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IN THE HIGH COURT OF SOUTH AFRICA

KWA ZULU NATAL LOCAL DIVISION, DURBAN

Case No: D7515/2020

In the matter between:

NCP ALCOHOLS (PTY) LTD **APPLICANT**

and

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

ORDER

The following order is made:

1 Condonation of non-compliance with section 7 of the Promotion of Administrative Justice Act 3 of 2000 is hereby granted;

2 The application is dismissed with costs, including the cost of counsel.

JUDGMENT

Date Delivered: 17 July 2023

Sipunzi AJ

Introduction

[1] On 30 August 2017, the Commissioner for the South African Revenue Services ('the respondent') took a decision to impose customs duty, interest, VAT and penalties on two consignments that were imported by NPC Alcohols (Pty) Ltd ('the applicant') on 30 October to 03 November, and 12 December 2014, for purposes of export to its customers in Zambia.

[2] In a dispute that arose from this decision, the applicant approached this court for an order to review and set aside the said decision. The applicant also sought a declaratory order that it is not liable for the customs duty, VAT, penalty on VAT and interest on VAT in respect of bills of entry BOE 5002556 and BOE 5025338. In its Notice of Motion, the applicant sought the following order:

'1. To the extent necessary, the applicant's non-compliance with the time limit in section 7 of the Promotion of Administrative Justice Act, 2000, ('PAJA') is condoned and extended to the date on which this application was delivered.

2. The following decisions by the respondent are reviewed, declared invalid and set aside:

   2.1 the imposition of payment of R10 954 697.02 comprising customs duty, VAT, penalty on VAT and interest on VAT communicated by the respondent to the applicant per the respondent's letter dated 10 July 2018 with reference 1/12/3/2/2/N20/PT2015.

   2.2 The respondent's rejection of the applicant's internal appeal, communicated by the respondent to the applicant per the respondent's letter dated 05 April 2019 with reference 1/10A/1/4/32/N.26.

   2.3 The respondent's termination of the alternative dispute resolution process communicated by the respondent to the applicant in terms of –

      2.3.1 The respondent's letter dated 13 March 2020 with reference 1/10A/2/1832; read with

      2.3.2 The reasons provided by the respondent to the applicant for termination of that process per the respondent's letter dated 30 March 2020 with reference 1/10A/2/1832.

3. It is declared that the:

3.1 The applicant is not liable for the customs duty, VAT, penalty on VAT and interest on VAT in respect of bills of entry BOE 5002556 and BOE 5025338 or otherwise as alleged in the respondent's letter dated 10 July 2018;

3.2 The respondent is liable and required to refund to the applicant within 30 calendar days of this Order, all amounts paid by the applicant to the respondent in respect of customs duty, VAT, penalty on VAT and interest purportedly and erroneously raised by the respondent in respect of bills of entry BOE 5002556 and BOE 5025338 or otherwise as alleged in the respondent's letter dated 10 July 2018.

4. In the alternative to paragraph 3, the question of the applicant's liability for custom duty VAT, penalty on VAT and interest on VAT in respect of bill of entry BOE 5002556 and BOE 5025338 or otherwise as alleged in the respondent's letter dated 10 July 2018, is remitted to the respondents for reconsideration, subject to paragraph 5 below.

5. In reconsidering the issue of the applicant's liability, if any, the respondent is directed to consider that:

5.1 There is cogent evidence to demonstrate that the consignments were exported to Zambia.

5.2 The applicant only need establish such export on a balance of probabilities.

5.3 In order to establish export on a balance of probabilities, applicant need not provide every document ordinarily required by the respondent to prove export.

5.4 The applicant is not required conclusively to prove a negative, namely, that the consignments were not used or consumed within the Republic.

5.5 The respondent must be armed with evidence to contradict applicant's evidence if it is to make a finding that the consignments were not exported.

5.6 Should the respondent remain of the view that applicant has not proved export, the respondent must provide an explanation as to why it contends applicant's explanations regarding the export are not acceptable and stand to be rejected.

6. The respondent is ordered to pay the costs of this application.

7. Such further and /or alternative relief as this court may consider appropriate.'

[3] During the presentation of oral arguments, the applicant submitted that it no longer pursued the relief sought in paragraphs 4 and 5 outlined above. The parties also indicated that they no longer sought the court to order or direct that the matter be remitted back to the respondent for reconsideration. Therefore, the focus of this judgment will be on the remainder of the relief sought in the Notice of Motion.

The parties

[4] The respondent is the South African Revenue Services ('SARS'). It administers the country's tax system; customs service and enforces compliance with the related legislation. When the respondent imposed the customs duty, tax, interest and penalties on the applicant, it was in the exercise of its powers in terms of s 18A of the Customs and Excise Act 91 0f 1964 ('the Act'). It was performing an administrative function that is subject to s 8(1) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA').

