THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 598/2015

Reportable

In the matter between:

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE	**Appellant**

and

VAN DER MERWE, LIEBENBERG DAWID RYK NO	**First Respondent**
MONYELA, KHASHANE CHRISTOPHER NO	**Second Respondent**
JACOBS, WELCOME NORMAN NO	**Third Respondent**
LUKHELE, MOTSWANA GRACE NO	**Fourth Respondent**
MAHANYELE, JOHANNA NINI NO	**Fifth Respondent**
PELA PLANT PROPRIETARY LIMITED (IN LIQUIDATION)	**Sixth Respondent**
UTI SOUTH AFRICA PROPRIETARY LIMITED	**Seventh Respondent**
TRANS-MED SHIPPING CC	**Eighth Respondent**

Neutral Citation: *CSARS v Van der Merwe NO* (598/2015) [2016] ZASCA 138 (29 September. 2016)

Coram: Lewis, Theron, Wallis, Petse and Dambuza JJA

Heard: 31 August 2016

Delivered 29 September 2016

Summary: Customs and Excise Act 91 of 1964 - ss 20(4), 38, 39 and 114 do not create an embargo in favour of the Commissioner preventing a liquidator from taking possession of property in terms of the Insolvency Act 24 of 1936 until duty and VAT is paid.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Annandale AJ sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Theron JA (Lewis, Wallis, Petse and Dambuza JJA concurring):

[1] The appellant is the Commissioner for the South African Revenue Service (the Commissioner). The first, second, third, fourth and fifth respondents are the duly appointed liquidators (the liquidators) of the sixth respondent, Pela Plant Proprietary Limited (in liquidation) (the company). The company was placed under winding-up because it was unable to pay its debts. A provisional winding-up order was granted on 20 July 2014 and a final order was granted on 16 September 2014. The effective date of the commencement of the winding-up, in terms of s 348 of the Companies Act 61 of 1973 (the 1973 Companies Act), was 18 July 2014.

[2] Prior to its winding-up the company concluded instalment sale agreements in terms of which it purchased certain items of heavy duty earthmoving equipment. Twenty three items of this equipment form the subject matter of this appeal (the equipment). The company had sent the equipment, to the value of some R25 million, to the Democratic Republic of the Congo (DRC) for operations in that country. Fourteen items were subject to credit sale agreements concluded between the company and Absa Bank Ltd, First Rand Bank Ltd and Bidvest Bank Ltd, the fourth, fifth, and sixth respondents,

respectively, in the court a quo (the banks), and as such those items were subject to the usual reservation of ownership. These items became the property of the company by virtue of the provisions of s 84(1) of the Insolvency Act 24 of 1936 (the Insolvency Act) and the banks obtained a hypothec over the equipment to secure any outstanding indebtedness. The remaining nine items always belonged to the company.

[3] When the company's operations in the DRC were complete the equipment was returned to South Africa. In the ordinary course, when the equipment was returned from the DRC, customs duty would have been payable in terms of s 39(1) of the Customs and Excise Act 91 of 1964 (the Customs Act) and VAT would have been payable in terms of s 7(1)(b) of the Value Added Tax Act 89 of 1991 (the VAT Act). The company appointed the seventh respondent, UTI South Africa Proprietary Ltd (UTI), as its clearing and forwarding agent in respect of the importation of the equipment. During March and June 2014, the equipment arrived in the country and was duly entered into the warehouse of the eighth respondent, Trans-Med Shipping CC, acting as UTI's sub-agent, with deferment of customs duty and VAT pursuant to s 20(1)(*a*) of the Customs Act and s 13(6) of the VAT Act, respectively.

[4] The goods remained in the warehouse under the control of UTI. UTI's freight costs and disbursements amount to approximately R2,7 million. UTI has also charged and continues to charge a storage fee of R12 000 per day to store the goods. As at October 2014, the storage charges amounted to R767 000 but have since escalated to almost R6 million. The duty and VAT said to be payable 'to clear' the equipment is R8,5 million although this is disputed by the liquidators.

