IN THE HIGH COURT OF SOUTH AFRICA /ES

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 41881/2006

DATE:

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED. ✓

28/2/09 .....

DATE SIGNATURE

IN THE MATTER BETWEEN

APOLLO TOBACCO CC	1ST APPLICANT
EXCLUSIVE TOBACCO PRODUCTS (PTY) LTD	2ND APPLICANT
HENDRIK FREDERIK DELPORT	3RD APPLICANT
CHRISTOPHER ARTHUR ILLSTON PICKARD	4TH APPLICANT
AND	
THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	RESPONDENT

JUDGMENT

PRINSLOO, J

[1] The applicants have applied for a decision taken by the respondent in terms of the provisions of the Customs and Excise Act, No 91 of 1964 ("the Act") to be reviewed and set aside. They have also applied for certain related declaratory relief.

The respondent, in opposing the application, has also raised three arguments *in limine*.

[2] Before me, Mr Pretorius, assisted by Mr Barnard, appeared for the applicants and Mr Dunn SC, assisted by Mr Meyer SC appeared for the respondent.

Introduction and brief synopsis

[3] The first applicant close corporation ("AT") and the second applicant company ("ET") are registered importers, exporters and VAT vendors and at all relevant times imported and distributed cigarettes on the local market. ET at all relevant times held a manufacturing warehouse licence which enabled ET to manufacture cigarettes. Cigarettes with the brand name "Exclusive" were initially imported and distributed locally by AT and subsequently imported and distributed locally by ET. At times ET also, to a limited extent, manufactured cigarettes of the Exclusive brand for export.

[4] The third applicant ("Delport") is the sole member of AT. He is also a consultant of ET.

[5] The fourth applicant ("Pickard") is a director of ET.

[6] The respondent, which is a creature of statute and appointed as such in terms of the South African Revenue Service Act, Act 34 of 1997, is the administrative

authority appointed to administer the Act as well as the Value Added Tax Act, Act 89 of 1991 ("the VAT Act").

[7] It appears that the import and export and manufacturing business of AT and ET had its origin in the late 1980's when Delport flew as a pilot in various countries in Africa, amongst others Mozambique, Malawi, Zambia and Zimbabwe. The major portion of his flying was done as a famine relief pilot. He realised that there was a need for consumer goods in all these countries and started buying food-stuff, whisky, wine, cigarettes and other products locally and sold them at a good profit in the countries mentioned.

Later he also had a contract with Rothmans International to distribute their cigarettes. Further activities were extended to Angola and Zaire, as well as Malawi and other countries.

It seems that the Rothmans International connection came under threat when the latter merged with another big player, British American Tobacco. This new merged monopoly became known as BATSA. This forced Delport to start manufacturing his own cigarette brand under the Exclusive name.

[8] It appears from undisputed allegations made by Delport in an annexure to the founding affidavit that his enterprises initially had a good relationship with the respondent. There were regular inspections of the books and documents of the

bonded warehouse conducted by AT and ET. There were physical inspections of the warehouse and of the cigarettes exported. VAT procedures were properly conducted and there were regular VAT inspections conducted by officers of the Alberton VAT office. An airline business, also forming part of Delport's group of enterprises, was subject to control measures by the civil aviation authorities and was at one stage appointed as the official cargo carrier of the South African government in respect of certain goods and products.

[9] Although AT had a distribution agreement with BATSA, it seems that the latter became hostile when the Exclusive brand, now distributed in competition with BATSA, started to gain ground.

[10] It seems that the previously happy state of affairs in which Delport and his enterprises found themselves, came under threat when the respondent launched an investigation into the Delport businesses in the year 2000, possibly with the co-operation of BATSA.

[11] On a general reading of the papers, it appears that the Delport camp and the respondent have been at loggerheads ever since. Litigation has been the order of the day. A number of different legal processes have been instituted over the years. Many of them are still pending. These are some examples:

- In response to claims issued by the respondent against two of the Delport entities by the respondent, a review application was launched under case no 20523/03 in this court. According to an allegation in the founding affidavit, this application is still pending.

- Delport and twelve other persons were charged with various alleged offences relating to allegations of false exports. These criminal proceedings had been running for a period of more than two years and were still pending when the founding affidavit was signed. On a general reading of the papers, it appears that five of the accused had already been discharged and the matter had been referred to this court on special review in regard to some or other irregularity.

- Due to ongoing investigations, SARS (effectively the respondent) allocated a so-called code ten stopper to Delport's name. This had the effect of freezing all VAT transactions of companies or entities that Delport was associated with as a director or proprietor or member. The practical effect was to put an end to the business of any such company or entity.

- To gain relief from alleged ongoing harassment of SARS officials, ET brought an interdict application in this court under case no 19315/2003. This ended in an agreement being reached between the warring parties.

A copy of the agreement and the founding affidavit in the last mentioned case are annexures to the founding affidavit in the present application. It appears that the dispute forming the basis of the present application flows from events which occurred before the agreement was entered into in respect of case 19315/2003.

- Although ET applied for and was issued with a manufacturing licence, it seems that ET and SARS (effectively the respondent) were at loggerheads since May 2003 as to the extent or contents of this licence. In order to obtain clarity, ET instituted an urgent application in this court under case no 33012/03, which application, evidently, failed for lack of urgency.

- This inspired the applicants to institute case no 5918/2004, the outcome of which plays a pivotal role in the present proceedings. It appears that the issue as to the extent of the licence and ancillary allegations as to inappropriate use and possession of diamond dies remained unresolved and in order to obtain clarity ET launched this application for declaratory relief. The matter was heard by BERTELSMANN, J who gave a judgment in May 2005. This judgment is annexure "AT15" to the founding affidavit, and will be discussed more fully hereunder.

[12] What is patently clear, from a general reading of the papers, is that there has been a great deal of bad blood for many years between the SARS officials on the one

side and the applicants' officials on the other side. Allegations of *mala fides* on the part of SARS officials are made in the founding papers. Some, in my view compelling, examples of obstructive and one-sided behaviour by SARS officials are illustrated in the papers offered by the applicants.

For purposes of the present application, matters came to a head when the respondent wrote the following letter of demand to AT and ET on 17 August 2006:

"LIABILITY FOR DUTY AND VAT

1. This letter is to serve as a notification in terms of the provisions of section 3(2)(b) of the Promotion of Administrative Justice Act, 3 of 2000.

2. As you are well aware, an investigation by this office into the activities of Exclusive Tobacco Products (Pty) Ltd ('Exclusive') and Apollo Tobacco CC ('Apollo') relating to the importation, manufacturing and distribution of Exclusive cigarettes was conducted. The investigation was specifically aimed at establishing whether all the duty and taxes on the cigarettes were brought to account and, further, whether any provisions of the Customs and Excise Act, 91 of 1964 ('the Act') had been breached.

3. Based on the evidence obtained by SARS, the full particulars of which appear from the papers filed of record in the application filed by Exclusive and Apollo against the Commissioner in the Transvaal Provincial Division of the High Court, case no TPD 598/2003, it has been concluded that at least 11 753 master cases of Exclusive cigarettes had been distributed by Apollo and/or Exclusive without the relevant duty and tax thereon having been paid.

4. As a direct result of your refusal or failure to furnish this office with the relevant documentation it has simply been impossible to determine with certainty which of the cigarettes were imported and which locally manufactured and, further, which of the cigarettes were distributed by Exclusive and which by Apollo.

5. You are hereby afforded an opportunity, within fourteen days from date of receipt of this letter, to furnish this office with such further evidence as you may deem meet to:

   5.1 rebut the evidence as set out in the papers filed of record in the high court application and, consequently this office's aforesaid finding;

   5.2 resolve the problem set out in paragraph 4 above.