[5] The applicant is NCP Alcohols Pty LTD ('NCP'), a company whose business and incorporation are in terms of the South African Laws. It was engaged in the business of manufacturing food additives or alcohol ingredients. It also imported and exported similar products into the neighboring countries within the continent.

Condonation

[1] The relief sought in paragraph 1 of the Notice of Motion, namely the condonation in terms of s 7 of PAJA was not opposed. On a closer consideration and assessment of the explanation given by the applicant for its non-compliance with the prescribed times within which it was permitted to lodge the application, it made out a case for condonation. That application, in my view, must succeed.

The Factual Matrix

First consignment

[6] On 30 October 2014, the applicant agreed to sell 140 x 250 litres drums of alcohol to its customer, Champion Industries in Zambia. Part of this order was imported into the Republic and the other part was locally manufactured by the applicant. When part

of the consignment due to be exported was received at the port of entry, it was processed through the SARS' Electronic Data Interchange System ('EDI'), bearing shipping order number SO 15375. Subsequent to that, the consignment went through various stages in the processing, as will be outlined hereunder.

[7] Initially, BOE 5063525 was allocated to this consignment. On 03 November 2014, and according to the applicant, when the locally produced part of the consignment was added, then a new BOE 5002556 was allocated. This process effectively cancelled the initially allocated BOE 5063525. However, as the applicant claimed, an error occurred, in that when the truck driver proceeded to the border, he still had the "old cancelled" or the first allocated BOE 5063525. As a result of this, a CN2 exit scan, giving an exit status to this consignment could not be granted. However, for reason unknown to the applicant, the consignment was allowed to exit the respondent's common customs area, even with a cancelled BOE 5063525 which no longer existed.

Second consignment

[8] On 12 December 2014, the applicant concluded another sale of 140 x 250 litres drums of neutral portable ethanol with its customer, Legendary Auto & General Dealers in Zambia, in fulfilment of order number SO 15751 and manifest number 387961.

[9] The EDI system released notification that generated the BOE 5025338 to this consignment. However, when the driver left to the border, they had BOE 5034868, which the applicant believed was erroneously issued by the officials of the respondent.

[10] The applicant further noted that the details of the truck that carried the BOE 5025338 were of JL Logistics, whereas, the details of the trucker issued with the "erroneous" BOE 5034868 was of Truck Africa.

[11] According to the applicant, these factors led to the absence of the CN2 scan or exit status that would have been conclusive proof (according to the respondent's EDI system) that this consignment had exited the respondent's common customs area. The applicant could not account for the circumstances that led to the generation of a

CN2 exit scan of BOE 5025338 by the respondent's system on the 28th of December 2014 instead of the 12 of December 2014 when the consignment would have been processed through the EDI. This would have been the date when it, in fact, exited the respondent's common customs area. The applicant also found this turn of events to be strange.

[12] According to the applicant, the two consignments were exported and received by their respective customers accordingly.

[13] Subsequent to audit queries and the decision that imposed custom duty, penalties and tax on the two consignments, there were various exchanges between the applicant and the respondent. These included the representations by the applicant; the respondent's Internal Appeal Process and the Alternative Dispute Resolution procedures to which the applicant was subjected. The applicant sought to explain the error or errors that occurred in the chain of processing of the two consignments. A variety of documents were presented to the respondent to explain the queries raised about the processing of the two consignments and in the absence of the CN2 exit scan. The EDI system would have generated the CN2 exit scan at the exit point and confirmed that the consignments had left the respondent's common custom area. All these were meant to persuade the respondent to conclude that the consignments had been exported and delivered to the respective customers in Zambia.

[14] In the event that the respondent was eventually persuaded that the two consignments had been exported and delivered without the CN2 exit scans, the applicant would not have been liable to pay the customs duty. The implication of this would have been that the applicant was exempt from liability imposed by s 18A(2) of the Act.

[15] As the parties continued to engage, the integrity; lack of detail; inconsistencies in the documents presented, and their credibility were in the spotlight. The respondent maintained its rejection of the process that the applicant contended should suffice as proof that these consignments were exported and therefore, no longer within the respondent's common customs area. On the other hand, the applicant contended that even in the absence of the CN2 exit scan, the respondent acted unlawfully when it

imposed the customs duty, VAT, penalty on VAT and interests as if the consignments had not been exported.

[16] The respondent argued that, if the CN2 exit scan were not provided it would be regarded that the goods were not exported, unless other satisfactory proof was provided.[1] In fact, the Respondent contended that the Applicant failed to discharge that as a fact.