[5] The liquidators endeavoured to secure the release of the equipment from UTI and the Commissioner. These endeavours were unsuccessful. They instituted proceedings in the court a quo for an order directing that the equipment be released to them without payment of duty and VAT. They contended that they were obliged, in terms of s 391 of the 1973 Companies Act, and s 61, read with s 83(3) of the Insolvency Act, to take possession of the equipment. The Commissioner and UTI opposed the application contending that the equipment could only be released to the liquidators after compliance with certain provisions of the Customs Act, namely, ss 20(4), 38, 39, 47A, 19(1), 19(6), 19(7), 19(9), 20(4), 107(2)(*a*)(*i*), 114(aC) and 114(1)(*b*)(*i*). The Commissioner claimed that these sections precluded him from releasing the equipment (and the court from making an order that he do so) unless and until the customs duty and VAT in respect of the equipment was paid in full. In the court a quo, UTI aligned itself with SARS' contention but did not participate in this appeal.

[6] The application was successful in the court a quo (Annandale AJ). It ordered that the equipment be released to the liquidators to be dealt with in terms of the laws of insolvency. It found that upon a proper interpretation of the Customs Act, read with the Insolvency Act, the 1973 Companies Act and the common law, none of the sections in the Customs Act relied upon by the Commissioner precluded the latter from releasing the equipment to the liquidators. The Commissioner appeals to this court with the leave of the court a quo.

[7] On appeal, the Commissioner and the liquidators agreed, in terms of rule 8(8) of the rules regulating the conduct of the proceedings of the Supreme Court of Appeal of South Africa, that a decision on the following question would be determinative of the appeal:

'Whether the law relating to insolvency in respect of the winding up of a company unable to pay its debts permits a liquidator of such a company to take possession of property of the company in the custody and/or under the control of the Commissioner for the South African Revenue Service ("the Commissioner") and to deal with such property as provided for in the law relating to insolvency even though duty has not been paid in respect of such property in terms of section 20(4), 38 and/or 39 of the Customs and Excise Act 91 of 1964. . . and/or value added tax has not been paid in respect of such property as required in terms of section 7(1)(*b*) of the Value Added Tax Act 89 of 1991 . . . Put differently, do sections 20(4), 38 and/or 39 of the Customs and Excise Act or section 7(1)(*b*) of the VAT Act constitute an embargo in favour of the Commissioner preventing the liquidator of a company being wound up and unable to pay its debts from taking possession of property of the company in the custody and/or under the control of the Commissioner and dealing with such property as provided for in the law relating to insolvency, unless duty and/or value added tax has been paid on such property.'

[8] The main complaint of the Commissioner on appeal was that Annandale AJ erred in approaching the matter as if the Commissioner was simply a creditor of the company and by determining whether, qua creditor, the Commissioner was entitled to be treated otherwise than in terms of the Insolvency Act. It was argued on behalf of the Commissioner that while the Customs Act is primarily a fiscal measure it is also a means of promoting the State's economic and other interests. It was further argued that duty is imposed on imported goods not only for fiscal purposes but also to protect local manufacturers. In this regard reference was made to Chapter VI of the Customs Act which deals with anti-dumping, countervailing and safeguard duties. Reference was made to the Customs Act being used to implement State policy, for example, the power of the National Executive to conclude agreements with the government of any territory in Africa in terms of s 51 of the Act and Chapter VII which provides for the imposition of environmental levies.

[9] The court a quo considered the scope and purpose of provisions relating to the winding-up of companies unable to pay their debts in terms of the 1973 Companies Act, the Insolvency Act, the Customs Act and the VAT Act and came to the conclusion, correctly in my view, that the ranking of claims within the Insolvency Act does not countenance any creditor being granted a preference such as that contended for by SARS. The court reasoned as follows (paras 12 and 13):

'The fundamental principle of insolvency law is that all creditors are subject to its provisions, save in exceptional cases where statutes specifically provide otherwise. This fundamental principle is given effect to in two ways. Firstly by the creation of a *concursus creditorum* in terms of which the claims and rights of all creditors of an insolvent company are determined as at the date of insolvency, with the result that one creditor is not entitled to improve its position in relation to others after the date of the *concursus.* Secondly, by ensuring that every asset belonging to the insolvent company is properly realised by its liquidator so that the proceeds can be distributed amongst the company's creditors in the order of preference dictated by insolvency law and determined as at the *concursus.* So it is then that section 391 of the old Companies Act obliges a liquidator to recover *"all the assets and property"* of the insolvent company *"all"* being a word of the widest possible import.

The purpose of the Insolvency Act as recorded in the preamble thereto is *"to consolidate and amend the law relating to insolvent persons and to their estates"*. The aim of consolidation suggests that the Insolvency Act is intended to deal comprehensively with what will happen upon insolvency. It reflects and gives effect to the fundamental principle of insolvency law and contains an array of detailed provisions regarding the ranking of claims and how security claimed in respect of claims must be dealt with'. [Footnotes omitted.]

