

CASE NO: 168/95

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE CHAIRMAN OF THE BOARD
ON TARIFFS AND TRADE

FIRST APPELLANT

THE DIRECTOR-GENERAL:
TRADE AND INDUSTRY

SECOND APPELLANT

THE MINISTER OF TRADE
AND INDUSTRY

THIRD APPELLANT

and

TELTRON (PTY) LTD

RESPONDENT

CORAM: CORBETT CJ, VAN HEERDEN, EKSTEEN, HOWIE
et ZULMAN JJA

HEARD: 1 NOVEMBER 1996

DELIVERED: 28 NOVEMBER 1996

JUDGMENT

EKSTEEN, JA:

During 1988 the government became concerned at the worsening balance of payments in the country's international trade. In order to alleviate the position and to restore the balance to acceptable levels the then Minister of Economic Affairs and Technology requested the Board for Trade and Industry ("the Board") to investigate the possibility of introducing differentiated rates of surcharge to be imposed on certain imported goods. The Board conducted the investigation and in its report to the Minister recommended the imposition of such surcharges. The government accepted these recommendations and immediately imposed the surcharges in terms of the provisions of the Customs and Excise Act, 91 of 1964, by Government Notice R1635 promulgated in Government Gazette 664 of 15 August 1988.

These surcharges were imposed at such short notice that they had the effect of causing harm and inconvenience to importers who had already placed orders and were bound to accept the goods so ordered. In an attempt to deal with this situation the Minister of Finance, by Government Notice 1862 of 8 September 1988, inserted Note 9 to Part 4 of Schedule 1 of the Customs and Excise Act ("Note 9") providing for certain exemptions to the payment of the surcharge. This Note read as follows:

"9. Any rate of surcharge specified in this part in respect of any goods shall not apply to any such goods entered for home consumption before 31 October 1988, in such quantities or of such values as the Director-General: Trade and Industry, on the recommendation of the Board of Trade and Industry, may allow by specific permit provided -

- (a) satisfactory evidence is submitted that the goods were irrevocably ordered before 15 August 1988;
- (b) the continued existence of the undertaking is, in the opinion of the Board, in jeopardy; and

- (c) the application for a permit was in the possession of the Board before 30 September 1988."

(The name of the Board for Trade and Industry was changed by section 1(a) of Act 60 of 1992 to the Board on Tariffs and Trade, and its Chairman is the first appellant in this matter.)

The words "entered for home consumption before 31 October 1988" in the Note, were deleted by Government Notice R2239 of 28 October 1988, and they are of no consequence to the present appeal.

On 28 September 1988 the respondent applied for exemption under Note 9. On 9 November 1988 it was informed that its application had been refused. It is common cause that that refusal was improper and consequently invalid. Respondent subsequently renewed its application and submitted further information in support of its case. After a considerable amount of discussion and correspondence

respondent's application was finally refused. In a letter dated 7 October 1993 it was informed that:

"The Board has duly reconsidered your application and the documentation filed in support thereof The Board has come to the conclusion that the continued existence of Teltron (Pty) Limited was not in jeopardy due to the imposition of the differentiated rates of surcharge on 15 August 1988. The Board, therefore, cannot accede to your request to recommend that exemption from the payment of surcharge in terms of Note 9 be granted your company in respect of goods ordered by it prior to 15 August 1988."

On 31 March 1994 respondent filed an application in the Transvaal Provincial Division for an order reviewing and setting aside the decision of the Board; for an order directing the Board to recommend to the Director-General: Trade and Industry ("second appellant") that the application be granted, and for an order directing the second appellant to grant the application. In its founding affidavit

respondent based its application on the submission that the Board had misdirected itself and had not properly applied its mind to the application, and that it had been unduly influenced by irrelevant considerations in coming to its decision. In the appellants' answering affidavits it became apparent that the Board had in fact not dealt with the application itself but had purported to delegate its functions to a committee known as the Industrial Investigation Committee ("the I.I.C."). In consequence of this revelation the respondent reformulated its grounds for review alleging that the refusal had been irregular and improper for the following reasons:

- (a) The Board did not consider the application at all, but abdicated its responsibility to do so to the I.I.C.
- (b) The Board misconceived the nature of its discretion under

paragraph (b) of Note 9 which required only that the continued existence of the undertaking be in jeopardy and not that the surcharge should have been the cause of the jeopardy; and

- (c) The application had been refused not on its merits but for ulterior considerations. It was conceded that this latter ground involved factual disputes on the papers, and that consequently, in the event of the respondent not succeeding on either of the first two grounds, it was bound to ask for the matter to be referred to oral evidence to resolve the disputes.

