IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL PIETERMARITZBURG

Case No. 8056/06

In the matter between:

FAR EASTERN GARMENTS MANUFACTURERS (PTY) LTD APPLICANT

and

SOUTH AFRICAN REVENUE SERVICES RESPONDENT

JUDGMENT 26 November 2009

MNGUNI, J

[1] This is an application for rescission of two judgments obtained by the respondent against the applicant on 13 October 2004 under case number 16868/04 in the sums of R505 080-17 and R1084714-31

[2] The applicant, a Far Eastern Garments Manufacturers (Pty) Ltd, is a company duly registered and incorporated in terms of the company laws of the Republic of South Africa with its registered office at 28 Patterson Street, Newcastle, KwaZulu-Natal,

[3] The applicant had been registered in terms of REBATE ITEM 470.03 in terms of which it was obliged to ensure that all goods manufactured within the Republic were exported within a specified time of 12 months of the date of importation.

[4] It relied on fabric and accessories which were imported for that purpose and which ordinarily would, in terms of section 75 (1) (b) read with rules 75 (14) and 75 (15) of the Customs Act No. 91 of 1964 ("the Act"), not have attracted any import duty or vat provided that they were manufactured and exported within such specified time indicated above. Any contravention of section 75 (1) (b) read with rules 75 (14) and 75 (15) obliged the respondent to call for duty and vat on such goods as specified in the tariff,

[5] The procedure relating to the manner in which the Commissioner would be entitled to recover any amount of any duty, interest, fine, penalty or forfeiture incurred under the Act when it becomes due is set out in section 114 of the Act. Section 114 (1) (a) (ii) provides:

> "if any person fails to pay any amount of duty, interest, fine, penalty or forfeiture incurred under this Act, when it becomes due or is payable by such person, the Commissioner may file with the clerk or registrar of any competent court a statement certified by him as correct and setting forth the amount thereof so due or payable by that person, and such statement shall thereupon have all the effects of, and any proceedings may be taken thereon as if it were a civil judgment lawfully given in that court in favour of the Commissioner for a liquid debt of the amount specified in the statement".

Similar provisions are found in section 40(2) (a) of the Value Added Tax Act No. 89 of 1991.

[6] On 13 October 2004 and under the same case number, the respondent filed two statements with the Registrar of the High Court, Durban, one in terms of section 114 (1) (a)(ii) and (iii) of the Act that duty, interest, forfeiture and penalty in the sum of R1084714-31 was due and payable, and another in terms of section 40(2) (a) of the Vat Act claiming tax in the amount of R441977-58 with interest owed making a total amount of R505080-70. Pursuant to the filing of the said statements, the Registrar entered two default judgements against the applicant in the total sum of R1 589 794-48 and the applicant now seeks an order to rescind and set aside the said judgements,

[7] It is common cause between the parties that the statements submitted to the Registrar and, in terms of which judgments were granted, are civil judgments, and as such, the applicant can bring an application to have them rescinded and set aside. It is also common cause between the parties that rules 42 (1) and 31 (2) of the rules of this court have no application in these proceedings as these rules apply to judgments where an order was erroneously sought or granted, and to judgments taken by default in trial actions respectively. Both counsel are, however, agreed that the court has inherent jurisdiction to grant a rescission of one of its own judgment on sufficient cause being shown under common law.

[8] Both sections 40 (2) (a) of the Vat Act and 114 (ii) of the Act make no provision for an entry of appearance or for any of the ordinary procedures applicable to civil litigation. It therefore follows that this court will be entitled to exercise its discretion to rescind a judgment granted against a taxpayer in terms of these sections provided that sufficient cause has been shown. Miller, JA defined the term sufficient cause in **Chetty v Law**

Society, Transvaal 1985 (2) SA 756 at 765 A-C

'' the term sufficient cause (or "good cause") defies precise or comprehensive definition, for many and various factors require to be considered ….But it is clear that in principle and in long standing practice of our courts, two essential elements of sufficient cause for rescission of a judgment by default are:

(i) that the party seeking relief must present a reasonable and acceptable explanation for his default, and

(ii) that on the merits such party has a bona fide defence which, prima facie, carries some prospects of success

[9] The first question which requires the decision of this court is to determine whether the applicant has given a reasonable and acceptable explanation to the inordinately long period of time that has elapsed before it decided to take any steps to have judgment rescinded. Mr Tsai, the sole shareholder of the applicant, deposed to the applicant's founding affidavit in which he stated that it only came to his knowledge on 3 May 2006 that judgments had been taken against the applicant. From the application papers, it appears that the papers which initiated the proceedings were only filed by the applicant on 16 November 2006 and despite the fact that the respondent's answering affidavit was filed on 30 March 2007, the applicant chose to file its replying affidavit on 8 September 2008. The applicant's counsel conceded the delays but attributed such to three factors which, he submitted, resulted in the applicant's failure to launch and prosecute the application without any delay. He enumerated those factors as lack of funds on the part of the applicant, the distance between the applicant's representative (Tsai) who resided at Vietnam at the time and the legal representative of the applicant in Newcastle (South Africa). It was submitted that

the applicant's representative had difficulty in understanding correspondence from the applicant's attorneys, and as such the services of the interpreter had to be used to translate the documents for him, thus causing an extensive wastage of time. He however, contended that the applicant's representative had provided an explanation which in his view was reasonable and submitted that there has not been any wilful conduct by the applicant and asked that the delays be condoned by the court.

