THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case No : 622/02

Reportable

In the matter between

STANDARD GENERAL INSURANCE COMPANY LIMITED Appellant

and

COMMISSIONER FOR CUSTOMS AND EXCISE Respondent

Coram: HOWIE P, NUGENT, CLOETE, LEWIS JJA, JONES AJA

Heard: 4 MARCH 2004

Delivered: 31 MARCH 2004

Summary: Customs and Excise Act – liability of clearing agent for payment of duty.

JUDGMENT

NUGENT & LEWIS JJA:

[1] This appeal concerns the liability of a clearing agent for the payment of customs duty. It arises from an action that was instituted in the Johannesburg High Court by the respondent (the Commissioner) against the appellant (Standard General) as surety for the obligations of a clearing agent, Gem Shipping (Pty) Ltd (Gem). Because the action took an unusual course it is necessary to set out some of its background.

[2] The appeal is confined to one of two claims that were advanced in the particulars of claim (claim A). The other claim (claim B) was disposed of in separate proceedings that terminated in this court.[1]

[3] In the particulars of claim the Commissioner alleged that Gem became liable to pay customs duty on certain goods pursuant to an undertaking that it gave in a document referred to as a 'special bond' and pursuant to s 18A of the Customs and Excise Act 91 of 1964, and that Gem's failure to pay the duty renders Standard General liable to do so. There was also a passing reference to s 99 of the Act but that added nothing material to the Commissioner's causes of action.

[4] In response to the particulars of claim Standard General filed a special plea in which it alleged that the Commissioner's claim against Gem was 'in

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[1] *Commissioner for Customs and Excise v Standard General Insurance Co Ltd* 2001 (1) SA 987 (SCA).

terms of section 99(1), (2) or (4) of the Act' and had expired by the effluxion of time when the summons was issued. The significance of the allegation that the claim was 'in terms of section 99(1), (2) or (4) of the Act' is that the liability that is incurred by an agent pursuant to any of those subsections expires after two years by virtue of s 99(5) of the Act[2] (as does the accessory liability of a surety).[3]

[5] That allegation in the special plea was not a correct reflection of what was said in the particulars of claim in relation to claim A. The Commissioner did not allege that Gem's liability was incurred pursuant to any of the provisions of s 99 (we have mentioned that there was no more than a passing and immaterial reference to that section) – he alleged that Gem's liability arose pursuant to the special bond and s 18A (and in neither case do the provisions of s 99(5) apply). What Standard General did was to reformulate the Commissioner's claim – incorrectly – and thereby purport to bring it within the terms of the time-bar in s 99(5). If an exception to the special plea had been brought it ought to have succeeded on the pleadings alone (whether or not the Commissioner's claims were good in law).

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2 Section 99(5) reads as follows: 'Any liability in terms of subsection (1), (2) or (4)(a) shall cease after the expiration of a period of two years from the date on which it was incurred in terms of any such subsection.'

3 *Commissioner for Customs and Excise v Standard General Insurance Co Ltd* above.

[6] But instead the matter took another turn shortly before the trial. The parties' representatives agreed to place what they referred to as a 'stated case' before the court for adjudication. The stated case was set out in a document in which it was recorded that various facts were agreed upon 'for purposes of the special plea only'. The parties also posed three questions (each with two subsidiary questions) for the court's adjudication. The effect of all this was to call upon the court to decide whether, on the facts that were provisionally agreed, Gem (and hence the surety) became liable to the Commissioner on any one or more of three grounds, and if so, whether that liability had expired by the effluxion of time. Nothing was said in the document as to the order that the court was expected to make if it answered the various questions in one way or the other.

[7] Scant regard seems to have been given to the earlier admonition by this court – to the same parties – that care must be taken when invoking the provisions of rule 33 because the courts are not there to answer academic questions.[4] We might add that the ordinary procedures for the conduct of litigation – which have generally served well over many years – should not lightly be discarded in favour of self-devised and often ill-considered procedures.

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[4] *Commissioner for Customs and Excise v Standard General Insurance Co Ltd* above 983C-E.

