AFRICAN
(PTY) LTD

RESPONDENT

JUDGMENT

Raulinga J

1. In this application, the Commissioner seeks, prior to him having filed an answering affidavit, discovery of documents relating to products to the tariff dispute between the parties. In essence, the Commissioner seeks an order in terms of which Samsung is directed to provide SARS with the documentation identified in prayer 2 of the (amended) Notice of Motion.
2. The applicant in this application is the respondent in the main application and vice versa. For ease of reference, the parties are referred to as in the main application, alternatively "Samsung" and "the Commissioner" or "SARS".
3. The main application concerns a tariff appeal in terms of section 47(9) (e) of the Customs and Excise Act 91 of 1964. ("The Act").
4. On 1 February 2021, in his supplementary founding affidavit in this application, the Commissioner gave notice of his intention to apply for the amendment of the notice of motion. At the hearing of this matter, Samsung didn't object to the amendment of the Commissioner's notice of motion. The notice of motion was accordingly amended.

5. The relief is sought in terms of rule 35(1), 35(2), 35(13) and 38(14) of the Uniform Rules of this Court. In the alternative, the Commissioner relies on a request for information in terms of section 4 (4)(aC) (iii) of the Act.

6. The history of the dispute between the parties and the facts that gave rise to this application can be summarised as follows:

6.1 On 4 August 2011, the Commissioner made a tariff determination in terms of the Act. The products in issue are 98 monitors imported by Samsung during the period April 2008 to October 2010. The monitors include desktop computer monitors (75 models) and large format display ("LFD") monitors with a screen size exceeding 32 inch (23 models all in all 98 models). The Commissioner's relief sought in this interlocutory application only relates to the 23 LFD monitors.

6.2 The Commissioner determined that: "The [98] monitors [including the 23 LDF monitors] ... are multi-purpose monitors and even though they are connectable to computers they have the necessary outputs for use with other apparatus and for purposes other than data processing: i.e., VGA/DV1/HDMI. Classification will therefore be within TH8528.59"

- 6.3 On 21 September 2011 Samsung instituted an internal administrative appeal (provided for in Chapter XA of the Act) challenging the tariff determination.
- 6.4 On 30 April 2015, the Commissioner refused the internal appeal. Samsung was unsuccessful. It took the Commissioner nearly 5 years to finalise the internal administrative appeal.
- 6.5 On 11 March 2016, Samsung gave notice to the Commissioner of its intention to institute the present tariff appeal, as enjoined to do in terms of section 96 of the Act.
- 6.6 Following the section 96 notice, the Commissioner requested relevant material from Samsung at various occasions. The Commissioner inter alia requested relevant material on 25 July 2016. In this letter, the Commissioner requested Samsung to provide information in respect of the 98 monitors in dispute. In addition, the Commissioner requested Samsung to identify the serial numbers of the "ordinary TV monitors" that were sold by Samsung during the relevant period. The reference to "ordinary TV monitors" seems to be monitors classifiable under TH8528.59 ("other") also referred to by SARS as "multi-purpose monitors".

6.7 A number of other correspondence were exchanged between the parties through their attorneys during October and November 2016. More than two years after the filing of its section 96 notice, Samsung issued the main application on 22 May 2018; a tariff appeal in terms of section 47(9)(e) of the Act.

6.8 On 20 June 2018 the Commissioner filed a notice in terms of Rule 35 requesting inter alia the user manuals, product brochures and marketing material relating to the 23 LFD monitors.

6.9 In the application Samsung relies on the views of an expert, Professor Coenrad Johann Fourie, ("Prof Fourie") an electrical and electronic engineer. Prof Fourie confirmed that he investigated all the user manuals and specifications of all 98-monitor models (i.e. including the 23 LFD monitors). He concluded that all of them are monitors adapted principally for use with an automatic data processing system (Computer). This includes the 23 LFD monitors. He did this by comparing the 23 LFD monitors with his own Samsung television.

