REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 23278/2022

DOH: 26 November 2024

DECIDED: 26 May 2025

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

..... [redacted] ..... **26 MAY 2025**

SIGNATURE **DATE**

In the matter between:

POSEIDON OPERATIONS (Pty) LTD **(Reg No.2016/299208/07)**	Applicant
And	
THE COMMISSIONER FOR SOUTH	First Respondent

AFRICAN REVENUE SERVICE	
KWIKFREIGHT SERVICES (Pty) LTD (Reg No. 2009/01429/07)	Second Respondent
ZIEGLER SOUTH AFRICA (Pty) LTD (Reg No. 2005/017338/07)	Third Respondent
TRANSGLOBAL AFRICA LOGISTICS (Pty) LTD (Reg No. 2018/013690/07)	Fourth Respondent
INTERMODAL CONNECTIONS CC (Reg No. 1998/039594/23)	Fifth Respondent
RAINET LOGISTICS (Pty) LTD (Reg No. 2009/203750/23)	Sixth Respondent
BEYOND HEAVY HAULAGE (Pty) LTD (Reg No: 2014/0033763/07)	Seventh Respondent

This judgment has been handed down remotely and shall be circulated to the parties by way of email / uploading on Caselines. The date of hand down shall be deemed to be 26 May 2025.

ORDER

_____

1. Condonation is granted for the late filing of this application.
2. The application succeeds with costs.
3. The respondent's demand of 25 July 2020 is hereby set aside.
4. The respondent is ordered to remit the penalties and the amount paid in lieu of forfeiture.
5. Condonation is granted for the late filing of the answering and replying affidavits.

JUDGMENT

Bam J

Introduction

1. This is an application to review and set aside the first respondent's decision to levy duties and penalties, and an amount in lieu of forfeiture, on the basis that the goods that form the subject matter of this review were diverted without the Commissioner's consent, and could not readily be found. First respondent is resisting the relief on various grounds, including the applicant's failure to comply with the 180 days set out in PAJA[1], and inadmissible hearsay.

2. The main issue in these proceedings is whether, based on the various pieces of evidence placed by the applicant before this court, it has succeeded in demonstrating that the goods had not been diverted and has thus shown good cause for the remittal

[1] Promotion of Administrative Justice Act 3 of 2000.

of the penalties and forfeiture raised by the Commissioner, as provided for in Section 93(2) of the Act. Section 93 deals with remission and mitigation of penalties and forfeiture. It states :

> '(2) The Commissioner may, on good cause shown, mitigate or remit any penalty incurred under this Act on such conditions as the Commissioner may determine.'

3. The Commissioner and the applicant seek condonation for the late filing of their answering and replying affidavits, respectively. I commence by introducing the parties and follow-on with a summary of the background facts.

The parties

4. Applicant, formerly known as Seagull Africa (Pty) Ltd, is a private company duly incorporated in terms of South African laws, with its registered address set out in its papers as Unit 807, The Firestation, Baker Street, Rosebank, Gauteng. Applicant is licensed as a clearing agent in terms of Section 64B of the Customs and Excise Act[2], (CEA or simply the Act) and is registered for VAT with vendor registration number 4930274420.

5. First respondent is the Commissioner for the South African Revenue Service. Their address is described as Lehae La SARS, 299 Bronkhorst Street, Nieuw Muckleneuck, Groenkloof, Gauteng. First respondent is charged with, amongst others, the enforcement of the CEA.

[2] Act 91 of 1964.

6. Second respondent, Kwikfreight Services Proprietary Limited (Kwik), is a private company duly registered in terms of South African laws, with its registered address recorded as 11 Inanda Road, Hillcrest, KwaZulu Natal. Kwik is a licensed clearing agent in terms of the Act.

7. Third respondent is Ziegler South Africa Proprietary Limited. Ziegler is a private company duly incorporated in terms of South African laws, with its registered address noted as 136 Plane Road, Spartan Extension 19, Kempton Park, Johannesburg, Gauteng. Third respondent is licensed as a clearing agent in terms of Section 64B of the Act.

8. Fourth respondent is Transglobal Africa Logistics Proprietary Limited (Trans), a private company duly incorporated in terms of South African laws, with its registered address noted as 20 Meridian Drive, Umhlanga Ridge, KwaZulu Natal. Trans is a licensee of a customs warehouse as provided for in Section 19 of the Act. It and Intermodal, oversaw the loading of the trucks, according to the papers.

9. Fifth respondent is Intermodal Connections CC, a close corporation duly registered in terms of the Close Corporations Act 69 of 1984, with its registered address noted as 40 Leceister Road, Mobeni, KwaZulu Natal.

