REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION PRETORIA

CASE NO: 2022/026798

DOH: 25 NOVEMBER 2024

DECIDED: 14 FEBRUARY 2025

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

(3) REVISED

DATE: 14 FEBRUARY 2025

SIGNATURE

In the matter between:

WOODS WAREHOUSING (PTY) LTD **Applicant**

and

THE COMMISSIONER FOR THE SOUTH AFRICAN AFRICAN REVENUE SERVICES **First Respondent**

S PILLAY **Second Respondent**

H NAICKER **Third Respondent**

P RAMBURATH **Fourth Respondent**

A PILLAY **Fifth Respondent**

This judgment has been handed down remotely and shall be circulated to the parties by way of email / uploaded on Caselines. Its date of hand down shall be deemed to be 14 February 2025.

ORDER

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1. The application is dismissed.
2. The applicant must pay the respondent's costs, including the costs of two counsel, on scale C for Adv van der Merwe and scale B in respect of Adv Mothibe.

JUDGMENT

Bam J

Introduction

1. The applicant brings the present application for review in terms of Rule 53 of the Uniform Rules, *inter alia,* to review and set aside four letters of demand, hereinafter referred to as decisions, issued by the Second to the Fourth respondents. The letters, read together, demanded payment of the total amount of R 7 113 015, 00 (Seven Million One Hundred and Thirteen Thousand and Fifteen Rand) from the applicant. The decisions were confirmed on appeal by the fifth respondent. The amount demanded, according to SARS, represents the value of the missing goods for duty

purposes or the export value of the goods, plus any further unpaid duties. The demand, it was said, is based on the applicant's failure to demonstrate, by means of due entry, that goods removed from its warehouse for export were removed by a licensed remover of goods in bond, RoG, and were delivered in terms of such entry or were exported. The respondents oppose the application. I begin by introducing the parties and follow on with the background.

Parties

2. The applicant, Woods Warehousing, (Pty) Ltd, is a private company duly incorporated in terms of South African laws, with its principal place of business in Gosforth Park, Germiston, Gauteng. The first respondent is the Commissioner for the South African Revenue Service (Commissioner). The Commissioner is appointed in terms of section 6 of the SARS Act[1] and is charged, *inter alia*, with the administration of the Customs and Exercise Act[2], the Act. The first respondent's principal place of business is described as *Lehae la* SARS in Bronkhorst Street, Nieuw Muckleneuk, Pretoria, Gauteng. The second to the fifth respondents are individuals in the employ of the first respondent. As such, I use respondent when referring to the five respondents or the Commissioner, or SARS.

Background

[1] Act 34 of 1997.
[2] Act 91 of 1964.

3. The applicant has a licence for a customs and excise storage warehouse (warehouse) as provided for in section 19 (1) of the Act. As a licensee of a warehouse, the applicant must comply with certain obligations, which include self-assessment and voluntary declaration of various activities governed by the Act. This includes ensuring compliance with the Act for goods stored, removed or exported.

4. During May to August 2021 the respondent's Tactical Intervention Unit conducted a post inspection/investigation in connection with four bills of entry, BsoE, relating to container numbers T[...]; S[...]; B[...] and a Breakbulk (consignments or simply goods), which were initially imported, stored in, and exported from the applicant's warehouse.

5. Upon receipt of the applicant's submissions, the respondent, during or about September 2021, issued four letters of demand (decisions) with findings. At the heart of the letters is the finding that the applicant had released goods to an unauthorised person; that the SARS entry and exit system through which export entries are acquitted at the border, reflected the status, '*Manual manifest ready to mark on arrival*', which means, the goods had not exited the border; that the goods were diverted; and the goods remain un-acquitted. The decisions further held that in terms of section 19(7) of the Act, liability on the part of the applicant as licensee, had not ceased as there was no proof that the goods had been duly entered in terms of section 20(4), and delivered or exported in terms of such entry. As the goods could

not be found, the applicant became liable for an amount equal to the value for duty purposes or the export value of such goods, plus any unpaid duty.