6.10 On 20 June 2018, SARS filed a notice in terms of Rule 35 requesting inter alia the user manuals, product brochures and marketing material relating to the 23 LFD monitors.

6.11 The Commissioner appointed its own expert, Dr Jacques van Wyk, an expert on electronics, attached to the University of Pretoria, to assist in the litigation. Dr Van Wyk disagrees with Prof Fourie on the conclusion he arrived at.

6.12 It is now common cause that the Commissioner has not yet filed his answering affidavit. On or about 20 May 2019 the Commissioner instituted its interlocutory application seeking relief in terms of Rule 35(1) and 3(13).

6.13 On 1 February 2021, the Commissioner served a notice to amend the relief sought by seeking alternative declaratory relief based on section 4(4) (ac) (iii) of the Act ("declaratory relief").

7. Having read the papers, and having heard counsel for the parties, I am of the considered view that this matter can be determined on the provisions of Rule 35 and not based on the provisions of section 4 (4)(aC) (iii) of the Act. It is for that reason that in determining this matter, only the provisions of Rule 35 will be dealt with. This precisely means that the alternative relief contained in the amended notice of motion won't be considered- except for those prayers which are revived therein.

8. The Commissioner submits that the system introduced by the Act is one of self-regulation and self- assessment. Furthermore, the application is a

tariff appeal, brought in terms of the provisions of section 47 (9) (e) of the Act.

9. It is also the argument of the Commissioner, that in order to prepare his opinion, Prof Fourie merely compared the data sheets and manuals of the 23 LFD monitors with his own flat screen television (at home) and two flat screen televisions imported by Samsung during 2011. As far as the document that Prof Fourie had when he prepared his report, Mr Shivanda explained that "Prof Fourie was not provided with all the data sheets and user manuals in respect of all multi-purpose monitors imported by Samsung during the period April 2008 to October 2010" – See Answering Affidavit at para 55. Prof Fourie confirms that the data sheets and user manuals of the multi-purpose monitors imported by Samsung (under tariff heading 8528.59) would conclusively prove or disprove the correctness of his evidence. –See second affidavit of Prof Fourie dated 1 October 2019("Prof Fourie 2nd aff") para [13], read with "AM8" para 9.8.1, S F A, para 15.11.2; AA, para 142.- [I must at the outset mention that this is one of the issues that paralyses the case for Samsung].

10.It is furthermore submitted by the Commissioner that after studying Prof Fourie's report Dr Van Wyk, the expert appointed by the Commissioner, advised that in order to be able to properly assess the monitors and

express an opinion on the nature and characteristics thereof he requires the data sheets and user manuals in respect of the 23 LFD monitors. Based on Dr Van Wyk's advice, Samsung was then requested to provide SARS with the said documents.

11. The Commissioner argues that there are exceptional circumstances that warrant and demand that the provision of Rule 35 be made applicable. That the request by the Commissioner for the documents is not a fishing expedition. The documents are relevant.
12. To the contrary, Samsung submits that the Commissioner is not entitled to discovery of the documents in terms of Rule 35, prior to him having filed an answering affidavit in motion proceedings.
13. It is also the argument of Samsung that the Commissioner may not be permitted to violate its right to a fair trial as guaranteed in Section 34 of the Constitution, by further delaying the resolution of the tariff dispute with its request for additional documents.
14. It is also the case of Samsung that in paragraphs 43 to 47 of his first report Prof Fourie dealt in detail with the LFD monitors. In explaining the nature and characteristics of these monitors, Prof Fourie alluded to differences between ordinary television monitors and the LFD monitors that he had

to consider. He did this by comparing the 23 LFD monitors with his own Samsung television monitor.

15. Samsung furthermore submits that it responded to all the requests the Commissioner made and has therefore provided him with all the information necessary.

