

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

CASE NO: 2022/059481

DOH:14 November 2023

- 1) REPORTABLE: NO
- 2) OF INTEREST TO OTHER JUDGES: NO
- 3) REVISED.

.....
SIGNATURE

23 JULY 2024
DATE

In the matter between:

TURNERS SHIPPING (PTY) LTD

Applicant

And

**COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICE**

Respondent

JUDGMENT

**THIS JUDGMENT HAS BEEN HANDED DOWN REMOTELY AND
SHALL BE CIRCULATED TO THE PARTIES BY E-MAIL AND UPLOADING
ON CASELINES. THE DATE AND TIME OF HAND DOWN IS DEEMED TO BE
10h00 23 JULY 2024**

BAM J

A. Introduction

1. During August 2021 up to June 2022, the respondent issued five¹ Letters of Intent (LsOI) to the applicant, informing it of the status of the audit conducted by SARS into certain diesel fuel consignments declared for export to Zimbabwean entities, between July and October of 2018. The applicant had rendered services as clearing agent in respect of the consignments, acting on the instructions of Shell and BP as its clients. The audit had uncovered various infractions of the Customs and Excise² (the Act) including acts of misrepresentations made by, amongst others, the applicant to the respondent. Based on the audit findings, the respondent held the prima facie view that the fuel had not been exported and that the diesel refunds claimed by the applicant's principals, Shell and BP, pursuant to the purported exports, had been unlawfully claimed. The applicant was informed of the Commissioner's intention to hold it liable, jointly and severally, with its principals, for amounts, in lieu of forfeiture, as well as duties. The applicant was further invited to answer

¹ I note that the applicant refers to four letters of intent whereas there were five, which includes the letter of intent to raise debt, dated 10 June 2022. Nothing however, turns on the number of these letters and their labelling.

² Act 91 of 1964.

several pointed questions relating to its conduct, to enable the respondent to decide on the way forward.

2. In August 2022, the respondent followed up with several letters serving as addenda to the LsOI. In the letters, the respondent expressed the view that the applicant had played a significant role in facilitating the 'exports' way beyond that of an agent. It was the Commissioner's intention to hold the applicant liable as exporter, in addition to any other basis. Further, the respondent held a view that the applicant had participated in a scheme with Shell and BP, as envisaged in Sec 119B of the Act, for an undue tax benefit. The applicant was invited once again to respond to various pertinent questions.

3. The applicant replied to the LsOI. The applicant held the view that there was no legal basis on which the respondent could hold it liable for amounts, in lieu of forfeiture, nor for duties. In November 2022, the respondent issued a demand for the amount of R 109.6 million, being the value of the consignments, in lieu of forfeiture. By then, the amount of R 71 million, representing duties attracted by the fuel consignments, had already been collected from Shell. The present application was filed on 14 December 2022, following the applicant's statutory notice in terms of Sec 96 of the Act. The parties had further agreed to extend the time for the applicant's response to the addenda pending a declarator from this court on the question of the applicant's liability. It is against that brief setting that the applicant came to seek the present declaratory order, that the respondent has no legal basis to hold it liable for amounts in lieu of forfeiture,

as set out in the five LsOI³. The applicant relies on the provisions of Section 21(1)(c)⁴ of the Superior Courts Act⁵ in seeking the declarator. The respondent opposes the relief and asks that the application be dismissed with costs. It is now appropriate to introduce the parties and follow on with a brief sketch of the background facts.

B. Parties

4. The applicant, Turners Shipping (Pty) Ltd, (Turners) is a private company duly incorporated in terms of the company laws of South Africa. Its registered address is noted in the founding affidavit as 37 Margaret Mncadi Avenue, Durban. Turners is a customs clearing agent and is duly licensed as such by the South African Revenue Service. At the times material hereto, Turners had offices at various locations in South Africa, including Tarlton and Beit Bridge border post, (BBR), but its clearing and forwarding activities are mainly centralised at its main place of business in Durban.

