THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 267/2016

In the matter between:

SA METAL GROUP (PROPRIETARY) LIMITED **APPELLANT**

and

THE INTERNATIONAL TRADE ADMINISTRATION COMMISSION **FIRST RESPONDENT**

THE MINISTER OF ECONOMIC DEVELOPMENT **SECOND RESPONDENT**

Neutral citation: *SA Metal Group (Pty) Ltd v The International Trade Administration Commission* (267/2016) [2017] ZASCA 14 (17 March 2017)

Bench: Ponnan, Leach, Majiedt and Willis JJA and Fourie AJA

Heard: 1 March 2016

Delivered: 17 March 2016

Summary: Appeal – s 16(2)*(a)*(i) Superior Courts Act 10 of 2013 – dismissal of appeal where judgment or order sought would have no practical effect or result.

ORDER

On appeal from: Western Cape High Court, Cape Town (Dolamo J sitting as court of first instance):

Save for the costs of the application by the first respondent to adduce further evidence on appeal, the appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

JUDGMENT

Ponnan JA (Leach, Majiedt and Willis JJA and Fourie AJA concurring):

[1] This may laconically be described as a scrap about scrap, in which counsel were, at the outset of the hearing, required to address argument on the preliminary question of whether the appeal and any order made thereon would, within the meaning of s 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013, have any practical effect or result. After hearing argument on this issue, the appeal was dismissed on 1 March 2017 in terms of that section. It was intimated then that reasons would follow. These are the reasons.

[2] Courts should and ought not to decide issues of academic interest only. That much is trite.[1] Section 16(2)*(a)*(i) provides:

'When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.'

[1] See *Legal-Aid South Africa v Magidiwana & others* [2014] 4 All SA 570 (SCA) and the cases there cited.

Of its predecessor, s 21A of the Supreme Court Act 59 of 1959,[2] this court stated:

'The purpose and effect of s 21A has been explained in the judgment of Olivier JA in the case of *Premier, Provinsie Mpumalanga, en 'n Ander v Groblersdalse Stadsraad* 1998 (2) SA 1136 (SCA). As is there stated the section is a reformulation of principles previously adopted in our Courts in relation to appeals involving what were called abstract, academic or hypothetical questions. The principle is one of long standing.'[3]

[3] The primary question therefore – one to which I now turn – is whether the judgment sought in this appeal will have any practical effect or result. It arises against the backdrop of the following facts: The scrap metal supply chain in this country begins with the collection by informal operators, who sell the metal to recyclers. Recyclers, including the appellant, SA Metal Group (Pty) Ltd (SA Metal) – one of the largest scrap metal dealers in South Africa – process the metal, which they then either export or sell to the local scrap processing industry such as steel mills, mini mills and foundries. The scrap-processing industry then manufactures products, which it onsells to various downstream industries such as the mining, automotive, construction and agricultural sectors. Historically, the export price of scrap metal had a direct bearing on the price at which scrap metal was sold within the domestic market. According to the second respondent, the Minister of Economic Development (the Minister), parts of the scrap-processing industry are in a dire state and have experienced substantial decline over the last decade. Job losses and closures have been the order of the day, and the dramatic decline in parts of the domestic scrap-processing industry has impacted negatively on Government's infrastructure-build programme and its imperative of deepening downstream manufacturing.

[4] South Africa is a founding member of the World Trade Organisation Agreement and also a signatory to the General Agreement on Tariffs and Trade of 1947 (the GATT). The South African Government acceded to the GATT and its accession was

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[2] Section 21A(1) of the Supreme Court Act 59 of 1959 provided:
'When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.'