[8] What was placed before the court in this case, in effect, was a hybrid of a stated case on a limited issue (the question of the time-bar) and an exception to the particulars of claim as supplemented by facts that were agreed upon provisionally. Courts should generally decline to decide questions on facts that are only provisional for that will inevitably mean that their decisions are equally provisional and might be academic. But even if the facts in the present case had been finally agreed some of the questions were in any event academic. (The fact that the court *a quo* was able to dismiss the special plea notwithstanding that it answered one question in favour of Standard General is ample testimony to that.) We have already pointed out that the defence that was raised by Standard General could have been tested and disposed of by an exception to the special plea. And if Standard General was of the view that the Commissioner's claims were bad in law it could have tested them by an exception to the particulars of claim. But if the parties truly wished to isolate issues to dispose of in accordance with rule 33(4) they ought properly to have agreed upon the facts, or led evidence to establish them, and called upon the court to dispose of those issues finally in the ordinary course. The procedure that the parties devised merely invited confusion.

[9] But because the court *a quo* chose to answer the questions and the issues have now been ventilated in two courts, and because those answers might assist in bringing this matter to finality, we intend to deal with the questions that were posed.

The material facts that were provisionally agreed upon

[10] The following were the material facts that were provisionally agreed upon by the parties for purposes of the 'stated case':

(a) Gem was a licensed clearing agent as contemplated by s 64B of the Act. On 22 and 26 January 1990 Gem and Standard General respectively executed a 'special removal bond' in favour of the government of South Africa (the terms of which are set out later in this judgment).

(b) In January 1993 Gem entered for export and removal in bond from a customs warehouse in Durban, and transportation by road to Zambia, goods reflected in two bills of entry. The named exporter on those bills was an entity known as AMKA, for whom Gem was acting as agent. Gem declared that the particulars on the bills of entry were correct; undertook to comply with the relevant provisions of the Act; and declared that the goods would be removed in bond to Zambia (which is outside the common customs area). The Commissioner, by

reason of the entries made in the bills, and in terms of the provisions of the special bond, gave permission for the goods to be transported to Zambia without the payment of duty.

(c) The goods were removed from a customs warehouse by Gem, which failed to prove, within 30 days of the date of the bills, to the satisfaction of the Commissioner, that the goods had been taken out of the common customs area. Gem also failed to prove that the goods were transported in accordance with the declarations made by it in the bills.

(d) Gem was placed in liquidation in May 1993. The first written demand for payment of the duty on the goods was sent to Gem in December 1993, and no demand was made on AMKA. In September 1994 the Commissioner proved a claim against the estate. The claim included the amount that is in issue in this case.

(e) In June 1995 the Commissioner instituted the present action against Standard General.

The questions posed in the stated case

[11] The questions that were posed by the parties were as follows (we set them out verbatim):

‘1. 1.1 Did Gem Shipping incur a liability in terms of section 99(2) of the Act?

1.2 If the answer to question 1.1 is in the affirmative, did such liability cease in terms of the provisions of section 99(5) of the Act prior to 7 June 1995?

1.3 If the answer to 1.2 is in the negative, did such liability cease in terms of the provisions of section 99(5) of the Act after 7 June 1995 and by reason thereof extinguish the liability of the defendant?

2. 2.1 Did the principal Gem Shipping incur a separate liability in terms of the provisions of the bond, annexure "A1" to the particulars of claim, independently of any liability imposed by section 99(2) of the Act?

2.2 If the answer to the question in 2.1 is in the affirmative, did the provisions of section 99(5) of the Act operate to extinguish such liability prior to 7 June 1995?

2.3 If the answer to 2.2 is in the negative, did such liability cease in terms of the provisions of section 99(5) after 7 June 1995 and by reason thereof extinguish the liability of the defendant?

3. 3.1 Did the principal Gem Shipping incur a separate liability in terms of the provisions of section 18A of the Act?

3.2 If the answer to 3.1 is in the affirmative, did the provisions of section 99(5) of the Act operate to extinguish such liability prior to 7 June 1995.

3.3 If the answer to 3.2 is in the negative, did such liability cease in terms of the provisions of section 99(5) of the Act after 7 June 1995 and by reason thereof extinguish the liability of the defendant?