³ The four letters of intent may be identified thus:

- Reference 21/CAS 0005/04 dated 25 August 2021, confirmed in the letter of demand dated 29 November 2022;
- Reference 21/CAS0006/04 dated 2 September 2021, in the letter of demand dated 29 November 2022
- Reference 21/CAS0007/04 dated 2 September 2021, confirmed in the letter of demand dated 29 November 2022;
- Reference 21/CAS0122/12 dated 10 September 2021, confirmed in the letter of demand dated 29 November 2022. The fifth letter is the letter of intent to raise debt

⁴ 21. (1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power—

(c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.

⁵ Act 10 of 2013.

5. The respondent is the Commissioner for the South African Revenue Service and is appointed in terms of Sec 6 of the South African Revenue Service Act⁶. The Commissioner is charged with, amongst others, the enforcement of the Act. The Commissioner's offices are located at Lehae La SARS, 299 Bronkhorst Street, Nieuw Muckleneuk, Groenkloof, Pretoria. In this judgment I use the Commissioner, SARS, and the respondent to refer to the same person.

C. Investigation

6. The following details, originating from the respondent's LsOI are either common cause or were not seriously challenged: During the period beginning from July to October 2018, the applicant, acting as clearing agent for Shell and BP framed and submitted to the Customs division of the respondent various invoices and export bills of entry, representing that its clients Shell or BP, had sold excisable fuel goods (fuel consignments or simply fuel) to Zimbabwean entities, ie, North Oil and Maps Enterprises. Shell or BP were declared as exporter/consignor of the goods and the foreign entities as purchasers and consignee. In the course of time, and in circumstances not mentioned in the LsOI, the respondent's Syndicated Tax and Customs Crime Division: Illicit Trade Unit (Illicit Unit), decided to conduct an investigation into the consignments and identified several violations of the Act. In the immediately following subparagraphs, I set out some of the findings:

⁶ Act 34 of 1997.

7.1 The fuel was removed from Tarlton pipelines, a facility owned by Transnet, which is not a licensed warehouse, whereas, according to the applicant's representation to the respondent, the fuel was removed from either Shell or BP's manufacturing warehouses. There were no entries for the removal of the fuel from either Shell's or BP's manufacturing warehouses to Transnet's pipelines as required in terms of Sec 19A of the Act and the rules.

7.2 In respect of each transaction, two invoices were issued. The first invoice was issued by Shell or BP, through the applicant. This invoice represented to the respondent that a transnational sale between Shell or BP and the Zimbabwean entity had taken place, while Shell or BP issued a second invoice to the local entity, the real purchaser of the fuel.

7.3 The applicant issued the first invoices and framed the bills of entry for export, in circumstances where it knew that its clients had not sold fuel to the Zimbabwean entities. This fact is asserted in each of the five letters of intent and the applicant has not denied it. The applicant has also not denied its knowledge of the second invoice issued by the principals.

7.4 The customs values reflected on the pro-forma invoices submitted at the time of clearance differed from the transactional values captured on the final invoices.

7.5 There was also no licensed remover of goods in bond (ROG) declared in the necessary forms, SAD 502.

7.6 The reference numbers on acquittal documents, Consignment Notes (CN2), proved to be false. Where the reference numbers existed, it was found that they related to different goods that had left South Africa through different borders, on different dates, than the dates of the fuel consignments. The

respondent concluded that the CN2s were false and could not have been generated from SARS' system as their system is designed to issue a unique reference number for each consignment.

7.7 The Zimbabwean entities — the declared purchasers and consignees — could not be verified and their physical addresses were found to be false. None of the clearing agents responsible for clearing the goods on the Zimbabwean side were registered with the Zimbabwean Customs authorities. The stamps used to authenticate the records from the Zimbabwean side were false. One such stamp was an old, damaged stamp which had fallen into disuse in February 2017. In some records, the stamp used was found to be that of the Zimbabwean Environmental authorities, instead of the Customs authorities.