[3] *Coin Security Group (Pty) Ltd v SA National Union for Security Officers & others* 2001 (2) SA 872 (SCA) para 7.

published in the *Government Gazette*. Parliament approved the agreement in the Geneva General Agreement on Tariffs and Trade Act 29 of 1948. The World Trade Organisation Agreement was the outcome of the so-called Uruguay Round of the GATT negotiations and was concluded in Marrakesh by the signing of some 27 agreements and instruments in April 1994 by the members including South Africa.[4] The Preamble to the GATT reads:

'The Governments of . . . :

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods,

Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.'

[5] Domestically, that is echoed in the International Trade Administration Act 71 of 2002 (the Act), which seeks to 'foster economic growth and development in order to raise incomes and promote investment and employment in the Republic . . . .'.[5] Section 7 of the Act established the first respondent, the International Trade Administration Commission (ITAC). ITAC is obliged to carry out the functions assigned to it in terms of the Act or by the Minister or that arise out of an obligation of the Republic in terms of a trade agreement.[6] Section 5 of the Act empowers the Minister to issue trade policy statements or directives. According to s 6(1) of the Act:

'The Minister may, by notice in the Gazette, prescribe that no goods of a specified class or kind, or no goods other than goods of a specified class or kind, may be–

. . .

(c) exported from the Republic; or

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[4] See *Progress Office Machines v SARS* 2008 (2) SA 13 (SCA) para 5; *Bridon International GMBH v International Trade Administration Commission* 2013 (3) SA 197 (SCA) para 12*; International Trade Administration Commission & another v South African Tyre Manufacturers Conference (Pty) Ltd & others* (738/2010) [2011] ZASCA 137; 2011 JDR 1161 (SCA) para 1.

[5] Section 2 of the Act.

[6] Section 15 of the Act.

(d) exported from the Republic, except under the authority of and in accordance with the conditions stated in a permit issued by the Commission.'

In terms of s 7(2), ITAC is subject to any trade policy statement or directive issued by the Minister in terms of s 5 and any notice issued by the Minister in terms of s 6.

[6] On 10 May 2013 the Minister published 'a policy directive on the export of ferrous and non-ferrous waste and scrap metal' (the directive) in terms of s 5 of the Act.[7] The directive provided:

'2. (a) Ferrous and non-ferrous waste and scrap metal should not be exported unless it has first been offered to domestic users of scrap, for a period determined by ITAC, and at a price discount or other formula determined by ITAC intended to facilitate local rather than export sale.

(b) To ensure the type and quality of scrap metal that is intended for export are accurately reflected on applications for export permits, all permit applications should be accompanied by confirmation by a metallurgical engineer or a suitably qualified person, confirming the type, quality and quantity of scrap at hand for export, and information as to when and where such scrap metal may be inspected by prospective buyers.'

The concluding paragraph of the directive reads:

'Should this directive be found to be in conflict with any provision of a trade agreement which is binding on South Africa, ITAC should apply it in a manner which ensures compliance with such agreement.'

[7] What motivated the directive is explained by the Minister thus:

'In the last decade, many steel mills, secondary smelters and foundries have been forced to close shop as a result of being unable to make ends meet. This was caused, amongst other things, by their inability to afford scrap metal at the prices at which scrap metal was available for sale locally – which was effectively the same price at which the scrap was being offered to international purchasers of scrap metal. The closure of these businesses caused job losses and a reduction in the supply of steel products manufactured from recycled scrap metal for sale to end users such as mining houses . . . .

[7] Policy Directive on the Exportation of Ferrous and non-Ferrous Waste and Scrap Metal, GN 470, GG 36451, 10 May 2013.

This state of affairs also affected the quality of the scrap metal which was available for local use because most of the high quality scrap was exported. These combined difficulties facing the domestic industries caused an economic crisis in respect of which government had to intervene

. . . .

It was in the light of the economic crisis described above that I issued the Directive, which led to the publication by ITAC of the original Guidelines and the amended Guidelines. I shall refer to the Directive and the Guidelines collectively . . . as "the price-preference system".

. . .

The Directive and Guidelines constitute interventions to address the crisis in the scrap-processing industry. They form part of a much broader economic strategy on the part of government.'

