REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

…………………………… ……………………

SIGNATURE DATE

Case No: 9726/2021

In the matter between:

PREMIER PLASTICS (PTY) LTD **Applicant**

And

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE **Respondent**

JUDGMENT

WINDELL, J:

INTRODUCTION

[1] This is an appeal in terms of the provisions of section 47(9) of the Customs and Excise Act 91 of 1964 ("the Act"), against a decision by the Commissioner for the

South African Revenue Service ("SARS"). The products, which form the subject matter of the appeal, are plastic carrier bags and flat bags (“the plastic bags”), manufactured by the applicant, Premier Plastics (Pty) Ltd. SARS held the applicant liable for environmental levies, penalties and interest in the sum of R3 392 626.46 in respect of the plastic bags on the basis that they were disposed of in a manner inconsistent with, and in contravention of section 20(4), read with rule 54F.12 of the Act. It is alleged that the applicant removed the plastic bags from its manufacturing warehouse into the local market, without due entry and payment of environmental levy.

[2] This is a wide appeal. The court determines the merits *de novo*, with or without additional evidence.[1] Premier Plastics relies on additional evidence in support of its appeal. It contends it is not liable for the environmental levies on two bases. Firstly, the plastic bags were not environmental levy goods, and, secondly, the disputed plastic bags were exported to Lesotho and Swaziland (now Eswatini), and thus not subject to environmental levies.

[3] Central to the determination of this appeal is whether the plastic bags were environmental levy goods, as defined. The determination of this question is dispositive of the appeal.

ENVIRONMENTAL LEVY ON PLASTIC BAGS

[4] Plastic carrier bags and flat bags can be manufactured in varying wall thickness. The wall thickness of plastic is measured in microns. The compulsory specification for plastic carrier bags and flat bags is 24 microns. This is the standard specification in terms of the Compulsory Specifications for Plastic Carrier Bags and Flat Bags

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[1] *Levi Strauss v the Commissioner for the South African Revenue Service* 2021 (4) SA 76 (SCA) at paragraph [26].

Regulations issued under section 22(1)(a) of the Standards Act 29 of 1993.[2] In terms of the Regulations[3] promulgated under section 24(d) of the Environment Conservation Act 73 of 1989, the manufacture, trade and commercial distribution of domestically produced and imported plastic carrier bags and plastic flat bags, for use within the Republic of South Africa (also hereinafter referred to as "the Republic"), other than those which comply with paragraphs 4 and 5 of the Compulsory Specifications, is prohibited. Paragraph 4.2 specify that "*When the film thickness of a plastic carrier bag or flat bag is measured in accordance with 6.1, no individual thickness measurement shall be less than 24 µm".* In other words, the manufacture, trade and commercial distribution of domestically produced and imported plastic carrier bags and plastic flat bags of less than 24 microns, **for use within the Republic**, is prohibited and anyone contravening this Regulation, shall be guilty of an offence.[4]

[5] Plastic bags less than 24 microns may therefore be manufactured in the Republic for use outside the Republic. This is consistent with SARS Interpretation Note, Excise External Policy: Environmental Levy on Plastic Bags Manufactured in South Africa,[5] which states as follows:

> *"(d) Manufacturing of plastic bags:*
>
> *i) Prohibited — Carrier and flat bags, except those mentioned in paragraph (iii) below, of less than 24 microns may be manufactured*

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[2] The Compulsory Specifications for Plastic Carrier Bags and Flat Bags Regulations (notice R.867), Government Gazette number 25082, dated 20 June 2003, issued under section 22(1)(a) of the Standards Act 29 of 1993. Compulsory Specification for Plastic Carrier Bags and Flat Bags (VC8087 - 2013) read with SANS 695 replaced the Compulsory Specification for Plastic Carrier Bags and Flat Bags issued under the Standards Act 1993, published in Government Notice No R. 867 (Government Gazette 25082) of 20 June 2003 ICS 55.080; 83.140.01. This provision remains unaltered.

[3] Department of Environmental Affairs and Tourism. Government Notice No. R. 625, 9 May 2003. The Regulations were amended in April 2021. See Government Notice 44421 dated 7 April 2021.