7.8 The Shipshape system used by the applicant for export entries reflected the colour yellow, signifying that the creation of the export entries had not been completed, as opposed to the colour green for a complete export.

7. On the basis of the aforementioned anomalies and infractions, taking into account the applicant's responses, the respondent concluded that there was no valid proof that the fuel had been exported and accordingly made a determination to that effect.
8. There then followed the demands as alluded to in the introduction of this judgment.

D. Summary of the parties' contentions

Applicant's case

9. The applicant's case may be summarised as follows:

9.1 There is no liability for duties on the goods entered by the applicant for export as duties were paid upon removal from the manufacturing warehouse by Shell and BP, in line with the duty at source system of rules.

9.2 When the refunds are claimed and paid by set off, duties and levies in respect of goods, other than those declared for export by the applicant, are unpaid with the result that the two-year limitation period in Sec 99(5) of the Act comes to the assistance of the applicant from the time the duties on those other goods first became due.

9.3 Liability under Sec 76A of the Act to repay the duties refunded is confined to Shell and BP, as the person(s) concerned, not the applicant, as the latter is not the person concerned.

9.4 The conduct of the applicant in completing the invoice and framing the export entries does not amount to dealing with the goods irregularly or contrary to the provisions of the Act.

On the basis of the foregoing, the applicant cannot incur liability for payment in lieu of forfeiture.

Respondent's case

10. The respondent foregrounds his submissions by stating that the applicant's liability stems from joint and several liability as agent of Shell and BP in respect of whom the applicant performed services. The respondent adds that prior to engaging in any interpretation of the provisions of the Act which may give rise to the applicant's liability as agent of Shell and BP, there is the question of analysis of the applicant's conduct, which gives rise to its liability, independently

of its relationship with Shell and BP. The respondent then makes the following submissions:

10.1 The applicant's own conduct and participation in the scheme of Shell and BP renders it liable for the payment of the export value of the goods in lieu of forfeiture and the duties.

10.2 Although the duties were paid on the fuel at the time it was removed from the manufacturing warehouse, when the set-off is claimed by Shell or BP — by way of submission of the excise account — and allowed by the Commissioner:

10.2.1 the duties become unpaid; and

10.2.2 the duties in respect of other goods are paid with the refund by way of set off.

10.3 When the Commissioner makes a determination that the goods were not exported as required for a refund and thus the refund was not due, the Commissioner is entitled to demand repayment of such refund and it is recoverable as if it were the original duty or charge on the goods.

10.4 The provisions of Sec 99(2) operate to impose on the applicant the liabilities of Shell and BP in respect of any demand made under Secs 76A or 88(2)(a) of the Act.

10.5 The period of two years in Sec 99(5) is calculated from the time that the Commissioner makes the demand under Sec 88(2)(a) and Sec 76A and not from when the refund is paid by way of set-off.

E. The issue

11. The question to be answered as I see it is, whether on the conspectus of the facts of this case, the respondent has any legal basis at all to hold the

applicant liable for the export value of the goods, in lieu of forfeiture. In the event the court finds no legal grounds on which the respondent may hold the applicant liable, then the declaratory orders sought by the applicant must be granted. The converse applies where this court finds no legal grounds to hold the applicant liable.

F. Legal Framework

12. The nature and architecture of the Act is usefully summarised in *Gaertner and Others v Minister of Finance and Others*⁷. I refer to the summary without repeating same in this judgment. In order to properly answer the question posed by the applicant, it is necessary that one sets out very briefly the relevant provisions of the Act and the Rules.

i) Liability of an agent for obligations imposed on principal

13. Section 99(1) provides:

‘An agent appointed by any master, container operator or pilot or other carrier, and any person who represents himself or herself to any officer as the agent of any master, container operator or pilot or other carrier, and is accepted as such by that officer, shall be liable for the fulfilment, in respect of the matter in question, of all obligations, including the payment of duty and charges, imposed on such master, container operator or pilot or other carrier by this Act and to any penalties or amounts demanded under section 88 (2) (a) which may be incurred in respect of that matter.

