THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 529/08

PAHAD SHIPPING CC Appellant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

Neutral citation: *Pahad Shipping v SARS* (529/08) [2009] ZASCA 172 (2 December 2009)

Coram: STREICHER, BRAND, SNYDERS, MALAN and BOSIELO JJA

Heard: 16 NOVEMBER 2009

Delivered: 2 DECEMBER 2009

Summary: Customs duty – determination of transaction value – appeal in terms of Act 91 of 1964 a wide appeal - serious reservations about credibility of applicant's factual averments – reference to evidence.

ORDER

On appeal from: High Court Johannesburg (Tsoka J sitting as court of first instance)

1 The appeal is upheld with costs including the costs of two counsel.

2 The following order is substituted for the order by the court below:

'(1) The application is adjourned to a date to be arranged with the Registrar for the cross-examination of Mr Nassim Pahad in respect of the evidence deposed to by him in the applicant's founding and replying affidavits.

(2) The provisions of rule 35 will apply in regard to the adjourned hearing.

(3) The costs of the hearing are to stand over for determination at the adjourned hearing.'

JUDGMENT

STREICHER JA (BRAND, SNYDERS, MALAN and BOSIELO JJA concurring):

[1] The issue to be decided in this matter is whether amounts labelled 'finance charges' paid by the appellant as an importer of goods to an import export agent in Dubai, Al Ajwad International LLC, forms part of the transaction value of the goods imported by the appellant. The respondent determined that they do, that the appellant underpaid the

customs duty payable in respect of such goods and that, as a result, customs duty in an amount of R247 440,20, VAT in an amount of R130 104,24 and penalties in an amount of R94 386,04 were payable by the appellant. An appeal by the appellant against the determination was dismissed by the Witwatersrand Local Division (per Tsoka J) which thereafter granted leave to the appellant to appeal to this court.

[2] Customs duty is payable on imported goods at the time of entry for home consumption of the goods.[1] In terms of s 65(1) of the Customs and Excise Act 91 of 1964 the value for customs duty purposes of any imported goods shall, at the time of entry for home consumption, be the transaction value thereof, within the meaning of s 66. Section 66 provides that the transaction value of any imported goods shall be the price actually paid or payable for the goods when sold for export to the Republic, adjusted in terms of s 67. The 'price actually paid or payable' means 'the total payment made or to be made, either directly or indirectly, by the buyer to or for the benefit of the seller of the goods, but does not include dividends or other payments passing from the buyer to the seller which do not directly relate to the goods'.[2] Section 67 provides that in ascertaining the transaction value of any imported goods certain amounts, inter alia 'any commission other than a buying commission', shall be added to the price actually paid or payable for the goods.[3] In terms of s 65(4)(a)(i) the respondent may in writing determine the transaction value of imported goods and an appeal against such determination lies to the High Court.[4]

[1] Section 47(1) of the Customs and Excise Act 91 of 1964.
[2] Section 65(9).
[3] Section 67(1)(a)(i).
[4] Section 65(6)(a).

[3] The appellant paid to Al Ajwad what purports to be the purchase price in respect of the imported goods plus amounts described as ‘bank charges’ consisting of ‘payment commission and cable charges’, ‘postage and petties’, ‘finance charges’ being 5% of the aggregate of these amounts and ‘finance costs’ being 6,5% pa of the aggregate of these amounts. The dispute between the parties is whether the 5% ‘finance charges’ formed part of the transaction value of the goods.

[4] When queried about its relationship with Al Ajwad, the appellant provided the respondent with a copy of a document which purports to be a written agreement between them. The agreement provides as follows:

‘We, Al Ajwad International (L.L.C.), (“Al Ajwad”) agree to make available to you Pahad Shipping C.C. (“the Buyer”), a confirming / trade finance facility subject to the terms and conditions set out herein. Under the terms of this facility, Al Ajwad will act as principal for the Buyer in the puchase of goods on the Buyer’s behalf and will provide its confirmation, by way of Letters of Credit to the seller, for payment of the purchase price of the goods.