[4] Regulation 3

[5] SARS Excise External Policy: Environmental Levy on Plastic Bags Manufactured in South Africa para 2 (2.1.)(d) (i). Effective 17 July 2019.

locally but only for removal to Botswana, Lesotho, Namibia, and Swaziland (BLNS) countries or export to other foreign countries.

iii) Allowed –

A) The under-mentioned plastic bags have no restrictions with regards to micron specifications when manufactured locally: I) Bread Bags; II) Refuse bags; III) Bin liners; IV) Household plastic bags; V) Primary packaging (e.g. barrier bags which is defined as a thin or flimsy bag, used to separate incompatible products at the final point of sale, for health, hygiene or transport purposes); and VI) Plastic bags for export.

B) The only plastic bags subject to the levy that are allowed on the local market are those which are manufactured to the specific legislative requirements of material, thickness, printing, use and design as described in Schedule 1 Part 3A – Subheadings 3923.21.07, 3923.21.17, 3923.29.40 and 3923.29.50.

[6] This Interpretation Note recognises the export exception to the prohibition covering the manufacturing of plastic bags for use within the Republic. The Constitutional Court, in the decision of *Marshall and Others v Commissioner, South Africa Revenue Service,*[6] settled the status of SARS Interpretation Notes with regard to when a court may consider or defer to an administrative body's interpretation of legislation. It recognised the rationale for consistent interpretation by those responsible for the administration of legislation, and stated that it might *"conceivably be justified where the practice is evidence of an impartial application of a custom recognised by all*

[6] 2019 (6) 246 (CC).

concerned, but not where the practice is unilaterally established by one of the litigating parties."[7]

[7] It is common cause that where the applicant made direct export to Namibia of plastic bags of less than 24 microns, SARS did not impose any environmental levy. In terms of section 5(1) of the Tax Administration Act ("TAA")", a "practice generally prevailing" is defined as *"...a practice set out in an official publication regarding the application or interpretation of a Tax Act".* The TAA defines an "official publication" to specifically include an Interpretation Note. In the context of the TAA, when a taxpayer is assessed in accordance with a practice generally prevailing, SARS has to be consistent with its interpretation and application of the legislation and cannot make a determination contrary to practice generally prevailing.

[8] Section 54A of the Act provides that *"a levy known as environmental levy shall be leviable on such imported goods and goods manufactured in the Republic as may be specified in any item of Part 3 of Schedule 1."* Part 3 of Schedule 1 of the Act provides that plastic carrier bags with a wall thickness of 24 microns or more fall under the tariff heading "3923.21.07" and the environmental levy item number "147.02.01". Plastic carrier bags and flat bags with a thickness of 24 microns or more, excluding immediate packaging, zip lock bags and household bags, including refuge bags and refuge liner bins fall under the tariff heading "3923.21.17", with an environmental levy item number of "147.01.03".

[9] The rate at which the environmental levy was imposed on plastic carriers bags with a thickness of 24 microns or more, for the period in dispute, namely June 2017 to May

[7] At paragraph [10].

2018 was at a rate of R0,08 for the period June 2017 to March 2018 and R 0.12 for the period April to May 2018 per plastic carrier bag.

[10] 'Environmental levy' means any duty leviable under Part 3 of Schedule 1 on any goods which have been manufactured in or imported into the Republic. 'Environmental levy goods' means any goods specified in Part 3 of Schedule 1, which have been manufactured in or imported into the Republic.[8] Plastic carrier bags and flat bags of less than 24 microns do not fall under Part 3 of Schedule 1 and are not environmental levy goods. Additionally, there is no provision in the Act or the Schedules that provide for environmental levy payable on plastic carrier bags and flat bags less than 24 microns.

[11] Further, in terms of section 54B(2) of the Act, an environmental levy is deemed to be a duty leviable under the Act except for the purposes of any customs union agreement. In terms of Article 18(1) and (2) of the Southern African Customs Union ("SACU") agreement, member countries (Lesotho, Eswatini, Botswana and Namibia, referred to as "the BNLS Countries") have a right to impose restrictions on imports or exports in accordance with national laws and regulations. These restrictions include the regulation of issues relating to the environment. In the circumstances, national laws of the BNLS countries, are not bound by the Compulsory Specification Standard prohibiting the manufacture or import for use of plastic bags of less than 24 microns for use in the Republic. In addition, all SACU member states are bound by the World Trade Organisation's agreement on 'Technical Barriers to Trade' ("TBT"). The TBT requires that states must ensure that technical regulations and standards do not create unnecessary obstacles to international trade. South Africa recognises these

[8] Section 1 of the Act.

obligations. The Compulsory Standard and the Plastic Bag Regulations are therefore not applicable to goods manufactured in the Republic that are exported and no environmental levies are payable on plastic bags exported to BNLS countries.