[8] In accordance with the directive, on 2 August 2013 ITAC published 'export control guidelines on the exportation of ferrous and non-ferrous waste and scrap'[8] (the guidelines) which, to the extent here relevant, provided:

'. . . scrap metal will be allowed to be exported only if the scrap metal concerned was offered to domestic consumers at a price that is 20% below international spot prices for the published types and grades of scrap metal.

. . .

ITAC will exempt affected exports from these requirements to the extent that application of these requirements would be in conflict with South Africa's obligations under an existing trade agreement. The guidelines will be applied and implemented in such a manner that they are consistent with any binding trade agreement.'

On 12 September 2014 ITAC published amended guidelines (the amended guidelines). Paragraph 8.7 thereof read:

'ITAC will exempt affected exports from these requirements to the extent that application of these requirements would be in conflict with South Africa's obligations under an existing trade agreement. Where such an allegation is raised with ITAC, it must be raised at the time an application form is submitted to ITAC and must be in sufficient details for ITAC to understand the nature and basis of the allegation. ITAC will consider the merits of an allegation and make a decision that will be determinative thereof for purposes of the export permit application.'

[8] ITAC Export Control Guidelines on the Export of Ferrous and non-Ferrous Waste and Scrap, GN R543 GG 36708, 2 August 2013.

[9] On 20 October 2014, SA Metal applied for ten permits for the export of scrap metal. It sought an exemption in each instance from the price preference system primarily on the basis that the application of those requirements would be in conflict with South Africa's obligations under the GATT. On 30 October 2014 ITAC, asserting that 'subjecting the application to the guidelines would not violate South Africa's obligations under the GATT', refused SA Metal's request. Aggrieved by that refusal, SA Metal applied to the High Court, Western Cape Division, Cape Town seeking:

'1. An order in terms of Sections 6 and 8 of the Promotion of Administrative Justice Act 3 of 2000 reviewing and setting aside the decision taken on 30 October 2014 by the first respondent refusing to exempt the applicant's ten applications for export permits made on 20 October 2014 annexed to the founding affidavit as "GB4" and "GB5" ("the permit applications") from the price preference system administered by it, and on that basis refusing to grant the export permits;

2. An order substituting for the decision of the first respondent described in paragraph 1 above the following decisions:

2.1 SA Metal's applications dated 20 October 2014 for export permits are exempted from the price preference system;

2.2 SA Metal's applications dated 20 October 2014 for the following permits are granted:

2.2.1 Two permits to export 500 metric tons of grade 201 steel scrap each;

2.2.2 Two permits to export 20 metric tons of copper scrap each of the grade known internationally as "Millberry";

2.2.3 Two permits to export 20 metric tons of copper scrap each of the grade known internationally as "Berry";

2.2.4 One permit to export 50 metric tons, and one permit to export 40 metric tons, of copper scrap of the grade known internationally as "Birch/Cliff";

2.2.5 Two permits to export 50 metric tons of brass scrap each of the grade known internationally as "Honey";

3. An order directing the first respondent forthwith to issue export permits in accordance with the aforesaid decisions;

4. Alternatively to paragraphs 2 and 3 above, an order remitting the permit applications and the application for exemption from the price preference system for reconsideration by the

first respondent and directing the first respondent to take a decision within five (5) days of the date of this order in accordance with such directions as the Court may make.'

The High Court (per Dolamo J) dismissed the application but granted leave to SA Metal to appeal to this court.

[10] Inasmuch as: (a) ITAC's refusal had occurred during October 2014; and (b) the proposed dates in SA Metal's applications for the export of the scrap metal was November 2014 to January 2015, we were required to consider, at the hearing of the matter, whether the appeal should be entertained at all. To that end, counsel were requested to file supplementary heads of argument and present argument as to whether it was not appropriate to deal with the matter in terms of s 16(2)*(a)*(i) of the Act.

