HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 35089/2020
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 8 AUGUST 2024
SIGNATURE

In the matter between:

QI LOGISTIS (PTY) LTD Applicant

and

THE COMMISSIONER FOR SOUTH AFRICAN REVENUE SERVICES Respondent

Summary: *Taxation – Customs & Excise – Clearing Agent remaining liable for import duties payable on imported diesel unless and until sufficient proof that diesel had been exported is supplied to SARS - In this case, in respect some 67 consignments of diesel, insufficient records had been kept and insufficient "acquittal documents" had been lodged with SARS to prove that the diesel had been exported. Demands of payment of duties in excess of R14 million together with penalties and forfeiture amounts in excess of R 20 million had been issued by SARS. Clearing Agent sought to have these reviewed and set aside. Clearing Agent failed to prove incorrectness of decision to issue demand and still failed to prove exporting of the diesel. Review application refused. Punitive costs order granted on the basis of scurrilous and unwarranted attack on SARS.*

ORDER

The application is dismissed with costs on the scale as between attorney and client.

J U D G M E N T

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically with the effective date thereof being 8 August 2024.

DAVIS, J

Introduction

[1] The importation of goods into South Africa attracts import duties unless the goods are imported for purposes of export to other countries. In such a case, upon submission of the necessary "acquittal documents", proving the exporting of the goods, the liability ceases. Depending on the circumstances, a clearing agent, submitting documents on behalf of importers, shares this liability.

[2] The applicant is such a clearing agent and it was alleged that, in respect of 67 consignments of imported goods, it could not sufficiently account for the successful exporting thereof to Zimbabwe and Botswana. SARS[1] accordingly demanded payment from the applicant of some R14 million of import duties and payment of some R20 million comprising of interest, penalties and forfeiture amounts.

[3] In this application, the applicant sought to have the decision to issue the demand reviewed and set aside.

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[1] SARS is used Interchangeably as a reference to the Commissioner for the South African Revenue Service or the South African Revenue Service itself.

The applicant's case

[4] The applicant has been registered as a clearing agent since 2008. As such it is routinely instructed by importers, transporters, shippers and exporters to prepare and process customs clearance documentation "through SARS". It thereby acts as a clearing and forwarding agent[2].

[5] The matter in question relates to "RIT documentation"[3] prepared by the applicant and submitted to SARS on behalf of Black Knight Oil Traders (Pty) Ltd, Corporate Treasury Solutions, Elkrus Freight Dynamics (Pty) Ltd, Iltech Energy (Pty) Ltd, Manong Management Consultants (Pty) Ltd, Masaula Trading and Logistics (Pty) Ltd, Rence Oil and Gas (Pty) Ltd and Zakhele Supply.

[6] The purpose of submitting the RIT documentation was to obtain the authority to "proceed to border", meaning that the goods mentioned in the RIT documentation would enter into South Africa with the sole purpose of being transported to a border from whence it would be exported again from South Africa to a specified foreign country.

[7] The goods in question, all related to consignments of diesel.

[8] The applicant stated that, in the "normal course of business" it obtained the relevant export documentation, proving that the imported diesel had indeed been exported. As such, it attracted no liability for payment of import duties.

[9] The applicant stated that, when it received the proof of export documents, also called by the parties the "acquittal documents", it "*had no reason to think or suspect that there could or would be any problems with the documentation*"[4]. It was therefore surprised[5] to receive a "notice of intention to raise a debt" (NOI) from the office of the SARS Lebombo Border Post on 11 February 2019. In terms of the NOI SARS expressed the intention to hold the applicant liable for customs duties, penalties and RAF and fuel levies in an amount in excess of R47 million for alleged

[2] Par 6.1 of the Founding Affidavit.
[3] "Removal in transit" documentation.
[4] Par 8.1.3 of the Founding Affidavit.
[5] Par 8.1.5 of the Founding Affidavit.

contraventions of sections 18(13), 75(19), 88(2)(a) and 91 of the Customs and Excise Act[6] (the Act).