1. The Facility

The facility is a revolving facility and the amount of the facility available at any time, subject to the terms and conditions hereof, shall be up to a maximum amount of USD 75,000.00 . . .. Such amount shall be calculated by reference to amounts paid out or agreed to be paid out by Al Ajwad to suppliers of goods.

2 Payment, Interest, Commission and Other Charges

2.1 The Buyer undertakes:

2.1.1 to reimburse Al Ajwad all sums expended by it under the terms hereof, together with all fees, commission and other sums payable to it in accordance with the terms thereof; and

2.1.2 . . .

2.2 The maximum repayment term from the date of Al Ajwad’s payment to any supplier shall be 180 days. Payment will be secured by bills

drawn by Al Ajwad in US Dollars or other currencies as agreed between the Buyer and Al Ajwad through the Buyer's bankers.

2.3 Interest on all amounts outstanding hereunder will be payable by the Buyer to Al Ajwad at a rate of 2% over the US prime rate.

2.4 Any amounts remaining unpaid after the due date for payment will be subject to default interest payable by the Buyer to Al Ajwad at the rate referred to in 2.3.

2.5 The Buyer will pay to Al Ajwad a confirming commission calculated at a rate of 5% of the total disbursements made on behalf of the Buyer.

2.6 All the following charges will be made for the Buyer's account and will be included in the bills of exchange drawn by Al Ajwad:

2.6.1 bank charges;

2.6.2 letter of credit fees;

2.6.3 postage and all other petty disbursements.'

[5] Relying, inter alia, on clause 2.5 in terms of which it was agreed that the appellant would pay a confirming commission of 5% to Al Ajwad, the respondent determined that the 'finance charges' of 5% paid by the appellant to Al Ajwad represented a confirming commission and that it formed part of the transaction value of the goods purchased. On the basis of this determination the respondent contended that the appellant had contravened s 84(1) of the Act and demanded payment of the customs duty underpaid together with a penalty for the contravention of the Act.

[6] The appellant thereupon, in terms of s 65(6)(a), applied to the court below for the setting aside of the respondent's determination. Mr Nassim Pahad ('Pahad') the sole member of the appellant, who deposed to the appellant's founding affidavit, denied that Al Ajwad was a confirming agent. He alleged that the written agreement does not accord with the intention of the parties or with the true nature of the transactions

concluded between them. In regard to the ‘agreement’ that Al Ajwad would ‘act as principal for the buyer in the purchase of goods on the buyer’s behalf and will provide its confirmation, by letters of credit to the Seller for payment of the purchase price of the goods’ he alleged that Al Ajwad never provided this form of service to the respondent and that it was not the intention of the parties that such a service would be provided. It was sometimes the appellant but primarily appellant’s client who negotiated the price of goods from an overseas supplier. Appellant purchased the goods and the supplier invoiced the appellant. No prepayment of goods took place and the appellant did not secure payment by means of letters of credit. Payment was only made to the supplier after clearance of goods in South Africa. In the normal course appellant’s instruction to make payment occurred approximately 45 days after the clearance of the goods. Al Ajwad then paid the invoice value to the supplier and levied finance charges at the rate of 5% of the disbursed amount and interest at the US prime rate over a period of six months. The system afforded the appellant approximately 225 days to make payment of the purchase price. Al Ajwad would not have known, until instructions for payment had been received from the appellant, who the seller or supplier was. The provision that appellant would pay to Al Ajwad ‘a confirming commission calculated at the rate of 5% of the total disbursements made on behalf of the buyer’ was inaccurate and did not reflect the true intention of the parties or the factual relationship between them. These payments comprised finance charges and interest. Al Ajwad at no stage confirmed a purchase between the appellant and its supplier or guaranteed payment of the purchase price to the supplier. The supplier had no recourse against Al Ajwad. This relationship, Pahad submitted, was the very antithesis of a confirming agent relationship.