The learned Judge *a quo* upheld the respondent's contention on the first ground and found it unnecessary to consider the latter two. In view of its finding that the Board had in fact not considered the matter at all, and that it had no authority in law to delegate its responsibility in this

regard to the I.I.C., the Court came to the conclusion that it could not simply grant the prayers as framed in respondent's notice of motion. It therefore made an order that:

- "1. The purported decision of the Board on Tariffs and Trade not to recommend to the second respondent that the applicant's application in terms of Note 9 to Part 4 of Schedule 1 to the Customs and Exercise Act 1964 for exemption from the payment of surcharges in respect of certain imports is reviewed and set aside.
2. The first respondent is ordered to pay the costs of the application which will include the costs consequent upon the employment of two counsel."

It is against this order that the present appeal is brought.

Mr Trengove who argued the matter before us on behalf of the respondent advanced argument on all three grounds for review referred to above. As a result of the view I take of the first ground it will be unnecessary to consider the other two despite the fact that the second

ground does not seem to me to be entirely without substance.

In his answering affidavit the first appellant makes the bald allegation that the Board delegated its functions in respect of this application to the I.I.C., which consisted of himself and two other members of the Board. The Board itself, it would appear, consists of some 17 members. Nowhere in the papers does the first appellant say when such delegation took place, or how it took place or what the ambit of the delegation was.

The first appellant then goes on to say that, in view of the fact that the Board had investigated and recommended the imposition of differentiated rates of surcharge, it "was also considered to be the most appropriate body to consider and make recommendations to the second respondent [second appellant] on applications for exemption permits".

In the light of this allegation, and if one has regard to the fact that the amount involved in the application was some R16 million, one would have expected any delegation of the Board's responsibilities to the I.I.C. to have been done with a measure of formality, such as a duly approved resolution of the Board. The Board is, after all, a creature of statute, and where the statute creating it gives it the right to delegate its duties, there is an *onus* on the Board to show that that delegation had been properly made. It may well be that the *onus* has not been discharged by the mere allegation that there had been a delegation. The terms of the delegation have not been disclosed. There is furthermore no proof that the formalities required for a resolution to that effect had been complied with, that the requisite *quorum* had been present, and that the resolution had been properly recorded. None of this has been done.

Mr Dunn, who appeared on behalf of the appellants, submitted that the allegation that the Board had delegated its responsibility had not been denied by the respondent in its replying affidavit, and that this aspect was therefore never put in issue. It is true that the respondent did not specifically deny that the Board had purported to delegate its responsibility. It does, however, transpire from the papers that the respondent had requested the first appellant in terms of Rule 53(1)(b) to send the record of the proceedings before the Board to the Registrar. He did so, but in a letter dated 1 August 1994 respondent's attorneys pointed to certain deficiencies in the record and requested the first appellant to furnish them with copies of the missing documents. It referred *inter alia* to the alleged delegation and complained that

"No documents, minutes or resolutions concerning such delegation have been disclosed."

The first appellant's terse reply to this request was that

"The stipulated documentation does not form part of the record of proceedings pertaining to the decision sought to be reviewed."

First appellant's attention was therefore pertinently drawn to the *lacuna* in his papers, but he did nothing to clear it up. If in fact there had been no resolution, or any proper delegation, that would be the end of the matter, because in such event there could be no doubt that the I.I.C. had no authority whatever to consider the application. The point was, however, not pertinently taken up by the respondent in its affidavits, and so I do not propose to pursue this aspect any further. For the purposes of this judgment I shall assume that the Board had indeed purported to delegate its duty to the I.I.C. The question remains whether in law it was entitled to do so.