BACKGROUND

[12] The applicant is a registered and licensed manufacturer and producer of various plastic products. The applicant is the owner of a registered manufacturing warehouse with number PTANM/00564. The applicant manufactures plastic carrier bags and flat bags both for home consumption in South Africa, as well as exports to various neighbouring states, predominantly in the South African Development Community ("SADC"). The applicant avers that the plastic carrier bags and flat bags the applicant manufactures for home consumption in the Republic all have a wall thickness of 24 microns or more and are thus subject to environmental levies. It also avers that the plastic carrier bags it manufactures for export are produced at less than 24 microns and not subject to environmental levies.

[13] In the course of 2019, SARS conducted an environmental levy audit of the applicant for the period June 2017 to May 2018. The audit found that the applicant manufactured plastic products falling under Schedule 1, Part 3A to the Act (wall thickness of 24 microns or more) and on its accounting records, marked the goods for export. It was, however, established that the plastic bags were not exported by the applicant directly, but sold to three of the applicant's local customers namely Shoprite Checkers Limited; Cedar Point (Pty) Limited, t/a Ace Retail Solutions CC, previously trading as Ace Packaging, (hereinafter referred to as "Cedar Point"); and the Pepkor Division of Pepkor Trading (Pty) Limited (hereinafter referred to as "Pepkor Division"). No environmental levies were paid to SARS in respect of the plastic bags.

[14] On 19 September 2019, SARS issued a notice of intention to raise environmental levies, interest and penalties on the plastic bags sold to the three entities. SARS informed the applicant that the plastic carrier bags were removed from the manufacturing warehouse without due entry and that the applicant had thus contravened Section 20(4) of the Act, read with Rule 54F.12.

[15] On 8 November 2019, the applicant responded to SARS' letter of intent, denying that any environmental levies were due on three bases: the correct environmental levies due were paid; the time expired goods were destroyed or made available for recycling; and, the bags intended for export by the three entities were not leviable goods and were exported by the customers from South Africa.

[16] On 27 February 2020, SARS made a determination of the applicant's liability for environmental levies reiterating its findings in its letter of intent. The only adjustment SARS made was to reduce the liability by the direct exports made by the applicant to Namibia, and the time expired stock. The latter, SARS conceded had in fact been sold to a recycler and any appropriate levy was paid.

[17] On 5 March 2020, the applicant filed an internal appeal against SARS' decision in accordance with the provisions of Section 77 of the Act. On 25 August 2020, SARS informed the applicant of the outcome of the appeal, confirming its decision of 27 February 2020. The applicant requested reasons for SARS' decision. On 11 September 2020, SARS responded to the request for reasons, recording that the declaration for export made by the local entities, Shoprite Checkers, Cedar Point and the Pepkor Division, did not qualify as exports in terms of the Act. On 18 December 2020, the applicant gave notice to SARS in terms of the provisions of Section 96 of the Act of its intention to institute these proceedings.

WERE THE DISPUTED PLASTIC BAGS ENVIRONMENTAL LEVY GOODS?

[18] As stated, central to the determination of this appeal is whether the plastic bags were environmental levy goods. The applicant contends that the plastic carrier bags that the applicant manufactured and produced for the three customers, Shoprite Checkers, Cedar Point and the Pepkor Division, in the period June 2017 to May 2018 were not subject to environmental levies as all the plastic carrier bags manufactured in this period for these three customers had a wall thickness of less than 24 microns.

[19] The applicant has adduced additional evidence in this appeal. The additional evidence relates both to the film thickness of the plastic bags and that the plastic bags were in fact exported from South Africa to Lesotho and Eswatini. The applicant avers that it retained samples of the plastic bags in dispute, which were given to its expert metrologist, Ms Yvette Volschenk, and in that regard is able to prove that the contended goods were of wall thickness of less than 24 microns.