[12] The court *a quo* (Malan J) answered those questions as follows and in consequence of his findings he dismissed the special plea:

1.1 Gem did incur liability in terms of s 99(2).

1.2 Gem's liability in terms of s 99(2) expired prior to 7 June 1995 by virtue of the provisions of s 99(5).

2.1 Gem did incur a separate liability in terms of the bond, annexure A1 to the stated case, and independent of the liability imposed by s 99(2).

2.2 Section 99(5) did not operate to extinguish Gem's liability in terms of the bond prior to 7 June 1995.

2.3 Gem's liability in terms of the bond did not cease in terms of s 99(5) after 7 June 1995. The liability of the defendant under the bond was thus not extinguished.

3.1 Gem did incur liability in terms of s 18A.

3.2 Section 99(5) did not operate to extinguish Gem's liability in terms of s 18A prior to 7 June 1995.

3.3 Gem's liability in terms of s 18A did not cease in terms of s 99(5) after 7 June 1995. The liability of the defendant under s 18A was thus not extinguished.

[13] In summary, the learned judge found that Gem had incurred liability pursuant to s 99(2) for the payment of the duty, but that the liability so incurred was extinguished by s 99(5) before the summons was issued. He also found that Gem incurred a separate liability to pay the duty pursuant to the special bond, and a separate liability to do so pursuant to s 18A of the Act, and that neither of those obligations (which were secured by Standard General) was extinguished by s 99(5).

[14] The notice of appeal – and the terms in which leave to appeal was granted – encompassed all those answers but Standard General said in its heads of argument that it was not appealing against the findings made on the first question (answers 1.1 and 1.2). The Commissioner, however, asked us to reverse answer 1.2. He submitted that the liability that was incurred by Gem pursuant to s 99(2) of the Act (see answer 1.1) arose only when demand for payment of duty was made upon Gem's principal (AMKA) as provided for in s 18A(3). That occurred not earlier than 7 December 1993 and thus, it was submitted, the liability had not expired pursuant to s 99(5) when the summons was issued less than two years later.

[15] It is not necessary to decide whether it is competent to reverse the finding made by the court *a quo* in the absence of a cross-appeal because in our view the Commissioner's submission is in any event not correct. We deal more fully with s 18A later in this judgment and it is sufficient to say at this stage that a demand by the Commissioner was not a precondition for the principal to become liable in terms of that section. Its liability arose when the goods were entered for export (otherwise there would be no liability capable of ceasing as provided for in subsection (2)). Subsection (3) does no more than create a statutory duty to meet that liability, the breach of which constitutes an offence in terms of s 78. In our view the answer given by the

court *a quo* was correct and we need say no more with regard to the first question, except that it is quite academic.

[16] Before dealing with the substance of the remaining questions there is a matter that is common to both of them that can be disposed of at once. If Gem incurred liability to pay the duty pursuant either to the special bond, or pursuant to s 18A, then clearly that liability had not expired when the summons was issued. The time-bar provided for in s 99(5) of the Act is expressly confined to liability that is incurred by an agent in terms of that section.[5] Liability pursuant to the bond and to s 18A would be subject to the ordinary period for prescription and it is not disputed that that period had not elapsed when the summons was issued. Thus if answers 2.1 and 3.1 were correct (and in our view they were correct for reasons that we will come to) so were the respective subsidiary answers correct (answers 2.2 and 2.3, and 3.2 and 3.3).

[17] We turn then to the essential questions in this appeal (for convenience they are dealt with in reverse order) which are whether Gem incurred liability for the payment of duty in terms of s 18A of the Act, and whether it incurred liability pursuant to the special bond (quite apart from any liability that it might have incurred pursuant to s 99(2)). If it did incur liability on either of those grounds the Commissioner's claim has not expired and the

special plea must fail. (It will be apparent that a positive answer to either of those questions would make the other question otiose but we deal with both questions nevertheless.)

