

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

Case No: 1983/2003

In the matter between:

**AMI FORWARDING (PTY) LIMITED**

Plaintiff

and

**THE GOVERNMENT OF THE REPUBLIC OF SOUTH  
AFRICA (DEPARTMENT OF CUSTOMS AND EXCISE)**

First Defendant

**SGI GUARANTEE ACCEPTANCES (PTY) LTD**

Second Defendant

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**JUDGMENT**

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**HASSIM AJ**

[1] The plaintiff, AMI Forwarding (Pty) Ltd was primarily involved in clearing and forwarding goods in transit through South Africa over the period commencing at the earliest during November 1990 to May 1998.<sup>1</sup> Its office was situated in Durban. AMI was a subsidiary of a shipping line based in Antwerp, Belgium. In 1998, AMI sought a partner in for its business. It found such in Micor Shipping. The result of the partnership

was the formation of a joint venture company AMI Micor.

The plaintiff and the first defendant are referred to as AMI and SARS respectively.

Relevant Statutory Provisions on liability for customs duties

[2] In terms of the Customs and Excise Act<sup>2</sup> (the Act) a remover of goods in bond is liable for the duty on the goods.<sup>3</sup>

[3] The liability for duty is suspended for thirty (30) days<sup>4</sup> on condition that the remover of goods in bond submits proof to the satisfaction of SARS of SARS that the goods have been removed to a place contemplated in section 18(1) read together with section 18(3). The proof of removal is referred to in customs and excise parlance as proof of acquittal.<sup>5</sup>

[4] Where the remover of goods in bond fails within the 30 (thirty) day period to submit proof that the goods to have been removed, the remover is obliged to pay on demand to SARS the duty due on the goods.

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<sup>1</sup> The plaintiff ceased its business operations in mid-1998.

<sup>2</sup> Act No 91 of 1964

<sup>3</sup> Section 18(2) and section 18A (2)

<sup>4</sup> Section 18(3) read together with section 18(4)

<sup>5</sup> The word acquittance bears the same meaning. The verb form of the word is acquit. When a bill is referred to as having been acquitted, it means that the goods were removed.

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[5] The Act <sup>6</sup>enjoins a person carrying on business in South Africa to keep, within South Africa, for a period of at least two years from the date of importation, exportation books, accounts and documents relating to his transactions for inspection by an officer. The remover of *inter alia* imported or excisable goods is obliged to produce proof on request by an officer *inter alia* of the place where the duty due was paid.<sup>7</sup>

[6] In a dispute with the State as to whether duty has been paid or not it is presumed that the duty has not been paid, unless the contrary is proved<sup>8</sup>.

Sars' demands for duty

[7] On 18 October 2000 SARS demanded (the first demand)<sup>9</sup> that AMI bring to

<sup>6</sup> Section 101 read together with the Rules for section 101, more particularly 101.01

<sup>7</sup> Section 102(1)

<sup>8</sup> Section 102 (4)

<sup>9</sup> The demand read as follows:

"Dear Sir

VARIOUS DA 570 BILLS OF ENTRY AS PER ATTACHED SCHEDULE  
ACQUITTAL OF GOODS ENTERED FOR REMOVAL IN TRANSIT

The acquittal documents produced by you to this office, for acquittal purposes were not accepted, as Beitbridge border confirmed that the stamps and special attendance numbers were not processed by their office.

You are requested to bring the following duties (as per attached schedule) to account on the above-mentioned Bill of Entry in terms of section 18(4) of the said Act:

Customs Duty:	R230 522.16
VAT:	R 79 446.08
Surcharge:	R 21 384.60
<u>Total:</u>	<u>R331 352.84</u>

The (DA 490) Departmental Bill of Entry together with (DA67) pay in slips and a cheque in the outstanding amount of R331 352.84 must be presented to room 91 for prior approval and acceptance, within 14 days of the date hereof.

account duties in the sum of R331 352.84 in respect of four bills of entry listed in the schedule to the letter. These were the following:

- (i) No 855 dated 13 July 1995;
- (ii) No 1561 dated 24 July 1995; and
- (iii) No 427 dated 7 August 1995.

[8] SARS claimed that while the Bills of Entry had ostensibly been acquitted, the acquittals were false. The reason advanced for this claim was that the impression of the rubber stamp affixed thereon was not the impression of the rubber stamp at Beit Bridge. These three bills of entry were in the course of the trial labeled either the "fraudulent or false bills of entry"<sup>10</sup>. They will be referred to in this judgment by either of these labels.

[9] On 23 May 2001 SARS demanded ("the second demand")<sup>11</sup> that AMI bring to

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You are advised that in terms of section 99(2)(a) of the act (*sic*), should you fail to comply, action will be taken as may be deemed necessary and appropriate in the circumstances, including the enforcement of the provisions of the said Act"

<sup>10</sup> The plaintiff disputed that they were false / fraudulent.