6. Should you fail to submit any further evidence, or should the evidence submitted be insufficient to prove proper compliance in respect of the cigarettes in issue, you, by virtue of the provisions of section 45(1)(b) of the Act, will become, and will be held, liable for payment of the amount of R24 405 809,60 which amount is compiled and calculated as set out in schedule A hereto.

Yours faithfully

COMMISSIONER FOR SOUTH AFRICAN REVENUE SERVICE"

[13] Schedule A reflects as "undeclared cigarettes distributed" 11 753 master cases and under "quantity loose cigarettes" 170 530 000 such cigarettes. The duty payable is fixed at some R20,6 million which, together with the VAT of some R3,7 million makes up the total claim of some R24,4 million.

[14] This letter of intent was sent under cover of another letter, also dated 17 August 2006, in which it is made clear that Delport and Pickard are also held personally liable, jointly and severally, as directors and members of AT and ET, in terms of the provisions of section 103 of the Act. Part of this section provides:

> "... any person having the management of any premises or business in or in connection with which the contravention or non-compliance took place or the liability was incurred may be charged with the relevant offence and shall be liable to any penalties provided therefor and shall be liable in respect of any liability so incurred."

[15] These letters of intent were followed by a flurry of correspondence between the parties and references to efforts (or lack thereof) to comply with the provisions of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA").

[16] The parties could not resolve this issue, and, on 8 November 2006, the final demand was sent to the applicants. The relevant paragraphs of this demand read as follows:

> "Having considered the contents of your above referred to letter and having obtained legal advice, you are hereby advised that this 0ffice is satisfied that your clients were previously provided with sufficient information and reasons to support and justify this 0ffice's intention to demand payment of duties and VAT and to enable your clients sensibly to respond thereto.
>
> In view of the fact that your clients have to date refused or failed to submit any evidence to prove proper compliance with the Customs and Excise Act, 91 of 1964 ('the Act') in respect of the cigarettes in issue, your clients, by virtue of the provisions of section 45(1)(b) of the Act have become liable for payment of the amount of R24 405 809,60 which amount is compiled and calculated as set out in schedule A hereto.

Payment of the aforesaid amount is hereby demanded in terms of the provisions of section 44(8) of the Act and the amount should be paid at the Office ... on or before 12:00 on 15 November 2006 failing which the appropriate steps will be taken without further notice."

[17] It is this decision of the respondent, to demand these monies from the applicants, which the latter seek to have reviewed and set aside in the notice of motion which is dated 15 December 2006. The following orders are sought in terms of prayers 1 and 2 of the notice of motion:

"1. The decision of the respondent conveyed under cover of a letter dated 8 November 2006 to claim the amount of R24 405 809,50 on the basis that 11 753 master cases of Exclusive cigarettes were not duly accounted for in terms of the provisions of the Customs and Excise Act, 91 of 1964 and the VAT Act, 89 of 1991 by the first and second applicants is reviewed and set aside.

2. The decision conveyed under cover of letters dated 8 November 2006 to hold the third and fourth applicants liable for the aforementioned amount claimed from the first and second applicants in terms of the provisions of section 103 of the abovementioned Customs and Excise Act is reviewed and set aside."

[18] Prayers 3, 4, 5 and 6 of the notice of motion, aimed at obtaining ancillary declaratory relief, are crafted along the following lines:

"3. It is declared that no basis exists for the allegation that 11 753 master cases of Exclusive cigarettes were introduced in the local market.

4. It is declared that no basis exists to claim any amounts from the first and/or second applicant in respect of 11 753 master cases of Exclusive cigarettes.

5. It is declared that no basis exists to hold the third and fourth applicants liable in terms of the provisions of section 103 of the Customs and Excise Act, 91 of 1964 in respect of claims against the first and second applicants based on 11 753 master cases of Exclusive cigarettes.

6. It is declared that for the period January 2001 to June 2003 the first and second applicants for purposes of the abovementioned Customs and Excise and VAT Acts duly accounted for 6 071 master cases of Exclusive cigarettes."

Prayer 7 deals with the question of costs.

[19] In the opposing affidavit, under the heading "0verview of the Commissioner's case" the deponent, who is a Customs and Excise officer employed by the respondent and authorised to make the affidavit, says that the defence of the respondent is based on the following:

> "2.2.1 First, the defence of *res judicata* in its extended application as issue estoppel, by virtue of the fact that the central issue in this matter is the very same issue that has already been disposed of in the proceedings referred to hereunder; (my note: this is case 5918/2004, *supra*, heard by BERTELSMANN, J) and
>
> 2.2.2 second, a defence arising from the applicants' failure to avail themselves of the opportunities given to them in compliance with fair and proper administrative justice procedures, which would justify the denial of the relief claimed by them in the present application."

[20] To further circumscribe the defences offered by the respondent, it should be added that the first defence, namely that of *res judicata*/issue estoppel, is only aimed at AT and ET, who were the only applicants in the case before BERTELSMANN, J ("the 2004 application"). Delport and Pickard did not feature as applicants in that case. Moreover, in the 2004 application the present respondent was the second respondent and there was also a first respondent, the Minister of Finance. In the proceedings before me, the applicants argued strongly

that the *res judicata* defence cannot succeed for the simple reason that the parties in the two cases, namely the 2004 application and the present application, are not the same. They also offered other arguments, which I shall deal with.

[21] It appears that the second defence mentioned in the opposing affidavit, *supra*, and relating to PAJA, is primarily aimed at the third and fourth applicants (Delport and Pickard). The introductory paragraphs in the respondent's heads of argument dealing with this second defence, read as follows:

> "1.2.2 As far as the third and fourth applicants are concerned, the Commissioner contends that as these applicants (ie the third and fourth applicants) –
>
> 1.2.2.1 were afforded the fullest opportunity to furnish him with evidence and submissions proving that all the relevant provisions of the Customs Act had been complied with and/or had not been breached; and
>
> 1.2.2.2 failed to avail themselves of the opportunity to do so,
>
> they should not be allowed, in any event not at this belated stage, and as part of this application, to place any evidence before this court – even if such evidence might prove or tend to prove compliance with and/or no breach of the Customs Act. As part of

this leg of the Commissioner's defence to the application, an application will be made at the hearing of this matter for the striking out of those parts of the evidence identified in the Commissioner's notice of application to strike out dated 29 May 2009." (Emphasis added.)

[22] Even though the argument is worded, *supra*, on the basis that this second defence ("the PAJA defence") is directed only at Delport and Pickard, I shall assume, for present purposes, that the respondent intends to offer it also as a second or alternative defence against AT and ET.

[23] The portion of the argument which I underlined, *supra*, appears to contain the somewhat startling submission that even if the respondents have managed to place evidence before the court which tend to prove compliance with and/or no breach of the Customs Act, it is too late to do so, and they have to accept liability for the claim of some R24,5 million.

[24] Before dealing in greater detail with the PAJA defence, I consider it appropriate to remark at this stage that I have difficulty to accept the stance adopted by the respondent as described above. In my view the following considerations militate against such an argument:

1. The applicants strongly deny that they were given sufficient opportunity, in the letters of intent which I quoted, to furnish the

necessary information and to rebut the evidence relied on by the respondent. Further reference to the correspondence exchanged between the parties before the final demand was dispatched will be made hereunder.

2. Delport and Pickard did not feature in the 2004 application, forming the basis of the demand now being challenged on review, which was decided approximately eighteen months before this decision to hold them liable was taken.