[10] Despite the applicant's response to the NOI, it received a second NOI on 9 April 2019 relating to 26 consignments on behalf of Rence Oil and Gas (Pty) Ltd. The amount sought to be raised in this NOI was over R12 million.

[11] Despite the applicant's protest that the second NOI appears to be a partial duplication of the contents of the first NOI, SARS subsequently issued a letter of demand on 3 July 2019. It is this letter which forms the basis of this application.

In it, payment of R14 199 139, 35 is demanded in respect of customs duties and R20 881 336, 00 in respect of penalties and forfeiture amounts.

[12] The applicant's case is that, save for the submission of the RIT documentation, it had nothing further to do with the transportation, sale or export of the diesel. It further accepted and contended that the acquittal documentation were all in order and that it therefore has not attracted any liability to SARS as claimed.

[13] The applicant further contended that SARS had not furnished it with any reasons for having raised the duties and penalties and that its decision to do so, should be reviewed under PAJA[7] and be set aside.

[14] The applicant also complained that, despite SARS having provided a breakdown of the amounts claimed, it had failed to provide sufficient details of the basis of its claim. The applicant accused SARS of "*… evidently demonstrating bias and acting in pursuance of some undisclosed unlawful motive, steadfastly ignoring the provisions of section 99(2) of the Act*"[8].

[15] The breakdown provided to the applicant by SARS was as follows:

Customs duty	R109 434.60

[6] 91 of 1964.
[7] The Promotion of Administrative Justice Act 3 of 2000.
[8] Par 10.1 of the Founding Affidavit.

RAF Levy	R5 280 219.45
Fuel Levy	R8 809 485.30
Penalties	R396 000.00
Forfeiture ito section 88(2)(a)	R20 485 366.00
Total	R35 080 475.35

The law

[16] The Supreme Court of Appeal (the SCA) has described the purpose of the Act as follows: "*The object of that Act (insofar as it relates to import duty) is to ensure that duty is collected on goods that are imported into this country and its provisions are mainly directed towards that end*"[9].

[17] Where, as in this matter, multiple parties are involved in such importation, including importers and a clearing agent, the SCA continued as follows: "*It is not surprising that liability for the payment of duty should be imposed upon more than one person …*"[10].

[18] Both the Court and the Act were alive to the fact that it cannot be assumed that only one person would undertake the process of importing goods, keeping it either in a bonded warehouse or directly transporting the goods to the next border post and thereafter exporting it.

[19] The scheme of the Act is therefore that duties become payable when goods are imported into the country, but the liability is suspended, if the goods are "removed in bond"(RIB) or "removed in transit"(RIT) and the liability would cease

[9] *Standard General Insurance v Commissioner for Customs and Excise* 2005 (2) SA 166 (SCA) at [27].
[10] Ibid.

should the goods actually be exported, with the result that its entry into the customs area was simply temporary or transitional[11].

[20] This much is clear from Section 18 of the Act. Section 18(1)(a)(i) and (v) provide that *"… any importer or any clearing agent licensed in terms of section 64B, appointed by such importer … may enter such goods for removal in bond and may remove such goods or cause such goods to be removed – (aa) … to any place in the Republic appointed as a place of entry or warehousing under this Act or to any place outside the Republic: Provided that any goods which are in transit through the Republic … may only be so entered and removed or caused to be so removed by such licensed clearing agent …*".

[21] Section 18(2) then further provides that "*In addition to any liability for duty incurred by any person under any provision of this Act, but subject to the provisions of section 99(2), the person who enters any goods for removal in bond and who removes or causes such goods to be so removed shall, subject to the provisions of subsection (3) be liable for the duty on all goods which are so entered and so removed in bond*".

[22] In terms of section 18(3)(b) any person who is liable for duty as contemplated in section 18(2) must obtain valid proof that liability has ceased as specified in paragraph 18(1)(a)(i) or (ii) within a prescribed period. Proof of such information and documents relating to the removal (exporting) of the goods (the acquittal documents) must be kept available for inspection.

[23] Goods imported for removal in bond or for removal in transit for export may not be directed to a destination other than the destination declared upon the importation of the goods without the permission of the Commissioner of SARS[12].