[7] In support of these allegations and by way of example Pahad annexed documents relating to a particular transaction comprising an instruction by the appellant to Al Ajwad to pay an invoice from Kingsburg Exports Ltd for goods purchased to which instruction was attached: a copy of the invoice by Kingsburg; a customs release notification; an arrival notification by a shipping agent; and an invoice by Al Aljwad. Pahad stated that all invoices generated by Al Ajwad for payment by the appellant followed the same format. According to the documents the goods were shipped on 8 April 2005, the expected time of arrival was 2 May 2005, the goods were released on 13 May 2005 and Al Ajwad was instructed to pay the invoice on 1 August 2005. Al Ajwad's invoice is dated 7 August 2005. Interest was claimed for a period of 120 days and the amount of the invoice was stated to be due on 11 September 2005. Pahad's version as to the true nature of the transactions between the appellant and Al Ajwad would seem not to be borne out by these documents. First, according to the documents the invoice is addressed to the appellant as well as Al Ajwad contrary to Pahad's averment that Al Ajwad would not have known until instructed to pay who the seller or supplier was. Second, the payment instruction is dated 68 days after the goods had been released contrary to Pahad's averment that it was given approximately 45 days after the goods had been cleared. Third, interest for a period of 120 days was claimed by Al Ajwad contrary to Pahad's averment that Al Ajwad levied interest over a period of 180 days. Fourth, if Al Ajwad only became involved in the transaction upon the instruction to pay, ie on 1 August 2005, Al Ajwad could only have been entitled to interest for the period 1 August 2005 to 11 September 2005 (the due date), ie for a period of 42 days. Al Ajwad would therefore appear to have been involved in the transaction in some way or other before the instruction to pay was given so as to entitle it to charge interest for a

period of 120 days. Apart from the inconsistencies between the documents and Pahad's evidence, Al Ajwad is not a trade finance bank as was alleged by Pahad.

[8] Another set of documents referred to in the respondent's answering affidavit consists of an instruction by Geochris Investments (Pty) Ltd dated 18 January 2005 to Al Ajwad to pay an amount of US$19 772,60 to Kingsburg relating to invoice number KE5950; an invoice by Al Ajwad to Geochris dated 1 February 2005 in respect of the execution of the instruction; and a bill of entry dated 31 December 2004 indicating that the expected time of arrival in South Africa was 3 January 2005. The bill of entry bears a stamp:

'Habib Overseas Bank
$21 595-16
07 Mar 2005
Exchange
Provided'

In the respondent's answering affidavit it is alleged that the stamps on the bill of entry indicate that the amount of US$21 595,16 was paid and remitted from South Africa to Al Ajwad. In reply Pahad did not deal with the allegation. He said that he was unsure as to what stamps were being referred to. The reply is, on the face of it, blatantly dishonest. There are two stamps on the document, the one quoted above and another one which is clearly not relevant. There could have been no doubt in Pahad's mind as to the stamp being referred to. In these circumstances the allegation that according to the stamps on the document the amount of US$21 595,16 was paid and remitted from South Africa to Al Ajwad stands undisputed. The stamp is dated 7 March 2005 and therefore indicates that payment was effected on or before that date.

[9] The Al Ajwad invoice dated 1 February 2005 included 5% 'finance charges' as well as interest for 120 days. According to the invoice the total amount of the invoice was due on 26 April 2005. Again Pahad's averments as to the true nature of the transactions between the appellant and Al Ajwad would seem not to be borne out by these documents. First, the amount of US$21 595,16 which was claimed to be due to Al Ajwad on 26 April 2005 included interest for a period of 120 days ie, so it would seem, from 27 December 2004 a date prior to the date of the bill of entry and prior to the estimated time of arrival of the goods in South Africa. Again, Al Ajwad must in some way or other have been involved before the instruction to pay was given. Second, the payment instruction was given on 18 January 2005 and payment was effected on 7 March 2005 contrary to Pahad's averment that the payment instructions were given approximately 45 days after the goods had been cleared in South Africa and the averment that the system allowed the appellant 225 days for payment. Third, the payment instruction was given by Geochris Investments (Pty) Ltd and not by the appellant. The appellant gave no explanation of what its relationship with Geochris was or what the nature of the involvement of Geochris was. Fourth, credit was ostensibly extended by Al Ajwad for a period of 120 and not 180 days as averred by Pahad. Fifth, payment of the Al Ajwad invoice was effected some 50 days before the due date in terms of the invoice. If that payment included the interest for a period of 120 days claimed in the Al Ajwad invoice it would mean that Al Ajwad became involved in the transaction in some way or other on 23 November 2004, ie long before the goods arrived in South Africa, the date of Al Ajwad's invoice and the date of the instruction to pay.