3. The review application was launched very soon (slightly more than a month) after the decision was taken. The founding affidavit (and the supplementary affidavit later filed in terms of rule 53) contains extensive evidence aimed at showing compliance with the Act. This evidence is undisputed because, rather than dealing therewith in an answering affidavit, the respondent chose to apply for the striking out of that evidence.

4. In terms of section 102(4) of the Act, it is presumed that the duties claimed are payable unless the contrary is proved. If the argument offered by the respondent is upheld, it would mean that the applicants are prevented from discharging this particular *onus*.

Moreover, such a result would be particularly prejudicial to the applicants because they make clear and repeated allegations in the founding affidavit and the supplementary affidavit (which allegations are uncontested) that crucial evidence going to the root of the question as to whether or not they contravened the Act, was already in the possession of the respondent before the decision, now challenged on review, was taken.

Consequently, to uphold the respondent's argument, would be to approve of a situation whereby the respondent, as decision-maker, was entitled to consider only the record of the 2004 application (as stated in paragraph 3 of the letter of intent, quoted *supra*) to the exclusion of further crucial evidence presented to the respondent before taking the decision, now challenged on review.

Such a situation would seem to me to fly in the face of the authorities dealing with the rules of natural justice and, in particular, the *audi alteram partem* principle. In *Du Preez & Another v Truth and Reconciliation Commission* 1997 3 SA 204 (AD) this principle is described with approval as follows at 231C:

> "A rule of natural justice which comes into play whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in his liberty or property or existing rights, or whenever such an individual has a legitimate expectation entitling him to a hearing, unless the statute expressly or by implication indicates the contrary."

No such indication to the contrary is to be found in PAJA.

In the same judgment, and at 231H-232C, the learned chief justice quotes with approval certain guide-lines offered in the English case of *Doody v Secretary of State for the Home Department and 0ther Appeals* [1993] 3 All ER 92 (HL) when answering the question "What does the duty to act fairly demand of the public official or body concerned?". Principle 5 offered by the English court reads as follows:

> "Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with the view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both."

[25] Against this background, it would seem that the respondent's failure and/or refusal (which is undisputed on the papers) to consider the additional evidence before (and even after!) taking the decision now being challenged goes to the root of the main issue to be decided in this case, namely whether or not that decision to proceed against the applicants for payment of the amount of R24,5 million falls to be reviewed and set aside.

[26] In concluding this introductory synopsis, it is convenient to quote some of the closing remarks to be found in the replying affidavit of the applicants after it

became apparent that the respondent had chosen not to deal with the extensive evidence presented in the founding and supplementary affidavits to show compliance with the Act and to fortify the reliance of the applicants on a host of the codified review grounds to be found in section 6 of PAJA:

> "It is specifically denied that the applicants are barred from introducing new evidence and, in any event, it is denied that any of the evidence contained in the founding and supplementary affidavits are (*sic*) new evidence. The bold allegation that it is denied that the evidence prove (*sic*) full compliance with the Act in respect of the cigarettes, is nothing but a bare denial. The deponent nowhere deals with the documentation or the content of the founding affidavit or the supplementary affidavit. There is no averment that the documentation referred to in the founding and supplementary affidavits does not support the submissions made or that the conclusions drawn from those documents can be faulted."

Brief remarks about the evidence offered in the founding and supplementary affidavits, as to compliance with the Act

[27] Before turning to the *res judicata* defence, the PAJA defence and the application to strike out, it is convenient to make a few remarks about the evidence offered in the founding and supplementary affidavits which was not dealt with in the opposing affidavit but which the respondent is seeking to have struck out.

[28] It is not necessary, for present purposes, to analyse this evidence or to come to any conclusions as to the correctness thereof. It is only necessary, in my view, to describe the nature of this evidence as part of the process of deciding, in particular, the merits of the PAJA defence and the application to strike out.

[29] The evidence briefly listed is evidence targeted by the application to strike out. Similarly, the evidence mentioned is evidence which was in the possession of the respondent, on the uncontested allegations of the applicants, before the decision sought to be reviewed was taken.

[30] Moreover, the evidence briefly mentioned for purposes of this exercise, constitute only a portion of all the evidence targeted by the application to strike out. For example, the respondent is applying for paragraphs 8.3 to 9.11 of the founding affidavit to be struck out. This constitutes pages 22 to 57 of the record. All this evidence is aimed at showing compliance with the Act and criticising conclusions to the contrary, whereas, in this exercise, only some of the paragraphs will be highlighted for illustrative purposes. It is undisputed that the evidence listed hereunder was in the possession of the respondent before the decision was taken. None of the evidence was dealt with in the opposing affidavit. It is improbable that any of the evidence was considered by the respondent for purposes of taking the decision, given the repeated statements made by the respondent that the decision was based solely on the record of the 2004 application which, as I have said, had been disposed of some eighteen months before the decision was taken.

[31] These are some of the examples:

(i) "All imports are documented by the supplier's invoice, a bill of entry and goods received voucher ('GRV'). These documents are supported by payments to the supplier and payments of the applicable duties. These payments are reflected in the bank account as payments to clearing agent A D B McGregor or SARS. AT used the Brilliant Accounting System and the installation discs with all the data files are available and has at all times been available and was previously furnished to SARS."

(ii) "Proof of payment in respect of the invoices issued is reflected on the bank statements of AT and the accounts receivable module as accessible from the electronic format (Brilliant Accounting System)."

(iii) "It must be borne in mind that AT did not only sell cigarettes of the Exclusive brand but also products of BATSA, JTI and Master Mind as well as pipe tobacco and snuff. Approximately 3 100 sales invoices in respect of cigarettes were issued by AT. The reason why a reference is made to an approximate amount is that the documents include credit notes and it will be an unnecessary time consuming exercise to calculate the exact amount of sales. The local sales were duly reflected on the VAT 201 forms. In addition the financial statements of AT until 2003 were submitted to SARS and assessed."

(iv) "The documents are to the best of my knowledge already in possession of SARS and should form part of the record to be filed. (My note: this would be the record to be filed in terms of rule 53.) To the extent that it might later be required reference can be made to specific documents. For sake of completeness it is mentioned that the books of accounting are contained in an electronic accounting system known as 'Brilliant'. These include all the sales invoices (in excess of 3 000 pages). [The General Ledger for instance comprise of some 822 pages.] Due to the volumes the system was not printed out but the whole system in electronic format is tendered with the other documents."

(v) "In the books of AT the sales of the cigarettes were invoiced as Exclusive cigarettes as they were sold with Exclusive cigarettes but perusal of the records of RPB Systems CC (which are in possession of SARS) will show that RPB never required any Exclusive cigarettes. These 400 master cases are not included in the quantities of Exclusive cigarettes referred to in this affidavit."

(vi) "ET imported a total of 2 275 master cases of Exclusive cigarettes from Cut Rag. 0f these cases 275 were exported (250 Ex Bond plus 25 in Transit [50 master cases of the 250 were exported from Bond at a later stage outside the period in question]). The balance of 2 000 master cases (1 840 directly duty paid plus 160 duty paid Ex Bond plus 328 bought

from AT) were sold locally under cover of VAT invoices. It must be stated here that in accordance with the accounting system of ET and also AT the commercial invoice is printed as an invoice/delivery note. In total 2 220 invoices (excluding credit notes) covering the local sales were issued and duly accounted in the VAT 201 forms for VAT purposes. Proof of payment is reflected in the bank accounts of ET and the financial statements of ET were duly submitted and assessed by SARS."

(vii) "The documentation that reflect the above are not annexed to the papers but are herewith again tendered for inspection and perusal by SARS. As stated above the reasons why the documents are not annexed to the papers are that these documents comprise several thousand pages and are repetitive and will, with respect, serve no purpose for the honourable court and will only unnecessarily burden the papers. The documents are to the best of my knowledge already in possession of SARS and should form part of the record to be filed." (The emphasis is that of the deponent.)