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[11] Section 75 (19) of the Act provides as follows: "*No person shall, without the permission of the Commissioner, divert any goods entered under rebate of duty under any item of Schedule No. 3, 4 or 6 or for export for the purpose of claiming a drawback or refund of duty under any item in Schedule No. 5 or 6 to a destination other than the destination declared on such entry or deliver such goods or cause such goods to be delivered in the Republic otherwise than in accordance with the provisions of this Act and, in the case of goods entered the goods or on whose behalf the goods were entered*".
[1212] Section 18 (13)(a)(i).

[24] In terms of section 18(13)(a)(iii), where any person fails to comply with or contravenes this portion of the Act, the goods so imported shall be liable to forfeiture.

[25] A clearing agent licensed as such as contemplated in terms of section 64B of the Act shall be liable for customs duties in respect of any entry made or bill of entry delivered.

[26] Section 99(2) of the Act confirms that a clearing agent shall not only be liable for the duties in question, but also be liable for the fulfillment of all the obligations of the importer or exporter, including penalties. These penalties and forfeiture are, in turn, provided for in section 88(2)(a) of the Act[13].

[27] In terms of section 99(2) of the Act however, the liability of a clearing agent shall cease *"…if he proves that – (i) he was not a party to the non-fulfillment by any such importer, exporter … remover of goods in bond … (ii) when he became aware of such non-fulfillment, he notified the Controller thereof as soon as practicable and (iii) all reasonable steps were taken by him to prevent such non-fulfillment*".

Was the law complied with and has the applicant's liability ceased?

[28] The scope of the enquiry regarding the above question had been widened by the applicant beyond what has been set out above, by the applicant having introduced new matter in its replying affidavit. Due to the fact that SARS had delivered a duplicating affidavit in respect of the new matter, its introduction as well as SARS' further affidavit were, in the interests of justice, allowed.

[29] The further evidence introduced by the applicant in its replying affidavit, primarily consisted of two affidavits by Messrs Lewis and Makwenyane respectively. These affidavits indicated that the applicant was a "sub-agent" of a "main agent", Biocharl Logistics (Pty) Ltd or other "unnamed clearing agents".

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[13] Section 88(2)(a)(i): "*If any goods liable for forfeiture under this Act cannot readily be found, the Commissioner may …. Demand from any person who imported, exported, warehoused, removed or otherwise dealt with such goods contrary to the provisions of 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 …*".

[30] The further evidence was presented in an attempt to indicate that, in respect of line items 1 -18, 47 and 48 of SARS' schedule of documents relating to the various consignments, the export of the diesel relating to these consignment had ostensibly been verified by an officer of the Customs office in Komatipoort. SARS was further accused of not having disclosed certain correspondence between the parties. Reliance was also placed on the absence of disclosure of a number of the entries in question having been captured, allegedly for export (or "exit") on the SARS Service Manager System (the SMS), ostensibly proving exportation.

[31] The widening of the scope was therefore an attempt to show that SARS' own documentation showed that the diesel in question had been exported and that SARS failed to acknowledge this. Insofar as the applicant sought to rely on this evidence as part of its case (i.e as if part of its founding papers) then the duplicating affidavit thereto should be treated as if an answering affidavit to the supplemented case.

[32] I shall firstly deal with this widened scope of the applicant's case. In the replying affidavit, complaints were expressed that in respect of at least 13 consignments SARS' SMS system would show that these had been exported. In the duplicating affidavit screenshots of all 13 SMS entries were produced. Of these, only one (line item 67) showed that the consignment was in fact successfully exported. SARS readily conceded that this was an "inadvertent error" by the investigative team.

[33] In respect of the remainder of the 12 entries, although ten of them had been marked with the message "*automated manifest has successfully been marked for exit …*", this only indicated that the consignments had been logged as such at the border post, but did not prove that they had indeed been exported.

[34] Insofar as "vouchers of correction" appear to have been passed on two of the line items that had only been done months after the letter of demand (one even after the application had been launched) and even in respect of these two consignments, the RIB entries had not yet been cancelled.