16. Samsung is of the strong view, that discovery in motion proceedings is a very rare and unusual procedure and applying sound practice only occurs in exceptional circumstances. The Commissioner does not seem to have a defence to the appeal in respect of the 23 LFD monitors. It is for this reason that he has not yet filed his answering affidavit and he needs the documents to merely strengthen his case. In fact, so Samsung submits, the request for discovery is a "fishing expedition".

17. Rule 35 provides as follows:

"35 Discovery, interpretation and production of documents

(1) Any party to any action may require any other party thereon, by notice in writing to make discovery on oath within twenty days of all documents and tape recordings relating to any matter in question in such action (whether such matter is one arising between the party requesting discovery and the party requested to make discovery or not) which are or have at any time been in the possession or control of such

other party. Such notice shall not, save with the leave of a judge, be given before the close of pleadings.

(2) The party requested to make discovery shall within twenty days or within the time stated in any order of a judge make discovery of such documents on affidavit as near as maybe in accordance with Form 11 of the First Schedule, specifying separately –

(a) Such documents and tape recordings in his possession or that of his agent other than the documents and tape recordings mentioned in paragraph(b);

(b) Such documents and tape recordings in respect of which he has a valid objection to produce;

(c) Such documents and tape recordings, which he or his agent had but no longer has in his possession at the date of the affidavit. A document shall be deemed to be sufficiently specified if it is described as being one of a bundle of documents of a specified nature, which have been initiated and consecutively numbered by the deponent. Statements of witnesses taken for purposes of the proceedings, communications between attorney and client and between attorney and advocate, pleadings, affidavit and notices in the action shall be omitted from the schedules.

....

(13) The provisions of this rule relating to discovery shall mutatis mutandis apply, in so far as the Court may direct, to applications.

(14) After appearance to defend has been entered, any party to any action may, for purpose of pleadings, require any other party to make available for inspection within five days a clearly specified document or tape recording in his possession which is relevant to a reasonably anticipated issue in the action and to allow a copy or transcription to be made thereof".

18. It is trite that discovery in motion proceedings will only be ordered in exceptional circumstances, in particular when it is sought by a respondent before delivery of his answering papers- See **The MV Urgup: Owners of the MV Urgup V Western Bulk Carries (Australia) (Pty) Ltd and Others**¹

19. The factors to which a court will have regard when considering whether discovery should be ordered include the following:

19.1 Principles of fairness and equity. The Court will be guided by the fact that the values created by the Constitution include openness and transparency by a litigant – See **African Bank Ltd V Buffalo City Municipality**².

¹ 1999 (3) SA 500 (C) at 513 E-F.

² 2006 (2) SA 130 (CkH) at [8].

19.2 The stage in the proceedings at which discovery is sought.

19.3 The nature of the proceedings and the evidence that has been adduced.

19.4 The extent of the discovery sought. In this regard it has been stated that “ (a) request for general discovery may indicate a fishing expedition whereas a request for specific discovery might indicate a genuine need for discovery” – African Bank *supra* at 8.6

19.5 Prejudice. This includes the situation where it would not be possible for the respondent to prepare answering papers without the documentation in respect of which discovery is sought – **Saunders Valve Co Ltd V Insamcor (Pty) Ltd**³.

20. The purpose and value of discovery have been stated to be the following:

20.1 The whole object of discovery is to ensure that before trial both parties are made aware of all the documentary evidence that is available. By this means the issues are narrowed and the debate of points which are incontrovertible is eliminated. It is easy to envisage circumstances in which a party might possess a document which utterly destroyed his opponent's case, and which might yet be withheld from discovery on the interpretation which it is sought to

³ 1985 (1) SA 146 (T) at 149F.

place upon the rules. To withhold a document under such circumstances would be contrary to the spirit of modern practice, which encourages frankness and then avoidance of unnecessary litigation - **Durbach V Fairway Hotel Ltd**⁴

and

"Discovery has been said to rank with cross-examination as one of the two mightiest engines for the exposure of the truth ever to have been devised in the Anglo-Saxon family of legal system. Properly employed where its use is called for it can be, and often is, a devastating tool. But it must not be abused or called in aid lightly in situations for which it was not designed or it will lose its edge and become debased. It seems to me that generally speaking, its employment should be confined to cases where parties are properly before the Court and are litigating at full stretch, such as the main application in this matter is, unless there are exceptional circumstances".