(2) (a) An agent appointed by any importer, exporter, manufacturer, licensee, remover of goods in bond or other principal and any person who represents himself to any officer as the agent of any importer, exporter, manufacturer, licensee, remover of goods in bond or other principal, and is accepted as such by that officer, shall be liable

⁷ (12632/12) [2013] ZAWCHC 54; 2013 (6) BCLR 672 (WCC); 2013 (4) SA 87 (WCC); [2013] 3 All SA 159 (WCC) (8 April 2013), paragraphs 17 – 49.

for the fulfilment, in respect of the matter in question, of all obligations, including the payment of duty and charges, imposed on such importer, exporter, manufacturer, licensee, remover of goods in bond or other principal by this Act and to any penalties or amounts demanded under section 88 (2) (a) which may be incurred in respect of that matter: Provided that, except if such principal has not been disclosed or the name of another agent or his own name is stated on the bill of entry as contemplated in section 64B (6) or the principal is a person outside the Republic, such agent or person shall cease to be so liable if he proves that-

- (i) he was not a party to the non-fulfilment by any such importer, exporter, manufacturer, licensee, remover of goods in bond or other principal, of any such obligation;
- (ii) when he became aware of such non-fulfilment, he notified the Controller thereof as soon as practicable; and
- (iii) all reasonable steps were taken by him to prevent such non-fulfilment.

(5) Any liability in terms of subsection (1), (2) or (4) (a) shall cease after the expiration of a period of two years from the date on which it was incurred in terms of any such subsection. (Own underline)

ii) Presumptions

14. Sec 102 provides:

(4) 'If in any prosecution under this Act or in any dispute in which the State, the Minister or the Commissioner or any officer is a party, the question arises whether the proper duty has been paid or whether any goods or plant have been lawfully used, imported, exported, manufactured, removed or otherwise dealt with or in, or whether any books, accounts, documents, forms or invoices required by rule to be completed and kept, exist or have been duly completed and kept or have been furnished to any officer, it shall be presumed that such duty has not been paid or that such goods or plant have not been lawfully used, imported, exported, manufactured, removed or otherwise dealt with or in, or that such books, accounts, documents, forms or invoices do not exist or have not been duly completed and kept or have not been so furnished, as the case may be, unless the contrary is proved.

(5) If in any prosecution under this Act or in any dispute in which the State, the Minister or the Commissioner or any officer is a party, it is alleged by or on behalf of the State or the Minister or the Commissioner or such officer that any goods or plant have been or have not been imported, exported, manufactured in the Republic, removed or otherwise dealt with or in, it shall be presumed that such goods or plant have been or (as the case may be) have not been imported, exported, manufactured in the Republic, removed or otherwise dealt with or in, unless the contrary is proved.

iii) Brief discussion on the Control environment

a) Licensing of warehouses

15. The Commissioner may license any place appointed for that purpose, as a storage warehouse⁸, for storage of dutiable imported or suitable locally produced goods; as manufacturing warehouse for the manufacture of dutiable goods from imported or locally produced materials⁹. It is the warehouse or the premises that are licensed, not the person. However, the person in whose name the premises are licensed is referred to as the licensee and incurs the obligations to comply with the licence requirements. Licensed warehouses are control environments and goods in a licensed warehouse are in a control regime.

b) Removal of goods from a warehouse

16. The removal of goods from a warehouse is regulated by Sec 20 (4), which is subject to the provisions of Sec 19A and the Rules made thereunder. Sec 20 (4) provides that no goods stored or manufactured in a warehouse shall be

⁸ The Act uses the words licensed customs and excise warehouse. For ease of reading, this judgement uses the word warehouse as short for licensed customs and excise warehouse.

⁹ Sec 19 of the Act.

taken or delivered from such warehouse except in accordance with the rules and upon due entry for any of the following purposes:

- i) home consumption and payment of any duty thereon;
- ii) re-warehousing in another warehouse or removal in bond; and
- iii) export from a warehouse.

