REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(PRETORIA DIVISION)

CASE NO: 01740/21+ 3889/21 and 7772/21
DOH: 16-17 AUGUST 2022

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

13/9/2022

....
SIGNATURE **DATE**

In the matter between:

SOUTH AFRICAN BREWERIES (PTY) LTD **APPLICANT**

and

THE COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICE **FIRST RESPONDENT**

SDL GROUP CC **SECOND RESPONDENT**

J U D G M E N T

THIS JUDGMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF EMAIL. ITS DATE ANDTIME OF HAND DOWN SHALL BE DEEMED TO BE 13 SEPTEMBER 2022

MALI J

1. The applicant, South African Breweries (Pty) Ltd imported corona light beer ("*goods*") from Mexico over a period spanning 6(Six) months from August 2018 to November 2019 utilising the services of Ocean Light Shipping CC ("*Ocean Light*"). Ocean Light is a clearing agent established in terms of Section 64 B of the Customs and Excise Act 91 of 1964 ("*the Act*"). Ocean light is part of the group of companies of the second respondent. The first respondent is the Commissioner for South African Revenue Service ("***SARS***") an autonomous institution established in terms of SARS Act 34 of 1997. The Commissioner is responsible for administration, collection of tax and any attendant tasks including tax law enforcement, hence the citation.

2. The goods were cleared in the Port of Durban, South Africa in 139 import transactions. Later on, the applicant discovered that the goods were fraudulently cleared by Ocean Light as Traditional African Beer. Traditional African beer is a product attracting less or nil import duties compared to Corona Beer attracting import duties and Value Added Tax ("*VAT*"). As a result, import duties and VAT amounting to R139 MILLION was not paid over to the first respondent, SARS. SARS had through third party appointments and Vat refunds, then due to the applicant already recovered a huge amount inclusive of capital from the applicant. The end result, as envisaged by the applicant is the refund by SARS of the amount already collected, and the applicant to not make further payments allegedly due.

3. On 13 July 2022 SARS issued a letter of demand to the applicant for a sum R130 590 852.89. The summary of applicant's answer in

subsequent correspondence is SARS must recover the taxes due from the second respondent or Ocean Light. According to the applicant Ocean Light is a clearing agent licensed by SARS in terms of Section 64B of the Act. The decision to clear and release goods from import was made by SARS.

4. Various exchange of correspondence took place between the parties, the applicant ultimately launched three applications in this court. The first application under case number 01740/21 was brought on 18 January 2021 for the review of the decision /s of the first respondent. The second application brought under case number 7772/21 by SAB on 16 February 2022 was an urgent application which applicant sought to compel SARS to suspend applicant's 's debt as set out in the applicant's letter of 22 December 2022, pending finalisation of all internal matters and finalisation of the High Court. The urgent application was struck off the roll with costs, due to lack of urgency.

5. The third application referred to as the main application, brought under case number 38891/21 on 4 August 2021, pertains the review and setting aside of the decision of the first respondent with the same background and similar facts to the first application; hence the applicant requested the simultaneous hearing of the applications.

6. Despite the manner in which the applications are brought, I understand the applications to seek relief attributing the outstanding liability to Ocean Light. Therefore, the issue for determination is which party is liable between the applicant and Ocean Light.

7. I deal with the first application whose first prayer is couched as follows:

> *"Each decision of the first respondent to reverse the original decisions to accept the declared duties, charges and VAT and clear the consignments of imported beer detailed by reference to the MRN and LRN numbers in paragraph 7 of the First Respondent's letter of demand to the applicant dated 13 July*

2020 (annexure "L", attached to the founding affidavit), is reviewed and set aside as against the Applicant."

8. Distilled from the above is that the, letter of intent imposing liability is the decision reversing the clearing; release of goods; imposition and payment of duties and taxes. According to SARS there is no decision made, but for Section 77G of the Act which imposes obligation for the payment.