<sup>11</sup> The demand read as follows:

"Dear Sir

**VARIOUS DA 570 OR DA 26 BILLS OF ENTRY AS PER ATTACHED SCHEDULE  
ACQUITTAL OF GOODS ENTERED FOR REMOVAL IN BOND OR TRANSIT**

In terms of Section 18(3) and 18 A (2) of the Customs and Excise Act 91 of 1964, as amended, proof in the form of a border stamped copy of the bill of entry or the original customs stamped bill of entry from the BLNS countries, must be produced for acquittal purposes.

As no proof of acquittal could be produced you are hereby requested to bring the following duties (as per attached schedule) to account on the above-mentioned Bills of Entry in terms of section 18(4) and Section 18(A)(3) of the said Act:

Customs Duty: R7 652 670.43

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account duties in the sum of R11 488 613.16 in respect of sixty-eight (68) bills of entry listed in the schedule to the letter. The bills of entry listed in the schedule to the first demand were included in the schedule to the second demand.

[10] On 22 October 2002<sup>12</sup> SARS demanded (the third demand)<sup>13</sup> that AMI bring to

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VAT:	R 3 011 912,50
Shed. IP2B	R 399 615,03
Surcharge:	R 424 415,20
<u>Total:</u>	<u>R 11 488 613,16</u>

The (DA 490) Departmental Bill of Entry together with (DA67) pay in slips and a cheque in the outstanding amount of R11 488 613.16 must be presented to room 91 for prior approval and acceptance, within 14 days of the date hereof.

You are advised that in terms of section 99(2)(a) of the act (*sic*), should you fail to comply, action will be taken as may be deemed necessary and appropriate in the circumstances, including the enforcement of the provisions of the said Act"

<sup>12</sup> The demand is dated 17 May 2002. The witness Makhatini who testified on behalf of the defendant testified that this date while being the date of the second demand is incorrect because he used the template of the second demand when he prepared the third demand and in so doing erred in not changing the date.

<sup>13</sup> The demand read as follows:

"Dear Sir

**NON ACQUITTAL OF GOODS ENTERED FOR REMOVAL IN BOND OR TRANSIT  
BILL OF ENTRY NUMBERS AS PER ATTACHED SCHEDULE**

In terms of Section 18(3) and 18 A (2) of the Customs and Excise Act 91 of 1964, as amended, proof must be produced for acquittal purposes.

As no proof of acquittal could be produced you are hereby requested to bring the following duties (as per attached schedule) to account on the above-mentioned Bill of Entry in terms of section 18(4) and Section 18(A) (3) of the said Act:

Customs Duty:	R3 556 128,10
Shed. 1P2A/B	R 383 628,23
VAT:	R 1 561 448,28
Surcharge:	R 402 395,35
<u>Total:</u>	<u>R 5 903 599,96</u>

The (DA 490) Departmental Bill of Entry together with (DA67) pay in slips and a cheque in the outstanding amount of R 5 903 599,96 must be presented to room 94 for prior approval and acceptance, within 14 days of the date hereof.

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account duties in the sum of R 5 903 599.96 in respect of forty-nine (49) bills of entry listed in the schedule to the letter. The bills of entry listed in the schedule to the first demand were included in the schedules to the second and third demands. The duties claimed to be outstanding are in respect of those bills of entry listed in the schedule to the third demand. Hence the plaintiff's liability for outstanding duties is R5 903 599.96. It is common cause that the difference between the sum claimed in the second demand and that claimed in the third demand is by reason of acquittances for some of the bills of entry to the value of the difference becoming available.

[11] The plaintiff disputes that it is liable to SARS for the duties demanded in the third demand.

Relief claimed by plaintiff

[12]. Plaintiff seeks declaratory relief in the following terms:

*"1. An order declaring that the plaintiff is not liable to pay the first defendant any of the customs duty and other charges reflected in Annexure "B"<sup>14</sup> to the particulars of claim herein.*

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You are advised that in terms of section 99(2), read with Section 114 (1) of the said Act, should you fail to comply action will be taken as may be deemed necessary and appropriate in the circumstances, including the enforcement of the provisions of the said Act. Furthermore if payment is not effected on the due date the amount of Duty and full VAT demanded will bear interest at the rate of 15% per annum."

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2. *An order declaring that the first defendant is not entitled to call up payment against any of the Customs Road Transit Bonds furnished to it by the second defendant and/or SGI Acceptances (Pty) Ltd, in respect of the claim referred to in paragraph 1 above."*

[13] SARS refused to cancel the security bonds which were given by the plaintiff and the second defendant to it for outstanding duties. SARS called on the second defendant to draw down on the bonds. The plaintiff sought to prevent this. Consequent thereupon SARS furnished an undertaking to the plaintiff that pending the finalization of this action it would not call for payment on the bonds. SARS seeks to hold the second defendant as well as the plaintiff liable for customs duties.