Chain of events in the processing of a consignment that was imported for exportation

[17] The customs electronic system generated by the respondent is for the handling of consignments from entry into its common customs area until the goods exited by way of export. This was a fully automated system and had its chronology, which can be summarized, as follows:

(a) All goods that were declared into the port of entry had to be registered into the automated system, the EDI;

(b) In the case of the first consignment, for instance, on 31 October 2014, the customer completed the SAD500, being the declaration of the arrival of the consignment or goods at the port of entry;

(c) As soon as the consignment was received into the common custom area of the respondent, an LRN number would be electronically allocated to the consignment;

(d) The automated system would generate the CN1 scan, being the entry status to the consignment;

(e) The system would assign the Bill of Entry number ('BOE') to that consignment;

(f) Once the consignment had been registered into the EDI by use of the generated CN1 entry status, It would be allowed to proceed to the border;

(g) At the border, the consignment would be inspected, whereby the officials of the respondent would verify if the SAD500, that was allocated on the declaration of the entry into the customs area, corresponded with the CN1, which allocated an entry status to the consignment, which in turn assigned the BOE;

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[1] SARS Customs and Border Management letter dated 30 August 2017 "Annexure Q", volume 1, page 69.

(h) Then respondent officials would issue an "entry notification" electronically to the truck driver or transporter at the border. This would then confirm that the consignment that was initially allocated the same SAD500 number; with the same CN1 and BOE was permitted to pass the border;

(i) Then, there would be an "exit notification" and the electronic system would generate a CN2 exit scan. It would be this CN2 that served as conclusive indication to the respondent that the consignment that was initially declared on the SAD500 left the respondent's common customs area.

(j) That consignment with the CN2 exit scan would have an exit status. Having attained that status, it would have left, and based on that exit status, the applicant would be exempt from custom duty that would have been levied in terms of s 18A of the Act.

[18] The applicant further contended that the decision of the respondent to conduct the s 65 inspection of the processes in the handling of the two mentioned consignments fell outside the prescribed period of two years, within which the respondent was permitted to impose the custom duty; VAT; interest and penalties on it. In other words, they averred that the liability, if any, had prescribed.

[19] The applicant asserted that the queries which necessitated the inspection of the processes followed the export of the two consignments which occurred in November and December 2014. However, the inspection was only initiated in August 2017. It is on that basis that the applicant argued that the two-year period had expired and therefore it was no longer permissible for the respondent to impose any custom duty or taxes and penalties, arising from that process.

Issues in dispute

[20] Among others, the applicant seeks to review and set aside a decision taken by the respondent where it imposed a custom duty on goods that it imported and later exported to Zambia and other countries in the Southern Africa on 03 November and 12 December 2014.

[21] The applicant disputed that the respondent acted lawfully when it exercised its administrative function by imposing custom duty, VAT and penalty against the two

consignments that were imported on 30 October to 03 November and 12 December 2014. In summary, the applicant contended that the respondent's conduct was invalid and that it should be reviewed and set aside.

[22] It also disputed that the respondent's exercise of its administrative function was valid. The applicant contended that the conduct of the respondent when it imposed custom duty; rejected the Applicant's internal appeal and when it terminated the ADR should be reviewed; declared invalid and set aside.

[23] On the other hand, the respondent disputed that its decision to impose customs duty; VAT and penalties against the applicant on the two consignments was invalid; reviewable and had prescribed. According to the respondent, the two year period would only find application if the applicant had proved that the goods had left the respondent's common customs area. It further denied that it was barred from imposing the custom duty and taxes on the two consignments that were the subject of their dispute.

[24] The respondent also contended that it acted within its legislated powers; that it had given due considerations to the information provided and gave adequate reasons for its decisions against the applicant.

Issues

[25] As parties agreed that there was also a material dispute of fact among matters that required determination, it remained to be considered if such dispute could be resolved from the facts contained in the papers, and without presentation of evidence.

[26] The central question however is whether the respondent was entitled to impose custom duty, VAT, interest on VAT and penalties against the applicant when it exercised the administrative powers in terms of s 18A of the Act on the two consignments that were processed from 31 October to 03 November and on 12 December 2014.

[27] It is also imperative to determine whether the decision and inspection of the applicant's handling of the two consignments had prescribed as it was alleged that two years had expired since they were processed. Simply put, the question herein is whether the respondent was barred from imposing the custom duty; tax and VAT and VAT penalty due to the lapse of the two-year period and as provided for in s 18A(2)(*c*) of the CEA.

[28] Lastly, whether the conduct of the respondent in the decision to impose duty; the rejected internal appeal and the ADR were invalid and reviewable for such were allegedly in violation of certain provisions s 6 of the PAJA.

Applicable legal principles

[29] The trite principle when it comes to the material dispute of facts and the application of the *Plascon-Evans* rule is found in *National Director of Public Prosecutions v Zuma*.[2] In that case, it was stated:

'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings dispute of fact arise on the affidavits, a final order can be granted only if the facts averred by the applicant's...affidavits, which have been admitted by the respondent..., together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version.' (Footnotes omitted.)