[10] Counsel for the Commissioner relied on various provisions of the Customs Act which, so the argument went, create an embargo on the relief sought by the liquidators. Reliance was placed on s 47(1)[1] which provides for

[1] Section 47(1) of the Customs Act reads:
'Subject to the provisions of this Act, duty shall be paid for the benefit of the National Revenue Fund on all imported goods, all excisable goods, all surcharge goods, all environmental levy goods, all fuel levy goods and all Road Accident Fund levy goods in accordance with the provisions of Schedule 1 at the time of entry for home consumption of such goods: Provided that the Commissioner may condone any underpayment of such duty where the amount of such underpayment in the case of-

duty to be paid on entry for home consumption as well as s 47A(1)[2] which prohibits any person from dealing with imported goods unless they have been duly entered. According to the Commissioner, there is nothing contained in the Customs Act that entitles liquidators of companies to be excused from these provisions.

[11] While the Commissioner accepted that payment of customs duty and VAT can be deferred under certain circumstances (ss 20(1), 39(1)(*b*) and 107 (2)(A)(*i*)), he maintained that such duty had to be paid in full at some stage in the future. It was also submitted that while the Commissioner may in the appropriate circumstances waive or reduce the imposition of penalties, in terms of s 93, his power to do so is extremely limited.[3] He may only waive duties where there is a 'dispute' and forms the view that it is 'to the best advantage of the State' to settle that dispute taking into account the factors listed in s 77M.[4]

(a) goods imported by post is less than fifty cents;
(b) goods imported in any other manner is less than five rand; or
(c) excisable goods is less than two rand.'

[2] Section 47A(1) provides that '[s]ubject to the provisions of this Act, no person shall remove, receive, take, deliver or deal with or in any imported or excisable goods or fuel levy goods unless such goods have been duly entered'.

[3] Section 93 of the Customs Act reads, in relevant part:
'(1) The Commissioner may, on good cause shown by the owner thereof, direct that any ship, vehicle container or other transport equipment, plant, material or other goods detained or seized or forfeited under this Act be delivered to such owner, subject to-
(a) payment of any duty that may be payable in respect thereof;
(b) payment of any charges that may have been incurred in connection with the detention or seizure or forfeiture thereof; and
(c) such conditions as the Commissioner may determine . . .
(2) The Commissioner may, on good cause shown mitigate or remit any penalty incurred under this Act on such conditions as the Commissioner may determine.'

[4] The factors listed in this section are:
' (a) whether that settlement would be in the interest of good management of the tax system, overall fairness and the best use of the Commissioner's resources;
(b) the cost of litigation in comparison to the possible benefits with reference to-
(i) the prospects of success in a court;
(ii) the prospects of collection of the amounts due; and
(iii) the costs associated with collection;
(c) whether there are any-
(i) complex factual or quantum issues in contention; or
(ii) evidentiary difficulties,
which are sufficient to make the case problematic in outcome or unsuitable for resolution through the alternative dispute resolution procedures or the courts;

Reliance was also placed on s 77K(1) which specifically records that it is the duty of the Commissioner to assess and collect taxes, duties and other amounts due according to the laws enacted by Parliament and not to forgo any such amounts properly chargeable and payable.

[12] In my view, the answer to the question whether there is an embargo as contended for by the Commissioner, which prevents the liquidators from taking possession of the equipment in order to deal with it according to the laws of insolvency without first having to pay duty and VAT thereon, is to be found in ss 20(4)(*a*), 38, 39 and 114 of the Customs Act. It is useful to refer to these sections. Section 20(4)(a) reads:

'Subject to section 19A, no goods which have been stored or manufactured in a customs and excise warehouse shall be taken or delivered from such warehouse except in accordance with the rules and upon due entry for any of the following purposes-

(a) h

ome consumption and payment of any duty due thereon;'

[13] Section 38(1)(*a*) deals with the entry of goods to be made within seven days of the date of importation and provides that:

'Every importer of goods shall within seven days of the date on which such goods are, in terms of section ten deemed to have been imported except in respect of goods in a container depot as provided for in section 43(1)*(a)* or within such time as the Commissioner may prescribe by rule in respect of any means of carriage or any person having control thereof after landing, make due entry of those goods as contemplated in section 39.'