10. Sixth respondent is Rainet Logistics Proprietary Limited. Rainet is a company duly incorporated in terms of South African laws, with its registered address situated at Unit 3, 55A Harris Road, Isandovale, Edenvale, Johannesburg, Gauteng.

11. Seventh respondent is Beyond Heavy Haulage Proprietary Limited (Heavy). This is a private company duly registered in terms of South African laws, with its registered address noted as Woodland View, Spitfire Road, Sunninghill, Johannesburg, Gauteng. Sixth and Seventh respondents are licensed removers of goods in bond (RoGs), as provided for in terms of Section 64D of the Act.

12. Of the seven respondents, first respondent is the only party resisting the relief sought by the applicant. In the event, I refer to the first respondent as respondent or SARS or the Commissioner.

Background

13. The essential facts in this case are largely common cause or have not been seriously disputed. They are: Sometime during May 2020, as the country emerged from COVID-19 Level 5 lock down regulations, the applicant was contacted by a Chinese entity, China Manufacturing and Engineering Company Comtrans International Company Ltd, a foreign entity based in Beijing, China, to assist with the clearance of various goods to a warehouse for subsequent export to the Democratic Republic of Congo (DRC). I refer to this entity as Comtrans. Comtrans was acting as an agent for Beijing Sun Rising Trade and Development (referred to in this judgment as Beijing). The goods came into South Africa via the Durban harbour as the port of entry, in seven 40-foot containers. To fulfill its client's mandate, the applicant assembled a team of providers to assist it. One of those providers was the second respondent, Kwik.

14. Kwik was appointed to assist with the importation and transportation of the goods from the harbour to a Customs warehouse. However, Kwik ended up helping only with the transportation of the goods from the harbour into the fourth respondent's warehouse, which is situated at Intermodal, the fifth respondent. The third respondent, Ziegler, was appointed to, *inter alia*, prepare and submit the exportation entries to Customs. From the warehouse, the goods were to be transported by road to DRC. For this purpose, applicant appointed Rainet and Heavy, the Sixth and Seventh respondents, both of whom are RoGs. Rainet issued three trucks while Heavy issued one.

15. The issue in these proceedings revolves around one truck, AJE1605 and its trailers, 1605, which was identified for random audit and later detained by respondent for approximately 5 weeks. It is common cause that three of the four trucks cleared Beit Bridge Border post (BBr) with acquittals issued. The importation of the goods into South Africa is not in question in these proceedings. Thus, nothing further need be said about it.

16. On 15 June, respondent issued a release in respect of truck 1605, following a number of queries. Soon thereafter, respondent issued a 'stop notice through the Electronic Data Interchange, EDI, system[3], in respect of the same truck, in terms of Section 4(8A) (a)[4] of the CEA. However, by the time Ziegler received the stop notice,

[3] The EDI system is an electronic platform, through which the respondent communicates with, amongst others, clearing agents such as applicant. Clearing agents submit declarations using the EDI platform.
[4] The section reads: (8A)
(a) An officer may stop and detain and examine any goods while under customs control in order to determine whether the provisions of this Act or any other law have been complied with in respect of such goods…

the truck had already commenced its journey towards BBr. The truck was stopped by Customs BBr for inspection of the load and documents. That inspection revealed that goods declared in lines 3, 4, 8, 9 to 18, and 20 to 23, were not on the trailers. Of the two items declared in line number 5, only one item was found. A second physical inspection confirmed the results of the first inspection.

SARS' letter of intent (LoI) to raise debt; applicant's reply; and the letter of demand (LoD)

17. Arising from the inspection, SARS, on 22 June 2020[5], issued a LoI to the applicant. The letter begins with a brief reference to the inspection carried out at BBr and the outcome of that inspection. Although the letter refers to enquiries having been made with various external and internal agencies, it deals only with the responses of Intermodal and applicant. The applicant's letter in response to SARS' enquiry is dated 14 June, while Intermodal's is dated 18 June. Chris Gerber of Intermodal, in a letter addressed to whomever it may concern, conveyed to SARS that trucks AJE1611ZM (1611) and 1605 arrived at the warehouse to load at around the same time; that Intermodal were provided with instructions to load each truck but a miscommunication regarding truck registrations occurred during the process of loading, leading to the goods that were meant for truck 1611 being loaded on truck 1605 and vice versa.

18. The applicant confirmed the version provided by Intermodal. It further mentioned that there had been an overload noticed while the trucks were enroute to BBr. In order

[5] The dates are for year 2020 unless otherwise stated.

to address such overload, some goods were transferred to truck 1611. The truck or trucks that had been overloaded are not identified. I interpose that repacking the trucks, contrary to the declarations made to SARS, on its own constitutes a violation of the CEA.