[20] SARS submits that there is no sufficient proof that the new information is a contemporaneous record of the applicant's accounts in respect of environmental levies during the audit period. It is submitted that the information relating to the samples was not provided to SARS at any time during the audit, nor was it thereafter made available to SARS during its engagement with the applicant. SARS further contends that it in any event does not matter whether the disputed plastic bags were more or less than 24 microns, as the applicant removed the goods from its warehouse in contravention of section 20(4) of the Act, read with Rule 54F.12.

[21] I disagree. Whether the disputed plastic bags were more or less than 24 microns is relevant. If the disputed bags are less than 24 microns, there is no environmental levy payable.

[22] In *Pahad Shipping CC*,[9] the Supreme Court of Appeal ("SCA"), held that where further evidence is required to bring a dispute to finality, new evidence has to be adduced. The applicant argues that the additional documentary and expert evidence is material to the resolution of the dispute and will bring finality to it as the evidence will prove that the plastic bags are not environmental levy goods and therefore not subject to environmental levies.

[23] In *Levi Strauss v the Commissioner for the South African Revenue Service*,[10] the court clarified the approach to appeals against SARS' determinations in terms of the Act as follows:

"The determinations are very much preliminary assessments done in the forensically less exacting basis, by which SARS, an interested party, puts forward its account of the liability owing to it by its customs debtor, the taxpayer. The determinations as noted in the SCA in Pahad Shipping are not preceded by any hearing. The very object of the de novo appeal, as is reiterated by the Constitutional Court in Kham, is to permit a first instance hearing before an independent and impartial tribunal at which it may seek reconsideration on additional facts and grounds."[11]

[24] The judgment referred to by the SCA above was *Kham and Others v The Electoral Commission and Others.*[12] This matter concerned the Electoral Court's powers to review any decision by the Independent Electoral Commission. The Constitutional Court held that it is *"the widest possible type of review where the decision in question is subjected to reconsideration, if necessary on new or additional facts, and the body*

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[9] *Pahad Shipping CC v Commissioner for the South African Revenue Services* [2010] 2 All SA 246 (SCA).
[10] Supra footnote 1.
[11] At par 29.
[12] 2016 (2) SA 338 (CC) at para [41].

exercising review power is free to substitute its own decision for the decision under review".

[25] In this appeal, the applicant is exercising a statutory right and opportunity for a full evidential determination of the correctness of information put before SARS. Section 47(9)(c) of the Act provides the power to a court hearing the appeal to substitute its decision for that of the Commissioner. In the circumstances of this case, the court has a duty to hear the appeal *de novo*, as a wide appeal and to substitute its decision for that made by SARS.

[26] Ms Bragazzi is a director and employee of the applicant. She deposed to an affidavit on behalf of the applicant. Her responsibilities as an employee of the applicant include the sales and marketing of the applicant's products. She ascertains what the customer's needs are, provides the customer with a quotation, places the order for manufacture and ensures that the manufactured and produced goods are either delivered to the customer or that customer's customer. She also retains a sample of the plastic carrier bag manufactured and produced for a particular customer in its file, for the applicant's internal records. This is to ensure that the customer's requirements, where a repeat order is placed, are met without delay.

[27] Ms Bragazzi stated that environmental levy goods are only produced in a licenced customs and excise manufacturing warehouse, which are subject to regulation and control. This includes the obligation on the manufacturer to retain accurate record keeping of stock, and the safeguarding of dutiable goods. She stated that the applicant retains accurate measuring equipment and ensures that the plastic carrier bags it produces not only meets the required standard in terms of the compulsory regulations, but also complies with the customer's specification. All manufacturing processes are

also subject to official supervision. The applicant is subject to regular unscheduled inspections by the National Regulator for Compulsory Specifications ("NRCS") to ensure that the plastic products manufactured comply to the standards specified by the regulator. NCRS had always been satisfied that the plastic carrier bags complied with the compulsory specifications standard.[13] Moreover, the South African Bureau of Standards ("SABS") conducts laboratory reports for the testing of thickness of plastics and carrier bags from time, and the applicant, as one of the foremost producers of plastic carrier bags in the country, participates in these tests conducted by the SABS. In the independent testing it has conducted of the applicant's carrier bags, the SABS has routinely found that the carrier bags conform with the measurements recorded in the applicant's records for each of the products tested. The applicant was however not in possession of a report which specifically covers the entire period in dispute.