Sallent background

[14] By 9 April 1998 SARS had either demanded outstanding duties from AMI or was querying same. At the time AMI was represented by Spyridon Akritidis an attorney in Johannesburg. He was in communication with SARS on the matter.

[15] On 20 August 1998 SARS wrote to Spyridon Akritidis as follows terms

**" SUBJECT: AMI FORWARDING: ACQUITTAL OF GOODS ENTERED FOR REMOVAL IN TRANSIT**

*Receipt of your fax reference no. S AKRITIDIS/MD/101473 dated 31 July 1998 is acknowledged.*

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<sup>14</sup> Annexure "B" to the particulars of claim is a copy of the third demand

*It was this office's decision to withdraw the Schedules for AMI Forwarding at the present time and hold it in abeyance pending the finalization of the Rennies and Conlog<sup>15</sup> case.*

*No steps will be taken against your client until the abovementioned case has been ruled on by the Supreme Court of Appeal"*

### The bonds

[16] Three bonds feature in these proceedings. Goods were removed by the plaintiff in bond against the security of two of these bonds, namely those identified in paragraphs (ii) and (iii) below.

(i) A General Bond, Number 210724<sup>16</sup>, in the sum of R10 000.00, executed on 17 May 1991;

(ii) A Special Removal Bond, Number 202906, in the sum of R375 000.00, executed on 19 July 1993. This bond secured the payment of duties in respect of the removal in bond of imported goods to any destination beyond the borders of the Republic of South Africa. The obligation under the bond was void in circumstances where it was proved that the goods were duly taken out of South Africa; and

(iii) A Special Removal Bond, Number 202907 in the sum of R2 000 000.00, executed on 19 November 1993, which secured the payment of duties in respect of the

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<sup>15</sup> Commissioner of Customs and Excise v Container Logistics (Pty) Ltd; Commissioner of Customs and Excise v Rennies Group Ltd t/a Renfreight 1999(3) SA 771 (SCA)



removal of goods from Durban Harbour and/or SA Container Depots, Durban, by road transport, goods to destinations outside of South Africa.

Removal of goods in-bond and in-transit

[17] Goods are described as being removed in bond when they are moved within the Common Customs Union. If the goods exit South Africa for a destination within the Common Customs Union then no duty is payable. If the goods do not exit South Africa, duty is payable. A removal-in-bond Bond will serve as security for the payment of duties in respect of goods which have been removed and are then moved within the Common Customs Union.

[18] Goods are described as being removed in transit when they are cleared into South Africa for the purpose of being transited through South Africa, for instance by road or rail, to a destination beyond the borders of the common customs union. A removal-in-transit Bond secures the payment of duty on a consignment that is being moved through South Africa to a destination outside the Common Customs Union.

[19] The evidence for SARS was that the word removal in bond is a term loosely used to describe all goods that are removed, irrespective of whether they are strictly removed in-transit or in-bond.

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<sup>16</sup> The plaintiff refers to this as a license. It has no relevance in the matter

The forms used in the removal of goods

[20] Where goods are removed being transited to a destination outside the Common Customs Union form DA570 with the purpose code "RIT" must be completed. Where goods being transited from the harbour to a customs warehouse or a bonded warehouse within South Africa the DA570 with the purpose code "RIB" must be completed.

[21] If goods are exported out of a warehouse to a destination outside the Common Customs Union the form DA 26 must be completed.

Classification of the R2 million rand and the R375 000.00 bond

[22] The R2 million bond was a bond for the removal of goods in transit (i.e. DA 570s with either the purpose code RIT or RIB). The R375 000.00 bond was for goods that were exported from a warehouse to a destination outside the Common Customs Union (i.e. DA 26s).

The acquitted and unacquitted bills of entry

[23] Of the forty-nine bills of entry identified in the schedule to the third demand, four<sup>17</sup> were DA 26s.

[24] The remaining bills of entry were DA570s. Of these DA570 bills of entry, Professor Wainer on behalf of SARS testified that:

(i) eight<sup>18</sup> had been duly acquitted;

(ii) five<sup>19</sup> whilst they appear to have been acquitted were not properly acquitted.<sup>20</sup>

Therefore there was no proof of acquittance;

(iii) thirty-six<sup>21</sup> of the forty nine bills of entry listed in the schedule to the third demand had not been acquitted. This included the four DA 26s

[25] In addition to the bills of entry referred to in paragraphs 23 and 24 above there were the three bills of entry referred to in paragraph 7 above that had been falsely or fraudulently acquitted.

[26] Accordingly to Professor Wainer the total owing to SARS in respect of the unacquitted bills of entry identified in paragraph 24(ii) and 24(iii) above is R5 148 446.19.

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<sup>17</sup> Bills of entry numbers BE641, BE 642, BE374 and BE 411.