17. In terms of Sec 19A and the relevant rules, the Commissioner may, by rule, prescribe the procedure, requirements and documents relating to the entry and removal of goods from and to any warehouse or for export or for use under rebate of duty. The provisions of Sec 19A are to be read in context with Sec 120 of the Act which empowers the Commissioner to make rules relating to the control of storage and manufacture of goods in a warehouse, including removal, importation, exportation or transit of goods.

c) Special rules pertaining to removal of fuel levy goods

18. The rules made under Sec 19A pertaining to fuel levy goods, introduced what is known as the duty at source, DAS, system of rules. These rules create an exception in that unlike the situation with other goods, where liability to pay duty is triggered only for home consumption, in respect of fuel levy goods the obligation of the warehouse licensee to pay duty is triggered on removal for any of the three purposes in Sec 20 (4), namely, home consumption; re-warehousing in another warehouse or removal in bond; and export from a warehouse. The duties paid are refunded to the licensee when the movement is acquitted, meaning, when it is proved, in line with the prescripts of the Act and the Rules that the goods have been received in the country of their

destination. Further, in terms of Sec 64F (2) (a), only a licensee of a customs warehouse or licensed distributor of fuel shall be entitled to a refund of duties.

19. Perhaps, it is useful to interpose before moving further that the Act and the Rules either impliedly or expressly, do not envisage removal of fuel levy goods from a place other than a licensed warehouse, such as Tarlton.

iv) Conduct offensive to the Act, with reference to the facts of this case

a) Diversion

20. No one shall without permission of the Commissioner divert any goods for export to a destination other than that declared on entry for export or for delivery of such goods or cause such goods to be delivered in the Republic or any other country in the common customs area¹⁰. Where any person fails to comply with or contravenes any provision of this subsection the goods shall be liable to forfeiture in accordance with this Act¹¹.

b) Dealing with or in goods contrary to the provisions of the Act and Forfeiture

21. Anyone who deals with or assists in dealing with any goods contrary to the provisions of this Act¹²; or makes or attempts to make any arrangement with a supplier, manufacturer, exporter or seller of goods manufactured in the Republic or with any agent of any such supplier, manufacturer, exporter or

¹⁰ Sec 18A(9)(a).

¹¹ Sec 18A(9)(c).

¹² Sec 83(1)(a).

seller, regarding any matter to which this Act relates, with the object of defeating or evading the provisions of this Act, shall be guilty of an offence¹³.

22. Further Sec 87(1) provides that any goods imported, exported, manufactured, warehoused, removed or otherwise dealt with contrary to the provisions of this Act or in respect of which any offence under this Act has been committed shall be liable to forfeiture wheresoever and in possession of whomsoever found: Provided that forfeiture shall not affect liability to any other penalty or punishment which has been incurred under this Act or any other law, or liability for any unpaid duty or charge in respect of such goods.

c) False documents and declarations

23. Any person who makes a false statement in connection with any matter dealt with in this Act, or who makes use for the purposes of this Act, of a declaration or document containing any such statement shall, unless he proves that he was ignorant of the falsity of such statement and that such ignorance was not due to negligence on his part, be guilty of an offence and liable on conviction to a fine, and the goods in respect of which such false statement was made or such false declaration or document was used shall be liable to forfeiture¹⁴.

d) Specified offences¹⁵

¹³ Sec 83(1)(c).

¹⁴ Sec 84 (1).

¹⁵ Sec 86 (1).