(viii) "The exports were documented by removal documents from the manufacturing warehouse (bills of entry and rebate register); export documents (export bill of entry, sales invoice, document of carriage and the special attendance document issued by the SARS official). The above documents are supported by proof of payment from the foreign entities as

reflected in the bank account of ET and proof of payment of special attendance fees as reflected in the receipts issued by SARS."

(ix) "For the same reasons as stated above the documentation mentioned in the preceding subparagraphs is not annexed to the papers. For sake of completeness I confirm that to the best of my knowledge SARS is in possession of the documentation but the documentation is herewith again tendered for inspection and perusal by SARS. A schedule reflecting the transactions and documentation is annexed as annexure AT18. The schedules that reflect the documents are annexed as annexures AT18(1) to AT18(9)." (The emphasis is that of the deponent.)

(x) "In case no 5918/2004 (my note: this is the 2004 application) SARS made allegations that 'more than 11 000 master cases Exclusive cigarettes were introduced into the South African market without the relevant duties and taxes having been paid'.

The responses to these allegations are contained in affidavits filed in that matter. I do not intend dealing with the history of the hearing of that matter or intend to express any opinion on the manner the matter was dealt with by BERTELSMANN, J but as stated above the fact of the matter is that the affidavits in that matter were done under serious time constraints and severe pressure. That we in the process failed to convince the

honourable judge that all documentation as required was in fact submitted to SARS is not surprising. I am, however, advised that the honourable judge did not express judgment on the allegations of wrongdoing. As can be seen from the documentation referred to above extensive documentation was submitted to SARS and is now once again tendered ..."

- In this portion of the founding affidavit, paragraphs 8.42 to 8.69, the applicants deal in great detail with the SARS allegations about the alleged approximately 11 000 master cases forming the subject of the claim. All of this is targeted by the striking out application. None of the allegations were dealt with in the opposing affidavit.

- There are repeated allegations in these paragraphs of documentation relevant to the calculation of the alleged offending master cases having been in the possession of SARS.

- The brief reference to the judgment by BERTELSMANN, J has a bearing on the main argument of the applicants, in opposing the *res judicata* argument, that the merits of the case were not dealt with by BERTELSMANN, J but he only found against the applicants on the basis of non-compliance with the Act for failure

to keep proper records. All this will be revisited when I deal with the *res judicata* defence.

- However, although this review application is not primarily aimed at determining whether or not there was non-compliance on the part of the applicants in respect of some 11 000 master cases of cigarettes, the submissions contained in these paragraphs, which the respondent chose not to deal with, may be relevant with regard to the section 6 PAJA review grounds dealing with, for example, questions such as whether or not the decision was arbitrarily taken and whether or not relevant considerations were ignored and irrelevant considerations taken into account.

- It has been held that the party who applies for the striking out of certain allegations must in his opposing affidavit deal with the said allegations sought to be struck out. In Erasmus *Superior Court Practice* the following is said at B1-58:

> "Since an application to strike out objectionable matter in affidavits is dealt with only at the hearing of the main application, a party must in his opposing affidavits deal with the allegations sought to be struck out. By doing so he or she does not waive his right to object to the offending allegations in the affidavits. He or she must direct the

court's attention to these statements of which he or she complained and specify the grounds on which he or she objected to each paragraph."

In *Gore v Amalgamated Mining Holdings* 1985 1 SA 294 (C) the following was said at 296F:

"In my view, a respondent wishing to take the point *in limine* against his opponent that hearsay evidence in motion proceedings should be struck out is bound to 'plead over', that is to answer the allegations sought to be struck out. To my mind, the reason for this rule of procedure is clear. He cannot, should the point *in limine* fail, claim an adjournment so as to deal with the allegations."

In my view there is much to be said for the submissions by counsel for the applicants in this regard to the effect that, in the absence of rebutting submissions, the allegations made by the applicants are deemed to be correct for purposes of this application.

(xi) "The officials of the respondent were informed of instances where unauthorised persons were dealing in cigarettes of the exclusive brand. The applicant went as far as to employ a private investigator to investigate one of the instances. The complete report from the private investigator

and all other information was furnished to the respondent. Correspondence and documents relevant hereto are annexed as a bundle annexure AT25. These documents and report do not appear in the record filed by the respondent. These are obviously relevant considerations to be taken into account by the person making the decisions."

(xii) "A further aspect that was raised in the correspondence is the fact that packaging material of ET was found in possession of Brother Tobacco, a manufacturer of cigarettes, which was closed down by SARS. Brother Tobacco had no authority or reason to be in possession of packaging material of cigarettes of the Exclusive brand. The only conclusion to be drawn from this is that Brother Tobacco was counterfeiting the brand and placing illegal exclusive cigarettes on the market. I need not labour the relevance hereof on the decision of the SARS officials. The lack in response from the SARS officials to assist the applicant is indicative of the bias of the SARS officials. The relevant documentation is annexed as annexure AT27."

(xiii) "The Brilliant Accounting System is a professional accounting system that requires training and skill in accountancy as well as training in the application of the system.

The accounting system incorporates a full set of books of account automatically cross-referencing entries in accordance with accounting and auditing principles. In broad terms, the Brilliant Accounting System provides for a cash book which includes bank reconciliations, a debtors module which includes invoicing, credit notes and age analysis, a creditors module including goods received vouchers, debit note and age analysis, a stock module comprising of stock received, stock issued and stock control function, reporting module comprising income statements, balance sheets, trial balance, general ledger and journals and audit trails.

Also included in the Brilliant Accounting System is the pay-roll module dealing with salary functions.

The system is such that it cannot be over-ridden. This means that for every debit there must be a credit and no forced entries are allowed. Invoice numbers are automatically generated by the system and follows in numerical order.

In being provided with all the data as contained in the compact discs referred to above, the respondent had full access to the information and data of the first and second applicants. This would allow the respondent to at any given point analyse, scrutinise and audit the data and information and correlate the information with statutory returns such as VAT returns

and income tax returns and financial statements. The respondent no doubt has qualified personnel able to perform the aforementioned functions.

It is submitted that a proper analysis of the data and information contained in the Brilliant Accounting System will confirm the correctness of the information provided by the applicants ... The absence of the information and data contained in the Brilliant Accounting System in the Record indicates that none of the above accounting and auditing functions were performed or duly performed. If duly performed, this would have a direct bearing and influence on the decision as formulated in the letter of claim."

[32] I consider the above to be sufficient illustration, for present purposes, of evidence in the possession of the respondent before the decision was taken and not dealt with in the opposing affidavit but, rather, targeted in the striking out application.

The striking out application

[33] The application is a brief affair. It reads as follows:

"Take note that application will be made by the respondent at the hearing of this matter for the following relief:

1. That the following evidence in the founding and supplementary affidavits of Hendrik Frederik Delport be struck out as being irrelevant and/or vexatious:

1.1 all of the evidence set out in paragraphs 8.3 to 9.11 of his founding affidavit

1.2 the second, third and fourth sentences of paragraph 5.1 of his supplementary affidavit

1.3 paragraphs 5.12 to 12.5 of his supplementary affidavit.

Take further note that the basis of the respondent's application is set out in the answering affidavit of Mr Francois Alwyn Smit."

[34] Some of the paragraphs listed in the application were quoted by me in the preceding paragraphs of this judgment. The paragraphs cover a substantial portion of the founding and supplementary affidavits.