<sup>18</sup> Bills of entry numbers BE425, BE 426, BE856, BE 857, BE1829, BE1836, BE556 and BE1119

<sup>19</sup> Bills of entry numbers BE1241, BE696, BE1348, BE1817 AND BE456

<sup>20</sup> As they reflected an acquittance date before the bill of entry date or very well after it.

<sup>21</sup> Bills of entry numbers BE641, BE642, BE374, BE28, BE1302, BE599, BE1991, BE411, BE1995, BE1996, BE2009, BE855, BE1038, BE1561, BE148, BE427, BE1903, BE1439, BE1466, BE1986, BE1848, BE 942, BE405, BE491, BE310, BE1435, BE1436, BE637, BE638, BE912, BE330, BE1218, BE212, BE491, BE497, BE1423.

The Plaintiff's case for denying liability to SARS

[27] The plaintiff disavows liability to SARS on the following grounds:

(i) The plaintiff had duly furnished proof of the removal of the goods to SARS. Mr Moosa SC who appeared with Ms V Singh argued that the plaintiff's case was not an attempt to tender proof that the goods forming the subject matter of the disputed bills of entry were indeed removed from South Africa, nor is the plaintiff seeking to prove that the bills of entry were indeed acquitted. He argued that what the plaintiff was rather seeking to demonstrate was that it had tendered proof of acquittal and that SARS had accepted that it had done so. He proceeded to argue that as a consequence of SARS's unsatisfactory records and without a basis in law to do so (This must mean that the plaintiff is asserting that SARS is acting unlawfully) SARS is requiring the plaintiff to re-prove to it that the bills of entry were acquitted.

(ii) SARS is precluded from relying on the provisions of section 102(4) of the Act in its demand for the payment of duties either because section 102(4) is unconstitutional or SARS cannot rely on section 102(4) after the expiry of the two-year period<sup>22</sup> prescribed in section 101 of the Act read together with rule 101.01 thereto.

(iii) SARS's conduct in failing to timeously pursuing its claim against the plaintiff

constitutes unlawful, unfair and unreasonable administrative action.

(iv) SARS's claim against the plaintiff on the Bonds has prescribed in terms of the Prescription Act No 68 of 1969<sup>23</sup>.

#### The issues

[28] The following issues arise in this matter:

(i) Whether the plaintiff has proved that it had duly furnished proof to SARS that the goods had been removed either outside the borders of South Africa or the Common Customs Union. (In other words, the question is whether the plaintiff had satisfied SARS that all the bills of entry forming the subject matter of this litigation had been acquitted);

(ii) Was the plaintiff obliged to retain the records relating to the transactions for more than two years?

(iii) Is section 102(4) unconstitutional?

(iv) Is SARS precluded from relying on section 102(4) after the two-year period set out in section 101(1) read together with rule 101.01?

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<sup>22</sup> for the keeping of records by a person such as the plaintiff

(v) Did SARS timeously pursue the claim against the plaintiff?

(vi) If not, does SARS's conduct in failing to timeously pursue its claim against the plaintiff amount to unlawful, unfair and unreasonable administrative action?

[29] The enquiry whether the plaintiff has proved that it had duly furnished proof to SARS that the goods had been removed either outside the borders of South Africa or the Common Customs Union is an enquiry into whether the plaintiff has in these proceedings shown that it had satisfied SARS that all the bills of entry forming the subject matter of this litigation had been acquitted

[30] For purposes of the issues it would be convenient to categorise the bills of entry as follows:

- (i) the alleged false acquittals;
- (ii) the DA 570s; and
- (iii) the DA 26s

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<sup>23</sup> The plaintiff abandoned, correctly so, its contention that SARS's claims for duty have prescribed under the provisions of the Prescription Act No 68 of 1969.

[31] Mr Caban, the plaintiff's witness, could not testify whether the plaintiff had satisfied SARS that the goods forming the subject matter of the bills of entries relevant in these proceedings had been removed from South Africa either to a destination within the Common Customs Union or to a destination outside it. Neither could he testify that proof of acquittance had been given to SARS.

[32] It is common cause that the process of the agent granting security to SARS for unpaid duties in respect of goods about to be removed as well as furnishing SARS with the acquittances was as follows:

(i) A clearing agent would have a bond register for each bond held by SARS as security for unpaid duties. He would also have an acquittance register for each bond;

(iii) Before removing the goods the agent would present to SARS a draft bill of entry together with the relevant bond book. (If the goods were to be removed in transit then in the plaintiff's it would be the bond book in which the penal debits and penal credits to the R2 million bond are entered. If they were being exported from a warehouse to a destination outside of the Common Customs Union then it would be the bond book in which the debits and credits to the R375 000.00 bond are entered.

(iv) The bond book would have a running balance. Each time a draft bill of entry is presented to SARS, the duty and the value added tax payable on the goods would be deducted from the amount of the security available to the agent. The deduction (the

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penal debit) would be entered in the relevant bond book. A SARS official in the section dealing with deduction from the bond and reinstatement thereof would sign the entry and affix the impression of a SARS' rubber date stamp at or near the entry by. After this has been done the draft bill of entry together with the bond book would be returned to the agent.