6. The genesis of the missing goods is narrated by SARS in its answering affidavit, the details of which have not been seriously disputed by the applicant. SARS explains: The goods in question were originally imported and were stored in the applicant's storage warehouse for purposes of export. In respect of each of the consignments is a Bill of Entry, BoE, referred to as SAD 505, which, amongst others, reflects the name of the RoG for purposes of export procedures.

7. The name of the RoG according to the first three BsoE and road manifests was recorded as Reddy Cargo, (Reddy). According to the fourth BoE, the remover recorded is Procet Freight, (Procet). The applicant, in terms of its duties as per the Act, had to release the goods to the removers recorded in the BsoE. The applicant did not do so. Instead, the goods were released to an unauthorised third party. As to how this came about is explained by the deponent to the applicant's founding papers in paragraph 69. What is said is that upon realising that the haulier that had arrived to collect the goods was not the same as recorded in the BsoE and the road manifest, the applicant contacted the clearing agent and the importer. Having made that contact, the deponent records that the clearing agent and the importer amended their records. Following such interaction and the alleged amendment between the clearing agent and the exporter, the applicant released the goods to the unauthorised person.

8. When SARS became aware of what had happened, it directed enquires, *inter alia*, to the importer/exporter, Sky Airfreight (Pty) Ltd, (Sky) and the clearing agent, A&E Holdings (Pty) Ltd (A&E). The results of the investigation initially indicated that Reddy and Procet had authorised the third party, to whom the goods were released, to use their bond codes. When these details were verified with Reddy and Procet, it became clear to SARS that no such authorisation had taken place. Neither Reddy nor Procet had any knowledge of the transaction. Reddy filed an affidavit refuting the allegations.

9. SARS makes the point in its papers that the applicant is a seasoned licensee. As such, the applicant enjoys certain privileges and advantages. The applicant, according to SARS, was well aware that the purported informal amendment is not how corrections are effected. A voucher of correction, VoC, ought to have been passed. It is only through a VoC that SARS' records could be amended and not via an informal interaction between the clearing agent and the importer/exporter. Without a VoC SARS' systems would continue to reflect, as it happened in this case, the original authorised removers, as per the BsoE and road manifests. SARS makes the point in its papers that it appears that the applicant became party to what is yet another fraud perpetrated against the fiscus.

Applicant's case

10. There is not much said by the applicant about the events of the day in question, when the goods were handed to an unauthorised remover. In furtherance of its case, the applicant puts the blame squarely at SARS' door. It accuses SARS of negligence in failing to verify the declarations made by the various role players. The applicant says that SARS lacks resources. It claims that it is as much a victim of fraud as is SARS. It also asserts that SARS' calculations, its the penalties and forfeiture amounts are demanded and calculated in a manner that is materially influenced by an error of law and are arbitrary. The applicant raises the defence of prescription in respect of the duties related to one of the consignments and it says SARS is bias and has acted capriciously in applying its Customs Policy. Finally, the applicant contends that the record of decision (record) provided, which is pivotal to the quality of investigations carried out by SARS, is incomplete.

Respondent's case

11. The respondent denies the charges levelled against it by the applicant. It submits that the applicant's liability is based on its wilful release of the goods from its warehouse to an unauthorised haulier, whose name was not reflected in the official documents authorised by SARS. SARS submits that the applicant is bound by law to demonstrate by means of due entry that goods removed from its warehouse for export were removed by an RoG and were delivered in terms of such entry or were exported. Since the goods cannot be traced and liability had not ceased, the applicant became liable for an amount equal to the value for duty purposes or the export value of such goods, plus any further unpaid duties thereon.

