

IN THE HIGH COURT OF SOUTH AFRICA
DURBAN AND COAST LOCAL DIVISION

Case No 6331/06

In the matter between :

MOHAMMED AMIN YUSUF SHAIKH
t/a YOUNG AMERICAN

Applicant

and

THE STANDARD BANK OF SOUTH AFRICA LIMITED
SOUTH AFRICAN REVENUE SERVICES

First Respondent
Second Respondent

JUDGMENT

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LOPES AJ

On the 28th March 2006 and the 8th May 2006 the Commissioner for the South African Revenue Service (the Second Respondent) issued notices in terms of Section 114A of the Customs and Excise Act, 1964 ("the Customs and Excise Act") to the Standard Bank of South Africa Ltd (the First Respondent).

Those notices appointed the First Respondent as agent for the Second Respondent and required the First Respondent to pay over to the Second Respondent amounts of R699

920,00 and R537 830,35 respectively which were held in accounts by the First Respondent for the Applicant.

The First Respondent duly issued cheques to the Second Respondent on the 29th March 2006 and the 7th June 2006 respectively for the aforesaid amounts. Those cheques were drawn on the Applicant's accounts held with the First Respondent.

On the 9th June 2006 I granted a rule *nisi* (without interim relief) calling upon the Second Respondent to show cause why the Section 114A notices should not be declared invalid and the money returned to the Applicants.

Answering and replying affidavits were filed and the matter came before me as an opposed motion on the 22nd June 2006.

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Mr Kemp who appeared on behalf of the Applicant together with Mr Phillips raised two points *in limine* which they maintain dispose of that portion of the matter relating to the recovery of the Value Added Tax ("VAT") of R364 421,54. It is common cause that that is the correct amount of VAT.

The first point is that :-

- a) the provisions of the Customs and Excise Act do not authorize the Commissioner to appoint agents for the recovery of amounts relating to VAT;
and

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- b) whilst Section 13(6) of the Value Added Tax Act, 1991 ("the VAT Act") imports the provisions of the Customs and Excise Act for certain purposes, the importation of these provisions only operate in one direction – they do not purport to bestow upon officials empowered by the Customs and Excise Act, the powers contained in the VAT Act;
- c) accordingly the Commissioner could not validly have appointed the First Respondent to collect VAT on behalf of the Second Respondent;
- d) as customs duty does not attract VAT (this was common cause), it could not have been included in the Commissioner's certification of what was due. If the Commissioner wished to recover VAT then a notice in terms of Section 47 of the VAT Act should have been issued. The Customs and Excise Act, however, does not import the provisions of the VAT Act.

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The second point is that the Applicant has not incurred any liability whatsoever for VAT.

This is because :-

- a) the Second Respondent relies upon the provisions of Section 99(2)(a) and Section 103 of the Customs and Excise Act to impose liability on the Applicant;
- b) those provisions are not applicable to a liability for VAT – VAT liability provisions are contained in the VAT Act (Section 46 and Section 48);
- c) in the certification in terms of Section 114(a)(ii) by the Commissioner (page 70 of the papers) she only certifies as correct the statement of "duty, interest, fine, penalty and forfeiture under the provisions of the Customs and Excise

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Act, 1964 ...” As no VAT was certified the Second Respondent was not entitled to collect it;

- d) the provisions of the Customs and Excise Act relating to imposing liability generally are different from those relating to payment. Not all the provisions of the Customs and Excise Act are incorporated by Section 13(6) of the VAT Act, and those imposing statutory liability (i.e. by way of Section 99(2)(a) and Section 103) are excluded.
- e) The legislature is well aware of the distinction between the imposition of liability and payment and recovery, and, if it had wished to include the imposition of liability under the Customs and Excise Act in the VAT Act it would have done so expressly in Section 13(6) thereof.

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Mr Pammenter submits that the points *in limine* can not assist the Applicant because :-

- a) Section 13(6) of the VAT Act must not be read in isolation, but in its context within the whole of the VAT Act;
- b) Section 7(1) of the VAT Act provides for imposition of VAT on the importation of any goods into the Republic – it is this VAT which the Second Respondent seeks to recover along with the duty, interest and other amounts reflected in the Second Respondent’s certification;
- c) Section 13(5) of the VAT Act provides that the Second Respondent may make such arrangements as deemed necessary for the collection of tax payable in respect of the importation of goods into the Republic;

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- d) Officials who recover amounts in terms of Section 13(6) may recover amounts due in terms of either the VAT Act or the Customs and Excise Act, or both. To hold otherwise would require the unnecessary issuing of more than one certification by the Second Respondent;
- e) It is not necessary for the certification of the Second Respondent to record the origin of the power to recover VAT.

With regard to the second point Mr Pammenter submitted :-

- a) the approach of the Applicant that Section 13(6) does not apply to the powers exercised in terms of Section 99(2)(a) and Section 103 of the Customs and Excise Act is too formalistic. 10
- b) Section 103 is aimed at the payment and recovery of duty, and by virtue of its incorporation into the VAT Act by Section 13(6) thereof, VAT is also recoverable in terms thereof. The effect of Section 103 is to create a co-principal debtor and joint and several liability is re-inforced by Section 44A of the Customs and Excise Act;
- c) Section 13(6) of the VAT Act is central to the Second Respondent's argument and properly interpreted envisages the incorporation into the VAT Act of all the provisions of the Customs and Excise Act ;
- d) It is not the Second Respondent's case that because the Applicant is liable in terms of Section 99(2)(a) and/or Section 103 of the Customs and Excise Act that he is therefore liable for VAT. Rather, it is because Section 99(2)(a) and Section 103 are part of the Customs and Excise Act as a means of recovering 20

payment of duty that they are included in the VAT Act in terms of Section 13(6) thereof as a means of recovering VAT.