[10] Respondent's counsel, contended that at all material times the Commissioner acted strictly within the provisions of the Customs Act in raising assessment against the applicant and in obtaining judgments against it. He submitted that due to the applicant's inordinate delay in making the present application, the Commissioner would be unduly prejudiced should the application be granted. Whilst accepting that the factors enumerated by the applicant's counsel may, in certain instance, contribute to the delay in the launching and prosecution of any matter, I however, find myself unimpressed by this explanation as the period of time in this particular matter is so unreasonable that the condonation thereof would be unjust, I am further in agreement with respondent's counsel that such condonation would unduly prejudice the respondent.

The second question which requires the decision of this court is to determine whether the applicant has presented a reasonable and acceptable explanation for its default. Evidently this question should not be looked at in isolation but within the context of the back ground of the entire matter. The facts and the circumstances which gave rise to

this application are briefly the following:

The Commissioner, on 19 September 2000, assessed and raised tax together with the penalty of R25814-00 against the applicant, which amount was never paid. On 9 December 2002 the applicant was inspected for its failure to, inter alia, keep proper records, maintain a stock record, keep a proper record of all receipts and withdrawals from the rebate store and to export goods originally imported within the specified period. As a result of aforementioned contraventions, a schedule for payment of an amount of R2 898 443-00 dated 19 December 2002 was raised by the Commissioner against the applicant, and an extension of time was given to the applicant until 15 March 2003 to produce documentation contesting the validity of the amounts which the Commissioner was demanding. The applicant provided the Commissioner with certain documentation, and as a result of that, a revised schedule was prepared on 31 March 2003 which reflected an amount of R1 265 056-44 as being due to the respondent by the applicant. By virtue of the judgments entered against the applicant and the subsequent writ of execution issued against it, the applicant's goods which were attached on 7 December 2000 were auctioned on 9 February 2005 and yielded an amount of R216 859–42. However, the balance of the debit could not be recovered. Dealing with this aspect **Fannin, J** in **Kajee and Others v G and G Investments and Finance Corporation (Pty) Ltd 1962 (1) SA 575 D** stated:

"It seems to me that what is required in a case such as this is that the applicant must explain his default. He cannot simply claim the court's indulgence without giving an explanation. The explanation must be reasonable in the sense that that phrase was used in Naidoo's case and Grant's case, *supra*, namely that it must not show that his default was wilful or was due to gross negligence on his part. If explanation passes that

test, then the court will consider all the circumstances of the case, including the explanation, and will then decide whether it is a proper case for the grant of indulgence."

Applicant's counsel submitted that to be in wilful default, applicant must have had knowledge of the action and of steps required to avoid a default and deliberately failed to take steps to avoid the default and appreciate the consequences of such action. As the applicant, so it is submitted, was not aware of the judgments which had been taken, and as soon as he became aware thereof, commenced the rescission proceedings. For this submission, he found comfort in **Harris v Absa Bank (2002) All SA 215(T).** The respondent's counsel, however, contended that Mr Tsai was at all times material hereto fully aware of the irregularities being committed by the applicant, as well as the Commissioner's concerns in that regard as evidenced by various inspections which were carried out from time to time. He submitted that in circumstances where an applicant for rescission of a judgment, as the applicant incasu, fragrantly disregarded statutory rules and procedures, reneged in agreements to settle outstanding debts, and failed to provide sufficient cause or a reasonable explanation for his default, the court should be loathe to grant any relief to such an applicant. It is not disputed that before the judgments were entered against the applicant, the respondent conducted several inspections on the applicant. The applicant was, at all times material hereto, aware of such inspections as well as of the amount(s) raised by the respondent from such inspection(s) from time to time. When the applicant's representative left South Africa, he was aware that the applicant had not resolved the matter with the respondent. Having regard to the cumulative nature of the applicant's representative conduct prior to as well as subsequent to the granting of the default judgments, I am driven to conclude that the applicant has failed to satisfy the

court that its explanation of the default is a reasonable one. I have reached such conclusion mindful of the fact that both sections 40 (2) (a) of the Vat Act and 114 (ii) of the Act make no provision for an entry of appearance or for any of the ordinary procedures applicable to civil litigation.