[35] The respondent did not follow the advice of the learned author *Erasmus*, *supra*, where it is suggested that "he or she must direct the court's attention to the statements of which he or she complained and specify the grounds on which he or she objected to each paragraph". See also *Securefin Ltd v KNA Insurance & Investment Brokers (Pty) Ltd* [2001] 3 All SA 15 (T) at 18d-e.

[36] The evidence of Francois Alwyn Smit, on which the striking out application is said to be based, is not a model in clarity and detail either. It is short and sweet:

"4.4 What is accordingly to be adjudged by the honourable court is whether, based on the evidence before him at the time (ie all the

evidence contained in the 2004 application as well as the judgment of His Lordship Mr Justice Bertelsmann), the Commissioner's decision was justified.

4.5 Consequently, if these submissions were to find favour with this honourable court, then it must follow that if the evidence, which the applicants now belatedly seek to introduce in their founding affidavit dealing with, and attempting to discredit and rebut the relevant evidence in the 2004 application, is not disregarded as inadmissible and/or entirely irrelevant, the Commissioner would be severely prejudiced. In order to give practical effect to the Commissioner's contentions in this regard an application will be made at the hearing of this matter for a striking-out of those portions of the founding affidavit identified in the notice of application to strike out, annexed hereto as annexure S1."

[37] There is also the following passage:

"26.2.5 Accordingly, and as the Commissioner's decision is to be adjudged on the basis of the evidence that was before him when taking such decision, any further evidence is totally irrelevant and thus inadmissible.

26.3 In the premises the admission of the evidence now belatedly sought to be introduced will severely prejudice the Commissioner.

> In this regard it is also important to point out that should the belated introduction of evidence be permitted the prejudice to be suffered by the Commissioner will not only be limited to the present issue, but would make it impossible, not only for the Commissioner, but for all organs of state, to function effectively."

[38] I have pointed out that it is undisputed that a great deal of evidence, over and above the record of the 2004 application, was before the respondent, and available for scrutiny, before the decision was taken. I have pointed out that allegations in this regard are undisputed. Examples of the evidence have been quoted, *supra*.

[39] Against this background, I cannot see how the evidence, as quoted, can be "irrelevant and/or vexatious" by any stretch of the imagination. In this regard the principles laid down in the cases of *Du Preez* and *Doody, supra*, have been dealt with.

[40] In view of the aforegoing, I have come to the conclusion that the grounds, such as they are, on which the respondent relies for claiming that the evidence sought to be struck out is irrelevant, are flawed and without merit. The same applies to the grounds upon which prejudice is claimed.

[41] In the result, I am of the view that the application to strike out falls to be dismissed.

The PAJA defence

[42] I have described this defence by quoting the formulation thereof by the respondent as it appears in paragraph 1.2 of the respondent's heads of argument.

> It amounts to this: where Delport and Pickard were afforded "the fullest opportunity" to furnish the respondent with evidence and submissions proving that all the relevant provisions of the Act had been complied with, and failed to do so, they should not be allowed, at this "belated stage" to place any evidence before this court "even if such evidence might prove or tend to prove compliance with and/or no breach of the Act" (emphasis added).

[43] I have pointed out that, according to the heads of argument, this defence is directed only at Delport and Pickard, because they were not part of the 2004 application, but I have also recorded my acceptance, for present purposes, and for the benefit of the respondent, that the defence is also directed at AT and ET.

[44] I have, to a certain extent, already dealt with this defence by expressing my reservations about the validity thereof, with particular reference to the principles laid down in *Du Preez* and *Doody, supra*.

[45] It also appears from the portion quoted from the respondent's heads of argument, that "as part of this leg of the Commissioner's defence to the application" the application for striking out would be launched.

[46] Having found that the application for striking out falls to be dismissed, it seems to me that very little, if anything, is left of this defence. Indeed, I deem it appropriate to remark, with the greatest respect to respondent's counsel, that I have serious reservations about whether this can be described as a "defence" at all, in the accepted sense of the word.

[47] Nevertheless, in dealing with the defence as offered by the respondent, it is convenient to revisit the correspondence between the parties as it was exchanged before the respondent took the decision, now under review, to claim the amount of some R24 million from the applicants.

[48] I have already quoted the letter of "intention to demand duty and VAT" dated 17 August 2006. I have pointed out, from quoting this letter, that the respondent adopted the attitude that, based on the evidence in the 2004 application, "at least" 11 753 master cases of Exclusive cigarettes had been distributed by AT and ET without the relevant duty and tax thereon having been paid.

[49] It also appears from these letters quoted (the letter of intent and the covering letter) that Delport and Pickard are also being held liable in terms of the provisions of section 103 of the Act.

[50] The covering letter (as quoted) also contains the following closing paragraph:

> "The contents of the previous paragraph and enclosed letters should in the circumstances also be considered as a notification in terms of the provisions of section 3(2)(b) of the Promotion of Administrative Justice Act, no 3 of 2000, to the individuals mentioned above."

[51] Section 3(2)(b) of PAJA reads as follows:

> "(2)(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)-
>
> (i) adequate notice of the nature and purpose of the proposed administrative action;
>
> (ii) reasonable opportunity to make representations;
>
> (iii) a clear statement of the administrative action;
>
> (iv) adequate notice of any right of review or internal appeal, where applicable; and
>
> (v) adequate notice of the right to request reasons in terms of section 5."

In my view, subsection (4), referred to in subsection (2)(a) does not apply to the present situation. No argument to the opposite effect was presented to me.

[52] The reply to this notice of demand was dated 20 September 2006 and written to the respondent by the applicants' attorney. It was of a somewhat indignant nature and it reads as follows:

> "Your letter dated 17 August 2006 addressed to our above-named client refers.
>
> In order for our client to fully respond to the intended claim you will understand that it is necessary for our client to fully understand the basis and content of the intended action in order to respond thereto. You will agree that in the absence thereof the 'opportunity' to respond to the intended claim is but a token compliance to the provisions of PAJA and will make a mockery of the provisions of that Act and the adherence to the *audi alteram partem*-rule.
>
> You, with reference to TPD case 598/2003, state that based on the evidence in that case it was 'concluded that at least 11 753 master cases of Exclusive cigarettes had been distributed by Apollo and/or Exclusive without the relevant duty and tax thereon having been paid'.

We in the first instance seek clarity on the issue of 'at least 11 753 master cases'. With reference to your calculations in the schedule it appears that the calculations are indeed based on 11 753 master cases. Is the allegation then to be understood that you have evidence of 11 753 master cases where the duty and VAT has not been brought to account?

Is the amount of 11 753 master cases based on the evidence and calculation of Mr Smit as it appears in his first affidavit in the above-mentioned case?

If so, what is to be made of the later admissions of Mr Smit, under oath, as to the incorrectness of the calculations? Kindly specify which of the statements, under oath, you now rely on.

Kindly provide us, with reference to all the evidence, in the above matter with a basis for the calculation of the amount of master cases the intended claim is based.

You will appreciate that this goes to the heart of the matter as our client can hardly be expected to provide evidence or respond to allegations of master cases that simply do not exist.

In the above matter not only evidence of witnesses of your office appears but also evidence of witnesses on behalf of our clients. No finding on this evidence was made and most certainly the evidence was not tested under cross-examination.

No specific reference is made thereto in the letter under reply. Is it the intention of your office to disregard the evidence as contained in the affidavits of certain witnesses? If so kindly indicate what evidence your office intends to accept, which evidence you intend to disregard and provide full and detailed reasons therefor. This request is obviously in terms of the provisions of PAJA.

You will appreciate that in the absence of the above information it is not possible for our client to fully respond to the intended claim and until our clients have the opportunity to do so the requirements of PAJA have not been met.