19. The following findings are set out in the LoI:

(i) The goods were diverted, meaning, they were delivered to a destination other than the one declared in the declaration form.

(ii) An arrangement to load the trucks under SARS' supervision had been bypassed. As a result, the consignments left Durban without inspection.

(iii) Conflicting information had been furnished to SARS at the hub and at BBr, suggesting an intention to mislead the Commissioner.

(iv) SARS is of the view that the export of goods must be done within the prescripts of Customs and Excise legislation. That Section 40(1) of the Act read with Section 80(1) (c), 83 (a) and 84(1) stipulate that an entry shall be invalid if goods cleared for export which have been placed into export stacks, cargo depots, Customs controlled area or loaded into any vehicle which will remove such from South Africa, return[s] to SA without permission'.

20. The letter concludes that the goods were dealt with contrary to the provisions of the Act and that the Commissioner is entitled to demand payment in lieu of forfeiture. After the findings, there follows a large section titled Application of the law to the facts, but the author makes no attempt to apply the law to the facts. Instead, various

provisions of the Act are cited at length and in abstract. The letter ends with a summary of possible liability in the amount of R2 512 345.68 made up of duties in the amount of R211 030.68, a penalty of R460 263, plus an amount of R1 842 052 in respect of forfeiture. The applicant was invited to submit representations.

21. On 6 July 2020, the applicant replied through its attorneys. In its reply, the applicant deals with its appointment by Comtrans, its appointment of various providers to assist it in fulfilling its customer's order, and the furnishing of the loading instructions and load plans to Kwik, in order to load the different trucks. The applicant further mentioned that the same information was furnished to Ziegler. It acknowledged that there had been a human error in loading the trucks and that, bar that error, the exports continued as indicated in the relevant customs documentation and were delivered to the recipient mine in DRC. At this point, the applicant was referring to the three trucks that had cleared the border. It emphasised that the fiscus suffered no prejudice. The applicant further attached to its reply proof of the load plans and packing instructions for each truck, identified as Annexures D[6] and E, which were furnished to Kwik and Ziegler.

22. It is noted in the letter that Ziegler received EDI releases for trucks AJE1608, AJE1611 and CF00FMGP after they had already left for BBr. In respect of truck 1605, however, Ziegler had received a release, but SARS denied having issued that release, leading to escalation of the matter up to investigation. The applicant further conveys that after the trucks were loaded and had departed the warehouse, they were stopped

[6] The load plan is referenced as D1 in these proceedings.

at a weighbridge enroute to the border. There, it was noted that one of trucks (not identified) was overloaded. In order to reduce the load, various goods were transferred to other trucks. After clearing the border, the trucks continued with their journey. As proof that the goods had been delivered to the mine, the applicant attached various annexures identified as H, I and J, along with a letter from Comtrans. I return later to the detail concerning these annexures. I note for now, in order to obviate any confusion, that the labelling of the annexures, while the applicant was still dealing with SARS directly, differ from the labelling used in these proceedings. For example, Annexure H in these proceedings refers to the undated letter from Intermodal.

23. In response to the charges of bypassing arrangements to load under SARS' supervision, the applicant asserted that there had been no such arrangement and that the loading had been overseen by Intermodal and Trans, as is required of them in terms of Customs' requirements. The applicant stated that the goods declared in respect of 1605 were, in fact, loaded on 1611 and vice versa. It acknowledged that there had been a human error, but it denied any intention to mislead the Commissioner, adding that such charge had not been substantiated. The applicant requested SARS to furnish it full details pertaining to the charge in order to respond. It denied that the goods were loaded onto stacks and placed onto a vehicle meant to remove them from South Africa, only to return such goods without permission. Once again, applicant sought further details in order to deal with the charge.

24. The author of the LoI, or the team that was responsible for this investigation, were

clearly not impressed with the applicant's response because the next step in the investigation was not the furnishing of the details to enable applicant to respond but a demand, LoD, dated 20 July 2020. The demand repeated the content of the LoI. It purported to apply the law to the facts but steered clear of doing so. Instead, it set out numerous sections of the Act and demanded payment within 14 days. It warned the applicant of its rights and of the dispute resolution process. The applicant's appeal to first respondent's internal Appeals Committee was met with disfavour. Its referral and participation in ADR proceedings failed to yield positive results, as the Commission terminated the ADR proceedings on 21 May 2021. The present application was lodged on 22 April 2022.