[28] In the period June 2017 to May 2018, Ms Bragazzi retained a sample of the plastic carrier bags manufactured, produced and sold to each of the entities Shoprite Checkers, Cedar Point and Pepkor Division for export to Lesotho and Eswatini. She measured the thickness of the bags to ensure that they were less than 24 microns and met the customers' specifications. It is these samples that the expert, Ms Volschenk, utilised to conduct her independent verification.

[29] Ms Bragazzi stated that each plastic carrier bag that the applicant manufactures has a unique barcode. The barcode identifies the applicant's product code together with the date of manufacture as well as on which machine it was manufactured. In addition, on each plastic bag the film thickness is printed. This is evident from the photographs of the samples attached to the papers. Mr Clifford Mabusela was the

[13] Reports of the NCRS were attached to the founding affidavit.

extrusion manager during the period in dispute. He deposed to a confirmatory affidavit. He received the job cards, copies of which are attached to the affidavit, and entered the information into the extrusion machine that produced the plastic sheets from which the plastic bags are then manufactured. The gauge or microns of the required plastic sheet is also specifically entered into the extrusion machine.

[30] Ms Bragazzi stated that during the course of the audit, SARS only requested descriptions of the various plastic bags measuring 24 microns and above. SARS never requested samples of the bags that are the subject of this dispute. She, however, tenders these samples to SARS for verification of the plastic bag wall thickness should SARS so require.

[31] Ms Volschenk filed an affidavit wherein she confirmed that she independently verified samples of the plastic carrier bags manufactured for the three entities during the disputed period. She first conducted an audit of the available documentation in respect of each retained sample plastic bag from the quotation recording the required specifications, the purchase order, the invoices, the delivery note to the customer and the export documentation. She established that the applicant retained accurate records of the transactions from the placing of the order to the delivery of the manufactured plastic bags. She found that each of the plastic bags which form the subject matter of this appeal, had a wall thickness below the dutiable level of 24 microns.

[32] Ms Bragazzi further stated that she had subsequently extracted from the applicant's records, a sample of the documents relating to the plastic bags for the period in dispute. This documentary proof, which included the export documentation, clearly demonstrates that the products were in fact exported from South Africa to

Eswatini and Lesotho. Ms Volschenk also independently verified the export documentation evidencing the export of the plastic carrier bags to Eswatini and Lesotho. This documentation was tendered to SARS in the course of the audit.

[33] As stated in *Levi Strauss*, SARS' determinations are preliminary assessments done on a forensically less exacting basis. SARS did not measure the retained samples, and SARS did not compare any measurements with the applicant's contemporaneous records. SARS further adduced no evidence that the plastic bags were more than 24 microns and thus leviable goods. It is Ms Volschenk's opinion that the disputed plastic bags had a film thickness of less than 24 microns. Ms Volschenk's expert opinion is uncontested as the respondent has elected not to file its own expert report or engage with the contents of her independent findings. Her opinion supports the applicant's assertion that the plastic bags are not environmental levy goods.

[34] In conclusion, this court is satisfied that contemporaneous records were kept of the sales of the plastic bags to the three customers in the period June 2017 to May 2018. The records documented that none of the carrier bags produced by the applicant and sold to the three entities had a wall thickness in excess of 24 microns. I am further satisfied that the independent testing conducted by Ms Volschenk proves that the plastic bags had a film thickness of less than 24 microns. As a result, the plastic bags are not environmental levy goods subject to environmental levies. It is further clear from the evidence that the plastic bags were manufactured with the sole purpose of being exported to Lesotho and Eswatini. Although the applicant did not directly export the plastic bags to these two countries, it is undisputed that the plastic bags were in fact exported to Eswatini and Lesotho.

WERE THE GOODS REMOVED WITHOUT DUE ENTRY?

[35] The conclusion above, in my view, disposes of the appeal. But since a large part of the argument in this court was devoted to two further issues, I propose to deal with them.

[36] SARS alleges that the disputed bags were removed from the manufacture warehouse without due entry and that the applicant had thus contravened Section 20(4) of the Act, read with Rule 54F.