[14] Section 38(4)(a) provides:

'The Commissioner may by rule permit any excisable goods or fuel levy goods and any class or kind of imported goods, which he may specify by rule, to be removed from a customs and

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(d) a situation where a participant or a group of participants in a tax avoidance arrangement has accepted the Commissioner's position in the dispute, in which case the settlement may be negotiated in an appropriate manner required to unwind existing structures and arrangements; or

(e) whether the settlement of the dispute will promote compliance of the tax laws by the person concerned or a group of taxpayers or a section of the public in a cost-effective way.'

excise warehouse on the issuing by the owner of such goods of a prescribed certificate or an invoice or other document prescribed or approved by the Commissioner, and the payment of duty on such goods at a time and in a manner specified by rule, and such certificate, invoice or other document, shall for the purposes of section 20(4), and subject to the provisions of section 39(2A), be deemed to be a due entry from the time of removal of those goods from the customs and excise warehouse'.

[15] Section 39(1)(*a*) requires that:

'The person entering any imported goods … shall deliver … to the Controller a bill of entry … setting forth the full particulars …, and according to the purpose (to be specified on such bill of entry) for which the goods are being entered, and shall make … a declaration … as to the correctness of the particulars and purpose shown on such bill of entry'.

[16] Section 39(1)(*b*) provides that:

'At the same time the said person shall deliver such duplicates of the bill of entry as may be prescribed …. and shall pay all duties due on the goods: Provided that the Commissioner may, on such conditions, including conditions relating to security, as may be determined by him, allow the deferment of payment of duties due in respect of such relevant bills of entry and for such periods as he may specify'.

[17] Section 39(2A)*(a)* provides that:

'Any person who removes goods from a customs and excise warehouse by means of the issuing of a certificate, invoice or other document referred to in section 38(4) shall present to the Controller a validating bill of entry in the prescribed form at the time and in the manner specified by rule in respect of any such certificate, invoice or other document, and shall pay at the prescribed time to the Controller the duty due on the goods to which such certificate, invoice or other document relates'.

[18] Section 114 stipulates that any duty payable under the Act is a debt due to the State.[5] In terms of s 114(1)(*a*C) SARS is given a statutory lien over the goods in a customs and excise warehouse. This section provides:

'Any dutiable goods of whatever nature, which are stored in any customs and excise warehouse licensed for any purpose under this Act shall be subject to a lien, as if the goods are detained in accordance with the provisions of subsection (2), as security for the duty on such goods from the time of receipt of such goods in such warehouse until such goods have been duly entered for any purpose under this Act and any liability for duty of the licensee of such warehouse in respect of such goods has ceased in terms of this Act'.

[19] In terms of s 114(1)(*a*)(*iv*)(*aa*)(A) SARS has the right to exercise a lien over goods which are subject to a duty whenever they may be found as further security for its debt:

'Any imported or excisable goods, vehicles, machinery, plant or equipment, any goods in any customs and excise warehouse, any goods in a rebate store room, any goods in the custody or under the control of the Commissioner and any goods in respect of which an excise duty or fuel levy is prescribed, and any materials for the manufacture of such goods, of which such person is the owner, whether imported, exported or manufactured before or after the debt became so due and whether or not such goods are found in or on any premises in the possession or under the control of the person by whom the debt is due, may be detained in accordance with the provisions of subsection (2) and shall be subject to a lien until such debt is paid'.

Section 114(1)(*b*)(*i*) provides that SARS' claim over the property subject to a lien has priority over the claims of all other persons.[6] Section 114(1)(*b*)(*iii*) deals with execution over goods subject to SARS' lien.

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[5] Section 114(1)(a)(i) states that '[a]ny amount of any duty, interest, penalty or forfeiture incurred under this Act and which is payable in terms of this Act, shall, when it becomes due or is payable, be a debt due to the State by the person concerned and shall be recoverable by the Commissioner in the manner hereinafter provided'.

[6] Section 114(1)(*b*)(i) provides:

'The claims of the State shall have priority over the claims of all persons upon anything subject to a lien contemplated in paragraph (a), (aA), (aB) or (aC) and may be enforced in accordance with the provisions of this section if the debt is not paid upon demand after the person by whom the debt is due is in writing advised of such debt and of the date on which such debt becomes due and is payable'.

[20] The important aspect of these provisions is that they are all addressed to the ordinary situation where goods are brought into the country and attract a liability to pay customs duty. They are directed at the obligation of the importer and others liable to pay duty, and do not address the special situation of insolvency. That is not surprising because that is dealt with in the Insolvency Act, a general statue intended to deal with all cases of insolvency. In brief, when one looks at the liability to pay customs duty in the ordinary course, one looks to the provisions of the Customs Act alone. When insolvency intervenes one turns to the Insolvency Act.