(v) After processing at the port of entry, the agent would present the original bill of entry and approximately seven copies to SARS. The original bill of entry would be filed at SARS in a file labeled "unacquitted". Some of the copies would be given by the agent to the transporter with the consignment.

(vi) Where goods that have been removed have moved within the Common Customs Union the bill of entry from the destination of the goods would constitute proof of acquittance.

(vii) When the goods have been removed from South Africa to a destination outside of the Common Customs Union the agent would present to SARS a copy of the original bill of entry with impression of a rubber stamp affixed at the border post where the goods left the Republic. This bill of entry to which the impression of the border post's rubber stamp is affixed would constitute proof of acquittance. The border post would retain a copy of this stamped bill of entry.

(viii) All the bills of entries brought to the Acquittal at SARS for acquittal would be



entered in the agent's acquittance register<sup>24</sup> which was kept by the agent and constituted its record. The agent would make the necessary entries in this register. The acquittance register as well as the document constituting proof of acquittal<sup>25</sup> would be given to the Acquittal team at SARS<sup>26</sup>.

(ix) The SARS official would inspect the acquittance document presented to him. In doing so the bills of entry would be compared with the confirmation received from the South African border post<sup>27</sup> that the goods were removed. If SARS the official was satisfied that the documents were in order, he would sign at or near the relevant entry and affix the impression of a rubber stamp with the word "acquitted" at or near the entry in the acquittance register.

(x) The reinstatement of the bond<sup>28</sup> occurred as follows:

- The agent would record the penal sum credit in the bond book thereby recording the reinstatement of the bond. Consequently the balance would increase.<sup>29</sup>

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<sup>24</sup> The plaintiff's acquittance register was exhibit D1.

<sup>25</sup> i.e either a bill of entry of the place at which goods entered within the common customs union or in the case of goods that left the South African border destined to place outside the common customs union the bill of entry with the rubber stamp applied at the South African border)

<sup>26</sup> The acquittal and bond deduction and reinstatement processes were two separate processes attended to by different SARS teams.

<sup>27</sup> This was initially a copy of the bill of entry stamped at the South African border post and sent by the border post to the original office. Later on the border post furnished a list of acquitted bills of entry to the original office.

<sup>28</sup> This usually occurred before the acquittance register was stamped by the Controller's office. The reason for this was so have the bond reinstated as quickly as possible so that the agent could move more goods.

- If the reinstatement is accepted by SARS, the bond register book would be signed by the SARS official at or near the entry made by the agent. The SARS official would also at or near the same place affix an impression of a rubber stamp with the word "reinstated".

The reinstatement is a process separate from the acquittal process. It is also dealt with by two separate sections at SARS.

[33] The testimony for SARS was that a reinstatement of the bond in the bond register did not result in the acquittal of a bill of entry nor was it an indication that proof of acquittal had been furnished to SARS because the reinstatement of the bond usually preceded the proof of acquittance being furnished to SARS. Even if the bond had been reinstated but the acquittance documents were not furnished to the section dealing with acquittances then proof of acquittance was not furnished.

[34] The witnesses for SARS also testified that once the acquittal register was produced by the agent and the original endorsed acquitted entry is given to the acquittal section at SARS the copy of the bill of entry filed in the "unacquitted" file would be removed and the original acquittal document would be filed in an "acquitted" file in number and date order. The document taken out of the unacquitted file would be destroyed. If a customs official wanted to know whether goods reflected on a particular bill of entry had left the Republic or the Common Customs Union he would go to the

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unacquitted file. If an original of the unacquitted bill of entry is in the unacquitted file that would mean that no acquittal for that document had been received from the agent. If the agent wanted to know whether a particular transaction had been acquitted or not, his record would be his acquittal register. In the event of the SARS disputing that a bill of entry had been acquitted, the agent would present to SARS Acquittance register. A due entry therein would constitute proof that the proof of acquittal had been furnished to SARS.

[35] It is common cause that there would have been both a bond register and an acquittal register for the R2 million bond as well as the R375 000.00 bond. It was also common cause that the removal of goods in transit would have been recorded on form DA570 with the bond of R2 million as security and the export of goods from a customs and excise warehouse to a destination outside the Common Customs Union would have been recorded on form DA 26 with the R375 000.00 bond as security.

#### The DA570s

[36] Professor Wainer considered whether the bills of entry listed in the schedule to the third demand had been acquitted or not with reference to the acquittal register.<sup>30</sup> Therein he found eight<sup>31</sup> of the bills of entry recorded as being acquitted. These were not DA26 entries. It must therefore follow that the acquittance register (exhibit D1) was

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<sup>30</sup> Exhibit D1

<sup>31</sup> Bills of entry numbers BE425, BE 426, BE856, BE 857, BE1829, BE1836, BE556 and BE1119

a register of the acquittal of DA570 entries.