[30] The *Plascon-Evans* rule can be described as:

'-where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances, the denial by respondent of a fact alleged by the applicant may not be such as to

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[2] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA), para 26.

raise a real, genuine or bona fide dispute of fact. ... If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination...and the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks... there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.[3]

[31] Section 18A(1)-(3) of the Act, which is at the center of the decision by the respondent provides that:

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

(2) Subject to the provisions of subsection (3), any liability for duty in terms of subsection (1) shall cease if—

(i) the said goods have been duly taken out of the common customs area; or

(3)If the exporter fails to submit any such proof as is referred to in subsection (2) within a period as may be prescribed by rule he shall upon demand by the Controller forthwith pay the duty due to the goods."

[32] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Another*,[4] it was held that, in review proceedings, the courts are required to 'take care not to usurp functions of the administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution'.

[33] The role of the court in review proceedings was reaffirmed in *Dragon Freight (Pty) Ltd and Others v The Commissioner of South African Revenue Services and*

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[3] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).
[4] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Another* 2004 (4) SA 490 (CC) para 45.

Others.[5] The court pointed out that '[i]n review proceedings, PAJA constitutes the prism through which a court can determine whether an administrative decision was rational, reasonable or procedurally correct'.

Evaluation

For the sake of completeness, I will deal with the disputed issues sequentially.

[34] It is common cause that the applicant imported two consignments, each handled at the port of entry on 03 November and 12 December 2014.The parties agree that there is a material dispute of fact related to both consignments.

[35] On the one hand, the applicant maintains that the two consignments were exported from the respondent's common customs area and delivered to its customers in Zambia. On the other hand, the respondent accepts that the consignments were imported into its common customs area but denied that there was evidence that they were subsequently exported as the applicant claimed. According to the respondent, the applicant failed to show that the two consignments were exported from its common customs area.

[36] The parties agreed that the onus rested on the applicant to prove that the two consignments were exported. They were also in agreement that the material dispute of fact was whether the two consignments were delivered or exported to the applicant's customers in Zambia. It is common cause that this disputed fact is at the center of all attempts made by the applicant to ensure that it escaped liability for custom duty that was levied after the investigations or inspections conducted by the respondent.

[37] The applicant argued that it was unnecessary to refer the matter for oral evidence to resolve the dispute. It averred that, in any event, there was no further evidence or facts to supplement the information that it had already presented in its papers. It therefore argued that this material dispute of fact could be resolved by the application of the *Plascon-Evans* rule.

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[5] *Dragon Freight (Pty) Ltd and Others v Commissioner for South African Revenue Service and Others (South African Clothing and Textile Workers Union as Intervening Party)* [2021] (1) All SA 883 (GP) para 14.

[38] The respondent contended that the information provided in the papers failed to establish, as a fact, that the two consignments were indeed exported to Zambia. The respondent argued that there were various factors and material discrepancies in the available information. These rendered the presented information inadequate and, therefore fatal to the applicant's efforts to prove that the consignments had been exported. In its view, the information in the applicant's papers would have assisted in resolving this material dispute. However, for lack of credibility and some detail, it fell short.

[39] According to the respondent, the applicant missed an opportunity when it did not facilitate the presentation of any evidence to supplement available information. In part, such would have explained the alleged mistakes in processing the consignments and inconsistencies, which may have assisted in resolving the factual dispute. According to them, the apparent weaknesses in the information; the nature of the dispute and the extent to which the discrepancies impacted on the veracity of such information rendered it inadequate for the application of the *Plascon-Evans* rule to suffice.

[40] In the circumstances, the question remained whether applying the *Plascon-Evans* rule would suffice to resolve such material dispute of fact. If not, the next enquiry would be whether the applicant had discharged the onus to prove that the two consignments were exported and delivered to the customers in Zambia.

[41] The court in *National Director of Public Prosecutions v Zuma*[6], asserted that the court of first instance failed to have regard to the principle in *Gate v Gate*[7], namely that, 'the more serious the allegations or its consequences, the stronger must be the evidence before a court will find the allegation established.[8] In my view, this passage resonates well in the matter at hand. In light of the likely consequences for the applicant, if the application of the *Plascon-Evans* rule would not suffice.

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[6] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA).
[7] *Gates v Gates* 1939 AD 150.
[8] Ibid.

[42] In the case of the first consignment, some of the information that could have been strengthened by the presentation of evidence included, but was not limited to the following: Firstly, the cancelled BOE number that was given to the transporter instead of the new BOE number; secondly, a CN2 exit scan that was issued or stamped almost a year after the goods were handled at the port of entry; and lastly, the documents from Zambian customs office that had no stamp.

[43] On the second consignment, such would be: the identity of the transporting company that varied on the delivery note where the trucker that transported the consignment was JL Logistics, yet the documents bore the name of Truck Afrika; secondly, the consignment did not have a CN2 exit status on the date that it supposedly went through the borders, but was eventually issued with the same about two weeks later; and thirdly, how it occurred that the trucker was given a BOE that had been cancelled, instead of the newly issued BOE.