The Board came into being by virtue of the provisions of Act 107

of 1986 ("the Act"). Section 9 of the Act provides that:

"9. (1) The Board may, with the consent of the Minister, establish from among their number committees.

.....

(4) (a) The Board may, subject to such directions as it may issue from time to time -

- (i) delegate any power granted to it by or under section 4 to such a committee; and
- (ii) grant authority that a duty assigned to it by or in terms of section 4 may be performed by such a committee.

(b) The Board shall not be divested of a power so delegated and the performance of a duty so authorized, and may amend or set aside any decision of a committee."

This section, therefore, contains a limitation. It only allows the Board to delegate or assign powers or duties granted to it under section 4 of the Act and not any other powers or duties. Section 13 of the Act also allows the Board, "subject to the directions of the Minister" to delegate the powers conferred on it by section 12 to "an officer or

employee of the Department of Trade and Industry". The provisions of this section are not applicable to the present case, and need not be considered any further.

In his answering affidavit the first appellant says that the Board's duty to consider and make recommendations to the second appellant for exemption permits was given to the Board by the third appellant (i.e. by the Minister of Trade and Industry) in terms of section 4(1)(a)(iii) of the Act, and that the Board delegated this function to the I.I.C. He then goes on to say:

"Although the Board is not divested of any power delegated to any of its committees, including the I.I.C., any such committee ... may effectively dispose of any matter dealt with by it. The practice ... has evolved for the I.I.C. to perform all its functions in the Board's name."

This explains why, in its letter of 7 October 1993, the I.I.C.

informed the respondent that "the Board has duly reconsidered your application", that "the Board has come to the conclusion", and that "the Board ... cannot accede to your request" whereas in fact the Board had not considered the application, nor had it decided not to accede to the respondent's request for exemption. Although the first appellant went on to allege that "the Board was appraised (*sic*) of this decision by the I.I.C. on the same date" it was conceded by first appellant's attorney in a letter dated 16 September 1994 that the Board was not apprised of the I.I.C.'s decision "on the same date" as alleged in the answering affidavit, but at some later date. This, he says, was "an erroneous averment" arising from "a drafting error."

Section 4(1)(a)(iii) on which the first appellant sought to rely provides that

"4(1) For the purposes of achieving its objects, and subject to the provisions in any other law contained, the Board may -

- (a) (iii) by order of the Minister investigate any other matter which affects or may affect the trade and industry of the Republic
- and
- (b) report and make representations to the Minister in respect of any investigation referred to in paragraph (a)."

The Board's duty by virtue of that sub-section could clearly not have been delegated. In the first place the Board was not ordered to investigate the matter by the Minister of Trade and Industry, but derived its power from Note 9 which was issued by the Minister of Finance. Secondly it was not enjoined to "report and make recommendations to the Minister" in respect of its investigation, but to make a recommendation to "the Director-General: Trade and Industry". Section 4(1)(a)(iii) therefore could not have founded any application to the relief sought by the respondent.

In argument before the Court *a quo* appellants' counsel recognized this and submitted that the delegation had been made in terms of section 4(1)(e) of the Act as it read prior to its amendment by section 4 of Act 60 of 1992. In argument before us Mr Dunn suggested a further alternative viz. that it might conceivably have been done in terms of section 4(1)(a)(iii) as it read prior to the amendment. The unamended section read as follows:

- "4(1) The functions of the Board shall be to endeavour to achieve its objects with the means at its disposal, and for the purposes of achieving those objects the Board may -
- (a) report or recommend to the Minister in respect of -
.....
 - (iii) the import and export of goods;
.....
 - (e) exercise or perform any other power or duty granted or assigned to it by or under this Act or any other law."

The suggestion that the duty entrusted to the Board in terms of

Note 9 was conferred in terms of the unamended section 4(1)(a)(iii) falls to be rejected for very much the same reasons as those applying to the amended section. The object of the reference to the Board was to make recommendations to "the Director-General: Trade and Industry", and not to "report or recommend to the Minister" as the section envisages. The duty imposed on the Board in the present respect could not have been imposed in terms of the unamended section 4(1)(a)(iii). The question remains as to whether it was imposed in terms of section 4(1)(e). This was in fact the mainstay of the appellants' contentions before us.

