REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case Number : 521 / 03

In the matter between

DISTCOR EXPORT PARTNERS — **FIRST APPELLANT**
DISTCOR YACHT EXPORTERS — **SECOND APPELLANT**

and

THE DIRECTOR-GENERAL OF THE DEPARTMENT OF TRADE AND INDUSTRY — **RESPONDENT**

Coram : **HARMS and CONRADIE JJA, COMRIE, JAFTA and PATEL AJJA**

Date of hearing : **5 NOVEMBER 2004**

Date of delivery : **23 MARCH 2005**

SUMMARY

Claim for damages by Department of Trade and Industry – director-general of department suing as nominal plaintiff in action – appellants contending that procedure incompetent – held that not only political head of department empowered to sue – appeal dismissed

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REASONS FOR ORDER

CONRADIE JA

[1] These are the reasons for an order handed down on 30 November 2004 dismissing with the costs of two counsel an appeal brought, with his leave, against McLaren J's dismissal of the appellants' special plea that the respondent, as plaintiff in the court below, lacked *locus standi in iudicio* to institute proceedings against the appellants for delictual damages or alternatively for unjustified enrichment. The claims arose from payments made by the Department of Trade and Industry (the Department) to the appellants in 1992 and 1994 in respect of benefits under the General Export Incentive Scheme (GEIS).[1] Since upholding the special plea would have put an end to the respondent's claims against the appellants, the parties agreed, and the court below ruled, that the plea be dealt with as a distinct issue.

[2] The first argument on behalf of the appellants was that the State, like other entities having legal personality, may only institute action in its own name and may not do so in the name of one of its officials.

[3] In the chapter on State Liability by Cilliers and D'Oliveira in Lawsa (vol 25 1st re-issue p 188 para 239) the State is described as 'a diffuse public law entity'. It nonetheless has juristic personality. Judicial affirmation that it is a

1 The background to GEIS is set out in *Dilokong Chrome Mines (Edms) Bpk v Direkteur-Generaal, Departement van Handel en Nywerheid* 1992 (4) SA 1 (A).

legal *persona* is to be found in *Die Spoorbond and Another v South African Railways* [2] where Watermeyer CJ said;

'The Governor-General -in -Council (whom I shall call the Crown and who is also sometimes referred to as the Government of the Union) is regarded in law as a legal *persona*, with a perennial existence, and as such, a legal *persona* distinct from the individual human beings or group of persons who from time to time hold office as Governor-General and as members of the Executive Council …'

The State is, however, not a corporation:

'The executive power of the Union was vested in the Governor-General acting with the advice of the Executive Council, known as the Governor-General-in-Council or commonly simply as the Government of the Union. Although this Government is described by writers as being an organ of the State, nevertheless it would be incorrect to draw an analogy with the law relating to companies and the relationship between a company and its board of directors.'[3]

These remarks by Vieyra J echo those of Schreiner JA in the *Spoorbond* case at 1011):

'It is no doubt convenient for certain purposes to treat the Crown as a corporation or artificial person. But it is obviously a very different kind of person from the rest of the persons, natural and artificial, that make up the community.'

[4] The appellants' argument by analogy to companies and their directors is not valid. The rule that has always governed litigation by corporations is that they are artificial persons and that, since generally no one may sue as agent for

2 1946 AD 999 at 1005.
3 *Die Regering van die Republiek van Suid-Afrika v SANTAM Versekeringsmaatskappy Bpk* 1964 (1) SA 546 (W) at 547E-F.

another,[4] a director cannot sue on behalf of a company. Where the political or administrative head of a government department sues or is sued the litigation is conducted *nomine officii.* The head is not regarded as the agent of the department but as the embodiment of the department.

[5] There is no statutory provision on how the State may initiate proceedings. There is one, however, providing how the State may be brought before the courts. It appears in s 2 of the State Liability Act 20 of 1957 which provides in ss (1) that ' … the Minister of the department concerned may be cited as nominal defendant or respondent.' The sub-section does not oblige a litigant to sue a minister.[5] It was intended to facilitate actions against the State by making it possible to sue the political head of a department instead of the State in its own name. It did not introduce an inviolable rule. A plaintiff may still choose to sue the government of the Republic of South Africa[6] and this has since 1957 often occurred.

[6] Although proceedings may, as commonly happens,[7] be commenced in the name of the Government of the Republic of South Africa, the government may also sue through a nominal plaintiff or applicant, usually the ministerial head of

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4 *Standard General Insurance Co Ltd v Eli Lilly (SA) (Pty) Ltd 1996 (1) SA 382 (W).*

5 *Marais v Government of the Union of South Africa* 1911 TPD 127 at 132; the provision has remained unchanged since the Crown Liabilities Act 1 of 1910. Where appropriate the term 'Minister' includes a member of the executive council of a province.