Liability pursuant to s 18A of the Act (question 3 in the stated case)

[18] Section 18A of the Act applies to goods that are imported into a customs and excise warehouse and then exported from the warehouse to a place outside the common customs area. It attaches liability for the payment of duty upon any 'person who exports' the goods who is referred to in subsequent subsections as the 'exporter'. At the time that is relevant to this appeal s 18A read as follows:

'**Exportation of goods from customs and excise warehouse**

(1) Notwithstanding any liability for duty incurred thereby by any person in terms of any other provision of this Act, any person who exports any goods from a customs and excise warehouse to any place outside the common customs area shall, subject to the provisions of subsection (2), be liable for the duty on all goods which he so exports.

(2) Subject to the provisions of subsection (3), any liability for duty in terms of subsection (1) shall cease when it is proved to the satisfaction of the Commissioner by the exporter that the said goods have been duly taken out of the common customs area.

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[5] The definition is set out in footnote 2.

(3) If the exporter fails to submit any such proof as is referred to in subsection (2) within a period of 30 days from the date on which the goods concerned were entered for export, he shall upon demand by the Commissioner forthwith pay the duty due on those goods.

(4) No goods shall be exported in terms of this section until they have been entered for export.

(5) No such entry for export shall be tendered by or may be accepted from a person who has not furnished such security as the Commissioner may require, and the Commissioner may at any time require that the form, nature or amount of that security be altered in such manner as he may determine.

(6) . . . .'

[19] The liability for the payment of duty devolves upon any 'person who exports' the goods from a customs and excise warehouse to any place outside the common customs area. Clearly Gem was not the person who exported the goods as that term would ordinarily be understood. But the Commissioner contends that the person who is referred to in subsection (1) (a 'person who exports') is an 'exporter' as that word is defined in the Act, which includes any person who acts on behalf of an exporter,[6] and that includes Gem (who was acting on behalf of AMKA).

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[6] Section 1 defines an 'exporter' to include 'any person who, at the time of exportation – (a) owns any goods exported; (b) carries the risk of any goods exported; (c) represents that or acts as if he is the exporter or owner of any goods exported; (d) actually takes or attempts to take any goods from the Republic; (e) is beneficially interested in any way whatever in any goods exported; (f) acts on behalf of any person referred to in paragraph (a), (b), (c), (d) or (e), and, in relation to imported goods, includes the manufacturer, supplier or shipper of such goods or any person inside or outside the Republic representing or acting on behalf of such manufacturer, supplier or shipper'.

[20] It was submitted on behalf of Standard General, on the other hand, that subsection (1) is confined to a 'person who exports' goods within the ordinary meaning of those words, and that the references to the 'exporter' in subsections (2), (3) and (10) are references to that person, and not to an 'exporter' as defined. The subsection (and the remaining subsections by extension) is confined, so it was argued, to the person who exports the goods as ordinarily understood: the person who 'transport[s] (merchandise) from one country to another in the course of trade' (per Nienaber JA in *De Beers Marine (Pty) Ltd v Commissioner, South African Revenue Service* 2002 (5) SA 136 (SCA) para 5. In other words, argues Standard General, although the noun ('exporter') is defined, the definition does not extend to the use of the verb.

[21] In support of that contention it was submitted that if the drafter of the legislation had intended to refer to an 'exporter' as it is defined in the Act that word would have been used in place of the phrase 'person who exports'. Moreover, it was pointed out that when defining the noun the drafter of the legislature did not expressly extend its meaning to the use of the verb, as is often done in legislation. For example, when the definition of the word

'manufacture' was later inserted in the Act it expressly provided that the noun would bear a corresponding meaning.[7]

[22] In our view some caution is required before attributing an intention to the drafter of legislation by inference. Giving meaning to particular words by drawing upon language that is used elsewhere in a statute is no more than the application of a process of logical reasoning – it is usually reasonable to infer that the compiler of a single document has used language consistently throughout.[8] But where a voluminous and complex statute has been repeatedly amended, probably by various drafters, over a long period of time – as in this case – that inference will not necessarily be sound.