[11] In this regard, every case has to be decided on its own facts. And efforts to compare or equate the facts of one case to those of another are unlikely to be of assistance.[9] SA Metal's notice of motion sought to review and set aside ITAC's refusal to exempt its ten applications for export permits. Each application by SA Metal related to specified items of scrap metal that were to be exported from November 2014 to January 2015 and said to be available for inspection at named locations. The permits did not relate to scrap metal in generic terms. Rather, the relief sought was directed at permitting SA Metal to export the specified scrap metal referred to in the applications. It must be accepted that it would be impermissible for SA Metal to use the export permits for any other scrap metal but those the subject of the applications.

[12] Counsel for the appellant was constrained to concede that the setting aside of the High Court order now and the granting of prayers 1 to 3 of SA Metal's notice of motion would plainly have no practical effect. He accordingly sought to rest his case on prayer 4. But, prayer 4 is not a self-standing prayer. What is sought in prayer 4, in the alternative to the main relief, is an order 'remitting the permit applications and the application for exemption from the price preference system for reconsideration by [ITAC]'. In context, the permit applications contemplated in prayer 4 can only be those

[9] *The Kenmont School & another v D M & others* (454/12) [2013] ZASCA 79; 2013 JDR 1365 (SCA) para 12.

envisaged in prayer 2. And, as prayer 4 inexorably follows upon prayers 1 to 3, the fate of the former is inextricably linked to the latter. There obviously can be little point in now remitting the 20 October 2014 permit applications for reconsideration by ITAC. Given the passage of time there can be nothing for ITAC to reconsider. To remit the matter to ITAC in circumstances such as this, where the issue has become hypothetical, abstract or academic, would be meaningless and amount to an act in futility.[10] Moreover, even were we to incline to the view that the high court was wrong in declining to grant a declaratory order, there would be no point in referring the matter back to that court.[11]

[13] Faced with that difficulty, there was some attempt by Counsel to suggest that the review also encompassed within its ambit a much broader challenge to the price preference system, which, so the argument went, remained a live issue. But, that was specifically eschewed by SA Metal in the court below. SA Metal had there pointed out that when regard is had to the answering affidavits of ITAC and the Minister, it was obvious that both of them had misconceived its (SA Metal's) case. It accordingly sought to set matters to right when it stated in its replying affidavit:

'ITAC appears to be under the erroneous impression that SA Metal seeks a mandatory interdict, and seeks to challenge the price preference system generally. The Minister, too, appears to be under the impression that SA Metal seeks to impugn the price preference system generally for being in violation of the GATT . . . .'

'SA Metal's application is not a challenge to the price preference system generally . . . The application is for an order reviewing and setting aside the decision made by ITAC on 30 October 2014 in respect of the export permit application . . . .'

SA Metal thus made it plain that the relief sought was limited to the ten permit applications annexed to its founding affidavit.

[14] It was nonetheless urged upon us that this is an appropriate matter for the exercise of this court`s discretion to allow the appeal to proceed. In that regard we were

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[10] 'A hypothetical interest is one that is expressly claimed, but is neither real nor true. And an academic interest is one that is not related to a real or practical situation and is, therefore, irrelevant.' (*Giant Concerts CC v Rinaldo Investments (Pty) Ltd & others* 2013 (3) BCLR 251 (CC) para 51).