12. Before moving further with this discussion, I consider it necessary to first ground the concepts of a controlled environment and the significance of the roles of a licensee of a warehouse and licensed remover of goods. These were discussed in in *Gaertner and Others* v *Minister of Finance and Others*:

> '[20] The Act contains various provisions aimed at controlling the movement of imported and excisable goods until any relevant duty has been paid. The reasons for this are not hard to discern. The duty payable on goods is determined with reference to their value, character and quantity. SARS may thus wish to examine the goods to see that they accord with what it has been told…. An important feature of SARS' control is that goods may not be moved from a particular controlled environment until 'due entry' has been made of the goods, even though the goods might only be moving from one controlled facility to another….
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> [24] The licensed warehouse.. is itself a controlled facility…If the goods in the warehouse are entered for export, they will be physically removed from the controlled environment but liability for customs duty will remain until the prescribed proof is furnished to SARS that the goods have left the common customs area. SARS' right to be paid customs duty if proof of export is not furnished is safeguarded by the requirements that in general removal for export may be done only by a licensed remover in bond and that security be furnished… Imported goods are thus meant only ever to leave a controlled environment upon due entry for home consumption with payment of duty or (upon provision of security) for removal in bond or export.'[3]

Compliance under the Act is driven through a system of self-regulation

[3] (12632/12) [2013] ZAWCHC 54; 2013 (6) BCLR 672 (WCC); 2013 (4) SA 87 (WCC); [2013] 3 All SA 159 (WCC); 75 SATC 184 (8 April 2013), paragraphs 20, and 24.

13. It is worth spending some time to consider how compliance with the Act works. This is important in light of the claims made by the applicant regarding SARS' lack of capacity and failure to verify the declarations made by the various role players. The Constitutional Court in *First National Bank of SA Limited t/a Wesbank* v *Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank* v *Minister of Finance* remarked:

> 'It is important to note that the Act is premised on a system of self-accounting and self-assessment. There exists no viable method by which the Commissioner can keep track of all goods imported that might result in customs duty being payable under the Act, and whereby such duties may be collected automatically. The Commissioner therefore verifies compliance through routine examinations and inspections and through action precipitated by suspected evasion.'[4]

14. In similar fashion to compliance with the Income Tax Act[5] and the VAT Act[6], it is the duty of every person or entity whose activities require compliance with the Act to comply. For example, under the VAT Act or Income Tax Act, the importer's/manufacturer's/exporter's duty to comply with these Acts is immutable and independent of any action that the Commissioner may or must take. As in many functioning self-regulating systems, there are consequences for non-compliance. The self-regulatory nature of the system also means that the Commissioner verifies compliance only after the fact and then only in limited instances.

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[4] (CCT19/01) [2002] ZACC 5; 2002 (4) SA 768; 2002 (7) BCLR 702 (16 May 2002), in paragraph 15.
[5] Act 58 of 1962.
[6] Act 89 of 1991.

Legal framework governing reviews

15. The standard applied by our courts to judicial reviews is captured in *Dragon Freight (Pty) Ltd and Others* v *Commissioner for the South African Revenue Service and Others*. There the court noted:

'[14] In review proceedings, PAJA constitutes the prism through which a Court can determine whether an administrative decision was rational, reasonable or procedurally correct. This is the essence of the Court's review function. The Court is not called upon to decide the correctness or otherwise of the decision.

[15] The role of the Courts in review proceedings was succinctly stated in Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Another 2004 (4) SA 490 at [45] to [46] where the following was said:

"[45] Although the review functions of the court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The court should take care not to usurp the functions of 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."[7]

Relevant statutory provisions

16. Section 18: Removal of goods in bond:

(1) Notwithstanding anything to the contrary in this Act contained –

(b) except as otherwise prescribed by rule -

(i) the importer or owner of any imported goods landed in the Republic

(ii) ..

[7] (13584/2020) [2021] ZAGPPHC 197 (17 March 2021), paragraphs 14-15.

(iii) ..;

(iv) the licensee or owner of any imported goods stored in a customs and excise storage warehouse; or

(v) any clearing agent licensed in terms of section 64B appointed by such importer, owner of licensee, may enter such goods for removal in bond and may remove such goods or cause such goods to be removed -

(aa) ..