[44] The applicant was itself alive to the shortcomings in the information it provided to the respondent. That was evident in the fact that in the three stages of its attempts to convince the respondent that the consignments were exported, the applicant presented additional information, and in some instances supplemented the information already contained in some of the documents. These developments militated against any inclination to blame the respondent or allegation that the unadmitted evidence was barely denied for the sake of it or that they were farfetched. Some of the information was not even in affidavits or sworn statements, some were copies and some lacked adequate information.

[45] In the ordinary course of evaluation of the reliability and veracity of any form of information in court proceedings, the aforementioned characteristics in the documents would have been subjected to an evaluation under oath. These were serious and substantial features of the information that were either inadequate; missing or contradictory. In fact, the applicant on its own was unable to explain some strange occurrences in the processing of the documents that it furnished as proof of export of the consignments. For instance, in the case of the second consignment, the identity of the transporters was an issue. For brevity, I shall not enumerate these in detail, as they are also common cause.

[46] Presentation of such information on affidavit under oath would have allowed for its credibility and veracity to be tested in order to eliminate any apparent inaccuracies for the probabilities to be made. As pointed out in *Zuma*, the more serious the allegations and the consequences, the stronger must be the evidence before a court will find the allegation established. However, it is unfortunate that the Applicant opted not to subject the information to be explained under oath or supplemented where there were unexplained inconsistencies. Yet, this is the same information it relied on, in support of its contention that the two consignments were exported.

[47] The apparent inconsistencies and discrepancies in the documents presented by the applicant appeared to be material and central to their veracity. These remained unexplained or not reconciled, even if the exception to the rule was applied, namely, placing some responsibility on the respondent, it would not have worked in these circumstances. Wherefore, the applicant's failure to correct the above in the initial representations; the Internal Administrative Appeal Process and the Alternative Dispute Resolution deprived any trier of such facts from making credibility findings or probabilities. Those factors that were not admitted, which also lacked credibility could not be reconciled. In my view, these discrepanacies weighed heavvly against the applicant.

[48] More so, the challenges recorded by the respondent cannot be simply regarded as fictitious or implausible, far-fetched or so clearly untenable that they could be rejected merely on the papers. After all, on all the matters raised in relation to the information provided by the applicant, there is no evidence to suggest that the denial of the alleged export of the consignments may not be such as to raise a real, genuine or bona fide dispute of fact. Notably, in an application of this nature, save for disputes of facts that are not real, genuine or bona fide, the respondent's version must prevail. I am of the view that the denial raised by the respondent, cannot be said to be farfetched or implausible. On the application of the *Plascon Evans rule,* the applicant's contention that the material dispute of fact could be resolved has failed and thefore rejected.

Review

[49] For the purposes of review, the applicant relied on the provisions of s 6(2)(*e*)(vi) and (f)(ii) of PAJA. The applicant further argued that the reasons given for the decisions of the respondent were inadequate, brief and failed to engage submitted information for consideration. Sub-section (2)(*e*)(vi) provides that 'a court or tribunal has the power to judicially review an administrative action if the action was taken arbitrarily or capriciously'. In simpler terms, 'to act arbitrarily means to make a random decision that is not systematic and often not based on reason. Capricious action refers to an action that is inconsistent with legal prescripts and unpredictable because of the impulsive and erratic nature of that decision'.[9]

[50] To the facts at hand, the question was therefore, whether the conduct of the respondent to impose the custom duty; the rejection of the representations made; rejection of the appeal and or terminate the ADR had been shown to have been senseless or irrational, without foundation and purpose.

[51] Sub-section 6(2)(*f*)(ii) provides that 'a court or tribunal has the power to judicially review an administrative action if the action itself-

(i) contravenes a law or is not authorized by the empowering provision; or
(ii) Is not rationally connected to –
  (aa) the purpose for which it was taken;
  (bb) the purpose of the empowering provision;
  (cc) the information before the administrator; or
  (dd) the reasons given for it by the administrator.'

[52] In relation to s 6(2)(*f*)(ii), the court in *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa*[10] provided an approach into the enquiry of a reasonable administrative action, and emphasized that it should be the the rational basis of the decision taken should be the focal point. It restated that, " In requiring reasonable administrative action the Constitution does not intend that such action must in review proceedings be tested against the unreasonableness of the merits of

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[9] Y Burns and M Beukes *Administrative Law Under the 1996 Constitution* 3 ed (2006) at 380.
[10] *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa* 2004 (3) SA 346 (SCA).

the action in the same way as in an appeal. In other words it is not required that the action must be reasonable, in that sense, in order to withstand review."[11]

[53] Section 8 of PAJA provides that:

'Remedies in proceedings for judicial review.— (1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders-

(a) directing the administrator-
  (i) to give reasons; or
  (ii) to act in the manner the court or tribunal requires;
(b) prohibiting the administrator from acting in a particular manner;

...