Applicant's submissions

25. In essence, the applicant acknowledges the error on its part and accepts that the goods declared in the BoE for truck 1605 were not found. The applicant submits that the goods were interspersed between the various trucks. It further makes the point that, notwithstanding, all the goods, including those carried by the delayed truck 1605, were eventually received by the mine. The applicant points to several pieces of evidence in support of the assertion that the goods were received by the mine. These include the statement under oath made by one Ntumbe Eudoxie, an employee of the mine in DRC, whom it is said was personally involved in overseeing the trucks while they were offloading. Ntumbe further confirmed, with reference to the order and the payment, that all the goods ordered were received, including those that were delayed with truck 1605.

26. The applicant further submits that there was neither an intention to mislead the

Commissioner nor fraud. According to the applicant, there was a human error which did not only involve trucks 1611 and 1605 as initially understood, but all four trucks. The goods, as it turned out, were interspersed across the trucks because the load plans were not followed. The applicant submits that the error was not foreseen at the time. It adds that SARS cannot ignore the conditions on the ground at the time, referring to the challenges associated with COVID-19, the backlog at the harbour, the increased workloads and the prevailing circumstances at the time. All of these, according to the applicant, led to the human error. It adds that it has shown good cause and submits that the Commissioner remit or mitigate the penalties as set out in Section 93(2).

Respondent's submissions

27. As a start, the respondent submits that the review is based on PAJA and, based on the applicant's failure to bring an application for condonation and explain the delay in launching the application, it ought to be dismissed on this ground alone. The respondent is critical of the records relied on by the applicant to demonstrate delivery to the consignee in DRC and levels various attacks on each of the records. As to the conditions on the ground caused by COVID-19 which led to the human errors, the respondent is dismissive of the submission and argues that the backlogs at the harbour had no impact on warehouses. The respondent submits that it is reasonable to conclude that the goods were diverted. For present purposes, it is sufficient to record that the respondent is well within their right to resist the admission of hearsay evidence.

Issues

28. The main issue in these proceedings is whether the applicant has demonstrated that the goods were not diverted. Expressed differently, the issue is whether the applicant has demonstrated that the goods were actually exported to the recipient in Katanga, DRC, as declared in the SAD 500.

Preliminary issues

29. Prior to determining the preliminary issues, it is apposite to begin by making some observations on the investigation purportedly conducted by SARS. It appears that during further interactions between applicant and SARS, including during the appeals committee and the ADR session, no attention was paid to the 'investigation' conducted.

30. Importantly, it appears that the prevailing conditions on the ground as caused by COVID-19 were not taken into account at all. The conditions caused by COVID-19, notwithstanding the respondent's dismissive attitude, resulted in enormous disruptions to ordinary lives, in business and in the activities of state agencies. Drastic measures, such as reducing staff, maintaining safe distances, to list a few, were required to manage the spread of the pandemic. These ought to be taken into account if the cases made by either party are to be properly assessed. The Supreme Court of Appeal has had occasion to describe what the country and, one might add, countries across the globe, were facing at the time. That description featured once again, in *Democratic Alliance* v *Minister of Co-operative Governance and Traditional Affairs*:

'In one of several judgments in which this Court had occasion to pronounce on the Covid-

19 pandemic, it said:

'The seriousness and the magnitude of the threat to life brought about by the pandemic cannot be exaggerated. It is not melodramatic to say that it posed, and continues to pose, the biggest threat to this country since the Spanish influenza pandemic of the immediate post-World War I years a century ago. It had the potential, and continues to have the potential, to cause devastation on a scale that, only a short while ago, people could not have begun to imagine. Drastic measures were required and an excess of caution was called for, especially given the limited knowledge about Covid-19, even among experts in the field of epidemiology.'[7]

31. To underscore the challenges faced by the government, including agencies such as SARS, one need only refer to the notice issued by SARS on 22 April 2020, the relevant parts of which read:

'Customs measures relating to COVID

'On 2 April 2020 amendments to the Regulations were made that allowed all cargo to be moved away from ports of discharge and onwards to their intended destinations in order to ease port congestion. The Minister of Transport, Mr Fikile Mbalula, would later remark, in his Media Statement of 16 April 2020, on the domino effect that the earlier decision allowing only the movement of essential cargo had on the value chain. This included the **unintended consequence of congestion at ports and surrounding storage facilities, which were not designed to handle the storage of such volumes of cargo**….

As a result, we wish to advise traders as follows:

The inspection of cargo

3. Customs inspections will now take place in respect of all cargo…

4. Extensive use will be made of documentary inspections and, where possible, non-intrusive examination methods will be used in an effort **to limit physical inspections to numbers that match our operational capacity at this time**...' (emphasis added).