[23] In our view the drafter of s 18A (which was inserted when the definition of 'exporter' already existed)[9] might just as well have held the view that because a 'person who exports' is the linguistic equivalent of an 'exporter' the former phrase would suffice. Naturally the noun might have been used instead but we do not think that a contrary intention was necessarily signified by the choice of words that have an equivalent meaning.

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7 That definition was inserted by s 1 of the Customs and Excise Amendment Act 84 of 1987.

8 *Marine Construction and Design Co,* supra, 189H-190A.

9 Section 18A was inserted by s 5 of the Customs and Excise Amendment Act 84 of 1987. The definition of an 'exporter' in its present form was inserted by the Second Customs and Excise Amendment Act 112 of 1977.

[24] We also think it would be remarkable – simply from a consideration of the intelligibility of language[10] – if the drafter of the definition of the noun were to have intended the verb to be used with a different connotation. It is true that when a noun is defined in legislation the drafter often expressly attributes a corresponding meaning to the verb – and vice versa – but that begs the question whether it is strictly necessary to do so. There are clear examples of tautology in the Act, just as there are examples of particular words being used when others might have sufficed.

[25] Rather than attempting to draw inferences as to the drafter's intention from an uncertain premise we have found greater assistance in reaching our conclusion from considering the extent to which the meaning that is given to the words achieves or defeats the apparent scope and purpose of the legislation.[11] As pointed out by Nienaber JA in *De Beers Marine,* above, para 7, when dealing with the meaning of 'export' for the purpose of s 20(4) – which draws a distinction between export and home consumption – the

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[10] Per Botha JA in *Marine Construction and Design Co v Hansen's Marine Equipment (Pty) Ltd* 1972 (2) SA 181 (A) at 189H.

[11] Per Schreiner JA in *Jaga v Donges, NO and Another: Bhana v Donges, NO and Another* 1950 (4) SA 653 (A) 662G-H:

> 'Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that "the context", as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background . . .'.

word must ‘take its colour, like a chameleon, from its setting and surrounds in the Act’.

[26] While the word ‘exporter’ as it is used in subsections (2) and (3) is clearly a reference to the ‘person who exports’ in subsection (1), in our view the person who is referred to in subsection (1) is, by equivalence of language, an exporter, and that word is in turn defined. That construction seems to fit more readily with the apparent purpose and operation of the Act than a construction that gives a narrow meaning to the phrase.

[27] The object of the Act (in so far as it relates to import duty) is to ensure that duty is collected on goods that are imported into this country and its provisions are mainly directed towards that end. It is not surprising that liability for the payment of duty should be imposed upon more than one person, or upon one person in more than one capacity, for the Commissioner cannot be expected to know who has what interest in goods that are landed.

[28] There are various provisions in the Act in which liability for the payment of duty is imposed at different times on a variety of people who might have some interest in the goods and s 44(6)(c) provides an appropriate example. When goods are imported and delivered by a carrier to a customs warehouse duty becomes payable by, amongst others, the ‘importer’ of the

goods,[12] defined to include a person who owns the goods, a person who carries the risk in the goods, a person who represents that or acts as if he is the importer or owner of the goods, a person who actually brings the goods into the Republic, a person who is beneficially interested in the goods, and a person who acts on behalf of any of the aforementioned persons. Just as different people might become liable for the payment of duty so one person might incur liability in different capacities. Furthermore the agent of any such person might become liable not only because he is an importer as defined but also by virtue of the liability imposed on agents generally by s 99(2). Duplication of payment is avoided by s 44A which absolves each of the various persons from liability upon payment of the duty by one of them.

[29] Where the net has been cast that widely upon the importation of goods (to include all those who might have an interest in the import) we would expect the net to be cast equally widely (to include all those who might have some interest in the export) when the goods are removed for export before the duty has been paid, rather than that liability would be limited to only a single person – and possibly his agent. For an agent becomes liable in terms of s 99(2)[13] only if he is the agent, or represents himself to be the agent, of a principal who is himself liable for the payment of duty. It cannot be assumed

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[12] Cf *EBN Trading (Pty) Ltd v Commissioner of Customs and Excise* [2001] 3 All SA 117 (SCA) para 28.

that a clearing agent will necessarily be appointed by, or represent himself to have been appointed by, the person who is in truth the exporter as narrowly defined (the person who actually exports the goods, whoever that person might be). It can also not be assumed that only one person will undertake the process of exporting from beginning to end. It is unlikely that the legislature would have intended that goods should be permitted to leave the warehouse for export (with the inherent potential that the goods might never leave the common customs area) but that the liability for duty would devolve only upon one undefined person. We do not think the legislature could have intended the Commissioner to seek out the true exporter in order to collect the duty from that person, and perhaps from his agent (but only if the agent has been appointed by, or has represented that he has been appointed by, that person).