(2) The court or tribunal, in proceedings for judicial review in terms of section 6(3) may grant any order that is just and equitable, including orders-

(a) directing the taking of decision;
(b) declaring the rights of parties in relation to the taking of the decision;
(c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or
(d) as to costs.'

[54] In order to come to a conclusion, I am mindful of what the Supreme Court of Apeal stated in *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa* 2004 (3) SA 346 (SCA) at para 20, where the court stated:

'A review...with or without additional evidence, or information is not to determine whether the decision was correct or not, but whether the arbiters exercised their powers and discretion honestly and properly. This leads to the conclusion that the essential nature of a review, is not directed at correcting a decision on the merits, but is aimed at the maintenance of legality. A review is therefore only concerned with whether the decision is lawful, whereas the appeal, is concerned with whether it is correct. A review is ultimately concerned with process and regularity. This will be determined on the basis of the record and reasons.'[12]

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[11] Ibid, paragraph 20
[12] *Cell C (Pty) Ltd v Commissioner for the South African Revenue Service* [2022] ZAGPPHC 152 para 9.

Decision to impose custom duty, VAT and Interest on VAT

[55] It is worthy to note that in this instance, the criticism against the conduct of the respondent is not so much about the processes that were followed to reach its determination to impose a total sum of R10 954 697.02. It appears that the attack was on the mechanism that informed the decision of the respondent to impose duty on the applicant. The main contention was that the respondent's decision was merely triggered by the absence of the CN2 exit scan that would have certified the exit status of the consignments. The gist of the applicant's argument, as I understand it, was that in the absence of the CN2 exit scan, the respondent should have accepted the documents that supported its explanation as conclusive proof of export. The applicant claimed therefore, that it had discharged the onus to establish that the goods had left the respondent's common customs area.

[56] The applicant argued that the ultimate decision of the respondent, as contained in the correspondence dated 10 July 2018, failed to consider the applicant's explanation as contained in the letters dated 26 September 2017. The applicant asserted that its onus was discharged in the correspondence that included various documents it submitted in support of the internal appeal and the ADR processes. According to the applicant, the failure to give regard to the documents presented in coming to its decision is where the fault or flaws are apparent in reaching its decision.

[57] Therefore, the central question is whether the record and reasons given by the respondent disclosed any flaws or irregularities in the process that informed its final determination and as alleged by the applicant.

[58] In the letter dated 10 July 2018, the respondent explained its decision to impose the duty at paragraphs 4-8. The substance of these paragraphs showed that, in consideration of the representations of the applicant, regard was not only had to the absence or the inaccuracies on the CN2 exit scans. It also shows further consideration of additional documents, including the affidavit of the customer of the first consignment that was processed on 03 November 2014.

Decision to reject the applicant's Internal Appeal

[59] The applicant initiated the 'Internal Administrative Appeal' on 10 July 2018 as per the prescribed Form DA 51. This was after the respondent rejected its attempts to explain that notwithstanding the absence of the CN2 exit scans for the two consignments, the respondent should find that they had been exported to their respective customers.

[60] The applicant complained that the reasons given for the rejection of its appeal were too brief and were a repeat of the content of the correspondence dated 10 July 2018. On 05 April 2019, the applicant was notified about the outcome of their appeal.

[61] The applicant averred that the reasons given by the respondent for the failure of its appeal were invalid. The grounds upon which the applicant based this claim were that:

(k) The respondent did not adequately engage with the detailed explanation in its appeal. The applicant made specific reference to the brevity of the reasons.

(l) That in paragraph 49.2 of the respondent's reasons, it was alleged that the applicant's explanation contained contradictory information but failed to point out the alleged contradictions. Hence it argued that the respondent did not adequately engage with the facts contained in its appeal and in order to explain its decision to reject the appeal.

(m) The applicant pointed that , in proving the exports, it was not required to meet a standard set by the respondent.

[62] The applicant therefore argued that the respondent's rejection of the appeal was on the basis that the respondent would only be satisfied if proof of export was by means of the CN2 exit scan.

[63] To these allegations, the respondent contended that the applicant failed to put up documents that adequately confirmed the export of the goods. The respondent also contended that in the absence of the CN2 exit scan, the presented documents were lacking and did not suffice as proof that the goods were duly exported. The respondent argued that documents that were provided as proof of export could not be accepted due to lacking and inaccurate content about the specific consignment.

[64] The respondent further explained its finding in regard to the veracity of the documents that purported to be obtained from the Zambian Customs. For instance, in the letter dated 05 April 2019, at paragraphs 36 to 49.3, the respondent made a detailed analysis of the documents that were submitted. It also made specific reference to some documents and their content or lack thereof. It found that the documents presented failed to show that the consignments were indeed exported. In my view, the respondent cannot be faulted with the reasons it furnished the applicant

Decision to terminate the Alternative Dispute Resolution process

[65] On the recommendations of the respondent, the applicant pursued the ADR. Pursuant thereto, the applicant provided additional documents or information to show that the consignments were delivered to the respective customers. This was in addition to the documents that formed part of the initial representation and the internal appeal process.