[7] *Democratic Alliance v Minister of Co-operative Governance and Traditional Affairs* (700/2022) [2024] ZASCA 65; [2024] 3 All SA 1 (SCA); 2024 (9) BCLR 1189 (SCA); 2024 (5) SA 463 (SCA) (30 April 2024), paragraph 1.

32. The notice undermines the respondent's assertions that backlogs in the harbour had no impact on warehouses. Similarly, the impact on humans caused by the increased workload at the time cannot be wished away. Good cause, after all, as the Constitutional Court has espoused in many a case, requires that the court consider relevant factors[8]. In *Madinda* v *Minister of Safety and Security, Republic of South Africa*, the Supreme Court of Appeal stated:

> '[10] Good cause looks at all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. In any given factual complex, it may be that only some of many such possible factors become relevant….'[9]

33. Back to the 'investigation', it is plain from the two letters issued by SARS in June and July 2020, namely, the LoI and the LoD, that from the onset, SARS maintained an intractable position that the goods had been diverted. Whether that position was informed by the absence of the goods in truck 1605 and/or the explanations relayed by Mr Kramer, the applicant's deponent, remains unclear. What is clear is that SARS went through the motions and rode roughshod over the applicant without following due process, which is a violation of the higher duty placed on the state to respect the law. The Constitutional Court in *MEC for Health, Eastern Cape and Another* v *Kirland Investments (Pty) Ltd* remarked:

> 'To demand this of government is not to stymie it by forcing upon it a senseless formality. It is to insist on due process, from which there is no reason to exempt government. On the contrary, there is a higher duty on the state to respect the law, to fulfil procedural

[8] *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* (CCT45/99) [2000] ZACC 3; 2000 (5) BCLR 465 ; 2000 (2) SA 837 (CC) (30 March 2000), paragraph, 6.
[9] (153/07) [2008] ZASCA 34; [2008] 3 All SA 143 (SCA); 2008 (4) SA 312 (SCA) (28 March 2008), paragraphs 10, 12.

requirements and to tread respectfully when dealing with rights.'[10]

34. The applicant's answers may have been confusing, and it may be criticised for relying on hearsay evidence, but SARS was required to conduct a proper and fair investigation. To underscore SARS' conduct of riding roughshod over the applicant, I refer to SARS' incautious charges levelled against the applicant, which were never substantiated at any stage by SARS, in spite of applicant seeking details in order to address SARS' concerns. There can be no doubt that these statements, labelled as findings in the LoI, informed SARS' steps going forward.

35. They are: (i) the charge that the trucks had bypassed arrangements to load under SARS' supervision; (ii) the conclusion that there was an intention to mislead the Commissioner, without providing the applicant with the basis for such conclusions in order for it to address it; and (iii) the contravention of the CEA allegedly based on the conduct of loading goods into stacks and placing them into a vehicle purporting to remove the goods from the Republic of South Africa only to return them without permission. Notwithstanding that the applicant had requested the opportunity to address these matters, SARS paid no heed to the request and swiftly moved to issue a demand. The applicant was entitled to the information that led to SARS conclusions. SARS' disregard of the requests demonstrates a refusal to be held accountable. In *Merafong City Local Municipality* v *AngloGold Ashanti Limited*, the court remarked:

'The courts have a duty "to insist that the state, in all its dealings, operates within the confines of the law and, in so doing, remains accountable to those on whose behalf it

[10] (CCT 77/13) [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) (25 March 2014), paragraph 82.

exercises power'[11].

36. SARS had the opportunity and indeed was obliged to properly investigate and pose whatever questions it considered relevant. It clearly did not do so, because, in these proceedings, SARS bemoans the idea of the applicant involving numerous providers to help with its client's order, notwithstanding that it is licensed as a clearing agent. It further claims not to know the role played by Kwik. Yet, it was always open to SARS to seek this information from the applicant. Having said that,, it is not for SARS to decide how businesses should run their operations, as long as the law is upheld. Business entities routinely make business decisions on when to compete and when to collaborate with others. The applicant in this case decided to collaborate with various entities, whether this was informed by the size of the mandate from the customer, the applicant's own competencies or the conditions occasioned by the COVID pandemic, is irrelevant.