We await your response.

Yours faithfully"

[53] The respondent's reply to this letter, written by the same Mr Smit whose calculations are questioned in the letter of the applicants' attorney, was somewhat abrupt. It is dated 12 October 2006 and the salient portions read as follows:

"This office has noted the contents of your letter but do not feel that it impacts on our decision. The information was given with enough clarity in our various affidavits and the letter of intent.

The basis of the *prima facie* indebtedness was furthermore properly explained.

In the circumstances you are hereby given a further five days from the date of this letter to make any representations, failing which SARS will make a decision."

[54] The applicants' attorneys' reaction to this, dated 13 0ctober 2006, was also bristling with indignation:

"Your letter dated 12 0ctober 2006 in reply to our letter dated 20 September 2006 has reference.

We are most surprised at you reply as your conduct makes it impossible for our client to properly respond to your allegation.

As an official who performs an administrative function you are obliged to perform your duties in accordance with the principals (*sic*) of the Constitution. As such your emotions should not influence any action/duty performed by your office.

The request for further information was properly motivated and succinct.

You cannot expect our client to answer to or provide information in respect of stocks and sales that, on your own evidence under oath, do not exist.

We await your full and detailed responses to our previous correspondence of 20 September 2006.

A copy of our letter and your response thereto will be forwarded to the Public Protector and simultaneously to the SARS Service Monitoring office."

[55] The respondent's reaction to this letter, almost a month later, on 8 November 2006, was the final demand. This I have quoted. This is the demand constituting the decision which is the subject of this review application. This demand contains none of the information and reasons requested in the preceding letters referred to. It only states, somewhat bluntly,

"... You are hereby advised that this Office is satisfied that your clients were previously provided with sufficient information and reasons to support and justify this Office's intention to demand payment of duties and VAT and to enable your clients sensibly to respond thereto."

The previous "sufficient information and reasons" are not elaborated upon.

[56] With reference to the requirements of section 3(2)(b) of PAJA, *supra*, it seems that the following observations can be justifiably made:

(1) The "full and detailed reasons" and "full and detailed responses" requested in both the letters of the applicants' attorney were not supplied. This, in my view, falls well short of the "procedurally fair administrative action" required by section 3 of PAJA:

(i) Despite the fact that section 3(2)(b)(v) provides that the party against whom the administrative action is directed should receive "adequate notice of the right to request reasons in terms of section 5", neither the letters of intent nor the final demand contained such notice.

(ii) When the reasons were nevertheless requested, they were refused.

(iii) One would have expected Smit, who was the author of the letters of demand as well as the deponent to the affidavits which are under scrutiny, *supra*, to be in a position to supply adequate reasons. He failed to do so.

(iv) In my view the unco-operative attitude adopted by the respondent is particularly unfair if one considers that the decision which is under attack was taken approximately eighteen months after the 2004 application, on which the decision is based, had been disposed of.

(v) The position is aggravated due to the fact that Delport and Pickard were not parties to the 2004 application and, moreover, because a great deal of evidence had been supplied to the respondent after the 2004 application but before the decision to demand payment of the approximately R24 million was taken. Despite receipt of this evidence, the respondent persisted in limiting the grounds for the decision to the record of the 2004 application.

(2) The letters of intent and the final demand do not contain notice of a right of review as required by the provisions of section 3(2)(b)(iv).

(3) Given the complex nature of the dispute, the wide range of conflicting factual allegations as to whether or not the Act had been contravened, and the fact that the record runs into thousands of pages, I am of the view that the applicants were not afforded "a reasonable opportunity to make representations" as required by section 3(2)(b)(ii). Given the unco-operative attitude of the respondent, I am also of the opinion that

there was no "clear statement of the administrative action" as required by the provisions of section 3(2)(b)(iii).

[57] 0n 14 November 2006, a few days after the final demand of 8 November had been received, the applicants, as they were obliged to do in terms of section 96 of the Act, through their attorney, notified the respondent in writing of their intention to launch this review application. The attorney, quite justifiably in my view, did so, *inter alia*, in the following terms:

"With reference to the previous correspondence it is evident that you fail to follow proper process in that:

(a) you did not provide proper and adequate information relating to the allegation that 'at least 11 753 master cases of Exclusive cigarettes had been distributed by Apollo and/or Exclusive without the relevant duty and tax thereon having been paid'. Disregarding all other evidence and based only on the evidence of Smit in case no TPD 598/2003 there is no basis or substance for the allegation of 11 753 master cases of Exclusive cigarettes.

(b) You, after being requested to do so, failed to provide reasons for your decision to demand duty and VAT in respect of 11 753 master cases of Exclusive cigarettes.

(c) You, after being requested to do so, failed to provide proper and adequate information as to what evidence in the above case you intend relying on and what evidence you intend to disregard.

(d) You, after being requested to do so, failed to provide reasons for the decision to rely on certain evidence and disregard other evidence in the above matter.

Application will be made that the decision(s) be reviewed and set aside due to the above reasons and that the decision(s) were made without proper assessment or at all assessing the submissions of our clients and/or the facts and evidence already known to you. Furthermore the application will be based thereon that on proper evaluation of the facts and documentation relevant to this matter the goods, on a balance of probabilities, were duly imported and/or manufactured and distributed. Appropriate declaratory relief will be sought in this regard."

[58] In all the circumstances, I am of the view that the conduct of the respondent fell well short of the requirements of PAJA when it comes to the constitutional imperative of providing "procedurally fair administrative action".

I also cannot agree with the submission on behalf of the respondent, as crafted in the heads of argument, that Delport and Pickard (and presumably AT and ET as

well) were afforded "the fullest opportunity" to supply evidence and submissions proving that the Act had been complied with.

[59] In the result, I see no merit in the "PAJA defence" which is aimed, effectively, at preventing the applicants from stating their case. In my view the PAJA defence falls to be dismissed.

The defence of *res judicata*/issue estoppel

[60] I repeat that this defence is crafted as follows in the respondent's heads of argument:

> "As far as the first and second applicants are concerned, the Commissioner contends that the issues which the honourable court is now called to rule on, have already finally been decided and disposed of by this court in an earlier application."

This is the 2004 application which came before BERTELSMANN, J.

[61] The general rule is that the cause of action in both cases must be the same, and the same thing (relief) must have been claimed or may have been claimed in both cases – Harms, *Amler's Precedents of Pleadings* 6th edition p303. The learned author also points out that the *onus* is on the party who raises *res judicata* to allege and prove all the elements underlying the defence.

Furthermore, the learned author points out that the judgment relied on must be a judgment given in litigation to which the present parties or their privies were parties. In other words, the same parties must have been involved in the previous litigation as are involved in the litigation where the defence is raised. According to the learned author an exception to this rule is that the requirement does not apply to a judgment *in rem* ("saaklik/real") as per the *Trilingual Legal Dictionary* of Hiemstra and Gonin (p213). In my view this rule does not apply to the present case. I was not presented with argument to the contrary. The other general requirement is that the cause of action in both cases must be the same, and the same thing (relief) must have been claimed or may have been claimed in both cases.

[62] Because these basic elements of this particular defence are clearly not present when a comparison is drawn between the present dispute and the 2004 application, the defendant relies on the defence of issue estoppel which involves the relaxation, in appropriate cases, of the common law requirements that the relief claimed and the cause of action must be the same in both the case in question and the earlier judgment.

[63] Before dealing with these legal principles it is necessary to briefly analyse the judgment in the 2004 application as well as the relief claimed in that application for comparative purposes.

[64] In the 2004 application the relief claimed in the notice of motion was the following:

"(1) It is declared that the licence 'EXD3' authorises the first applicant to manufacture cigarettes on the local market.