[66] The applicant also raised the issue of prescription to the imposing of custom duty after the lapse of a two-year period from the date when the respective consignments were processed through the port of entry. Seemingly, the applicant relied on the provisions of s 18A(2) of the Act to escape liability from the levied duty.

[67] In short, the applicant complained that the respondent produced no evidence to gainsay its contention that the documents presented by the applicant established the probabilities that the consignments were delivered to the customers in Zambia. It argued that the respondent failed to engage the applicant's detailed explanation.

[68] The ADR process was terminated at the instance of the respondent, as per the correspondence dated 30 March 2020, which also contained its reasons for the termination.

[69] The respondent argued that the period that was under its review had not prescribed. However, the applicant felt that this statement was unclear and without substantiation.

Reasons

[70] Without going into the correctness or not of the decision made by the respondent when the appeal was rejected, the warning in *Cell C (Pty) Ltd v Commissioner for the South African Revenue Service*[13] is instructive. It was said that, "A review on the other hand with or without additional evidence or information is not to determine whether the decision was correct or not, but whether the arbiters exercised their powers and discretion honestly and properly. This leads to the conclusion that the essential nature of review, is not directed at correcting a decision on the merits, but aimed at the maintenance of legality. A review is therefrore only concerned with whether a decision is lawful, whereas an appeal, is concerned with process and regularity."

[71] Therefore, in casu, the focus must be on whether there is any factors to gainsay the allegations by the applicant that the respondent did not adequately apply itself to the documents or consider them when it gave reasons for its decision.

[72] The applicant asserts that the proof of export should not be by the standards of the respondent. This was the applicant's challenge to the respondent's requirement of the CN2 exit scan, as conclusive proof of export. The applicant avers that the documents attached to support its claim that the goods were exported, should suffice as proof of export, in the absence of the CN2 exit scan.

[73] This assertion by the applicant still failed to acknowledge the respondent's consistency in the criticism of the information provided and the veracity of the documents that were submitted. Although the applicant was seemingly aware of the inconsistencies and the discrepancies pointed out by the respondent, it did not appear that the applicant appreciated that the respondent would have only been aware of such weaknesses if it applied itself to their content and in its consideration of whether they would suffice as an alternative means to prove export in the absence of the CN2 exit scan.

[74] The applicant also alleged that the respondent's decision was not rationally related to the purpose for which the administrative powers exercised by the

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[13] *Cell C (Pty) Ltd v Commissioner for the South African Revenue Service* [2022] ZAGPPHC 152, paragraph 9.

respondent were conferred. This implied that the action of the respondent was a contravention of the provisions of s 6(2)(*f*), however, a glean from the papers does not support this assertion. There are no factors to support this allegation. The respondent's conduct was agreed to be in terms of s 18 of the Act, as the empowering provision. Even with the argument that the imposing of the customs duty had prescribed, such had no factual basis or support by the agreed facts. The applicant had no objection to the respondent's powers conferred by s 65 of the Act and the motivation for initiating such inspection. If regard is also had to the provisions of s 18A of the Act, there are no factors to suggest that the respondent acted beyond the powers conferred in this empowering provision or a violation thereof. This allegation remained without any substance and cannot stand.

Prescription

[75] This is a contention of the applicant to which a determination is factually based, and reliant on the chronology of the processes that led up to the decision of the respondent that was communicated by the letter dated 30 August 2017. According to the correspondence from the respondent dated 05 April 2019,[14] the respondent had invited the applicant to take part in an initiative whereby the applicant would become a 'preferred trader'. This process necessitated that an audit of the applicant be first conducted.

[76] Pursuant thereto, an audit of the applicant commenced on 04 August 2015. Apparently as a result of the audit that was being conducted certain findings were made and communicated to the applicant. As such, '[o]n 30 March 2016, [the respondent] issued an audit finalization letter that...identified two further minor potential risks and steps to be taken to mitigate those risks. The letter recorded as follws: You "received a letter from SARS following an audit which was a continuation of the trusted trader audit started on 04 August 2015...on 30 August 2017...this audit covered declarations processed for the period 01 April 2014 to 30 March 2015 to ensure that CN2 documents were duly processed by the appellant for the goods that were exported to South African countries.'[15] Further correspondence dated 13 March

[14] Letter dated 05 April 2019, "Internal Administrative Appeal Against Customs Duties, VAT, VAT Penalty and VAT Interest and VAT By NCP Alcohols Pty LTD" , marked "SARS 9", paras 5-9.
[15] Ibid paras 6-7.

2020, from the respondent recorded that, 'I refer to the application for ADR dated 10 September 2019 and the ADR meeting convened on 31 October 2019.'