21. The "relevance" requirement of Rule 35(1) has been stated in **Swissborough Diamond Mines (Pty) Ltd and Others V Government of the Republic of South Africa and Others**⁵ to be the following:

⁴ 1949 (3) SA 1082 (SR) at 1083

⁵ 1999 (2) SA 279 (T), at 316 E-317B,

'The requirement of relevance, embodied in both Rule 35(1) and 35(3), has been considered by the Courts on various occasions. The test for relevance, as laid down by Brett LJ in **Compagnie Financiere et Commerciale du Pacifique V Peruvian Guano Co (1882) 11QBD 55**, has often been accepted and applied. See, for example the Full Bench judgment in **Rellams (Pty) Ltd V James Brown & Hamer Ltd**⁶ where it was held that:

'After remarking that it was desirable to give a wide interpretation to the word "a document relating to any matter in question in the action" Brett LJ stated the principle as follows:

"It seems to me that every document relates to the matter in question in the action which, it is reasonable to suppose, contains information which may – not which must- either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a

⁶ 1983 (1) SA 556 (N) at 564A.

document which may fairly lead him to a train of enquiry which may have either of these two consequences.”

...

The broad meaning ascribed to relevance is circumscribed in both sub rules (1) and (3) of Rule 35 that the document or tape recording relates to 35(1) or may be relevant to 35(3) ‘any matter in question’;

The ‘matter in question’ is determined from the pleadings. See in this regard **SA Neon Advertising (Pty) Ltd V Claude Neon Lights (SA) Ltd**⁷; **Schlesinger v Donaldson and Another** 1929 WLD 54 at 57, where Greenberg J held:

‘In order to decide the question of relevancy, the issues raised by the pleadings must be considered...’

22. As counsel for the Commissioner has clearly stated in his heads of argument, the history of the dispute between the parties and the facts that gave rise to this application are set out in paragraph 14 of the founding affidavit of Ms Myburg, under the heading “*History and Relevant facts*” and paragraph 15 of her supplementary affidavit, under the heading “*Relevant Evidence*”. It is not necessary to repeat same in this judgment.

⁷ 1968 (3) SA 381 (W) at 385A-C;

23. However, it is important to deal with the purpose and value of discovery including the relevance requirement in relation to the facts of this case.
24. In order to do this, one must be mindful of the fact that the system introduced by the Act is one of self-regulation and self-assessment. The Commissioner would almost never be in a possession of documentation that would or could prove compliance with the Act, because he is totally dependent on their importance to fulfil SARS mandate, i.e. to properly administer the Act and take the necessary steps to give effect thereto.
25. The application is a tariff appeal, brought in terms of the provisions of section 47(9) (e) of the Act. As counsel for the Commissioner correctly states, two aspects thereof are important for present purposes; first, the legal nature of the appeal and, second, the issues to be considered by the Court when determining the correct classification of the goods.
26. A tariff appeal is an appeal in the wide sense, i.e. "a complete re-hearing of, and a fresh determination of the merits of the matter with or without additional evidence or information" – **Tikly and Other V Johannes NO and Others**⁸. As a result of the nature of the proceedings "the previous determination does not ring fence consideration of the merits de novo" – **De Beer consolidated Mines (Pty) Ltd v The Commissioner for the South**

⁸ 1963 (2) SA 588 (T) at 590C

African Revenue Services Case No:60161/2017 GNP at para 13. The import thereof is that whatever happened prior to the Commissioner's determination is irrelevant. That includes the factual and or legal basis on which the Commissioner founded his determination.