(2) The detention of the diamond die on 3 April 2003 is declared invalid and the second respondent ordered to immediately return the die to the first applicant.

(3) It is declared that the provisions of section 35A(2) of the Act requires that no cigarettes not bearing a stamp imprint may be removed from the Customs and Excise manufacturing warehouse unless in terms of specific permission from the second respondent.

(4) It is declared that until 5 May 2003 no permission was issued by the second respondent to the first applicant to remove cigarettes not bearing the stamp imprint from its manufacturing warehouse.

(5) It is further declared that all removals from the manufacturing warehouse of the first applicant's cigarettes bearing the diamond die impression up and until 5 May 2003 were lawful.

(6) It is declared that the second applicant is in lawful possession of seven diamond dies which includes the die to be returned in terms of paragraph 2 above.

(7) It is declared that the second applicant is entitled to transfer the diamond dies in his possession to licenced manufacturers of cigarettes provided the second respondent is duly informed of the whereabouts of the diamond dies.

(8) The respondents and their officials are interdicted from detaining or seizing any equipment used by the first applicant in the manufacture of cigarettes for the local or export market or in any manner prohibiting the manufacture of cigarettes of the Exclusive brand for the local market by the first applicant.

(9) The respondents and their officials are interdicted from detaining or seizing any diamond dies in possession of the applicants."

[65] As I have already pointed out, in the 2004 case, ET was the first applicant and AT was the second applicant. The present third and fourth applicants, Delport and Pickard, were not parties to that application. Moreover, the Minister of Finance was the first respondent and the present respondent was the second respondent.

[66] In the 2004 application the second respondent (the present respondent) launched a counter-application asking for the issuing of the licence EXD3 to be reviewed and set aside alternatively for an order declaring that the Commissioner is entitled to withdraw the licence EXD3. Further declaratory relief claimed in the counter-application included that the then applicants were not entitled to be in possession of five dies issued to T H D Georgiades SA Cigarette Industry, that the then applicants be ordered to return the aforesaid dies to the then second respondent within three days, that the issuing of seven dies to AT in March 2001 be reviewed and set aside, that the then applicants be ordered to return the dies presently in their possession to the then second respondent within three days and a prayer for costs.

[67] The order granted by BERTELSMANN, J in the 2004 application (on 24 March 2005) reads as follows:

> "1. The application is dismissed with costs.
>
> 2. It is declared that the Commissioner is entitled to withdraw the licence, annexure EXD3, to the founding papers.
>
> 3. It is declared and ordered that the licence be returned to the Commissioner immediately and that all reference thereto in the records of the Commissioner be deleted inasmuch as they indicate that it is a valid licence in the first applicant's possession.

4. It is declared that the applicants are not entitled to be in possession of any dies originally issued to T H D Georgiades SA Cigarette Industry.

5. The applicants are ordered to return any or all dies in their possession to the second respondent immediately."

There is also a costs order against the then applicants.

[68] In his judgment, BERTELSMANN, J identified six issues which had emerged for decision and which he consequently decided. In the words of the learned judge these issues were the following:

"1. Had the licence held by the first applicant been issued properly, and if so, what did it authorise first applicant to do?

2. Was the Commissioner entitled to revoke the licence?

3. If so, was the Commissioner bound to do so in terms of either section 3(2) or section 60(2) of the Customs and Excise Act 91 of 1964, or was the second respondent entitled to a declaratory order by this court, that the licence was properly withdrawn?

4. Was there proper or substantive compliance with the provisions of the Promotion of Administrative Justice Act 3 of 2000?

5. What should happen to the dies in first applicant's possession?

6. Was there in fact an existing dispute in respect of which the court could issue a declaratory order?"

The court held that there was a very real and vigorous dispute in existence between the parties. This was issue no 6 identified by the learned judge. I deem it unnecessary to deal with the decision in respect of the other five issues, because they clearly do not relate to the present case.

[69] It seems that the argument offered on behalf of the respondent in the proceedings before me is the following: the "specific issue" that had to be considered in the 2004 application and "was actually ruled on" was whether the cigarettes had been dealt with in compliance with the Act or in contravention thereof. It is argued that in the 2004 application this issue was decided in favour of the respondent, so that it is now *res judicata*, "albeit in its extended form as issue estoppel".

[70] On a general reading of the judgment, it seems to me that the closest the learned judge came to this subject can be found in the following passages on pp11-13 of the judgment:

> "One of the grounds upon which the second respondent based the counter-application was the allegation that the Act had been contravened by the first applicant and its officials, *inter alia* Mr Delport and Mr Pickard.
>
> In particular, the charge was made that cigarettes had been introduced into the South African market without excise duty and VAT having been paid thereupon. These cigarettes were all of the Exclusive brand.

These charges were supported by affidavits of employees and business associates of the applicant, *inter alia* of a certain Reichert and a Ms Schoeman, who both testified that they distributed large volumes of Exclusive cigarettes without VAT being paid thereupon and without the necessary excise payments having been effected. These affidavits were made in terms of section 204 of the Criminal Procedure Act and were obviously intended as evidence to be produced against the applicants in a forthcoming criminal prosecution.

Because of the fact that these affidavits and the documents annexed thereto are obviously intended for the purposes of future criminal prosecution, I will refrain from dealing therewith in any great detail.

I prefer to base my conclusion on a different footing. The applicants are obliged to keep comprehensive records of all dealings in their warehouse and of all transactions in respect of goods that passed through it.

On the assumption that they were entitled to sell cigarettes on the local market, they obviously had to pay the necessary taxes and duties thereupon.

> This required, as I have underlined, comprehensive and detailed records of all cigarettes dealt with in this fashion."

[71] The learned judge then goes on to deal with the perceived failure on the part of the then applicants to produce proper records to show compliance with the Act. The learned judge then concludes with the following remark on p15 of the typed judgment:

> "Because of the fact that the Act is premised on a system of self-accounting and self-assessment, the failure to keep proper records strikes at the very root of the statute and undermines the second respondent's ability to perform its function ..." (Emphasis added.)

[72] It appears that the basis on which the learned judge came to his decision was non-compliance in the sense of failure to produce proper records, rather than non-compliance in the sense of failure to pay duties on a specific quantity of cigarettes, let alone 11 753 master cases.

[73] Counsel for the applicants, in my view correctly, identified the following points of difference between the 2004 application and the present dispute:

(1) The relief sought by ET and AT in the 2004 application had no bearing whatsoever on the liability to pay taxes.

(2) The relief sought by the respondent (then first respondent) in a counter-application had no bearing on the payment of taxes.

(3) The issues decided in the first judgment had no bearing whatsoever on the payment or liability in respect of taxes.

(4) The order made by the learned judge in the 2004 application had no bearing whatsoever on the payment of or liability for taxes.

(5) Nowhere in the judgment in the 2004 application is there a reference to any amount of taxes which any of the then applicants would become liable to pay to the then first respondent.

(6) Nowhere in the judgment is there any reference or ruling in respect of the quantity of master cases of cigarettes of the Exclusive brand.

[74] I consider it necessary to remark that the issue of *res judicata* relied upon by the respondent is dealt with in very brief and cursory fashion in the opposing affidavit. It spans no more than three or four pages and deals, mainly, with extracts of the judgment of BERTELSMANN, J. The areas of difference, referred to above, are not analysed. The same applies to the heads of argument.

[75] Another aspect, which I consider to be a compelling one from the point of view of deciding whether or not a defence of *res judicata* or issue estoppel can be applicable to the present matter, is the fact that the decision to demand the alleged outstanding taxes was taken some eighteen months after the judgment had been handed down in the 2004 application.