[37] The first entry in the acquittance register is dated 21 November 1990. The last is dated 18 May 1998. It is common cause that there may have been a separate bond register and acquittance register for the DA570s and for the DA 26s. However, at any given time there would only be one bond register and acquittance register used for DA 570s and only one bond register and acquittance register used for DA 570s.

[38] The Acquittance register (exhibit D1) records entries from 21 November 1991 (this appears to be the time when it commenced operations) to 18 May 1998 when it ceased its operations. Exhibit D1 was accordingly the only Acquittance register that AMI used for DA570s at least for that period. This being so, thirty-six bills of entry referred to in paragraph 24(iii) above, if acquitted ought to have been entered in the Acquittance register (D1). They are not entered therein. It must follow that these bills of entry were not acquitted.

[39] AMI sought to assert that because the balance in the bond register on 21 July 1998 was R 4 532 320.00, this was proof that all duties were accounted for. In my view the reliance on the Bond register (Exhibit D2) is misplaced for a number of reasons. First the balance suggests that AMI could remove goods to that value. This cannot be correct. SARS held security for only R2 375 000.00. The difference between these amounts is substantial- R2 157 320.00. AMI attempted to explain this difference. The R2 million bond replaced a R4 million. It was therefore suggested that at the time

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when the bond was reduced to R2 million the necessary adjustment was not made to the bond book. That this occurred is speculative. Apart from there still remains a difference of R157 320.00 which is unexplained. Second, the first entry in the bond register bears the date 11 February. It has a balance brought forward of R187 938.00 This is an indication that at least one bond book preceded exhibit D2. Third, the bond register records debits and credits the bond. On the evidence the reinstatement of bond from time to time is not necessarily and indication that proof of removal beyond South Africa's borders was proved to SARS. The reason for this was that the reinstatement of the bond often preceded the entry in the Acquittance Register.

#### The Three Falsified Acquittals

[40] SARS alleges that while these three bills of entry<sup>32</sup> *ex facie* have affixed to them the impression of a rubber stamp at the Beitbridge border post. These three bills of entry have been falsified. SARS correctly does not attribute fraud to AMI. I am satisfied on the evidence that the impressions of the Beitbridge border post rubber stamps affixed to these bills of entry were not those of the rubber stamps at that border post at the relevant time.

[41] These bills of entry available. There is therefore no question of records being unavailable after the two-year period. The question which arises in connection with these three bills of entry is whether SARS is entitled to claim the custom duties despite

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a period of two years from the date when liability for the duties arose having lapsed.<sup>33</sup> The proposition that where SARS discovers fraud after the two-year period it is precluded from demanding the duties is startling. The acceptance of this proposition not only countenances fraud but encourages it. The consequence of the proposition is that if SARS for whatever reason is unable to discover the fraud for two years the remover is released from liability. To absolve a person liable for duty in these circumstances is unconscionable.

[42]. The Supreme Court of Appeal<sup>34</sup> has held that a clearing agent can be liable for the payment of duties by reason of being an agent in terms of section 99 and a remover in terms of section 18A. The provisions of section 18 and 18A are essentially the same. This being so there is no rational basis for treating the position of an agent who removes goods in bond from a customs and excise warehouse (i.e. in terms of Section 18A) differently from an agent who removes goods in transit (i.e. in terms of section 18). In my view AMI is a remover of goods for purposes of section 18.

[43] While section 99(5) absolves an agent of liability for the payment of custom duties after a period of two years from the date when the liability was incurred, section 18 has not such limitation. A remover's liability ceases only when it is proved to the satisfaction of SARS that the goods to have been removed to a place within the Republic have been duly entered at such place or where the goods were destined for a

<sup>33</sup> Section 99(5)

<sup>34</sup> Standard General Insurance Company Ltd v Commissioner of Customs and Excise 2005 (2) SA 166 (SCA)

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place beyond the borders of South Africa that such goods have been duly taken out of the Republic. Where SARS discovers that the representation made to it two years prior was false it cannot be held to an acceptance of the proof of acquittal which was induced about by fraud.

[44] The goods under the three bills of entry under discussion were destined for Zambia<sup>35</sup> and Zaire<sup>36</sup>. By reason of the application of section 18 of the Act the prescription period which applies to AMI's liability for outstanding customs duty is thirty years<sup>37</sup>. SARS is entitled to claim payment of these duties up to the expiration of thirty years. SARS alleges that the bills of entry have been falsified. I am satisfied that it has proved acquitted itself of the burden of proving this. Clearly SARS is not satisfied with the proof furnished by AMI that the goods have been removed as contemplated in section 18(3)(a) and section 18(3)(b). Therefore, AMI's liability for duty has not ceased.