[21] In circumstances of insolvency our common law provides that a trustee has to realise all the assets of an insolvent including those subject to a lien and as such the trustee is entitled to demand delivery thereof. If it were otherwise the lienholder would be able to frustrate the winding-up of the estate.[7] The common law position is preserved in s 47 of the Insolvency Act.[8] The common law is somewhat altered by s 83 of the Insolvency Act which permits a creditor, who holds as security for his claim any movable property, to realise that security under certain prescribed conditions prior to the second meeting of creditors.[9] This section is not, however, relevant in this appeal since the circumstances in which a creditor may do that are not applicable to the Commissioner's claim in

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[7] *Roux en andere v Van Rensburg NO* 1996 (4) SA 271 (A) at 276E-277C.

[8] Section 47 provides:

'If a creditor of an insolvent estate who is in possession of any property belonging to that estate, to which he has a right of retention or over which he has a landlord's legal hypothec, delivers that property to the trustee of that estate, at the latter's request, he shall not thereby lose the security afforded him by his right of retention or lose his legal hypothec, if, when delivering the property, he notifies the trustee in writing of his rights and in due course proves his claim against the estate: Provided, that a right to retain any book or document of account which belongs to the insolvent estate or relates to the insolvent's affairs shall not afford any security or preference in connection with any claim against the estate'.

[9] Section 83 provides, in relevant part:

'(2) If such property consists of a marketable security, a bill of exchange or a financial instrument . . ., the creditors may, after giving the notice mentioned in subsection (1) and before the second meeting of creditors, realize the property in the manner and on the conditions mentioned in subsection (8).

(3) If such property does not consist of a marketable security or a bill of exchange, the trustee may, . . . take over the property from the creditor . . . and if the trustee does not so take over the property the creditor may, after the expiration of the said period but before the said meeting, realize the property in the manner and on the conditions mentioned in subsection (8)'.

this case and since the Commissioner relies solely on an 'embargo'. It is unnecessary for the purposes of this judgment to determine whether the statutory liens afforded by the Customs Act constitute security as specially defined in the Insolvency Act and I refrain from entering upon that difficult question.

[22] There is nothing in either the Customs Act or the Insolvency Act which expressly (or by necessary implication) provides that goods subject to a lien in favour of SARS do not fall to be dealt with under the laws of insolvency. This is to be contrasted with s 10 of the Admiralty Jurisdiction Act 105 of 1983 which excludes the vesting of certain property in the trustee on insolvency and s 90 of the Insolvency Act in terms of which the Land Bank retains its powers in relation to any property belonging to an insolvent estate. Such property is expressly excluded from the provisions of the Insolvency Act.

[23] It was argued on behalf of the Commissioner that if an 'embargo' is not inferred, this will result in an anomaly since he can still hold UTI (as the licensee of the warehouse) liable for payment of the duty and VAT by virtue of the provisions of s 19(6) of the Customs Act. I do not agree with this argument. Section 19(6) must be read with ss 19(7) and 19(8). These sections provide:

'(6) In addition to any liability for duty incurred by any person under any other provision of this Act, the licensee of a customs and excise warehouse shall, subject to the provisions of subsection (7), be liable for the duty on all goods stored or manufactured in such warehouse from the time of receipt into such warehouse of such goods or the time of manufacture in such warehouse of such goods, as the case may be.

(7) Subject to the provisions of subsection (8), any liability for duty in terms of subsection (6) shall cease when it is proved by the licensee concerned that the goods in question have been duly entered in terms of section 20(4) and have been delivered or exported in terms of such entry.

(8) If the licensee concerned fails to submit any such proof as is referred to in subsection (7) within the period for which goods of that class or kind may be stored or kept in a customs and excise warehouse or if the licensee commits an offence under this Act in respect of any goods

stored or kept in such warehouse he shall upon demand by the Controller forthwith pay the duty due on such goods'.

[24] It is apparent that the purpose and effect of these sections is to give the Commissioner additional security if goods are removed from the warehouse without payment of duty. In any event, these sections have no application where SARS itself is obliged to release the goods from its statutory lien under the laws of insolvency. I agree with the court a quo's finding, as set out below, that s 114 of the Customs Act was not intended to create an embargo against clearance for home consumption unless duty and VAT were first paid in full, but serves to provide the Commissioner with additional security (paras 41 and 42):

'The genesis of section 114(1)(*a*C) is also instructive. It appears to have been introduced to accord SARS security in goods where duty and VAT have not been paid but because the goods had not been detained under the provisions of section 114(l)(iv) of the Customs Act, SARS was left only with a claim which was unsecured and subject to the limited preference afforded by section 99 of the Insolvency Act. That was the situation which arose in *Secretary for Customs and Excise v Millman NO* 1975 (3) SA 544 (A) and section 114(1)(*a*C) was inserted into the Customs Act some years later.