Whether PAJA is applicable in these proceedings

37. It will be recalled that the applicant contends that the application is brought in terms of the provisions of the CEA. It argues that PAJA is not implicated. The question is, in the event this court were to conclude that PAJA applies, as applicant appears to concede, somewhat ambivalently in its replying affidavit, should this court grant condonation? During argument, the applicant doubled down on its contention that the application is based on the provisions of the CEA without identifying the specific provision on which the application is based. Bearing in mind that the review is not

[11] (CCT106/15) [2016] ZACC 35; 2017 (2) BCLR 182 (CC); 2017 (2) SA 211 (CC) (24 October 2016), paragraph 61.

pursued on the basis of legality, it must follow that it is brought on the basis of PAJA. Fortifying my view are the remarks of the court in *Zondi* v *MEC for Traditional and Local Government Affairs*:

> '[99] Ordinarily anyone who wishes to review any administrative action must now base the cause of action on PAJA. This is so because "[t]he cause of action for judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past.'[12]

38. Drawing from the *ratio* in *Zondi*, it must be inferred that the present review application is brought on the basis of PAJA.

The delay and whether condonation must be granted

39. In its replying affidavit, the applicant appears to accept that the review is brought on the basis of PAJA and makes some submissions regarding the delay in launching these proceedings. The first time PAJA was mentioned was in the respondent's answering affidavit, which was filed on or about 11 August 2022. At that point, the applicant ought to have brought an application for condonation. It is common cause that there is no such application before the court. To understand the extent of the delay, one must refer to the date of termination of the ADR proceedings, which was 21 May 2021. The review of the Commissioner's decision had to be brought within 180 days from the date of termination of the ADR, which was about 20 November 2021. However,

[12] *Zondi v MEC for Traditional and Local Government Affairs* (CCT 73/03) [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) (15 October 2004), paragraph 99-101; See also *Commissioner for the South African Revenue Service and Another v Richards Bay Coal Terminal (Pty) Ltd* (Case no 1299/2021) [2023] ZASCA 39 (31 March2023).

the review was brought only on 22 April. Thus, there was a delay of six months.

40. Does the fact of a delay mean the end of the application, as the respondent has suggested? I do not think so. I return to this issue later in the judgment. For now, the point must be made that whether or not a delay is to be condoned is ultimately determined by reference to what is in the interests of justice. This approach is informed by, amongst others, the reasoning of the court in *South African National Roads Agency Limited* v *City of Cape Town*. There, the court made the following informative remarks:

> '[69] With reference to this court's judgment in Opposition to *Urban Tolling Alliance v South African National Roads Agency Limited* [2013] ZASCA 148; [2013] 4 All SA 639 (SCA) (OUTA SCA), it was submitted on behalf of SANRAL that, sequentially, the question of delay must be dealt with before the merits of a review can be entertained. Unless an extension is granted, so it was contended, a court is precluded from embarking upon the merits of a review application. It was contended by SANRAL that the delay of more than three years, from the date of the Transport Minister's approval of SANRAL's proposal to the date that the review application was launched, was unexplained, unreasonable and in the light of all the circumstances ought not to have been condoned. [78]…[I]t does not, for practical purposes, matter whether condonation for the delay in launching the application is approached in terms of the provisions of PAJA or otherwise. As will be demonstrated below, in both instances, ultimately the decision whether to condone the delay is based on whether the interests of justice so require. [80] Simply put, whether one is considering condoning a delay either under the provisions of PAJA or beyond it, the same determining criterion applies, namely, the interests of justice…'[13]

41. The same approach was endorsed by the Constitutional Court in *Buffalo City Metropolitan Municipality* v *Asla Construction (Pty) Ltd* [2019] ZACC 15. Prior to the

[13] (66/2016) [2016] ZASCA 122; [2016] 4 All SA 332 (SCA); 2017 (1) SA 468 (SCA) (22 September 2016), at paragraphs, 69, 78, 80.

case reaching the Constitutional Court, *Asla* had successfully appealed to the SCA against the decision of the High Court which upheld *Buffalo*'s review application. *Buffalo* had failed to bring an application for condonation. There the SCA held that the High Court had erred in upholding the review in the face of *Buffalo*'s abject failure to furnish full and adequate details to explain its unreasonable delay for the entire period (15 months), together with the severe prejudice to the respondent. It accordingly concluded that the award of the contract had been 'validated' by the undue delay of the respondent. The Constitutional Court reasoned the issue of delay differently. Relying on the context sensitive and flexible test of interests of justice, the court said:

> [56] This Court has made plain that even within the context of PAJA, the extent and nature of the deviation from constitutional prescripts directly impacts upon an application for condonation in terms of Section 7 of PAJA. …
> In SANRAL, Navsa JA rejected a suggestion that the question of delay must be dealt with before the merits of the review can be entertained…[14]
>
> This approach was confirmed by this Court in Aurecon where the explanation for the delay was found to be unsatisfactory:
> "Nonetheless, due regard must also be given to the importance of the issue that is raised and the prospects of success…."