[35] The applicant had also argued that its liability should have been reduced in respect of five further consignments (line items 19, 20, 21, 22, and 23). This argument was based on "DP" (duty paid) entries made in respect of these consignments. If this was correct, it purported to indicate that the consignments had not been exported, but that the requisite duties had been paid. Had this been correct however, Vouchers of Correction, would have been issued whereby the entries would have been cancelled, but this had not happened. It was only in respect of line item 19 that such cancellation had in fact taken place, but then only 10 months after the launch of the application.

[36] In order to understand the reference to "line items", a word of explanation is necessary: the 67 consignments in respect of which SARS held the applicant liable were listed in a schedule which initially comprised of 92 items. In the schedule each consignment is indicated by a set of entries in a separate horizontal line. Each line contains particulars under various headings for separate vertical columns. These in turn refer to the name of the clearing agent involved, the client, the border post of entry and the reference number of the entry, the value of the consignment, the quantity of diesel and a calculation of the duties, the amount of the RAF and the fuel levies payable and the total liability, thereby making up a separate "line item" for each consignment. In SARS' internal system, should a full and valid set of acquittal documents have been produced, a line item would have been removed by having the liability "canceled". This is done by a Voucher of Correction (VOC). In the alternative, should a consignment not have been exported, then the full duty should have been paid and this should also be reflected as such.

[37] The schedule containing all abovementioned line items had been attached to the letter of intent dated 11 February 2019 and which, as stated therein, had been furnished by SARS to the applicant in terms of section 3(2) of PAJA in order to afford the applicant the opportunity to respond to SARS' *prima facie* audit findings.

[38] Before finally dealing with the evidence subsequently tendered by the applicant, one should also bear in mind that SARS had already in its letter of demand referred to earlier, furnished the following reasons why the liability had been imposed subsequent to having considered the applicant's response to the invitation

to deal with the prima facie findings: "*Further to the notice of intent dated 2019/02/11 of which we did receive a response on your letter dated 2019-02-12 and the response from Custom Consulting Dispute Resolution Specialist, Ref M. Maritz / db/ MAT4103, the matter has been decided as herein below …*"

[39] A background was then provided, referring to the initial documents submitted by the applicant whereafter initial findings are described thus: "*Upon analysing the said documents out office established that some of the entries were not marked for arrival and exit at both ports of exit which is Beitbridge border post, for goods removed in transit (RIT) and Botswana borders, for goods removed in Bond (RIB). On the 27th August 2018 and 26th September 2018 letters requesting documents regarding movements of the trucks/hauliers concerned were sent and to date no response has been received from your office providing such documents or clarity of issues raised thereof. Lebombo Management acknowledges receipt of all communications, however this did not provide any clarity on the issue raised of failure to proof that good have reached their final destination. It is in light of failure on your part to provide legitimate information/documents requested that the Commissioner has decided to proceed with a letter of demand which is due and payable on or before 12th July 2019*".

[40] Thereafter, an "application of the law to the facts" exercise followed with reference to section 18(13) of the Act and the entry of the diesel consignments through the Lebombo border post into South Africa. The following was also pointed out to the applicant: "*According to the provisions of section 75(19), the goods in question were entered under rebate of duty, meaning that payment of duties were deferred upon evidence shown to the Commissioner that the goods were exported outside the Republic. In terms of Rule 18.07 this office has requested the documentation to prove that the goods that were removed to a place in a customs common area have been duly entered at that place, and further that those that were destined in Africa beyond the borders of common customs area have been duly taken out that area*".

[41] The letter continued by setting out, in tabular form, the calculation of the amounts mentioned in paragraph 15 above before concluding with references to the remedies available to the applicant.

[42] It is against this background that the evidence and the applicants' claim that the decision should be reviewed on the following grounds (as set out in the concluding paragraphs of its founding affidavit) should be assessed: "*In view of the above it is respectfully submitted that the decision to hold the applicant liable … borders on the absurd and should be reviewed and set aside. Evidently the respondents' approach is that the applicant, being a clearing agent, is an easy target and scapegoat. This is irrational, unlawful and invalid as it is not supported in law and there is no factual substantiation for the conduct and it should be reviewed and set aside*".