24. In terms of Sec 86, Any person who:

(a) fails to advise the Controller of the receipt of any amended prescribed invoice or any credit note or debit note or of any change in the circumstances or particulars of whatever nature as declared in any prescribed invoice, which would increase the duty on such goods or exclude them from any rebate or refund or other privilege under this Act;

(d) issues two or more different prescribed invoices in respect of the same goods or fails to issue an amended prescribed invoice where any particulars declared in any prescribed invoice in respect of any goods have changed in any manner whatever;

shall be guilty of an offence and liable on conviction to a fine, and the goods in respect of which such offence was committed shall be liable to forfeiture.

v) Seizure

25. Sec 88 (2)(a)(i) provides, 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.

G. Application

i) The Applicant's conduct

26. The applicant framed invoices reflecting transnational sales of fuel by Shell or BP to a Zimbabwean entity (ies). The applicant further framed export bills of entry representing Shell or BP (its principals) as the exporter of fuel to Zimbabwean entity (ies) as consignee and purchaser. Each of these entries reflected false information, which to the knowledge of the applicant was contrary to the local and the true sale, as represented by the second invoice issued by Shell or BP, to the local purchasers. These assertions are made in each and every LOI sent to the applicant and are not placed in dispute by the applicant¹⁶. At the time material hereto, the applicant had offices in Tarlton, where the fuel was being delivered by Shell to the local entity. There the applicant issued the first invoice and gave it to the local South African purchaser. The applicant knew that its clients had not sold fuel to the Zimbabwean entities but to the local entities.

27. In dealing with the export bills of entry and invoices reflecting Shell as exporter and seller, the applicant simply expressed the view that it is not a party to the commerciality of the transaction¹⁷. It also said that it issued the invoice for customs clearance. In response to the same question, the applicant further expressed that Shell decided to be the exporter in terms of an agreement with the applicant¹⁸. Accordingly, the following conclusions are competently drawn:

¹⁶ *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* (66/2007) [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA) (10 March 2008), paragraph 13

¹⁷ Caselines 002-212 paragraph 21.1.1.

¹⁸ Caselines 002-190, paragraph 59.

27.1 By reason of the bill of entry and invoice reflecting an export to Zimbabwe, the delivery by Shell in South Africa constituted diversion of goods in violation of Sec 18(9).

27.2 Both the bill of entry and the first invoice are intentionally false and constitute an offence in terms of Sec 84(1).

27.3 Further, the goods became liable for forfeiture by reason of the applicant's own conduct, Secs 18A (9)(c), 87 (1) and 88 (2)(a) of the Act.

28. In terms of the last mentioned provision, 88 (2) (a), the Commissioner is entitled, notwithstanding anything to the contrary in this Act contained, to 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.

ii) Unpaid duty in respect of the diesel declared for export

29. Refunds along with rebates and drawbacks are provided for in Sec 75. The section provides that subject to the provisions of the Act and to any conditions the Commissioner may impose, in respect of any excisable goods or fuel levy goods manufactured in the Republic, if duly entered for export and exported in accordance with such entry, a refund of the duties (excise duty, fuel levy or Road Accident Fund levy) actually paid at the time of entry for home

consumption shall be granted as specified in schedule 6. Section 77¹⁹, Rule 19A4.05, and the notes to the items, 623.23²⁰ and 671.07²¹ provide for set-off of certain amounts.

30. Working on the basis of the spirit of the Sec 77, Rule 19A4.05 and the items, that the duties were indeed accounted for upon removal from the manufacturing warehouse, when the refund is claimed through the process of set-off on the principal's monthly excise account, the duties initially paid are refunded and operate as payment by way of set-off for other fuel removed from the warehouse as reflected in the monthly excise account. Given the Commissioner's determination that the fuel was not exported in this case, the refund was unlawfully claimed and wrongfully allowed. The Commissioner is thus entitled to demand and reclaim the duties as provided for in Sec 76A²². It

¹⁹ A licensee of a customs and excise warehouse who, in terms of the rules, is permitted to pay any duty monthly or quarterly, and who-

(i) Paid any duty for which he was not liable; or
 (ii) granted any provisional refund in terms of section 75 (1A); or
 (iii) becomes entitled to a refund in terms of item 534.00 of Schedule No. 5 or any item of Schedule No. 6 may, subject to the approval of the Commissioner, at any time within a period of two years from the date on which that duty was paid, ..., set off such duty, ... against that particular duty for which such licensee subsequently becomes liable.