[10] Referring to the written agreement between the appellant and Al Ajwad and to the other documents referred to above, the respondent in its answering affidavit submitted that the documents demonstrate that Al Ajwad purchased goods from the supplier and resold them to the appellant or Geochris. In the alternative the respondent submitted that, in the event that it cannot be considered that Al Ajwad purchased and resold the goods, 'it is clear that the 5% levied by Al Ajwad under the description "finance charges", was a commission for its services as a payment intermediary.' In a further alternative the respondent indicated that in the event of the court not being inclined to uphold the appellant's appeal he would seek the opportunity of cross-examining the deponent to the founding affidavit.

[11] The court below rejected the appellant's denial of what it called 'unambiguous terms' of the agreement and held that the 5% 'finance charges' was a commission in the ordinary sense and within the meaning of 'any commission' in s 67. It was of the view that the section is clear and that it was not a requirement that commission that has to be added in terms of s 67 had to be for the benefit of the seller. Only buying commission was excluded. In this regard the court below referred to the evidence that Al Ajwad was not involved at all during the procurement of goods, stated that it was clear that Al Ajwad was not the appellant's agent and held that the 5% 'finance charges' was not a buying commission. It is against this judgement that the appellant now appeals.

[12] The appellant's application to the court below for the setting aside of the respondent's written determination that the 'finance charges' formed part of the transaction value of the imported goods was brought in terms of s 65(6)(a) which provides as follows:

'An appeal against any such determination shall lie to the division of the High Court of South Africa having jurisdiction to hear appeals in the area wherein the determination was made, or the goods in question were entered for home consumption.'

In terms of s 65(4)(c)(ii)(bb) the respondent's written determination shall cease to be in force from the date of a final judgment by the High Court or a judgment by the Supreme Court of Appeal.

[13] In *Tikly and others v Johannes NO and others* 1963 (2) SA 588 (T) at 590G-591A Trollip J held that the word 'appeal', used in a similar context could have one of three meanings:

'(i) an appeal in the wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information . . .;

(ii) an appeal in the ordinary strict sense, that is, a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong . . .;

(iii) a review, that is, a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly . . ..'

[14] The parties dealt with the case as if it was an appeal in the wide sense, ie as if it was a complete re-hearing of the case and a fresh determination of the merits of the case. Correctly so, in my view, for the following reasons: (a) The Act does not require of the respondent to hear evidence, to give any reasons for his determination or to keep any record of proceedings. As was held in *Tikly* at 592B-C these considerations militate completely against the 'appeal' being an appeal in the strict sense. (b) It is implicit in the provisions of s 65(4)(c)(ii)(bb) to the effect that the determination by the respondent cease to be in force

from the date of a final judgment by the high court or this court that the court must itself make a determination upon appeal to it. That eliminates the appeal being a review in the sense set out in (iii) above (see *Tikly* 591H-592A). (c) As there is no provision for a hearing before the determination of the transaction value by the respondent the legislature must in my view have intended 'appeal' to be an appeal in the wide sense.

[15] It is on this basis that the appellant applied to the court below for an order setting aside the respondent's determination and directing that all amounts paid by the appellant to Al Ajwad forming the subject matter of the determination appealed against are not to be included in the transaction value of goods imported by the appellant.

[16] I now turn to the question whether the court below correctly rejected the appellant's evidence as to the nature of its relationship with Al Ajwad.

