

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA13/8/15
CASE NO: 15201/13

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED
12/12/14 DATE	
 SIGNATURE	

In the matter between:

ASSOCIATED EQUIPMENT COMPANY CC

Applicant

and

THE INTERNATIONAL TRADE
ADMINISTRATION COMMISSION

First Respondent

THE MINISTER FOR ECONOMIC DEVELOPMENT

Second Respondent

J U D G M E N T

MASETI, AJ:INTRODUCTION

[1] This is an application by the respondents for leave to appeal against the whole of the judgment and order, including leave on the issue of costs, handed down by this Court on 4 April 2014.

[2] Leave to appeal is based on the legal and factual grounds set out in paragraphs 1 to 18 of the application for leave to appeal.

[3] The matter was set down for hearing on 13 November 2014. The respondents' Counsel handed in her Heads of Argument during the hearing.

[4] The applicant opposed the application on the date of the hearing and also handed in his Heads of Argument during the hearing.

[5] Judgment was delivered on 4 April 2014 and the application for leave to appeal was lodged on 2 May 2014.

THE ISSUES

[6] The issues are whether there are reasonable prospects of success and whether another court may come to a different conclusion.

THE LAW

[7] The application for leave to appeal is brought in terms of Section 20(1) of the Supreme Court Act, 59 of 1959 and Rule 49(1)(b) of the Uniform Rules of this Court.

[8] Rule 49(1)(b) provides:

“When leave to appeal is required and it has not been requested at the time of the judgment or order, application for such leave shall be made and the grounds therefor shall be furnished within fifteen days after the date of the order appealed against:

Provided that when the reasons or the full reasons for the Court's order are given on a later date than the date of the order, such application may be made within fifteen days after such later date:

Provided further that the Court may, upon good cause shown, extend the aforementioned periods of fifteen days.”

[9] The application for leave to appeal complies with Rule 49(1)(b) as it was lodged, within the period prescribed by the Rule excluding public holidays, Saturdays and Sundays.

[10] Erasmus in his book titled “*Superior Court Practice*” (B1-356) in his commentary under Rule 49(3) states that there are four objects to be served by a notice of appeal namely:

10.1 to enable the presiding officer to frame his reasons for judgment;

10.2 to give the respondent an opportunity of abandoning the judgment;

10.3 to inform the respondent of the case he has to meet;

10.4 to notify the appeal court of the points to be raised. See *Kilian v Geregsbode Uitenhage* 1980 (1) SA 808 (A) at 815.

[11] The court has to consider whether the application for leave to appeal complies with all the jurisdictional requirements namely:

- 11.1 reasonable prospects of success;
- 11.2 whether grounds of appeal are not bad in law in that they are so widely expressed as to leave the appellant free to canvas every finding of fact and every ruling of law. See *Himunchol v Moharom* 1947 (4) SA 778 (W) at 780 judgment by Hathorn JP;
- 11.3 whether the grounds of appeal inform the respondent in clear and unambiguous terms exactly what case he has to meet; and
- 11.4 whether the grounds of appeal comply with the 4 (four) objects to be served by a notice of appeal in terms of Rule 49(3) mentioned in paragraph [10] above.

[12] The application for leave to appeal meets the requirements stated in paragraphs [10] and [11] above.

[13] In their Heads of Argument the respondents contend:

- 13.1 That the court *a quo* reduced the legislative weight of the respondents' Import Control Policy to a "*report*".

- 13.2 That the court further erred in referring to a letter dated 14 December 2012 whilst the letter was in fact dated 14 September 2012.
- 13.3 That the court erred in failing to take into account the impact of the judgment in *International Trade Administration v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) in particular the finding by the Constitutional Court that a court should only intrude into the terrain of the executive in the clearest of cases and only when irreparable harm is likely to ensue if interdictory relief is not granted.
- 13.4 That the court failed to take into account the discrepancy between the number of TLB's that the applicant was allowed to import in accordance with previously issued import licenses *vis-à-vis* the amount of TLB's that the applicant actually imported and further that the discrepancy clearly indicates that there is a sufficient local supply of TLB's.
- 13.5 That the letter written by Mr Rokebrand of Bell Equipment Sales SA Ltd to a third party called Dura Equipment Sales, which was not under oath, did not carry more weight than that carried by an affidavit deposed to by Prince Ndlela of Bell Equipment Sales SA Ltd which confirmed that Bell would not support importation of TLB's and that Rokebrand's letter which supports the granting

of the import licence was not before the first respondent when the permit was refused.