[37] Section 20(4) states that:

> *"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 one or other of the following purposes-*
>
> *(a) home consumption and payment of any duty due thereon;*
>
> *(b) rewarehousing in another customs and excise warehouse or removal in bond as provided in section 18;*
>
> *(c) ...... [Para. (c) deleted by s. 6 (b) of Act 84 of 1987.*
>
> *(d) export from customs and excise warehouse (including supply as stores for foreign-going ships or aircraft.)"*

[38] Relevant to the current dispute is subsection (a) and (d). SARS contends that subsection (a) applies because the goods were sold to three local customers and thus entered the local market for "home consumption", As a result, so it is argued, an environmental levy must be paid. The applicant contends that subsection (d) applies as applicant was an "exporter", as defined in the Act, who exported the plastic bags to

Eswatini and Lesotho, alternatively, the plastic bags were in fact exported to these countries, and no environmental duty is leviable.

Section 24(4)(a)

[39] Section 24(4)(a) will only be applicable if the plastic bags were removed from the warehouse for (a) home consumption in the Republic and (b) if they were environmental levy goods.

[40] Subsection 4(a) is clearly not applicable in the current matter. Firstly, the plastic bags were not subject to an environmental levy as they were not environmental levy goods. Secondly, the plastic bags were not removed from the warehouse for "home consumption" in the Republic, but were exported to Eswatini and Lesotho.

[41] Firstly, "home consumption" is defined in the Act as "consumption or use in the Republic". In *De Beers Marine (Pty) Ltd v Commissioner, South African Revenue Service,*[14] the court distinguished between "home consumption" and "foreign consumption". The court held:

"[8] The true antithesis of 'home consumption' is 'foreign consumption'. Foreign consumption (and hence 'export') has two sequential elements: (a) physical removal from South Africa; and (b) use or consumption not in South Africa. Foreign use or consumption postulates a foreign destination for further delivery of the goods taken from the warehouse in South Africa."

[42] The documentary evidence shows the entire supply chain of the disputed plastic bags from the time the order was placed for the manufacture of bags with a film of less than 24 microns to the actual delivery of the disputed plastic bags to Eswatini or

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[14] [2002] 3 All SA 181 (A) (20 May 2002).

Lesotho for foreign consumption. The plastic bags were not released into the local market for “home consumption”.

[43] Secondly, there is no definition for ‘export’ in the Act. The Glossary of International Customs Terms published by the World Customs Organisation, however, defines "exportation" as "the act of taking out or causing to be taken out of any goods from the Customs Territory. In accepting this definition, the SCA in *Levi Strauss,* held that the Act is concerned with the physical movement of goods in and out of South Africa, rather than the commercial transactions underlying such movements.[15] The court further held that the declaration of origin was concerned with the physical origin of the goods: *"An appropriate statement as to the origins of the goods made, in connection with the exportation, by the manufacturer, producer, supplier, exporter or other competent person on the commercial invoice or any other document relating to the goods."*

[44] The same principles ought to apply to the indirect exports in the current matter. By application of the International Customs terms, binding on South Africa, the disputed plastic bags were exported. The applicant, as a manufacturer, has met the objective test that goods entered as exports were actually consigned from South Africa into BLNS countries. In any event, the additional documentary evidence shows that no environmental levy goods (with the film thickness of less than 24 microns) were actually exported.

[45] SARS also relies on the Rules promulgated under Section 54F.[16] The Rules under section 54F only applies to environmental levy goods and does not take the matter

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[15] At paragraph [13].

[16] No. R. 684, 1 June 2004. *Rule 54F.12 (a) Any environmental levy goods removed from a customs and excise manufacturing warehouse for any of the following purposes must be entered, in the case of-*

any further. The plastic bags in this matter are below 24 microns and are not environmental levy goods.

Section 24(4)(d)

[46] Section 24(4)(d) is applicable when goods are exported from a customs and excise warehouse. As a secondary argument, the applicant argues that as the goods were manufactured for its local customers with the view that the goods would be exported, the applicant should be regarded as an exporter for purposes of the Act.