(bb) in the case of goods contemplated in subparagraphs (ii), (iii) or (iv), to any warehousing place in the Republic or to any place in any other country in the common customs area appointed as a warehousing place for re-warehousing at that place in another such warehouse.

(2) 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 or who may remove in bond any goods contemplated in subsection (1) 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.

(3)

(a) Subject to subsection (4), any liability for duty in terms of subsection (2) shall cease if –

(ii) goods destined for a place in the common customs area, have been duly entered at that place; or

(iii) (aa) goods destined for a place beyond the borders of the common customs area have been duly taken out of that area; or

(bb) in circumstances and in accordance with procedures which the Commissioner may determine by rule the goods have been duly accounted for in the country of destination.

(b) Any person who is liable for duty as contemplated in subsection (2) must—

(i) obtain obtain valid proof that liability has ceased as specified in paragraph (a)(i) or (ii) within the period and in compliance with such requirements as may be prescribed by rule;

(ii) keep such proof and other information and documents relating to such removal as contemplated in section 101 and the rules made thereunder available for inspection by an officer; and

(iii) Submit such proof and other information and documents to the Commissioner at such time and in such form and manner as the Commissioner may require; or

(iv)

(4) If -

(a) liability has not ceased as contemplated in subsection (3)(a); or

(b) the goods have been diverted or deemed to have been diverted as contemplated in subsection (13), such person shall, except if payment has been made as contemplated in subsection (3)(b)(iv), upon demand pay—

(i) the duty and value-added tax due in terms of the Value-Added Tax Act, 1991 (Act No. 89 of 1991), as if the goods were entered for home consumption on the date of entry for removal in bond;

(ii) any amount that may be due in terms of section 88(2); and

(iii) any interest due in terms of section 105:

Provided that such payment shall not indemnify a person against any fine or penalty provided for in this Act.

17. Section 18A deals with exportation of goods from a customs 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 or she so exports.

(2)

(a) …

(b) An exporter who is liable for duty as contemplated in subsection (1) must—

(i) obtain valid proof that liability has ceased as specified in paragraph (a)(i) or (ii) within the period and in compliance with such requirements as may be prescribed by rule;

(ii) keep such proof and other information and documents relating to such export as contemplated in section 101 and the rules made thereunder available for inspection by an officer; and

(iii) submit such proof and other information and documents to the Commissioner at such time and in such form and manner as the Commissioner may require; or

(iv)

(aa) notify the Commissioner immediately if liability has not ceased as required in terms of paragraph (a)(i) or (ii) or valid proof has not been obtained as contemplated in subparagraph (i); and

(bb) submit payment of duty and value-added tax payable in terms of the Value-Added Tax Act, 1991 (Act No. 89 of 1991), together with such notification as if the goods were entered for home consumption on the date of entry for export.

2(c) Subject to subsection (3), there shall be no liability for duty on any goods where such liability was discovered as a result of, or following upon, any such inspection by an officer or a request by the Commissioner as contemplated in paragraph (b)(ii) and (iii), respectively, where that liability occurred on a date earlier than two years prior to the date on which such inspection commenced or such request was made.

(3) If-

(a) the liability has not ceased as contemplated in subsection (2) (a); or

(b) the goods have been diverted or deemed to have been diverted as contemplated in subsection (9), such person shall, except if payment has been made as contemplated in subsection (2) (b) (iv), upon demand pay-

(i) the duty and value-added tax due in terms of the Value-Added Tax Act 1991 (Act No. 89 of 1991), as if the goods were entered for home consumption on the date of entry for export;

(ii) any amount that may be due in terms of section 88 (2); and

(iii) any interest due in terms of section 105:

Provided that such payment shall not indemnify a person against any fine or penalty provided for in this Act.

(4) No goods shall be exported in terms of this section –

(a) until they have been entered for export; and

(b) unless, except as otherwise provided in the rules, they are removed for export by a licensed remover in bond as contemplated in section 64D.

(9) (a)..