Whether condonation should be granted for the late filing of the answering and replying affidavits

42. Both the applicant and the respondent seek condonation for the late filing of their answering and replying affidavits, respectively. The parties have set out the circumstances that led to their late filing. None of the parties have raised any issue

[14] See quote in paragraph 25 of this judgment.

pertaining to prejudice. Condonation is thus granted to both parties.

Hearsay evidence

43. A fundamental question to be addressed in these proceedings is whether this court is at liberty to accept the evidence relied on by the applicant, which in large part, is based on letters or records, or both, compiled by people who are not giving evidence before this court. To this end, the applicant presented various records as proof of delivery: Annexures, I, J, K, including Annexures L1 and L2; an undated letter from the supplier, Comtrans, and an invoice produced in the Chinese language. Section 3(4) of the Law of Evidence Amendment Act, LEAA[15] defines hearsay evidence as:

> 'evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence'.

44. Section 3(1) of the LEAA, provides that:

> 'Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-
> (a) –; (b) - ; or
> (c) the court, having regard to:
> (i) the nature of the proceedings; (ii) the nature of the evidence; (iii) the purpose for which the evidence is tendered; (iv) the probative value of the evidence; (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends; (vi) any prejudice to a party which the admission of such evidence might entail; and (vii) any other factor which should, in the opinion of the court, be taken into account,
> is of the opinion that such evidence should be admitted in the interests of justice.

[15] Act 45 of 1998.

45. The touchstone as to whether hearsay evidence is to be admitted is set out in Section 3 (1) (c) (i)–(vii), which, according to the court in *Kapa v The State,* must be viewed holistically and weighed collectively to determine whether it is in the interests of justice to admit it[16]. I now embark on the enquiry.

The nature of the proceedings

46. It has been acknowledged by senior courts that hearsay evidence is more likely to be admitted in civil proceedings than in criminal proceedings[17]. As these are civil proceedings, this court is positively disposed to receiving hearsay evidence.

The nature of the evidence

47. Under this element of the enquiry, the court is concerned with the extent to which evidence can be considered reliable, along with weighing its probative value against its prejudicial effect, said the court in *Kapa*[18]. Reliability is, in turn, influenced by factors such as '(a) whether the witness testifying has any interest in the outcome of the proceedings; (b) the degree to which it is corroborated or contradicted by other evidence; (c) the contemporaneity and spontaneity of the hearsay statement; and (d) the degree of hearsay.'[19]

On the question of interest, there is no evidence provided suggesting that the persons from whom the hearsay evidence emanates have an interest in the outcome of these

[16] Kapa v The State [2023] ZACC 1, paragraph 77.
[17] Id, paragraph 78.
[18] Id paragraph 79.
[19] *Supra*, paragraph 80.

proceedings. Annexures I, J, K, L1 and L2 all bear stamps from the border authorities of DRC. There has not been a suggestion that the border authorities may have an interest in these proceedings, nor is there any indication that Comtrans has any connection with the applicant which may suggest the former's interest in the outcome of these proceedings. There is also no direct evidence contradicting the evidence in these records. The hearsay evidence is instead reinforced or corroborated by the statement under oath, deposed by Ntumba Eudoxie, that all the goods pertaining to the order made by the consignee, including those delayed with truck 1605, were received by the consignee.

48. As to contemporaneity and spontaneity, I, J, and K, in respect of the three trucks, appear to be dated 12 and 16 June 2020 while L1 and L2 contain stamps dated 8 August. This too is contemporaneous, regard being had to the date of release of truck 1605 after it was detained, on or about 31 July. The letter written on Comtrans' letterhead, albeit it does not appear to be dated (the letter contains a signature in Chinese, which makes it unclear whether there is a date in the foot), was already made available to SARS in June 2020. It can be accepted that Annexures I, J, and K, L1 and L2 are contemporary, much like the letter generated round June 2020.

49. The existence of admissible evidence in the nature of the supporting affidavit, deposed to by Ntumba Eudoxie, on 22 October 2022, enhances the probative value of the proof of delivery and the letter issued under Comtrans' letterhead. The deponent to the affidavit avers that he was involved in the offloading of the goods from the trucks. He further states that after confirming receipt of all the goods under the order, he

authorised payment.