[14] In his opposition applicant's Counsel contended that in examining the rationality of the decision of the respondents, it is perfectly bound and proper for the court to:

14.1 look at the reasons given by the respondents when asked to justify its decision;

14.2 look at the reasons given by the respondents in their answering affidavit.

[15] If the court finds:

15.1 that there is a difference between the reasons originally given for the decision and those ultimately given, this may call to question the rationality of the administrative functionary's decision;

15.2 the reasons ultimately given are, in themselves, not sound or justifiable, this too may call to question the rationality of the administrative functionary's decision.

[16] The respondent had formulated a policy to quote the relevant portion of the reasons given in advance:

“The prevailing import control policy entails that the importation of used or second hand goods is allowed only in the event of similar or substitute new goods not being available from local manufacturers.”

[17] The law in regard to the use of administrative functionaries of a general policy is that if an administrative functionary simply applies a policy guideline without considering the merits of each particular application, it has failed to exercise the discretion given to it and has therefore not made a proper decision.

[18] In their answering affidavit, the respondents then proceeded to provide different reasons through Collin’s affidavit with specific reference to Collin’s visit to the Bell factory. Those reasons were nothing more than bald conclusions. If valid the respondents would have adduced some data in support of those reasons.

[19] The applicant is claiming prejudice by its inability to import second hand TLB’s.

[20] The respondents contend that the applicant is limited to the grounds it raised in its founding papers when challenging the respondents’ reasoning whilst they ignore the fact that the respondents changed the reasons that they gave for their decision in their answering affidavit.

[21] The respondents raise two linked points in their notice, namely:

21.1 that the learned judge reduced the legislative weight of the policy and in so doing nullified its weight and importance”
and

21.2 failed to take into account the reasoning in *SCAW South Africa* case of the Constitutional Court dealing with the role of the legislative, executive and judiciary.

[22] The reasoning of the respondents here is confusing. The policy is not anything that has legislative weight. It is an administrative guideline.

[23] In the overall constitutional structure the courts only set aside legislation under very limited circumstances. However, the courts have a constitutional mandate to test administrative action on various grounds including rationality. In this case the court was concerned with whether or not irrelevant considerations were taken into account and relevant considerations not taken into account. The court found that the respondents had made an irrational decision.

[24] The respondents blindly followed their guidelines without applying their mind and therefore without exercising any discretion in regard to the applicant's request for an import permit. That respondents did not act

properly was demonstrated by an analysis of the reasons that they sought to give to justify their decision.

[25] In considering the reasonableness of the grounds of appeal, that is, the reasonable prospects of success and whether another court may come to a different conclusion this court has to address the question of law and facts raised in the following manner:

25.1 The contention by the respondents that the use of the word “*report*” to the respondents’ import control policy reduced the legislative weight of the policy, leads to confusion as the policy does not have any legislative weight other than being an administrative guideline and has thus been treated as such. This document termed Import and Export Control Policy was presented by ITAC to the Minister of Trade and Industry on 1 August 2007 and the document was accepted by the Minister as a policy on 3 October 2007. It never passed any legislative test.

25.2 The impact of the judgment in *International Trade Administration v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC), is that the Deputy Chief Justice addressed the principle of separation of powers that on the one hand recognizes the functional independence of the branches of government and on the other

hand the principle of checks and balances. The courts only set aside legislation under every limited circumstances.