(b) Goods shall be deemed to have been so diverted where-

(i) no permission to divert such goods has been granted by the Commissioner as contemplated in paragraph (a) and the person concerned fails to produce valid proof and other information and documents for inspection to an officer or to submit such proof, information and documents to the Commissioner as required in terms of subsection (2) (b) (ii) and (iii), respectively;

(ii) any such proof is the result of fraud, misrepresentation or non-disclosure of material facts; or

(iii) such person makes a false declaration for the purpose of this section.

(c) 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 Act.

18. Section 19: Customs and excise warehouses

(1) The Commissioner may license at any place appointed for that purpose under the provisions of this Act, warehouses (to be known as customs and excise warehouses) …

(2) Such warehouses may be licensed either for the storage of dutiable goods (to be known as customs and excise storage warehouses) or for the manufacture of dutiable goods (to be known as customs and excise manufacturing warehouses), but the Commissioner may license a storage and a manufacturing warehouse on the same premises provided they are separated in a manner approved by him.

19. Section 20(4): Removal of fuel levy goods from a licensed warehouse

Subject to section 19A, no goods which have been stored or manufactured in a customs and excise warehouse shall be taken or delivered from such warehouse except in accordance with the rules and upon due entry for any of the following purposes-

(a) ..;

(b) re-warehousing in another customs and excise warehouse or removal in bond as provided in section 18;

(d) export from customs and excise warehouse (including supply as stores for foreign-going ships or aircraft).

20. Section 20 (4) *bis*

No person shall, without the written permission of the Controller, divert any goods entered for removal from or delivery to a customs and excise warehouse, except goods entered for payment of the duty due thereon, to a destination other than the destination declared on entry of such goods or deliver or cause such goods to be delivered in the Republic except in accordance with the provisions of this Act.

21. Section 87: Goods irregularly dealt with liable to forfeiture.-

(1) 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.

22. Section 88(2) (a) (i)

If any goods liable to forfeiture under this Act cannot readily be found, the Commissioner may, notwithstanding anything to the contrary in this Act contained, demand from any person who imported, exported, manufactured, warehoused, removed or otherwise dealt with such goods contrary to the provisions of this Act or committed any offence under this Act rendering such goods liable to forfeiture,

payment of an amount equal to the value for duty purposes or the export value of such goods plus any unpaid duty thereon, as the case may be.

(b) …

Applicant's grounds of review: (1) The applicant is neither an importer/exporter/nor clearing agent

23. The applicant in its founding and supplementary affidavits makes much of the fact that it released the goods based on the fraudulent information submitted to SARS. It criticises SARS for failing to enforce the Act and failing to verify the declarations made by the various role players. It suggests that SARS lacks resources. The applicant further notes that it had played its role and, in the event SARS required its assistance in carrying out further due diligence, SARS ought have said so.

24. I have to start by recording that none of the statements made by the applicant disturb its duties and consequently, its liability as a customs warehouse licensee. What was expected of the applicant was to release the goods as per the BsoE and road manifests authorised by SARS. This, the applicant failed to do and it has no answers for its failure. The issue here is not whether the applicant is importer/exporter or clearing agent. Nor is it about what SARS is and is not capable of doing. It is irrelevant that the applicant characterises the information on which SARS authorised the release of the goods as fraudulent.

25. The below relevant subsections from section 19 are instructive:

> ‘(6) In addition to any liability for duty incurred by any person under any other provision of this Act, the licensee of a customs warehouse shall, subject to the provisions of subsection (7), be liable for the duty on all goods stored or manufactured in such warehouse from the time of receipt into such warehouse of such goods or the time of manufacture in such warehouse of such goods, as the case may be.
>
> (7) Subject to the provisions of subsection (8), any liability for duty in terms of subsection (6) **shall cease when it is proved by the licensee concerned that the goods in question have been duly entered in terms of section 20(4) and have been delivered or exported in terms of such entry.** (Emphasis added)

26. Section 18A (9) (b) provides that goods shall be deemed to have been so diverted where: (a) no permission to divert such goods has been granted by the Commissioner as contemplated in paragraph (b) and the person concerned fails to produce valid proof and other information and documents for inspection to the Commissioner as required in terms of subsection (2) (b) (ii) and (iii), respectively.