[11] I now turn to the third branch, namely, a bona fide defence, the existence of which should be demonstrated by the applicant. **Brink, J** in **Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (0) at 476 – 7** formulated the requirement as follows:

> ” It is sufficient if he makes out a *prima facie* defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.”

In **Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) at 9 Jones AJA** added the following:

> “ …..with that as the underlying approach the courts generally expect an applicant to show good cause ……(c) by showing that he has a bona fide defence to the plaintiff’s claim which prima facie has some prospects of success.”

It accordingly follows that the prospects of success of the applicant’s defence must be measured against the above exposition of the law.

[12] Counsel for the applicant contended that one Rosemary Southey, a secretary of the applicant’s attorneys, reconciled all documentation relating to the imports, exports and cutting sheets and came to the conclusion that the material which was imported was manufactured into garments and subsequently exported. He submitted that such findings and conclusion reached by Southey were indicative of the fact that the

applicant complied with the provisions of the Act and this constituted a bona fide defence against the respondent's claim. He referred me to the first representation made by the applicant on the assessment of 19 December 2002 which resulted in the amount raised by the respondent to be considerably reduced, and submitted that if the applicant can produce further documentation he can set out its defence. Finally, he argued that the applicant had lodged an internal appeal against the assessment of the respondent on which two judgments have been entered, and the respondent has not yet adjudicated on that appeal. As I understand his submission, the two judgments were than taken prematurely.

[13] Counsel for the respondent contended that the applicant was first inspected on 18 May 2000 and the inspection found irregularities on Bill of Entries 30139 dated 3 August 1998 and 32479 dated 18 September 1999 from which it was evident that the imported knitted cotton fabric had not been exported within one year of date of importation. Such failure, he submitted, resulted in duty and vat becoming payable together with a penalty. The respondent prepared a schedule on 4 July 2000 and raised an assessment in the amount of R170 225.54 which amount became due, owing and payable to the respondent. The aforesaid amount was not settled and the respondent placed a lien on the applicant's goods on 7 December 2000 in terms of Section 114 (iv) (aa) (A) of the Act and, that prompted the applicant to approach the respondent with a request to formulate a payment plan to enable it to liquidate the amount outstanding in accordance with such payment plan. He submitted that despite the approval of such payment plan, the applicant failed to meet some of the payments which were due, and the applicant is still indebted to the respondent. He submitted that the respondent's

case against the applicant was that it failed to export the manufactured goods within 12 months from date of importation and that no reliance whatsoever could be placed on reconciliation prepared by Southey, who is merely described as a qualified experienced company secretary whose qualifications and expertise on tax matters are not clearly set out. He further submitted that the applicant has failed to furnished any cogent evidence to prove that all manufactured goods were exported within 12 months from date of importation in order to qualify the applicant for a rebate on any duties. In examining the prospects of success of the applicant's defence it is instructive to refer to section 114 (iii) (cc) of the Act which provides:

> ‘‘pending the conclusion of any proceedings, whether internally or in any court, regarding a dispute as to the amount of any duty, interest, fine, penalty or forfeiture payable, the statement filled in terms of subparagraph (ii) shall, for purposes of recovery proceedings contemplated in subparagraph (ii) be deemed to be correct.”

Like wise section 40(5) of the Vat Act provides:

> “It shall not be competent for any person in proceedings in connection with any statement filed in terms of subsection (2) (a) to question the correctness of any assessment upon which such statement is based, notwithstanding that objection and appeal may have been lodged against such assessment”.

I have considered the applicant's defence and in so doing so, I also took into account the above mentioned provisions and in my view it does not disclose the existence of an issue which is fit for trial. Accordingly, it has failed to demonstrate the existence of a bona fide defence.

[14] The applicant raised for the first time, in its replying affidavit, a constitutional issue. It is

a well established law that the applicant must make his or her case in the founding affidavit and that, save in exceptional circumstances, he or she will not be allowed to make or supplement his case in his/her replying affidavit. In **Pountas' Trustee v Cananas 1924 WLD 6 at 68 Krause J** had this to say on the issue:

"I think it has been laid down in this court repeatedly that an applicant must stand or fall by his petition and the facts alleged therein, and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegations of facts stated therein, because these are the facts which the respondent is called upon either to affirm or deny"

Counsel for the respondent correctly pointed out that the constitutional issues raised by the applicant are in fact non-issues as the constitutional validity of similar provisions in the Vat Act have already been determined by the Constitutional Court in **Metcash Trading Ltd v Commissioner, South African Reserve Service and Another 2001 (1) SA 1109 CC).** Accordingly, the new issues of a constitutional nature introduced in the replying affidavit cannot be taken into account.

In the result, the following order will issue:

The application is dismissed with costs.