I am satisfied that, in the scheme of the Customs Act as a whole and given the protection afforded by sections 83 and 95 of the Insolvency Act, the statutory lien created by section 114(1)(*a*C) serves only to provide SARS with additional security and is not a bar to the relief sought by the liquidators'.

[25] The court a quo's interpretation protects the legitimate property expectations of all creditors to share in the proceeds of a speedy realisation of assets. The judge was mindful of the fact that some ambiguity may arise when the provisions of the 1973 Companies Act and the Insolvency Act are considered together with the Customs Act. She concluded that to the extent that there was ambiguity, she should prefer an interpretation that 'does not result in injustice, absurdity, and anomaly or contradiction'. Her reasoning, as evidenced in the following paragraphs (45-48) of the judgment, cannot be faulted:

'In my view, interpreting section 47(1) as an embargo provision is likely to cause injustice to other creditors of the insolvent estate of the company and lead to a potentially absurd result.

As companies in liquidation are almost always unable to pay their debts, there will ordinarily be no prospect that the liquidators could, out of the insolvent company's own resources, pay customs duty and VAT before disposing of the equipment. Ordinarily, the logical source of funds with which to pay customs duty and VAT would be the proceeds of the sale of the equipment itself. Few purchasers would be willing first to pay SARS before being able to take delivery of the equipment which they have bought. Of course no purchaser would be prepared to pay SARS if the value of duties and VAT outstanding exceeded the value of the equipment itself. In that event, if the respondents' interpretation of the legislation is correct, the goods would likely never be realised because there would not be enough money to overcome the embargo. That would result in the equipment ending up in a state warehouse to be sold by SARS in terms of section 43 of the Customs Act.

That is in my view an absurd result, particularly given the purpose of the insolvency regime which is to realise all the property of the company at best value in the interests of all creditors. It was precisely these types of difficulties that caused the court in *London and South African Exploration Co v Official Liquidator of North-Eastern Biltfontein and The Registrar of Deeds* (1895) 12 SC 225, to read a provision which apparently created an embargo on transfer of property before certain payments were made, as applying only to voluntary transfers, not those consequent upon insolvency.

The interpretation contended for by the respondents also results in the anomaly that assets which form part of the insolvent estate are dealt with not by the liquidators but by SARS (which need not even prove a claim) and without any input from or control by the liquidators or other creditors. It could not have been the intention of the legislature that assets of an insolvent estate, in respect of which other creditors also have real rights, should be dealt with completely outside the machinery of insolvency'.

[26] One final reason for rejecting the Commissioner's claims is that the Insolvency Act makes specific provision for the preference that the claims in issue in this case are to enjoy in the event of insolvency. The relevant sections are ss 99(1)(cA) and (cD) of the Insolvency Act. The effect of the argument on behalf of the Commissioner would be to nullify these provisions in relation to

these claims by giving the Commissioner a right to payment in preference to all other creditors. The statutory priority given to funeral and death bed expenses; the costs of sequestration and administration of the estate; the costs of execution; salaries and wages; payments of amounts due for workmen's compensation; income tax and payments under the Pneumoconiosis Compensation Act 64 of 1962; would all have to give way to claims under the Customs Act and the VAT Act. That would be so even though the Insolvency Act specifically confers on such claims a priority over the claims here in issue. That is not a sensible or realistic interpretation of the relevant statutory provisions.

[27] The court a quo correctly concluded that properly construed, the Customs and VAT Acts do not preclude the Commissioner from releasing the equipment to the liquidators without the liquidators first having to pay duty and VAT thereon.

[28] For these reasons the appeal is dismissed with costs, including the costs of two counsel.

L V Theron
Judge of Appeal

APPEARANCES

For Appellant:	A Meyer SC with MA Ngqanda Instructed by: TKN Inc, Durban Lovius-Block, Bloemfontein
For First to Sixth Respondents:	EA Limberis SC with BM Gilbert Instructed by: Reitz Attorneys, Houghton Estate Symington & De Kok, Bloemfontein