9. It is not in dispute that the clearance and release of goods as African Traditional Beer instead of the correct classification of the product was influenced by fraud committed by the agent of the applicant. The applicant denies principal- agent relationship between it and Ocean Light. According to the applicant Ocean Light is accredited by SARS and the applicant selected Ocean Light from the pool of approved agents by SARS. The applicant however, does not deny that Ocean Light acted as its clearing agent. This should be the end of the case, but the applicant's argument is akin to being forced by the first respondent to appoint Ocean Light. SARS relies on legal provisions, amongst them section 64 B and section 77 G of the Act.

10. Section 64 B of the Act provides:

    "(1) No person shall, for the purposes of this Act, for reward make entry or deliver a bill of entry relating to, any goods on behalf of any principal contemplated in section 99 (2), unless licensed as a clearing agent in terms of subsection (2). Subsection 2 provides for the rules and regulations."

11. Section 77G provides that notwithstanding anything to the contrary contained in this Act, the obligation to pay to the Commissioner and right of the Commissioner to receive and recover any amount demanded in terms of any provision of this Act, shall not, unless the Commissioner so directs, be suspended pending finalisation of any procedure contemplated in this Chapter or pending a decision by court.

12. Further argument advanced on behalf of the applicant is that the statute creates an agent – principal relationship between Ocean Light and SARS. In simple terms the applicant's argument is that Ocean Light is the agent of SARS. It is also argued on behalf of the applicant that Ocean Light is the importer in terms of the section 1 (f) of the Act, (definition), therefore the first respondent should hold Ocean Light liable for taxes because the applicant had paid all the money due to SARS to Ocean Light.

13. Regarding the above submissions, I take into account the prevailing rules of interpretation; the following is stated concerning the manner of interpretation:

> *"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument,* ***or contract****, 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; the apparent purpose to which it is directed and the material known to those responsible for its production.*** *Where more than one meaning is possible 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."*[1] *(my own emphasis).*

14. The above approach has become a staple of modern interpretation. It is used not only when the language of a text is found to be ambiguous but in every case and at every stage of interpretation. Other relevant laws in

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[1] Natal Joint Municipal Pension Fund v Endumeni Municipality (920/2010) [2012] ZASCA.

this application are; Section 38 of the Act which 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 goods as contemplated in section 39.

15. I find my support for conclusion below in Section 39 of the Act which provides that the person entering any imported goods for any purpose in terms of the provisions of this Act shall deliver, during the hours of any day prescribed by rule, to the Controller a bill of entry in the prescribed form, setting forth the full particulars as indicated on the form and as required by the controller, and according to the purpose (to be specified on such bill of entry) for which the goods are being entered, and shall make and subscribe to a declaration in the prescribed form, as to the correctness of the particulars and purpose shown on such bill of entry.

16. In the present case it is common cause that Ocean Light did all what is expanded in the above sections on behalf of the applicant. The only role played by SARS in the above sections is to prescribe the method of importation and obligations thereof. Furthermore, the bill of entry is completed by the clearing agent, its correctness and the accompanying documents are a responsibility of the agent. The Controller who is a Customs officer, accepts as true what is presented by the agent. The court takes judicial notice that this exercise is what is regarded as self-assessment. There is nothing in law prohibiting the applicant to clear its own consignments. Furthermore, the act of utilising the services of Ocean Light for a reward by the applicant creates a contract of principal-agent relationship between the two.

17. The terms of payment between the applicant and Ocean Light clearly suggest a business relationship. Compared to SARS and Ocean Light the business relationship between Ocean Light and applicant is more

profound than the general regulation terms between the first respondent and Ocean Light which are created by statute in section 64B of the Act above.- This argument is further attested by the provisions of section 64B(7) that no security provided by a licensed clearing agent shall be utilised or accepted as security for the fulfilment of any obligations in terms of this Act of any other such agent.