27. 18A(3) provides that if liability has not ceased and the goods have been or are deemed to have been diverted as contemplated in subsection 9, the person shall, except where payment has been made, pay duty and VAT as if the goods were entered for home consumption and any amounts due in terms of the forfeiture provision 88(2) (a), plus interest in terms of section 105. Section 18A(4) provides that

no goods shall be exported until they are entered for export and removed for export by an RoG as contemplated in section 64D.

28. The applicant released the goods to an authorised third party, following its interaction with the importer and the clearing agent, and the alleged amendment, which clearly did not include SARS. It now claims it had no way of knowing that the clearing agent had not appointed the person stipulated in the bills of entry and only SARS would have such knowledge. These statements serve no purpose. The applicant ignored what was in the BsoE and road manifest and chose to follow an informal amendment, which, on its own version, was after SARS' authorisation of the release of the goods.

29. In *Zacpak Cape Town Depot (Pty) Ltd* v *CSARS& O*[8], the Commissioner's had made a determination holding Zacpak jointly and severally liable with the clearing agent, and the owner of the goods for amounts, including, duties, penalties, and VAT based on the fact that there were no acquittals. The goods accordingly were said to have been diverted. Zacpack, the licensee of the warehouse could not produce proof in terms of section 19(7) that the goods were either delivered in terms of the due entry made per section 20 (4), or exported. The court, dismissing Zacpak's appeal affirmed after canvassing the provisions of section 19(6), and 19(7) that it was for the licensee

[8] (07301/2021) KZND, 3 October 2024.

of the warehouse in terms of section 19(7) to prove that the goods were either delivered in terms of the bills of entry or that the goods had been exported.

30. Section 20(4) *bis* prohibits the diversion of goods from a customs warehouse, to a destination other than the destination declared on entry of such goods or the delivery or causing of such goods to be delivered in the Republic except in accordance with the provisions of this Act. I must accept the Commissioner's submissions that, in releasing the goods to an unauthorised person other than the authorised remover, and in accepting the use of Reddy's and Procet's registered remover code, the applicant dealt with the goods contrary to the provisions of the Act as provided for in section 87(1). The goods as the Commissioner concluded are liable for forfeiture. I can find no reason to disturb the Commissioner's conclusions that the applicant is liable based on sections 18,18A, 19, 20(4), 20(4) *bis*, 87(1) and 88(2) (a).

31. The applicant contends that SARS has not established that the goods have not been acquitted. It is for the applicant in terms of section 19(7) to establish that the goods have been delivered in terms of the due entries and or exported. The applicant further bears the onus of proving that the goods have been exported in terms of section 102 (4) and 102(5)[9].

[9] (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

The Fourth Claim is time barred

32. The applicant claims that the Commissioner's claim for duty in respect of the fourth consignment is time barred. The goods were first imported on 13 August and 9 October 2019. The two-year period lapsed on 12 August 2021 and 8 October 2021. The investigation commenced on 18 May 2021 with a letter to Cassandra Logistics requesting acquittal documents. Cassandra was afforded an extension until 3 June 2021. The letter of demand was issued on 27 September 2021. In *NCP Alcoholics (Pty) Ltd* v *CSARS*[10], it was held that the two year prescription set out in section 18A(2)(c) of the Act is interrupted by the commencement of an investigation. The investigation in this case commenced prior to the expiry of the two years. The two year periods prescribed in terms of section 18A(2) (c) and 44 (11 (a) (I) do not assist the applicant. Liability accordingly has not ceased.

Decisions based on bias or reasonable suspicion of bias

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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.

AMI Forwarding (Pty) Ltd v Government of the Republic of South Africa (Department of Customs and Excise) and Another (251/09) [2010] ZASCA 62; [2010] 4 All SA 347 (SCA); 72 SATC 268 (3 May 2010), paragraphs 14 and 15.