On a literal reading of section 13(6) it seeks to incorporate into the VAT Act for certain purposes all the provisions of the Customs and Excise Act whether or not they apply for the purposes of any duty levied in terms of the Customs and Excise Act. These purposes include the importation and clearance of goods.

Although the function of the imposition of statutory liability is not expressly included in the purposes for which the Customs and Excise Act is incorporated into the VAT Act, the inclusion of "importation and clearance of goods" cannot be effective unless those sections of the Customs and Excise Act regulating liability are included. 10

Once the provisions of the Customs and Excise Act are applicable to the VAT Act, then so are the provisions of Section 99(2)(a) and/or Section 103 of the Customs and Excise Act – and, accordingly those provisions apply in the determination of who is liable for the payment of VAT.

Having found that the liability of the Applicant for VAT can thus be determined it falls to consider whether the Commissioner may appoint agents to recover VAT.

The Commissioner as defined in each Act is identical – "the Commissioner for the South African Revenue Service".

The power of the Second Respondent to recover VAT on imported goods is authorized by Section 13(5) of the VAT Act. The power to appoint an agent in respect of the payment of VAT is contained in Section 47 of the VAT Act and is in identical terms (save for the reference to "duty, interest, fine, penalty or forfeiture" in the Customs and Excise Act) to the power contained in Section 114A of the Customs and Excise Act.

Again, the Customs and Excise Act in Section 114(1)(a)(ii) and the VAT Act in Section 40(2)(a) provide, with the same differences in relation to the items concerned, identical methods by which the Second Respondent may certify the amounts due by a person for the purpose of obtaining judgment against them.

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If the certification contains items from both Acts but fails, as in the certification in this case, to mention the citation of the particular section of one of the Acts, is it fatal to the certificate? I do not think it can be. The Second Respondent is exercising the powers made available in terms of the two Acts, at the same time.

Similarly, the Second Respondent's ability to recover these amounts from an agent will be valid where the power to do so exists. That power clearly exists in each Act. The incorporation of the provisions of the Customs and Excise Act in the VAT Act by way of Section 13(6) thereof reinforces this interpretation.

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This interpretation is strengthened when one examines the purpose of the two Acts and establishes what was intended to be the essential elements or essence of each of them by looking at them, firstly individually, and then collectively to cater for the interconnection established by Section 13(6).

The preamble to the Customs and Excise Act describes its purpose as being :-

“To provide for the levying of customs and excise duties ... the control of the importation ... of certain goods; and for matters incidental thereto.”

The preamble to the VAT Act describes its purpose as being :-

“To provide for the taxation in respect of the supply of goods and services and the importation of goods; ..., and to provide for matters connected therewith.”

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Both Acts provide for the levying of taxes of various forms and both Acts are under the control of the Second Respondent who is responsible for administering them.

Matters which are incidental to the levying of both forms of taxes are the determination of persons liable and the collection of amounts due. Both are to be carried out by the Second Respondent and, obviously, in the most expeditious manner possible. This need for expedition is achieved by the incorporation by Section 13(6) of the VAT Act of the provisions of the Customs and Excise Act into the VAT Act.

This purpose would be best achieved were the Second Respondent able to recover both forms of taxation together from the same person liable to pay them. Interpreting Section

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13(6) in this light indicates the ability of the Second Respondent to recover VAT as has done in this case.

I make the following order :

- (a) I find against the Applicant on the two points *in limine* raised at the hearing on the 22nd June, 2006;
- (b) The Applicant is to pay the Second Respondent's costs of opposing the points *in limine*, such costs to include those consequent upon the employment of Senior counsel;
- (c) The application is adjourned *sine die* for the parties to deal with its continued conduct as they deem fit. 10



GRAHAM LOPES

ACTING JUDGE

CASE NO. 6331/2006
IN THE HIGH COURT OF SOUTH AFRICA
DURBAN AND COAST LOCAL DIVISION
BEFORE THE HONOURABLE MR JUSTICE LOPES (AJ)
AT DURBAN ON THE 3 JULY 2006

IN THE MATTER BETWEEN:-

MOHAMMED AMIN YUSUF SHAIKH
T/A YOUNG AMERICAN

APPLICANT

AND

THE STANDARD BANK OF SOUTH AFRICA
LIMITED

FIRST RESPONDENT 10

SOUTH AFRICAN REVENUE SERVICES

SECOND RESPONDENT

Upon the Motion of Counsel for the Applicant and Respondents on the 22 June 2006
and upon reading the Notice of Motion and the other documents filed of record,

JUDGMENT WAS RESERVED:

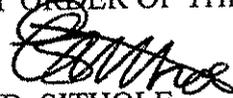
THEREAFTER ON THIS DAY:

THE COURT ORDERS:

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- (a) That the Court find against the Applicant on the two points in limine raised at the hearing on the 22nd June, 2006;
- (b) That the Applicant is to pay the Second Respondent's costs of opposing the points in limine, such costs to include those consequent upon the employment of Senior counsel;
- (c) That the application is adjourned sine die for the parties to deal with its continued conduct as they deem fit.

BY ORDER OF THE COURT



EJD SITHOLE
ACT. ASST. REGISTRAR

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