[47] The applicant relies on the wider scope of the definition of exporter in section 1 of the Act. The definition identifies all the persons potentially liable to pay duties:

'exporter' includes 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;

(i)export, including supply as stores for foreign-going ships or aircraft, on forms SAD 500 and SAD 502 or SAD 505 at the office of the Controller, before removal of the goods so exported or supplied; (iii) removal in bond to any customs and excise storage warehouse for export as contemplated in rule 54F.03 or to a duty free shop, on forms SAD 500 and SAD 502 or SAD 505 at the office of the Controller before each such removal. (iv) removal to a consignee in a BLNS country, on forms SAD 500 and SAD 502 or SAD 505in accordance with the procedures prescribed in paragraph (d). (b) The provisions of paragraph (a) (i) apply mutatis mutandis in respect of any goods exported from a customs and excise storage warehouse contemplated in rule 54F.03. (c) Where environmental levy goods are exported, removed in bond or removed to a BLNS country by a licensee of a manufacturing warehouse or exported by a licensee of a storage warehouse, as the case may be, and are wholly or partly carried by road, such goods must, except where the licensee uses own transport, be carried by a licensed remover of goods in bond contemplated in section 64D.

(f) acts on behalf of any person referred to in paragraph (a), (b), (c), (d) or (e)."

[48] Prior to the introduction of the expanded definition of "exporter", the definition was that of the ordinary meaning of exporter, namely, the person responsible for sending the goods out of the country. The language of this section applies to the removal of the goods from South Africa not the identification of the exporter in relation to the goods. I agree with the applicant that the purpose of the amendment appears to have been to clarify and possibly broaden the scope of the concept of an exporter in relation to goods being exported from South Africa and extend the categories of the persons liable to pay duties. In *Levi Strauss*, the SCA confirmed the interpretation of the word "exporter" given in *Standard General Insurance Co Ltd v Commissioner for Customs and Excise*[17] where the court held as follows:

"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."

[49] In interpreting the definition of the word "exporter" the court must attribute meaning to the words used in the legislation, having regard to the context provided, by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears and the apparent purpose to which it is directed. Where more than one meaning is possible

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[17] 2004 2 All SA 376 (SCA)

each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.[18] In *City of Tshwane Metropolitan v Blair Atholl Homeowners Association,*[19] the SCA reiterated that a restrictive consideration of words without regard to context has to be avoided and the words have to be interpreted sensibly and not have an unbusiness-like result. These factors have to be considered *"holistically, akin to the unitary approach".*[20] The wide definition of an exporter in section 1 of the Act must therefore be interpreted as one unitary exercise, unlike the literal meaning of the word exporter in isolation, as the respondent has elected to do.

[50] The applicant carries a number of risks in relation to the plastic bags exported to end users in Lesotho and Eswatini. The applicant, as manufacturer and seller of the plastic bags carries the risks associated with product liability. For example, product liability may arise from a quality defect of the product itself or its design or process of manufacture or insufficient product labels with regard to environmental information. These and other factors may result in the return of defective products to the manufacturer. Such scenarios were anticipated by Part 4 of Schedule 6 read with section 75(15) of the Act which provides for the re-export of plastic bags from the

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[18] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at [18].
[19] [2019] 1 ALL SA 291 (SCA) at [61] to [68].
[20] At par [61].

BLNS countries. Consequently, the applicant, as the manufacturer, maintains an interest in the exported goods.

[51] The wide meaning of "exporter" includes any person that at the time of the exportation, "*(e) is **beneficially interested** in any way **whatever i**n any goods exported".* The applicant has an interest in the sale of the goods. The interest is not limited to the vested or contingent interest of an owner. The applicant, as a result of the above risks and pecuniary interest, is beneficially interested in the goods. The applicant is thus an exporter within the meaning of the statute. Due entry of the goods was made on removal from the applicant's warehouse, and the applicant did not contravene section 24(4) of the Act.

CONCLUSION

[52] It is clear from the evidence that the goods produced by the applicant and sold to the three entities had a wall thickness of less than 24 microns and were in fact exported for consumption in Eswatini and Lesotho. These plastic carrier bags were not subject to environmental levies.

[53] In the result the following order is made:

1. The applicant's appeal against SARS' decision of 27 February 2020 is upheld.

2. The respondent's decision that the applicant was liable to pay the environmental levies, together with penalties and interest in the sum of R3 392 626,46 on the plastic bags manufactured in the period June 2017 to May 2018 is set aside.

3. The respondent is to pay the applicant's costs, such costs to include the employment of two counsel.

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L. WINDELL

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 28 July 2022.

APPEARANCES

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Date of hearing:	11 April 2022
Date of judgment:	28 July 2022