27. Secondly, it is trite that the classification process entails a three-step process:

- (1) Ascertainment of the meaning of the terms of the relevant headings;
- (2) Consideration of the nature and characteristics of the goods in issue and,
- (3) Selection of the most appropriate heading. For purposes of the present application, the second step is of primary importance. The nature and characteristics of the LFD monitors will have to be determined with reference to their objective characteristics - **Commissioner, South African Revenue Services V The Baking Tin (Pty) Ltd**⁹.

28. The particulars of the models of the non-LFD multi-purpose monitors imported by Samsung were first requested in July 2016, in response to Samsung's section 96 notice. Samsung refused to provide the information on the basis that the "The TV monitors properly so called do not form part of the appeal". This cannot be true, because in order to prepare his

⁹ 2007(6) SA 545 (SCA) at [13].

opinion, Prof Fourie, merely compared the data sheets and manuals of the 23 LFD monitors with his own flat screen television (at home) and two flat screen televisions imported by Samsung during 2011. Moreover, as far as the documentation that Prof Fourie had when he prepared his report, Mr Shivanda explained that “ Prof Fourie was not provided with all the data sheets and user manuals in respect of all multi-purpose monitors imported by Samsung during the period April 2008 to October 2010”.

29. Another important reason why the documentation should be discovered is because Dr Van Wyk, the expert appointed by the Commissioner, advised that in order to be able to properly assess the monitors and express an opinion on the nature and characteristics thereof he requires the data sheets and user manuals in respect of the 23 LFD monitors.

30. It is common cause that the two experts are the witnesses of the Court. It is therefore of paramount importance that the Court should consider the evidence of both witnesses in order to be able to properly assess the nature and characteristics of the products.

31. I agree with the submissions of counsel for the Commissioner, that there are exceptional circumstances that warrant that the provisions of Rule 35 be made applicable to the main application. The documentation is

essential to enable Dr Van Wyk to properly consider the nature and characteristics of the products and the Commissioner to take a decision on the merits of the appeal and, if necessary, prepare answering papers. The Commissioner would be seriously prejudiced if he is not given access to those documents as he then would not be in a position to take the necessary steps to protect his interest and fulfil his mandate in terms of the Act.

32. Because of the nature of the system created by the Act, the Commissioner is dependent on Samsung to get the relevant documentation and information. This will assist the parties in narrowing the issues and debate of points, which are incontrovertible, will be eliminated.

33. The commissioner was at pains to explain in numerous letters why the documents are relevant. This is further confirmed by Prof Fourie that they would exclusively prove the correctness of the case for the Commissioner.

34. As Brett LJ has stated in *Compagnie, supra*, the documentation relates to matter in question in the action, which in my view contains information which may, either directly or indirectly enable the Commissioner to either advance his own case or damage the case of Samsung. The argument by Samsung that the Commissioner requires the documentation in order to decide on its defence and prepare answering papers is of no moment. As

indicated in the decided cases above, a party in motion proceedings is entitled in exceptional circumstances to request for documents even before the close of pleadings, which is the case in this matter- The provisions of Rule 35 relating to discovery shall mutatis apply, in so far as the court may direct, to applications- Rule 35 (13).

35. It is therefore in the interest of justice that the relief be granted to ensure openness and transparency, thereby giving effect to the values enshrined in the Constitution and the delegation imposed thereby, in particular, section 39(2) thereof.

36. In the premises, the following order is made:

36.1 The application is granted in terms of Rule 35 of the Uniform Rules of the Court.

36.2 The Commissioner is ordered to pay the costs of the amendment of the Notice of Motion

36.3 Samsung is ordered to pay the costs of the interlocutory application.


RAULINGA J
JUDGE OF THE HIGH COURT

Appearances:

Applicant's Counsel	: Adv. A Meyer SC
Applicant's Attorneys	: Shepstone Wylie Incorporated
Respondent's Counsel	: Adv J Vorster SC Adv E Muller
Respondent's Attorney	: State Attorney, Pretoria
Date of hearing	: 12 May 2021
Date of judgment	: 12 October 2021