[11] *West Coast Rock Lobster Association & others v The Minister of Environmental Affairs and Tourism & others* [2011] 1 ALL SA 487 (SCA) para 45.

referred to *Natal Rugby Union v Gould*.[12] The fallacy in the approach of SA Metal, however, is to assume, erroneously so, that what confronts us in this matter - as in *Gould's* case - is a discrete legal issue. As I shall show, it is not. As was explained in *Centre of Child Law v The Governing Body of Hoërskool Fochville*:[13]

'This court has a discretion in that regard and there are a number of cases where, notwithstanding the mootness of the issue as between the parties to the litigation, it has dealt with the merits of an appeal (see, inter alia, *Natal Rugby Union v Gould* 1999 (1) SA 432 (SCA) ([1998] 4 All SA 258); *Land en Landbouontwikkelingsbank van Suid-Afrika v Conradie* 2005 (4) SA 506 (SCA) ([2005] 4 All SA 509); *The Merak S: Sea Melody Enterprises SA v Bulktrans (Europe) Corporation* 2002 (4) SA 273 (SCA) and *Executive Officer*, *Financial Services Board v Dynamic Wealth Ltd* 2012 (1) SA 453 (SCA)). With those cases must be contrasted a number where the court has refused to enter into the merits of the appeal.[14] The broad distinction between the two classes is that in the former a discrete legal issue of public importance arose that would affect matters in the future and on which the adjudication of this court was required, whilst in the latter no such issue arose.

[15] In my view, this case plainly falls into the latter of the two categories alluded to above.[15] As best as I could discern the argument, the discrete legal issue alluded to harked back to the price preference system, which, as I have already pointed out, had been specifically disavowed on the papers. What is more, as the orders sought had become moot and the relief prayed for was no longer competent, the attack, in truth, became one that was directed at the reasoning of the court below. However, an appeal does not lie against the reasons for judgment, but rather against the substantive order made by a court.[16]

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[12] *Natal Rugby Union v Gould* 1999 (1) SA 432 (SCA).
[13] *Centre of Child Law v The Governing Body of Hoërskool Fochville* 2016 (2) SA 121 (SCA) para 11.
[14] See for example: *Radio Pretoria v Chairman, Independent Communications Authority of South Africa & another* 2005 (1) SA 47 (SCA); *Rand Water Board v Rotek Industries (Pty) Ltd* 2003 (4) SA 58 (SCA); *Minister of Trade and Industry v Klein NO* [2009] 4 All SA 328 (SCA); *Clear Enterprises (Pty) Ltd v Commissioner, South African Revenue Service and Others* [2011] ZASCA 164 (29 September 2011); *Kenmont School and Another v D M and Others* [2013] ZASCA 79 (30 May 2013) and *Ethekwini Municipality v South African Municipal Workers Union and others* [2013] ZASCA 135 (27 September 2013) and *Legal Aid South Africa v Magidwana* [2014] ZASCA 141.
[15] See *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* 2013 (3) SA 315 (SCA) para 5.
[16] *Western Johannesburg Rent Board & another v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) at 355; *Absa Bank v Mkhize and Two Similar Cases* 2014 (5) SA 16 (SCA) para 64.

[16] A further string to SA Metal's bow is that the issue in this appeal will arise 'regularly' in respect of export permit applications. There is, however, no reason to believe that a 'large number of similar cases', as SA Metal put it, can be anticipated. ITAC is required to consider *mero motu* whether exports should be exempted from the price preference system. The amended guidelines make it plain that a prospective exporter is required to raise the exemption issue when it applies for an export permit, and must do so 'in sufficient detail for ITAC to understand the nature and basis of the allegation'. Although the price preference system has been in place since 2013, no other exporter appears to have raised the exemption issue. It thus seems that the only exporter likely to raise that issue 'regularly' is SA Metal itself.

[17] SA Metal's submission therefore amounts to this: even if the determination of the present appeal would have no practical effect for present purposes, this court should nonetheless decide the appeal because SA Metal intends to raise the exemption issue when it applies for export permits in the future. However, the fact that SA Metal may have an intention to rely on the exemption issue in future applications does not mean that there is a 'discrete legal issue of public importance' before the court. The directive, which was published in May 2013, is effective for five years. At the end of that period 'it will be reviewed to determine whether it should be terminated or extended for a limited period, with or without amendment'. The directive thus only has approximately one year to run. It follows that any decision of this court would therefore have limited application.