[30] In our view the legislature must have intended liability to fall upon all the persons who might have an interest in the export (those defined in the definition of an 'exporter') just as it imposed liability on all those who have an interest in the import and that a 'person who exports' was intended to bear that meaning.

[31] That construction does not give rise to anomalies, as suggested by counsel for Standard General. At first sight it might appear to be unusual

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[13] Read with ss 64B(5) and (6).

that Gem should incur liability under more than one section of the Act, and that the liability that it might incur under each of them expires after the effluxion of different periods of time. But we have already drawn attention to the fact that cumulative liability is not an uncommon feature of the Act, and the fact that the liability incurred as an agent expires after a shorter time does not seem to us to take the matter further. It would be more anomalous if the word 'exporter' as used in s 99(2) of the Act had one meaning for some purposes and another meaning for other purposes, which would necessarily follow from construing s 18A narrowly.

[32] Thus in our view s 18A renders Gem, as the agent for AMKA, liable to pay the duty if it is not proved to the satisfaction of the Commissioner that the goods were taken out of the common customs area. That it has failed to do so is not in dispute for present purposes, and Standard General is liable as surety for that debt. In our view the answer given by the court *a quo* to question 3.1 was correct. (We have already said that in those circumstances the subsidiary answers would also be correct).

Liability pursuant to the Special Bond (question 2 in the stated case)

[33] The Commissioner also contends that Gem undertook liability for the payment of the duty pursuant to the provisions of the bond – quite

independently of any liability that it might otherwise have incurred in terms of the Act – and that Standard General has an accessory obligation.

[34] The special bond reflects language from a bygone era and reads as follows:

'DEPARTMENT OF FINANCE

CUSTOMS AND EXCISE SPECIAL REMOVAL BOND No.

KNOW ALL MEN BY THESE PRESENTS that we GEM SHIPPING (PTY) LTD through our duly authorized Agent and Attorney in that behalf . . . , as Principal, and the Standard General Insurance Company Ltd through our duly authorized Agent and Attorney in that behalf . . . , as Sureties in solidum and co-principal debtors renouncing and waiving the exceptions ordinis seu excussionis et divisionis, . . . are held and firmly bound unto the Government of the Republic of South Africa in the sum of R700 000 . . . of good and lawful money to be paid to the said Government to which payment well and truly to be made we bind ourselves jointly and severally each for the whole, our heirs, Executors, Administrators and Assigns.

WHEREAS the above Principal is desirous of removing from Durban Harbour area and/or SA CONTAINER DEPOTS, DURBAN, by road transport, goods, wares or merchandise to destinations outside the Republic of South Africa subject to the rules and regulations of the Laws of the Republic of South Africa relating to Customs and Excise, without payment of Duty.

NOW THE CONDITIONS AND OBLIGATIONS ARE SUCH THAT if all goods as shall be entered and suffered to be removed from the DURBAN HARBOUR AREAS and/or SA CONTAINER DEPOTS, DURBAN, to any place outside the Republic of

South Africa shall be duly removed in accordance with the regulations in that behalf and shall be transported in accordance with the declaration of destination made by the above Principal from time to time.

AND FURTHER, if all goods in bond and every part thereof entered and suffered and delivered to be removed in bond to any place outside the Republic be conveyed in accordance with the regulations in that behalf and be removed from the Republic without alteration or diminution of the contents within the space of thirty days from the date of entry into the Republic or the full and lawful duty thereon be paid to the government of the Republic of South Africa;

THEN THIS OBLIGATION TO BE VOID, OTHERWISE TO REMAIN IN FULL FORCE AND EFFECT.'