[77] A glean at the content of the letters dated 17 March 2016 and 30 March 2016, as marked by the applicant "NCP 1" and "NCP 2" , revealed that the findings made included some recommendations for other processes that were yet to be pursued by the respondent.

[78] The aforementioned correspondence also reveals that the inspection that targeted the applicant's operations was sampled from the period of 30 April 2013 to 01 May 2015. This period covered October to December 2014, when the two consignments were processed between the applicant and the respondent. Further it can be seen that the inspection was not conducted in August 2017 for the first time, but rather that it was an ongoing process that commenced in August 2015.

[79] Therefore, the letter dated 30 August 2017 was the final determination to impose customs duty and taxes on the applicant, and to which the applicant responded in September 2017. Indeed, as the applicant contends, the focus on the applicant's export processes was pursuant to the invitation for it to participate in the "preferred trader" program that the respondent initiated.

[80] The applicant however, contends that this particular inspection had been finalized, although after certain findings were made, there were recommendations for further investigation of its processes 'in order to minimize some risks.' The applicant's contention seems to lose sight of the fact that even though the findings were made, further inspections were still to be done as recorded in the letters of 17 and 30 March 2016.

[81] According to the record of correspondences, it does not appear that the applicant was finally registered as the "preferred trader", as such would have been expected if that process of inspection was finalized. Instead, the record shows that the inspection was continuing since 04 August 2015 and up to 30 August 2017. In 'Annexure A' to the 'Internal Administrative Appeal, and at paragraph 5 (5.1), the applicant expressly stated that the Audit for which the applicant received correspondence dated 30 August

2017 was a continuation of the trusted trader audit that started on 04 August 2015. Common sense dictates to one that, if the audit process for the 'preferred trader' status had unfolded and finalized as the applicant contended in its arguments, then, the outcome would have been documented somehow. The applicant would have acquired such a status, and that is not the case in this instance. On the contrary, the audit or inspection continued as there were clearly stated potential risks that had been identified, and for which steps had to be taken.

[82] In the absence of any evidence or suggestions to gainsay the content of this correspondence, the commencement dates of the inspection or audit of the applicant can be accepted as 04 August 2015.

[83] This background then settles that at the time of the inspection or audit by the respondent, it was about nine to ten months since the consignments in question were moved within the respondent's common customs area. Therefore the provisions of s 18A(2)(*c*), as argued for the applicant, do not find application. It goes without saying that when the audit or inspection of the applicant commenced, it was before the two-year period expired.

[84] In light of this finding, it is not necessary to take the enquiry further into whether the lapse of the two-year period would have had any bearing on the respondent's decision to impose customs duty; penalties and taxes on the applicant.

Conclusion

[85] The applicant failed to establish that it had exported the consignments on 03 November and 12 December 2014. Such could not be established either through the EDI system or by alternative means, namely documents and information that were presented as the chain of handling of each consignment. In my view, the respondent was entitled to impose customs duty, VAT and VAT penalties on the two consignments.

[86] The respondent correctly followed all the reasonable prescribed steps to afford the applicant an opportunity to be heard, to explain the processes followed in the

absence of the respondent's automated system. It therefore, acted within the prescripts of s 6(2) of PAJA.

[87] The reasons given to the applicant in line with the provisions of s 6 of PAJA showed no evidence of conduct that was *ultra vires* or any violations particularly in circumstances under sub-section 2(*e*) and (*f*). On the contrary, the well considered reasons are clearly connected to the purpose of the empowering provisions of s 18A of the Act.

[88] Furthermore, the detail provided by the respondent in its consideration of the representations; the appeal, and the ADR reveal no factors that would support the applicant's allegations that the respondent's actions were not rationally connected to their purpose and against the provisions of s 18A. The entire inspection of the applicant's processing of both consignments and the ultimate decisions taken exhibited a direct connection to the initial invitation for the applicant to participate in the preferred trader initiative by the respondent, with no error in law and fact. The applicant has also failed to make a case that the administrative action taken by the applicant was invalid to be reviewed and set aside.

[89] The applicant failed to discharge the onus that rested on it, namely, that the two consignments were indeed exported to their customers. The applicant also failed to show that the provisions of s 18A(2) of the Act found application and therefore liable for customs duty; VAT and penalties on VAT as imposed by the respondent.

Costs

[90] There is no reason to deviate from the usual principle in relation to costs that costs should follow the result.

Order

[91] In the result, the following order is made:

1 Condonation for the non-compliance with section 7 of the Promotion of Administrative Justice Act 3 of 2000 is hereby granted;

2 The application is dismissed with costs, including the cost of counsel.

Sipunzi AJ

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant:	Ms J Thobela-Mkhulisi
Instructed by:	Norton Rose Fulbright South Africa Inc.
For the Defendant:	Mr C J Pammenter (SC)
Instructed by:	Linda Mazibuko & Associates
Matter heard on:	12 April 2023
Judgment delivered on:	17 July 2023