[43] In the heads of argument delivered on behalf of the applicant, the grounds of review are somewhat less emotionally set out. These were that the respondent had erred in fact and in law in having concluded that the applicant retained any liability despite its mandate having been terminated after the importation of the diesel and by having concluded that the applicant's liability had not ceased as contemplated in section 99 of the Act.

[44] Part of SARS' case against the applicant was that it had failed to keep and furnish records in terms of section 18(3) of the Act to show that goods cleared by it as RIB or RIT have subsequently been exported out of the country. On the evidence presented, this claim was clearly substantiated. The fact that the applicant could not, even after the launch of the application prove the exporting of all but two of the consignments (which was in one instance even only done after the fact) confirms that SARS' impugned decision was therefore both rational and factually correct.

[45] The applicant's case that its involvement in the importing of the diesel was limited to the clearance of the diesel for entry and not how the diesel was subsequently dealt with by the "main clearing agent" and its principals, ignores the provisions of the Act.

[46] The fact that, in some instances, the “main clearing agent” or the applicant’s principals may subsequently have caused vouchers of correction to be passed, changing entries in respect of some of the consignments to DP (duty paid) only proved that the diesel referred to in those entries had never been exported as the applicant had initially submitted to SARS that it would. This new ground of seeking to avoid liability occurred and only came to the fore based on facts alleged to have occurred after the impugned decision had already been taken. Should these facts be established (which it had not yet sufficiently been done) then some adjustment may be notionally be claimed as the duties in question had been paid, but that does not mean that the decision, based on the facts at the time, had incorrectly been taken.

[47] In addition to the above, in the duplicating affidavit, SARS dealt extensively with an analysis of those acquittal documents which had (only) been furnished in the applicant’s replying affidavit. Although the documents produced by the witness Lewis might on the face of it show completion of some export documents, they still fell short of proving actual exporting. The same applies to the documents supplied by Mr Dobby Makwenyane. The stamps or signatures ascribed to customs officials on covering letters of documents submitted to them and on which these witnesses and the applicant relied, merely proved an acknowledgment of receipt. After such receipt, the relevant customs official “goes into” the SMS system and then needed to verify that all processes have been completed. As already indicated above, this verification indicated that the processes have not been completed to the extent that SARS could have been satisfied that the diesel consignments have actually been exported. In fact, in some instances, falsification of export documentation was discovered.

[48] I therefore find no evidence supporting the applicant’s claims referred to in paragraph 38 above. The failure by the applicant to produce acquittal documents after the NOIs had been issued also indicate that the release of liability as provided for in section 99(2) of the ACT had not occurred. Although the applicant in its papers sought to rely on this section, it had not produced any evidence that it had taken all reasonable steps to prevent non-fulfillment of the exporting requirements or that it had reported to the customs controller any such non-fulfillment, as required by the

section. As a clearing agent, the applicant's liability incurred upon importation of the diesel therefore never terminated. It must follow that the review application must fail.

Costs

[49] Costs should follow the event. It is trite that a court has a discretion regarding the award of costs and the scale thereof. In this case, the applicant has, on numerous occasions in its papers, accused SARS and its officials of unlawful conduct. Scurrilous accusations were made of allegedly falsely targeting the applicant. These allegations are defamatory and were made without a factual basis. Irrespective of the applicant's views of the correctness of the impugned decision, the subsequent unwarranted attack made on oath in court papers, merit a sanction as a measure of this court's disapproval of such conduct by a litigant. In the exercise of the court's discretion, a punitive costs order will therefore be issued.

Order

[50] Consequently, the following order is made:

> The application is dismissed with costs on the scale as between attorney and client.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 13 May 2024
Judgment delivered: 8 August 2024

APPEARANCES:

For the Applicants:	Advocate J M Barnard
Attorney for the Applicants:	VFV Attorneys, Pretoria.
For the Respondent:	Adv M P D Chabedi SC
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