[10] KZND (D7515/2020)17 July 2023.

33. The applicant submits, without evidence, that the respondent has failed to prosecute the matter against the clearing agent, importer/exporter and road hauliers. The Commissioner disputes this assertion and points to the letters of intent issued to all the role players, including shipping lines. This is evidence that the Commissioner has invoked joint liability. In that case, there is no evidence of bias.

Decisions based on arbitrariness, capriciousness and error of law

34. The applicant claims that the respondents' actions are arbitrary capricious and are influenced by an error of law. This is a conclusion for which the applicant provides no facts. The record of this matter demonstrates the opposite. The letters of intent laid the basis for the Commissioner's *prima facie* views. The applicant was invited to provide information in its possession in order to demonstrate its compliance with the Act. Upon receipt of the applicant's responses, the Commissioner issued the decisions. Those decisions canvassed the applicant's liability on, amongst others, sections 18, 18A, 19, 20(4), 20(4) bis 87, 88 (2) (a) and 102. There is no evidence of bias or capriciousness or errors of law in the course followed by the Commissioner. This ground too must fail.

Incomplete record

35. The applicant contends that the record furnished by the respondent is incomplete. I cannot see being a ground of review as the applicant had the rules at its disposal to enforce the provision of a full and complete record. This ground has no merit.

The Constitutional point raised for the first time during argument

36. This ground is recorded solely to be dismissed. During argument, the applicant, through its counsel, raised a point dealing with the unconstitutionality of some provisions of the Act. It was not in dispute that the Notice in terms of Rule 16A had not been submitted to the registrar. Addressing the non-compliance with Rule 16A, counsel referred to *Phillips* v *South African Reserve Bank and Others*[11] arguing that the notice in terms of Rule 16A is not a prerequisite.

37. Firstly, the point was not pleaded at all. That means the respondent was denied the opportunity to address it. On this basis alone, the point should not succeed as this amounts to litigation by ambush. Secondly, *Philips* is no authority for the claim that a Rule 16A notice is not required. Thirdly, the Constitutional Court has repeatedly noted that it is impermissible to attack a statute collaterally. In *South African Transport and Allied Workers Union and Another v Garvas and Others*[12]*,* the court admonished:

> '[112] "It is not ordinarily permissible to attack statutes collaterally. The constitutional challenge should be explicit, with due notice to all affected. This requirement ensures that the correct order is made; that all interested parties have an opportunity to make representations; that the relevant evidence can, if

[11] (221/2011) [2012] ZASCA 38; [2012] 2 All SA 518 (SCA); 2012 (7) BCLR 732 (SCA); 2013 (6) SA 450 (SCA) (29 March 2012).
[12] (CCT 112/11) [2012] ZACC 13; 2012 (8) BCLR 840 (CC); [2012] 10 BLLR 959 (CC); (2012) 33 ILJ 1593 (CC); 2013 (1) SA 83 (CC) (13 June 2012), paragraphs 112-113, and 114.

necessary, be led and that the requirements of the separation of powers are respected.'

Conclusion

38. There is no merit in the applicant's grounds. In that case, there is no basis to interfere with the Commissioner's decisions.

Order

1. The application is dismissed.
2. The applicant must pay the respondent's costs, including the costs of two counsel, on scale C for Adv van der Merwe and scale B in respect of Adv Mothibe.

N.N BAM

JUDGE OF THE HIGH COURT,

GAUTENG DIVISION, PRETORIA

Date of Hearing:	**25 November 2024**
Date of Judgment:	**14 February 2025**

<u>Appearances</u>:

Counsel for the Applicant:	**Adv G.Y Benson**
Instructed by:	Pahad Attorneys
	Houghton, Johannesburg

Counsel for the Respondents:	**Adv M.P van der Merwe SC** with him **Adv W Mothibe**
Instructed by:	Maponya Inc. Arcadia, Pretoria