18. I am also emboldened by the general rule of principal-agent contract. The following has reference[2]:

"In the leading case of Hely-Hutchinson CA, Lord Denning MR explained the concepts of actual and apparent authority as follows:

"[A]ctual authority may be express or implied. It is express when it is given by express words, such as when a board of directors pass a resolution which authorises two of their number to sign cheques. It is implied when it is inferred from the conduct of the parties and the circumstances of the case, such as when the board of 24 NBS Bank above..... .....
19 directors appoint one of their number to be managing director. They thereby impliedly authorise him to do all such things as fall within the usual scope of that office. Actual authority, express or implied, is binding as between the company and the agent, and also as between the company and others, whether they are within the company or outside it. Ostensible or apparent authority is the authority of an agent as it appears to others. It often coincides with actual authority. Thus, when the board appoint one of their number to be managing director, they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the usual scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority....."

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[2] Makate v Vodacom (Pty) Ltd (CCT52/15) [2016] ZACC 13. para. 48

19. In applying the law as stated above, in this case the applicant does not argue against the actual authority it has over Ocean Light. Even the conduct of the parties supports the principle of authority whether ostensible or otherwise. For example, Ocean Light handled huge amounts on behalf of the applicant to attend payment to SARS. Applicant was in a position to be the first to discover fraud committed by Ocean Light because, amongst others the applicant was in possession of documents and certain information known between two. This attests to the control by the applicant over Ocean Light arising out of a principal - agent relationship between the parties.

20. In conclusion pertaining to the first prayer, applying the law into facts, there is no other answer than that the business-like approach is to attribute principal-agent relationship between the applicant and Ocean Light. If Ocean Light is agent of the applicant, as already found applicant ought to pay SARS, not Ocean Light.

21. The second prayer of the first application reads as follows:

> *"The decision of the First Respondent of 10 September 2020 dismissing the Applicant's internal administrative appeal as set out in annexure "DD" to the founding affidavit, is reviewed and set aside. the aforesaid decision is substituted with the following order:*
>
> *"The Appeal is upheld"."*

22. The decision of the first respondent referred to above pertains to the dismissal of the internal administrative appeal challenging the letter of demand. The decision of 10 September 2020 was followed by another letter of demand by the first respondent on 21 September 2020. From paragraphs 18.1 to 18.5 of the letter of 10 September 2020 the first respondent's reasons for imputing the tax liability on the applicant is based on applicable legislation; to wit sections 39(1)(b) and 44(6)(c) of the Act dealing with obligations and liabilities of the applicant in its

capacity as importer. Section 44(6)(c) provides that liability for duty on any goods to which section 10 relates shall commence from the time when such goods are in terms of that section deemed to have been imported into the Republic, on the importer or the owner of such goods or any person who assumes such liability for any purpose under the provisions of this Act, subject to the approval of the Commissioner and such conditions as he may determine.

23. In the letter of 10 September 2020, the applicant is referred to Section 99 which deals with the obligations and liabilities of Ocean Light as the Clearing Agent. Furthermore, Section 98 deals with the liability of the applicant for any acts done by its appointed clearing agent. At paragraph 19 of the letter the first respondent agrees not to impose a Section 88(2)(a) forfeiture amount and the adjustments were made accordingly. Section 88(2)(a) provides:

> *"(i) If any goods liable to forfeiture under this Act cannot readily be found, the Commissioner may, notwithstanding anything to the contrary in this Act contained, demand from any person who imported, exported, manufactured, warehoused, removed or otherwise dealt with such goods contrary to the provisions of this Act or committed any offence under this Act rendering such goods liable to forfeiture, payment of an amount equal to the value for duty purposes or the export value of such goods plus any unpaid duty thereon, as the case may be."*

24. The application of the above results to the imposition of 100% penalty on the applicant. SARS did not impose forfeiture on the applicant. In other words, SARS did not punish the applicant for Ocean Light's fraudulent activities. The tax amount which is a subject matter is not a form of punishment but fulfilment of payment obligation on the applicant's part. SARS concludes the letter by reiterating that the business relationship that involved the applicant and Ocean Light is a separate civil aspect and the applicant may seek other legal remedies against Ocean Light as a result of their actions.