The court in granting judgment was aware and took into consideration the submission by respondents' counsel that courts are ill-suited to judge on considerations of national policy choices and specialist knowledge by further referring to *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) in paragraph [28] of the judgment in addition to *SCAW* case.

The courts are not totally debarred but are warned to give due weight to findings of fact and policy decisions made by those with special expertise and experience in their fields.

- 25.3 The discrepancy between the TLB's imported and the number of TLB's allowed in accordance with the previous permits granted was not mentioned in the reasons for the refusal of the import licence in the letter dated 14 September 2012. The discrepancy appeared only in paragraph 4 of the respondents' answering affidavit deposed to by Marius Ettienne Collins. The fact that the applicant ordered less TLB's in 2011 than the number of TLB's granted in his permit issued in 2010 does not lead to the total exclusion of the applicant from importing any TLB's at all. The

applicant is potentially prejudiced by its inability to import second hand TLB's at all.

[26] It is conceded that the letter of no objection recorded in March 2013 by Rokebrand, a commercial director of Bell Equipment cannot be considered since it was written after the refusal of important licence in July 2012 and did not form part of the documents considered by the respondents in arriving at their decision. Paragraph 41(c) of the order is therefore flawed.

[27] The court in paragraphs 1, 16.2 and 38.5 of its judgment has erroneously written 14 December 2012 instead of 14 September 2012. This has been a typographic error. This error as a result had an effect on paragraph 41(b) of the order where the order reads 14 December 2012 instead of 14 September 2012. Paragraphs 4, 14 and 37 of the judgment refer to the correct date, that is, 14 September 2012.

[28] This Court is of the view that the typographic errors in the judgment itself have no material effect. Since this Court does not have powers to change its own order the error in the order itself does have a negative effect and justifies the granting of the leave to appeal on the order only. It is trite that once judgment is given in a matter it is final. It may not thereafter be altered by the judge who delivered it. He becomes *functus officio* and may not ordinarily vary or rescind his own judgment. That is the function of the Court of Appeal.

[29] In so far as the judgment is concerned this Court is still convinced that the refusal to grant Import licence was irrational but at the same time another court may come to the conclusion that my judgment has been influenced by the letter of no objection recorded in March 2013 by Rokebrand.

[30] In the premises the application by the respondent for leave to appeal against the judgment granted on 4 April 2014 succeeds.

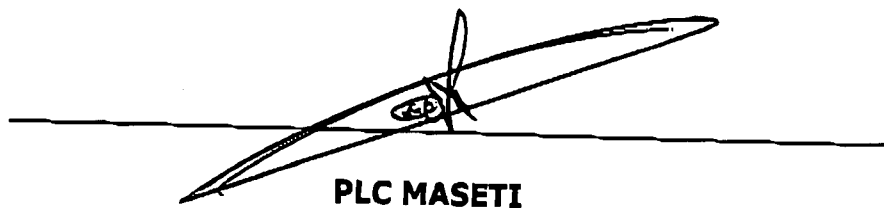
[31] The application for leave to appeal against the order granted on 4 April 2014 also succeeds.

[32] Since costs generally follow the results the question of costs will be addressed by the Appeal court that will hear the matter.

[33] I now make the following order:

(a) The application for leave to appeal against the judgment and order granted on 4 April 2014 is granted to the full court of this Division.

(b) There is no order as to costs.

A handwritten signature in black ink, appearing to be 'PLC Maseti', is written over a horizontal line. The signature is stylized with a large loop and a crossbar.

PLC MASETI
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE OF HEARING	13 NOVEMBER 2014
DATE OF JUDGMENT	12 DECEMBER 2014
FOR THE APPLICANT	ADV VAN BLERK SC
INSTRUCTED BY	FRIEDLAND HART SOLOMON & NICOLSON 79 Steenbok Avenue Monument Park Pretoria
FOR THE RESPONDENT	ADV NEUKIRCHER SC
INSTRUCTED BY	THE STATE ATTORNEY 255 Cnr Thabo Sehume & Francis Baard Streets Pretoria