[35] The document was signed on behalf of Standard General, which was described as 'surety', and on behalf of Gem, which was described as 'principal'.

[36] The meaning that the Commissioner ascribes to the bond is that it imposes a principal obligation on Gem which is independent of the provisions of the Act, thereby serving to guarantee payment of duty by the person for whom Gem acts when it clears the goods (in this case AMKA).

[37] On behalf of Standard General, on the other hand, it was submitted that Gem incurred no liability other than in terms of the Act, and that the bond serves merely to acknowledge the existence of that liability and to

secure that liability as contemplated by s 64B of the Act,[14] in much the same way as did the bond that was in issue in *Commissioner of Customs* v *C&S Trading Co* 1939 AD 519. In that case a bond was given by an importer in terms of the regulations made under the Customs Tariff and Excise Duties Amendment Act 36 of 1925, which permitted him to import goods free of duty on certain conditions, provided that he entered into a bond on the terms specified in the regulations. It was held that the bond that was executed by the importer did not itself give rise to an obligation but merely acknowledged the existence of an obligation that devolved upon the importer pursuant to the regulations. But as pointed out by Lord Steyn,[15] 'In law context is everything.' Clearly the bond in that case was construed in the context of the regulation pursuant to which it was given. As De Wet JA said at 527-8:

'This conclusion can also be reached by another line of reasoning. When the regulation makes it imperative that the applicant shall acknowledge in a written document (i.e. the bond) that he shall pay all the duty on a consignment if he misuses some of the goods, the latter obligation is by clearest implication laid down by the regulation, and the regulation must be read in the same way as if it provided that the applicant shall be bound to pay all the duty if he misuses some of the goods and shall further be bound to

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[14] Section 64B(3) provides that before any person is licensed as a clearing agent he must 'furnish such security as the Commissioner may require'.

[15] *R v Secretary of State for the Home Department, ex parte Daly* [2001] 3 All ER 433 (HL) at 447a.

acknowledge this liability in a written document and to get a surety to guarantee its performance.'

It was not suggested that there is any like consideration that determines the construction to be placed on the bond in the present case, nor is there anything in the statute to show that a bond that is required to be given by a clearing agent in terms of s 64B will be confined to liability that is incurred in terms of the Act, and we see no reason why the bond should not be given its ordinary meaning.

[38] When a person appends his signature to a document that is intended to create legal obligations the first rule in identifying those obligations is to give effect to his intention as it has been expressed in the document. The language of the document in the present case – though archaic – is to our minds quite clear. In summary, Gem expressly bound itself, upon signature of the document, to pay to the government the sum of R700 000, but it was released from that obligation for so long as goods that it caused to be removed from the harbour or the container depots at Durban, or that it caused to be removed in bond, were duly transported to their proper destination or duty was paid on the goods by someone.

[39] It is characteristic of the Act for liability to be created upon the happening of an event and then to expire upon the happening of another and the bond is in a comparable form. We see nothing in the language of the

bond – whether expressly or by implication – that limits Gem's liability to that which it might incur in terms of s 99(2) or in terms of any other section of the Act. Nor do we see anything to suggest that its obligation is in some way accessory to some other obligation. While Gem's obligation to pay is dependent upon the existence of a particular state of affairs (the absence of the goods at their proper destination and the absence of payment by someone – a state of affairs that exists in the present case) that is a principal obligation that arises when the state of affairs exists and is enforceable as such.

[40] We have already observed that the Act expressly contemplates cumulative liability in pursuance of its objective of ensuring that import duty is paid, and we do not find it surprising that the Commissioner should have chosen to add yet another basis for liability independently of the Act. The clearing agent, after all, is best placed to ensure that the duty is paid – and there is every reason why the Commissioner should seek to hold him liable on any number of grounds. In our view question 2.1 and its subsidiary questions were also correctly answered.

[41] The appeal is dismissed with costs including those occasioned by the employment of two counsel.

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NUGENT JA

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LEWIS JA

HOWIE P)
CLOETE JA) CONCUR
JONES AJA)