Moreover, the six issues identified and decided by the learned judge had no bearing whatsoever on the question of liability for tax on a fixed number of master cases: in other words, the present issue (outstanding liability in respect of certain cigarettes) was simply not decided in the 2004 application, neither was it necessary to decide the present issue in order to decide any of the six issues identified by the learned judge.

The issue estoppel rule is described as follows by the learned author *Harms*, *op cit* at 303:

> "The rule is that, where the decision set up as *res judicata* necessarily involved a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without, at the same time determining that question or issue in a particular way, such determination, though not declared on the face of the recorded decision, is deemed to constitute an integral part of that decision as effectively as if it had been made so in express terms." (Emphasis added.)

In my view, this situation does not apply at all to the present circumstances. The present dispute did not come up for consideration, neither was it decided, neither was it necessary to be decided for purposes of deciding the 2004 dispute.

[76] Counsel for the applicants referred me to a recent, as yet unreported, decision of the Supreme Court of Appeal. The neutral citation is *Janse van Rensburg NO v Steenkamp* (237/08 and 467/08) [2008] ZA SCA 154 (27 November 2008). In paragraph [24] on p12 of the typed judgment the following is stated:

"In *Smith v Porritt* 2008 6 SA 303 (SCA) at 307J SCOTT, JA summarised the law:

'[10] Following the decision in *Boshoff v Union Government* 1932 TPD 345 the ambit of the *exceptio rei iudicata* has over the years been extended by the relaxation in appropriate cases of the common-law requirements that the relief claimed and the cause of action be the same (*eadem res* and *eadem petendi causa*) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (*idem actor*) and that the same issue (*eadem quaestio*) must arise. Broadly stated, the latter involves an enquiry whether an issue of fact or law was an essential element of the judgment on which

reliance is placed. Where the plea of *res judicata* is raised in the absence of a commonality of cause of action and relief claimed it has become common place to adopt the terminology of English law and to speak of issue estoppel. But, as was stressed by BOTHA JA in *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 1 SA 653 (A) at 669D, 670J-671B, this is not to be construed as implying an abandonment of the principles of the common law in favour of those of English law; the defence remains one of *res judicata*. The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis (*Kommissaris van Binnelandse Inkomste v Absa Bank Bpk (supra)* at 670E-F). Relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others. As pointed out by DE VILLIERS CJ as long ago as 1893 in *Bertram v Wood* (1893) 10 SC 177 at 180, 'Unless carefully circumscribed, [the defence of *res judicata*] is capable of producing great hardship and even positive injustice to individuals'." (Emphasis added.)

[77] What is clear, is that, even when issue estoppel is raised, the requirement that the parties must be the same remains. In the present case, of course, that is not the position. For this reason alone, in my view, the plea of issue estoppel must fail.

[78] Moreover, it seems that the warning, already issued in 1893 by DE VILLIERS, CJ, that the defence of *res judicata* is capable of producing great hardship and even positive injustice to individuals should be considered in the present instance: here it is raised only against AT and ET. If it is upheld, it would mean that AT and ET are obliged to pay R24,5 million. The situation may then develop whereby Delport and Pickard in a subsequent hearing, manage to water down the *quantum* to a smaller figure or even manage to escape liability altogether because they can show compliance with the Act. In my view, such a result would represent an injustice towards AT and ET. On the same subject, it should be borne in mind that the issue of *quantum* is of major importance. It appears from the computation of the claim (attached to the letters of demand and referred to earlier) that the amount claimed is directly linked to the number of cigarettes. For example, 6 000 master cases may represent liability of some R12 million. Of course, the question of *quantum* was not even in the contemplation of the learned judge when the 2004 application was decided.

[79] In another recent case, that of *Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng*, 2009 3 SA 577 (SCA) the following is said at 586H-587B:

"It has been recognised though that the strict requirements of the *exceptio*, especially those relating to *eadem res* or *eadem petendi causa* (the same relief and the same cause of action), may be relaxed where appropriate. Where a defendant raises as a defence that the same parties are bound by a previous judgment on the same issue (viz *idem actor* and *eadem quaestio*), it has become common place to refer to it as being a matter of so-called 'issue estoppel'. But that is merely a phrase of convenience adopted from English law, the principles of which have not been subsumed into our law, and the defence remains one of *res judicata*. Importantly when dealing with issue estoppel, it is necessary to stress not only that the parties must be the same but that the same issue of fact or law which was an essential element of the judgment on which reliance is placed must have arisen and must be regarded as having been determined in the earlier judgment." (Emphasis added.)

The learned judge also refers to the cases of *Smith v Porritt, supra*, and *Kommissaris van Binnelandse Inkomste v Absa Bank, supra.*

As is evident from what I have emphasised from the quotation, the requirement that the parties must be the same remains. I repeat that the failure to meet this requirement, in itself, appears to be fatal to the prospects of upholding the issue estoppel plea in the present instance.

Moreover, I repeat the view I expressed earlier that the respondent has also failed to discharge the *onus* of proving the second requirement namely "that the same issue of fact or law which was an essential element of the judgment on which reliance is placed must have arisen and must be regarded as having been determined in the earlier judgment".

[80] I conclude by referring to the following passage from *Kommissaris van Binnelandse Inkomste, supra,* at 676C-E:

> "Die gemeenregtelike vereistes vir 'n verweer van *res judicata* was streng omskryf, juis om onreg te voorkom (sien bv *Bertram v Wood supra* op 180). Billikheidsoorwegings is ook van deurslaggewende belang by die aanwending van geskilpunt-estoppel in die Engelse regspraak (sien bv *Re State of Norway's application (No 2) (supra* op 714J)). Gevolglik moet die moontlikheid om die beginsels van *res judicata* tot enige bepaalde geval van geskilpunt-estoppel uit te brei, met groot omsigtigheid behandel word."

[81] In all the circumstances, I have come to the conclusion that the respondent has failed to discharge the *onus* of proving that the defence of *res judicata* (issue estoppel) can be applied in the present case.

[82] In the result, I have concluded that the defence of *res judicata*/issue estoppel falls to be dismissed.

Costs and the postponement of the main application

[83] As to costs, counsel for the applicants asked for a punitive costs order in the event of the special defences being dismissed.

After due reflection, I have come to the conclusion that such a punitive order would not be appropriate in the circumstances.

[84] A condonation application flowing from the late filing of the opposing affidavit, and a rule 30 application launched by the applicants were ruled upon at the commencement of the proceedings.

Thereafter, the full period of two days allocated for this hearing was taken up by argument relating to the striking out application, the PAJA defence and the *res judicata* defence. In my debate with counsel, it was agreed that, in the event of the special defences failing, the main relief prayed for in the notice of motion would have to be postponed *sine die*.

The order

[85] I make the following order:

1. The application to strike out is dismissed.
2. The defence flowing from the Promotion of Administrative Justice Act, 3 of 2000, is dismissed.

3. The defence of *res judicata*/issue estoppel is dismissed.

4. The application for the relief set out in prayers 1, 2, 3, 4, 5 and 6 of the notice of motion is postponed *sine die*.

5. The respondent is ordered to pay the costs, which will include the costs flowing from the employment of two counsel.

W R C PRINSLOO
JUDGE OF THE NORTH GAUTENG HIGH COURT

41881-2006

HEARD ON: 17 & 18 AUGUST 2009
FOR THE APPLICANTS: B PRETORIUS AND J M BARNARD
INSTRUCTED BY: THYS CRONJE INCORPORATED
FOR THE RESPONDENT: E W DUNN SC AND J A MEYER SC
INSTRUCTED BY: THE STATE ATTORNEY, PRETORIA