Mr Dunn conceded that the Board's authority to consider the respondent's application was conferred on it by Note 9 which was enacted in terms of the Customs and Excise Act. He submitted,

however, that the whole purpose of the enactment of section 4(1)(e) was to ensure that all the Board's functions, whether granted or assigned to it under the Act or by any other law, were to be incorporated in section 4 and therefore to be delegable in terms of Section 9. He conceded that if his argument was correct it would have the effect of allowing the Board to delegate any or all of its powers, however derived, to a committee. This, it seems to me, would be a startling conclusion to come to.

In our common law there is a presumption against delegation which is embodied in the maxim *delegatus delegare non potest*. The powers of administrative bodies, such as the Board in this case, are conferred on them, or delegated to them by the legislature, and they cannot delegate the powers so conferred to some other person or body

except insofar as they have expressly or by necessary implication been empowered to do so. In *Attorney-General, O.F.S. v Cyril Anderson Investments (Pty) Ltd* 1965(4) SA 628 (A) at 639 C - D Botha JA put it as follows:

"The maxim *delegatus delegare non potest* is based upon the assumption that, where the legislature has delegated powers and functions to a subordinate authority, it intended that authority itself to exercise those powers and to perform those functions, and not to delegate them to someone else, and that the power delegated does not therefore include the power to delegate. It is not every delegation of delegated powers that is hit by the maxim, but only such delegations as are not, either expressly or by necessary implication, authorised by the delegated powers."

In the present case the Board has, in terms of section 9 of the Act, been authorised to delegate any of the powers or duties granted or assigned to it "in terms of section 4" to a committee, subject to such directions as the Board may issue from time to time. The power to

delegate is therefore circumscribed and limited to those powers and duties granted or assigned to it under section 4. The authority to consider applications for exemption and to make recommendations to the second respondent is a power conferred on the Board not by section 4 but by the provisions of Note 9. The argument that the unamended section 4(1)(e) had the effect of turning the authority conferred by Note 9 into one conferred by section 4 is specious in the extreme. There can be no room for such a line of reasoning. All that that section did was to emphasise that the Board would be authorised to perform duties or powers granted or assigned to it by any other law. It cannot be interpreted so as to extend the authority conferred on the Board by section 9 to delegate its duties or powers conferred on it by section 4,

to powers conferred on it by some other law.

On the first appellant's own showing the Minister of Finance, when he promulgated Note 9, considered the Board to be the most appropriate body to consider and make recommendations to the second respondent. In such circumstances the *dictum* of Innes ACJ in *Shidiack v Union Government (Minister of Interior)* 1912 AD 642 at 648 is most apposite. The learned Judge there remarked that:

"where the Legislature places upon any official the responsibility of exercising a discretion which the nature of the subject matter and the language of the section show can only be properly exercised in a judicial spirit, then that responsibility cannot be vicariously discharged. The persons concerned have a right to demand the judgment of the specially selected officer."

The power to consider the application in this instance was clearly not granted to the Board under section 4 of the Act, and therefore there

was no express authority for it to delegate that power to the I.I.C. There was also no implied power for it to do so. Sections 9 and 13 of the Act conferred certain limited powers of delegation on the Board, and this in itself is a strong indication that the legislature intended the Board to have only those limited powers and no more. The facts of this case, to which I have already alluded, also militate against any such implication. The Board therefore had no authority whatsoever to delegate its powers or duties in this respect to the I.I.C.

In the result the Court *a quo* was right in coming to the conclusion that the Board had failed to consider the application at all, and that the review must succeed on that ground alone. It is therefore unnecessary to consider the other grounds relied on.

The appeal is dismissed with costs, such costs to include the costs
of two counsel.

J P G EKSTEEN
JUDGE OF APPEAL

CORBETT CJ)
VAN HEERDEN JA)
)CONCUR
HOWIE JA)
ZULMAN JA)