#### The DA 26s

[45] AMI is not in possession of the acquittance register for the DA 26 bills of entry. Exhibit D1 is the acquittance register for the DA570 bills of entry. Even though the bond book may be unreliable, AMI is not in possession of the bond book for the R375 000.00. AMI does not, correctly, claim that the bond book, (exhibit D2) is in respect of the

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<sup>35</sup> BE 427 and BE 1561

<sup>36</sup> BE 855

<sup>37</sup> Commissioner of Customs and Excise v Tayob 2002 (6) SA 86 (T)

R375 000. 00 bond. Exhibit D2 appears to be<sup>38</sup>the bond register for the R2 million bond and therefore for the DA 570 bills of entry.

[46] AMI for the same reason as in paragraph 44 above remains liable for the duties in respect of the DA 26 bills of entry.

[47] I turn now to consider whether there is merit in AMI's arguments that:

(i) SARS cannot rely on the provisions of section 102(4) of the Act in its demand for duties.

(ii) SARS' conduct in failing to timeously pursue its claim amounts to unlawful, unfair and unreasonable administrative action.

[48] If these arguments are sound then AMI is not liable for duties.

[49]. Section 102 (4) of the Act provides that:

*" If...in any dispute in which the State, the Minister or the Commissioner ... is a party the question arises whether the proper duty*

<sup>38</sup> The R2 million bond is affixed to the front inside cover of the Bond Register. It would be curious to affix the R2 million bond in a register that has nothing to do with that bond. If the register was indeed for the DA26s and therefore the R375 000.00 bond the reasonable expectation would be to have that bond affixed somewhere in the bond register.



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*has been paid... it shall be presumed that such duty has not been paid... unless the contrary is proved".*

[50] AMI argues that SARS appears to rely on the reverse onus contained in section 102(4) of the Act and it doubts, on the authority of International Travel Shops Africa (Pty) Ltd v The Commissioner for the South African Revenue Service,<sup>39</sup> whether such reverse onus is lawful or constitutional.

[51] Section 18(2) imposes an immediate liability to pay the duty but actual payment thereof is conditional upon it being proved to the satisfaction of the Commissioner that the goods have duly been taken out of the area. If proof is furnished within the prescribed time (i.e., thirty days) the liability ceases; if not, the duty is payable on demand.

[52] AMI does not have to rely on section 102(4) to claim the duties. It only has to demand payment of the duties and its onus is restricted to proving that duties were payable on the goods. AMI bears the onus of proving that the duties were paid or that proof was duly furnished to SARS and consequently its liability ceased.

[53] This does not arise from section 102(4) but section 18(2) of the Act read together with section 18(3) and section 18(4). On the basis that I am wrong on this, I proceed to consider AMI's attack on the constitutionality of section 102(4).

[54]. AMI contends that section 102(4) is unconstitutional on the basis that it deprives AMI of its right to proper access to the court, alternatively AMI's right to just administrative action further alternatively to a fair hearing before a court of law. In the context of an accused's right to be presumed innocent provisions such as section 102(4) have been found to be unconstitutional. However, these proceedings in which the question whether proper duty has been paid or not, are civil in nature. If the proceedings in which the question whether proper duties have been paid are criminal in nature then section 102(4) may be unconstitutional. It has been acknowledged that not every reverse onus provision will necessarily be considered unconstitutional.<sup>40</sup> Mr Pammenter who appeared with Mr Mukadam argued in his heads of argument that the constitutionality of section 102(4) should be tested with reference to a person's right of access to the court in terms of section 34 of the Constitution<sup>41</sup>. He argued that the test is whether section 102(4) limits a person's right of access to the court and if it does, is the limitation justifiable in terms of section 36 of the Constitution.

[55] Section 34 protects a person's right to have disputes adjudicated in "a fair public hearing". Mr Pammenter correctly contended that section 34 does not deal with the question of onus. The enquiry is limited to establishing whether section 102(4) affects the fairness of the hearing.

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<sup>39</sup> Unreported judgment Bertelsmann J

<sup>40</sup> S v Zuma 1995(2) SA 642 CC at para 41

[56] Mr Pammenter argued that in considering what is fair in the present litigation consideration should be had to a number of matters. Of these in my view the following are essential in the adjudication whether the litigation is unfair:

- (i) The clearing and forwarding industry is self regulatory.
- (ii) Virtually all documentary evidence of the export of the goods will be in the possession of the agent who is obliged by law to retain them.
- (iii) It should therefore be relatively simple exercise for a remover of goods to prove export than for the Commissioner to prove to the contrary.

[57]. There is force in Mr Pammenter's argument that by reason of at least the factors referred to in paragraph 56 (i) to paragraph 56(iii) above that section 102(4) does not limit the rights afforded by section 34 of the Constitution. So too, in the argument that even if section 34 does limit that right, the limitation is reasonable and justifiable.