25. The argument proffered on behalf of the applicant is that the provisions of 44 (A) (a) of the Act are applicable in its case. Section 44A pertains to joint and several liability for duty or certain amounts. Sub section (a) provides that liability devolves on two or more persons, each such person shall, unless he proves that his relevant liability has ceased in terms of the Act, be jointly and severally liable for such duty or amount, any one paying, the other or others to be absolved.

26. The applicant has not proved that the relevant liability has ceased and neither does the applicant complain about the unconstitutionality of section 77G of the Act. The reasons advanced on behalf of the applicant again relate to the applicant's relationship and Ocean Light CC. This has been dealt with in the analysis of the first prayer above.

27. Prayers numbers 3, 4 and 5 pertains to a declaratory, they read as follows:

> *"It is declared that section 98, 99(2)(b) and 44A of the Customs and Excise Act, 1964 are unconditional and of no force and effect in law.*
>
> *The applicant has no liability for any duties, charges, VAT arising from the consignments of imported beer referred to in paragraph 1 above.*
>
> *The First Respondent is to pay the costs of this application. In the event that the Second Respondent opposes any of the relief sought herein, or submits an affidavit even if purporting to abide."*

28. Section 98 provides for Liability of principal for acts of agent. Section 99(2)(b) provides that no importer, exporter, manufacturer, licensee, remover of goods in bond or other principal shall by virtue of the provisions of paragraph (a) be relieved from liability for the fulfilment of any obligation imposed on him by the Act. The section provides further that the importer is not relieved of any penalty or amounts demanded

under section 88 (2) (a) which may be incurred in respect thereof. There are no further reasons advanced by the applicant as to why the above-mentioned provisions of the Act are impugned; but for disputing Principal- Agent relationship. Again the issue of Principal-Agent relationship has been exhausted. Having regard to the above the first application cannot succeed.

29. I now turn to the main application which is clear from its reading and the arguments submitted on behalf of the applicant that it is launched under Promotion of Administrative Justice Act 3 of 2000 (*"**PAJA**"*).

30. It is common cause that the clearance and release functions are performed electronically. Same happened in this case. The system is designed to accept a Single Administrative Document (*"SAD 500"*), a self-assessment form by the importer and or its agent for clearing of goods and attendant functions. SAD 500 is accompanied by documents compiled by the importer and or agent. Furthermore, in the present case SARS accepts that there was a manual intervention which led to the clearance of goods. What needs to be determined is whether the administrative exercise is a decision in terms of PAJA.

31. To the above argument the following finds expression:

> *"As I said in Kuzwayo v Estate Late Masilela,12 not 'every act of an official amounts to administrative action that is reviewable under PAJA or otherwise'. I found there that the act of signing a declaration by a Director-General of the Department of Housing to the effect that a site permit be converted into the right of ownership, and the signing of the deed of transfer giving effect to that declaration, were simply clerical acts. Administrative action entails a decision, or a failure to make a decision, by a functionary, and which has a direct legal effect on an individual.13 A decision must entail some form of choice or evaluation. Thus while both the Master and the Registrar of Deeds may perform administrative acts in the course of their statutory duties, where*

they have no decision-making function but perform acts that are purely clerical and which they are required to do in terms of the statute that so empowers them, they are not performing administrative acts within the definition of the PAJA or even under the common law. As Nugent JA said in Grey's Marine '[w]hether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so . . .'.14"[3]

32. My view is that once I find that the decision to clear and release goods, an exercise followed by imposition and payment of duties and taxes is not a decision under PAJA this is the end of the main application. I find that in this case use of SARS systems, the actions of the customs officer or and anyone who had a hand in the release of goods was a clerical act. It is therefore concluded that PAJA is not applicable; the main application cannot succeed. In the result the following order ensues;

ORDER

1. The application is dismissed with costs, including costs of two counsel.

[3] Nedbank v Mendelow N.O. 2013 (6) SA 130.

N.P. MALI
JUDGE OF THE HIGH COURT

APPEARANCES:

For the Applicant

Adv. J. Campbell SC — Instructed by Bowman Gilfillan Inc.

For the Respondents

Adv. J. Peter SC

Adv. E. Mkhawane — Instructed by KEBD Inc.