6 There is an interesting discussion by Baxter in an article '"The State" and other basic Terms in Public Law' (1982 99 SALJ 212 at 222 and 228) on recognition by the courts of the government – the executive arm of the State – as a legal *persona*.

a department. According to the appellants the latter practice is so inflexible that it precludes the administrative head of a department from instituting action on behalf of a department of State. In my view the practice is more relaxed.[8] It is a matter of authority. Since a minister as political head of a department has the overall control of and responsibility for the department and is the ultimate decision-maker, the authorization for an action instituted by a minister can hardly be impugned. His or her external authority, by which I mean the authorization to the state attorney to institute an action, might still be challenged although such cases must be very rare. Where a Minister sues as nominal plaintiff, as the embodiment of her department, the potentially more troublesome issue of internal, intra-departmental, authority is eliminated. Particulars of claim alleging that an administrative head of a department sues on behalf of the government may elicit a puzzled request for further particulars on the scope of his authority but if authority can be satisfactorily established that is the end of the matter.

[7] The issue before us, considered by the parties and by the court below to be one of *locus standi*, is not really that. A nominal plaintiff does not sue for his or her own account and the question of whether such a plaintiff has a sufficient interest in the proceedings (the essential *locus standi* enquiry)

8 For a recent case in which a director-general's authority to counterclaim was, at least tacitly, accepted see *The Director-General: Department of Trade and Industry and Another v Shurlock International (Pty) Ltd* 2005 (2) SA 1 (SCA).

obviously does not arise.[9] Such a plaintiff is there (only) to put someone else's case before the court: the question is whether or not he has the authority to do so.

[8] The flexibility of the practice in this regard is illustrated by the range of officials who have, without demur, been allowed to sue on behalf of departments or sub-departments. Usually where the nominal plaintiff (or applicant) has not been a minister that role has been taken by the head of a specialized unit within a department such as the Registrar of Deeds or the Registrars of Companies, Close Corporations, Banks, Insurance or Pension Funds.[10] Unlike the Commissioner for Inland Revenue,[11] or the Master,[12] these officials are not, in the statutes setting up their sub-departments, given express authority to institute or defend proceedings. It is evidently considered that their authority goes with the job and no one has ever thought of denying them the right to institute or defend legal proceedings.

[9] Where a director-general has been brought in as a litigant it has often been because his decision was under attack on review.[13] In other cases the

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9 see the full discussion of the topic by Rogers AJ in *Financial Services Board and Another v De Wet NO and Others* 2002 (3) SA 525 (C) from para [141].

10 In *Pepcor Retirement Fund and Another v Financial Services Board and Another* 2003 (6) SA 38 (SCA) the Registrar of Pension Funds was held to have *locus standi* to apply to review his own decision to grant approval for the restructuring of a pension fund. In the specialized field of intellectual property there are of course the registrars of patents, trade marks and designs who enjoy considerable autonomy in litigation and are cited as defendants or respondents.

11 Empowered by s 91 of the Income Tax Act 58 of 1962 and by s 94 of the Customs and Excise Act 91 of 1964.

12 Administration of Estates Act 66 of 1965, s 96.

13 Cf *Dilokong Chrome Mines (Edms) Bpk v Direkteur-Generaal, Departement van Handel en Nywerheid* 1992 (4) SA (A); *South African Co-operative Citrus Exchange Ltd v Director-General: Trade and Industry and*

director-general was required to perform a specific act like signing a title deed[14] or documents sought by a litigant were in his possession.[15] May he also *nomine officii* claim damages suffered by the department of which he is the administrative head? The answer is that although it may be unusual for a director-general to do so, it is not impermissible.

[10] It seems to me that the decision to adopt this unusual procedure might have been influenced by the notion (mentioned above) of the top official of a specialist unit being empowered to sue in respect of matters specially entrusted to his authority and discretion. As appears from paragraph 3.11 of the GEIS Guidelines the respondent was in complete charge of the scheme and all responsibility with regard to its implementation and all discretion with regard to the recovery of money wrongly claimed from the scheme rested with him alone:

'The decision by the Director-General as to the eligibility of any product for benefits under the General Export Incentive Scheme as well as the determination of the amounts of the incentives will be final and conclusive. Nothing in this document shall be construed as an offer open to acceptance constituting any contractual or in fact any other obligation or any enforceable right against the Department. The Director-General may at any time conduct a full-scale investigation to verify any information furnished by a claimant. If the Director-General is satisfied that the claim was based on false information or that the claimant has

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Another 1997 (3) SA 236 (SCA); *Jayiya v MEC for Welfare, Eastern Cape, and Another* 2004 (2) SA 611 (SCA) decided that if a member of the executive council in charge of a department is sued, it is not necessary to join the director-general of the department.

14 *Khumalo v Director-General of Co-operation and Development and Others* 1991 (1) SA 158 (A). 14 *Le Roux v Direkteur-Generaal van Handel en Nywerheid* 1997 (4) SA 174 (T).

15 *Le Roux v Direkteur-Generaal van Handel en Nywerheid* 1997 (4) SA 174 (T).

furnished misleading information, he may disallow the claim and recover the full amount paid out to the claimant. Interest on bona fide overpayments will be levied at the rate prescribed in terms of section 1(2) of Act No. 55 of 1975.'

[11] I do not mean to suggest that authorization such as that appearing in paragraph 3.11 of the Guidelines was a *sine qua non*. I merely indulge in speculation on what the motivation for an unusual, but not impermissible, procedure might have been.

These are the reasons for the order given.

J H CONRADIE
JUDGE OF APPEAL

CONCURRING:

HARMS JA
COMRIE AJA
JAFTA AJA
PATEL AJA