[18] In circumstances where SA Metal has itself chosen to limit its relief to the ten permit applications, there can be no reason of public interest why the court should decide an appeal that would have no practical effect. The appellant is bound to the relief that it sought and if that relief has now become academic, it cannot resort to a general justification for pursuing the appeal. The general justification being that a similar legal issue may arise in relation to other export applications. If the appellant had wanted to have such an issue decided, it ought to have sought such relief and properly motivated for its grant in the public interest.

[19] In effect what SA Metal really seeks is to have this court express a view on a legal conundrum that may arise in the future without in any way affecting the position between the parties to the present dispute. The essential flaw in SA Metal's case is one of timing or ripeness.[17] As it was put in *Clear Enterprises (Pty) Ltd v SARS*,[18] whatever issues may arise in those matters are not yet 'ripe' for adjudication. In *Coin Security Group (Pty) Ltd v SA National Union for Security Officers*,[19] Plewman JA quoted with approval from the speech of Lord Bridge of Harwich in the case of *Ainsbury v Millington* [1987] 1 All ER 929 (HL), which concluded:[20]

'It has always been a fundamental feature of our judicial system that the Courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved'.

[20] After all, courts of appeal often have to deal with congested rolls. And, as Innes CJ observed in *Geldenhuys & Neethling v Beuthin*,[21] they 'exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important'. That was echoed by the Constitutional Court in *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs*[22] when it said:

'A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the court is to avoid giving advisory opinions on abstract propositions of law.'

[21] SA Metal's appeal was accordingly dismissed at the hearing of the matter in terms of s 16(2)*(a)*(i) of the Superior Courts Act. That leaves costs: In this court ITAC sought leave to adduce further evidence on appeal. The evidence was to the effect that an inspection by it revealed that SA Metal no longer had custody of the scrap metal, the

[17] *Ferreira v Levin NO & others*; *Vryenhoek v Powell NO & others* 1996 (1) SA 984 (CC) para 199.
[18] *Clear Enterprises (Pty) Ltd v SARS* (757/10) [2011] ZASCA 164.
[19] In *Coin Security Group (Pty) Ltd v SA National Union for Security Officers & others* 2001 (2) SA 872 (SCA) para 9.
[20] At 930g.
[21] *Geldenhuys & Neethling v Beuthin* 1918 AD 426 at 441.
[22] *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC) para 21 footnote 18.

subject of the ten permit applications. That application was opposed by SA Metal. The opposition gave rise to a dispute of fact that was incapable of resolution on the papers. In argument, ITAC accepted that the evidence sought to be introduced was not strictly necessary for the determination of the appeal and accordingly did not persist with the application. It follows that the application must be dismissed.

[22] The Minister did not seek any costs in respect of the aborted application. SA Metal, however, did. SA Metal persisted in an obviously unmeritorious appeal despite a note from the registrar of this court more than two months prior to the hearing of the matter raising mootness and enquiring whether the appeal was being persisted in. In addition, the costs of the application for leave to adduce evidence constitute a miniscule portion of the overall costs of the appeal. I accordingly take the view that there should be no order as to costs insofar as that application is concerned. Save for those costs, the costs of the appeal must otherwise follow the result.

[23] In the result:

Save for the costs of the application by the first respondent to adduce further evidence on appeal, the appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

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V M Ponnan

Judge of Appeal

APPEARANCES:

For Appellant:	LS Kuschke SC (with him E F van Huyssteen)
	Instructed by: Bernadt Vukic Potash & Getz, Cape Town Lovius Block, Bloemfontein
For First Respondent:	S Du Toit SC (with him F Ismail)
	Instructed by: The State Attorney, Cape Town The State Attorney, Bloemfontein
For Second Respondent:	A Cockrell SC (with him A Friedman)
	Instructed by: Webber Wentzel, Cape Town Honey Attorneys, Bloemfontein