[58] AMI's alternative argument is that the reverse onus applies only for the two year period prescribed by section 101 read together with rule 101.01. Mr Moosa submitted that to contend otherwise would lead to an absurdity. Section 101 relieves AMI from retaining documents after a period of two years. Where an agent chooses to avail himself of this right, he assumes the risk that SARS may demand payment of duties some time in the remaining 28 years before the debt prescribes. If this happens the

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<sup>41</sup> Act No 108, 1996

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agent must appreciate the precarious position he would be placing himself in. In the absence of records he may fail in demonstrating that his liability has ceased in terms of section 18(3) of the Act. A cautious and prudent agent should ensure that notwithstanding the right to dispose of records after the two-year period he can protect himself from a claim by SARS for duties.

[59] The prescriptive period for a debt in respect of any taxation imposed or levied by or under any law is thirty (30) years. Section 18(2) of the Act imposes an immediate liability for the payment of duties. SARS is in law entitled to claim duties for a period of thirty (30) years from the date on which the debt arose. In fact statutorily it is obliged to claim duty. It is absurd to suggest that SARS is acting unlawfully in fulfilling its statutory obligations. To find that claiming duties after the expiration of the two year period is unlawful is inconsistent with the Prescription Act and it would effectively render it unenforceable. The Commissioner's conduct in these circumstances cannot be unlawful.

[60] AMI does not clearly state on what basis it claims the Commissioner's conduct was unfair or unreasonable. It is not unreasonable for SARS to claim duty at any time before the thirty- year prescription period expires. It would be unreasonable for SARS not to collect taxes due to the fiscus. If AMI's claims that SARS' claim for duties was unreasonable because it ought earlier than it did have demanded the duties, I am unable to find that the Commissioner acted unfairly or unreasonably in failing to demand payment earlier than it did. The Prescription Act permits the collection of taxes for thirty years. There are sound policy reasons for this.

[61] No evidence was presented that the time lapse was unreasonably long. In any event by at least 9 April 1998 AMI was aware of SARS' contention that duties were outstanding.

[62]. I now consider whether SARS claim against AMI founded on the bonds has prescribed or not. In Standard General Insurance Co Ltd v Commissioner for Customs and Excise<sup>42</sup> the court held that the bond imposed a liability separate from the liability created in terms of the Act<sup>43</sup>. The obligation incurred by the clearing agent in terms of a bond was not accessory to some other obligation.<sup>44</sup> Liability pursuant to a bond would be subject to the ordinary period for prescription<sup>45</sup>.

[63] The bond creates an obligation independent of the Act. Therefore it does not give rise to a debt in respect of any taxation imposed or levied by or under law. For this reason the thirty-year period of prescription will not apply.

[64] There is nothing in the bonds<sup>46</sup> to suggest that the debts under the bond should prescribe later than three years being the period for the prescription of debts under section 11(d) of the Prescription Act<sup>47</sup>. To determine whether the debt under the bonds has prescribed the date when the debt arose or falls due must be determined.

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<sup>42</sup> 2005(2)SA 166 (SCA)

<sup>43</sup> Ibid P 178 para 39

<sup>44</sup> Ibid P178 para 39

<sup>45</sup> Ibid P172 para 16

<sup>46</sup> Bond No 202907 in the sum of R2 million and Bond No 202906 in the sum of R375 000.00

[65] The bond, unlike the provisions of section 18(4) does not prescribe a period within which the duties must be paid. It must follow that the debt arises or falls due when payment is demanded from the clearing agent. The first demand was made on 13 October 2000 and the third demand on 22 October 2002. On 3 January 2003, that is before the expiration of three years from the first demand and within three years of the date of the third demand, SARS undertook not to require payment under the bond provided that this action was instituted within sixty (60) days from the date of the undertaking, failing which the first would immediately be entitled to call for payment in terms of the bond.

[66]. This action was instituted within the 60 (sixty) days. The terms of the undertaking precluded SARS from calling for payment in terms of the bonds. The undertaking constituted an agreement by the parties that the debt owed to SARS would not prescribe (or perhaps stated more correctly that these proceedings would interrupt the running of prescription on the claim in terms of the bonds). Alternatively, AMI at worst waived its right to raise prescription if the claim under the bonds had not prescribed at the date of the undertaking.

[67] Consequently, I find that despite a claim under the bonds being subject to a three year prescription period, SARS' claims under the bonds have not prescribed.


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<sup>47</sup> Act 68 of 1969

The order.

[68]. I am not persuaded that AMI is entitled to the relief claimed.

[69]. Accordingly, the action is dismissed with costs which costs are to include the costs occasioned by the employment of two counsel.



31/12/08

**S. K HASSIM**

Acting Judge of the High Court  
(Durban and Coast Local Division)

Counsel for Plaintiff :Adv O A Moosa SC  
Adv V Singh

Counsel for First Defendant :Adv C J Pammenter SC  
Adv T Mukadam