[17] Counsel for the appellant was asked to explain the apparent inconsistencies between the appellant's evidence and the documentation but was unable to do so. He was again invited to do so after the lunch adjournment but was still unable to do so. In the light of these inconsistencies and also the fact that the appellant provided the written agreement to the respondent when queried about its relationship with Al Ajwad only to later deny that the agreement governed their relationship I have serious reservations about the credibility of the appellant's factual averments.

[18] Unfortunately the inconsistencies were not properly explored in the affidavits. For this reason I do not think that the court below should, on the papers, have rejected Pahad's version which is confirmed by Anwar Paruk the manager of Al Ajwad International LLC. As a result of the court below's view on the reliability of the appellant's averments the respondent never asked for an opportunity to cross-examine the deponent to the founding affidavit. But before us counsel for the respondent in accordance with what was said in the respondent's answering affidavit did indicate that the respondent still wanted to have such an opportunity should we be of the view that the appeal should succeed.

[19] Had the respondent at the outset of the hearing in the court below applied for an opportunity to cross-examine the deponent to the founding affidavit such a request should have been granted. In terms of rule 6(5)(g) a court has a wide discretion in regard to the hearing of oral evidence where an application cannot properly be decided on affidavit. In *Moosa Bros & Sons (Pty) Ltd v Rajah* 1975 (4) SA 87 (D) at 93H Kumleben J said:

'(c) Without attempting to lay down any precise rule, which may have the effect of limiting the wide discretion implicit in this Rule, in my view oral evidence in one or other form envisaged by the Rule should be allowed if there are reasonable grounds for doubting the correctness of the allegations concerned.

(d) In reaching a decision in this regard, facts peculiarly within the knowledge of an applicant, which for that reason cannot be directly contradicted or refuted by the opposite party , are to be carefully scrutinised.'

The passage was referred to with approval in *Khumalo v Director-General of Co-operation and Development and others* 1991 (1) SA 158 (A) at 167I-J.

[20] However, it has been held in a number of cases that an application to refer a matter to evidence should be made at the outset and not after argument on the merits (see *Kalil v Decotex (Pty) Ltd and another* 1988 (1) SA 943 (A) at 981D-F). As was stated by Corbett JA in *Kalil* at 981E-F the rule is a salutary general rule. Unnecessary costs and delay can be avoided by following the general rule. But Corbett JA also stated that the rule is not inflexible. In *Du Plessis and another NNO v Rolfes Ltd* 1997 (2) SA 354 (A) at 366G-367A this court dealt with an application which was made for the first time during argument in this court. The application was dismissed but it is implicit in the judgment that, in appropriate circumstances, this court may decide that a matter should be referred to evidence even where no application for such referral had been made in the court below. It would naturally be in exceptional cases only that a court will depart from the general rule (*Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A) at 587 C-D). In my view this is such a case. The respondent probably misjudged the strength of his case. Having regard to the reservations expressed about the credibility of Pahad's averments it was not unreasonable of the respondent to have thought that Pahad's version would be rejected on the papers as was done by the court below. Moreover, there is, as is apparent from the above, good reason to believe that an injustice may be done should the respondent not be given an opportunity to cross-examine Pahad. Pahad may of course be able to explain the inconsistencies and what I have described as, on the face of the documents, blatant dishonesty on his part. Referring the matter to evidence would give him an opportunity to do so.

[21] For these reasons the following order is made:

1 The appeal is upheld with costs including the costs of two counsel.

2 The following order is substituted for the order by the court below:

‘(1) The application is adjourned to a date to be arranged with the Registrar for the cross-examination of Mr Nassim Pahad in respect of the evidence deposed to by him in the applicant’s founding and replying affidavits.

(2) The provisions of rule 35 will apply in regard to the adjourned hearing.

(3) The costs of the hearing are to stand over for determination at the adjourned hearing.’

_____

P E STREICHER
JUDGE OF APPEAL

APPEARANCES:

For appellant:	A P Joubert SC F P Strydom Instructed by: Dockrat Incorporated, Johannesburg Mpobole & Ismail, Bloemfontein
For respondent:	J Peter Instructed by: The State Attorney, Johannesburg The State Attorney, Bloemfontein