²⁰ There has to be entry or deemed entry for home consumption;
 Payment of duty by a licensee of a customs and excise manufacturing warehouse;
 Exported (including supply as stores for foreign going ships).
 Compliance with Sec 19A and its rules.
 Compliance with Note 9 of Schedule 6, Part 1F;
 The goods are exported by the licensee;
 Proof of export having been obtained.

²¹ There has to be entry or deemed entry for home consumption;
 Payment of duty by a licensee of a customs and excise manufacturing warehouse
 Exported including supply as stores to foreign going ships.
 The goods are exported by such licensee of such warehouse;
 Compliance with Sec 19A and its rules;
 Compliance with Note 10 of Schedule 6 Part 3;
 Proof of export having been obtained.

²² If the Commissioner, purporting to act under the provisions of section 75 or 76, pays to any person by way of a refund or drawback any amount which was not duly payable to that person under those provisions or which was in excess of the amount due to that person by way of a refund or drawback under those provisions, that amount or the excess, as the case may be, shall be repaid by the person concerned to the Commissioner upon demand, failing which it shall be recoverable in terms of this Act as if it were the duty or charge concerned or part of such duty or charge, as the case may be.

may be added that the fact that the refund was unlawfully claimed, does not mean that it was not paid. The refund was allocated to discharge liability in respect of other goods on the excise account.

iii) Obligation to repay the refunds

31. The person concerned referred to in Sec 76A is the person to whom the refund was paid. However, the applicant incurs liability on the basis of the following:

- i) when the Commissioner demands repayment of duty in terms of Sec 76A(1), he demands it from the person to whom the refund was paid as exporter of the goods; the licensee whom exported the goods. This is liability of the exporter. However, the applicant, by reason of the relationship between it and its principals, falls within the definition of exporter.
- ii) where the principal does not repay the amount of refund demanded, the provisions of Sec 76A (1) expressly provide that the amount shall be refunded 'as if it were the duty or charge concerned. Thus, to the extent that the amount demanded is not duty, it is deemed to be duty for purposes of recoverability; and
- iii) the provisions of Sec 99(2) impose liability on the applicant as agent of its principal, not only for payment of duty but,

'for the fulfilment, in respect of the matter in question, of all obligations, including the payment of duty and charges, imposed on such importer, exporter, manufacturer, licensee, remover of goods in bond or other principal by this Act and to any penalties or amounts demanded under section 88 (2) (a) which may be incurred in respect of that matter'.

iv) Section 99(5) Time Period

32. Where the demand is made for repayment of refunded duties in terms of 76A, liability arises at the time of the demand. Similarly where the demand is made for payment in terms of Sec 88(2)(a) for either the amount in lieu of forfeiture or unpaid duties, liability arises at the time of demand. The LsOI foreshadowed the demands being made. The demands were indeed made on 29 November 2022, well within the two year period set out in Sec 99(5). As such the provision does not exclude the applicant's liability in the circumstances of this case.

33. It is on the basis of the reasoning as demonstrated in this judgment that I conclude that the Commissioner has grounds to hold the applicant liable for amounts payable in lieu of forfeiture. The order sought by the applicant cannot be granted.

H. Order

34. The application is dismissed with costs. Such costs shall include the costs of two counsel where so employed.



N.N BAM

**JUDGE OF THE HIGH COURT,
PRETORIA**

Date of Hearing: 14 November 2023

Date of Judgment: 23 July 2024

Appearances:

Applicant's Counsel: Adv J.P Vorster SC with him

Adv Adv L.K Olsen

Instructed by: EVH Inc Van Hyssteen
% Klagsbruin, Edelstein,
Bosman Du Plessis Inc
Nieuw Muckleneuk, Pretoria

Respondent's Counsel: Adv J Peter SC with him Adv

K Boshomane

Instructed by: MacRobert Attorneys
Brooklyn, Pretoria