The purpose of the evidence

50. The purpose of the evidence is to inform the court that the goods transported via the four trucks from South Africa, including truck 1605, had all been received by the mine. SARS is critical of the proof of delivery and the letter on Comtrans' letterhead. The criticism refers to the haphazard nature of the delivery records and the applicant's failure to point SARS to a specific page demonstrating receipt by the mine; the failure to itemise the goods that were delivered; and the use of the French language in the documents along with English. Perhaps SARS has a point. However, given the COVID-19 conditions at the time these records were produced, they must be accepted, imperfect as they may be. Regard must be had to the statements emanating from the employee of the mine, Ntumba, that the mine satisfied itself that the full order had been received and authorised payment.

The probative value of the evidence

51. Probative value refers to value for purposes of proof,[20] and it raises two questions, namely, what the hearsay evidence if admitted will prove, and whether it will do so reliably. For the two classes of records, namely proof of delivery, referenced as I, J and K, L1 and L2 and the letter on Comtrans' letterhead, referenced M, to be reliable and have probative value, it is not necessary that they must be corroborated on every aspect by the admissible evidence in the form of the supporting affidavit emanating

[20] *S v Ndhlovu* [2002] ZASCA 70; 2002 (6) SA 305 (SCA) at paragraph 45.

directly from the employee of the mine. What is required is that the records must be corroborated on a number of material aspects[21].

52. Firstly, the records demonstrating proof of delivery were stamped by DRC Authorities, part of the Ministry of Finance in that country. These records convey that, in addition to the three trucks, truck 1605 went through the DRC border. Secondly, the letter on Comtrans' letterhead confirms, amongst others, that the order handled by the applicant was part of a very large consignment and that the mine had confirmed receipt of the goods. The material element of these records is corroborated by the admissible evidence of Ntumba Eudoxie that the full order from Beijing had been received. That strengthens their probative value.

The reason the evidence is not given by person who issued the letter on behalf of Comtrans and a responsible person from the border authorities; and, the prejudice to SARS

53. It is not clear why the evidence in question was not given by the persons directly responsible for it. On the question of prejudice to SARS, bearing in mind that these are civil proceedings on motion, the Supreme Court of Appeal in *S v Ndhlovu and Others* made this informative remark:

> 'The Bill of Rights does not guarantee an entitlement to subject all evidence to cross-examination. What it contains is the right (subject to limitation in terms of s 36) to 'challenge evidence'. Where that evidence is hearsay, the right entails that the accused is

[21] Note 8, paragraph 86.

entitled to resist its admission and to scrutinise its probative value, including its reliability.'[22]

54. Here the Commissioner has done just that, criticised and challenged the reliability and the probative value of the evidence to resist its admission. Ultimately, it is for the court to decide whether it is in the interests of justice to admit the evidence.

Other factors the court considers necessary

55. Finally, it must be observed that, despite the respondent's reference to *Plascon Evans*, there was no mention of disputes of fact. Instead, the respondent contents itself with the statement that the applicant is seeking final relief on motion. A cursory glance at the respondent's answering affidavit would lead one to conclude that there are indeed insoluble disputes of fact in this matter, but this is not the case. The rule in relation to disputes of fact in motion proceedings is set out in *Plascon-Evans Paints (TVL) Ltd.* v *Van Riebeck Paints (Pty) Ltd*[23], which for present purposes, I have chosen to quote in full, states:

> '.... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order.... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted". This rule has been referred to several times by this Court ... It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the

[22] (327/01) [2002] ZASCA 70; [2002] 3 All SA 760 (SCA); 2002 (6) SA 305 (SCA); 2002 (2) SACR 325 (SCA) (31 May 2002), paragraph 24.
[23] (53/84) [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620 (21 May 1984).

> applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances, the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard *Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd, 1949* (3) SA 1155 (T), at pp 1163-5; *Da Mata v Otto, NO, 1972* (3) SA 585 (A), at p 882 D - H).'

56. A 'real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has, in his affidavit, seriously and unambiguously addressed the fact said to be disputed.'[24] In several areas in the answering affidavit where the respondent purports to dispute the version put up by the applicant, they recant the denial. For example, the respondent initially disputed that the applicant was appointed by Comtrans, only to accept that the applicant acted for a foreign company. The respondent disputed that there was a load plan, only to concede that the tabs in the excel spread sheet must refer to load per truck. I accept that the record, in large part, has Mandarin or some other Chinese language and English. In some respects, the respondent's denial is bare. For example, the respondent denies the impact of COVID-19 on warehouses, which is a bare denial. Such responses do not raise genuine and bona fide disputes of fact as recognised in law.

The said internal contradictions in the applicant's version

57. A further point to consider is whether there were indeed internal contradictions on

[24] *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.

the version of the applicant or whether the applicant's reasons for the missing goods changed, as and when it suited it. The applicant accepted from the onset that errors had occurred, which resulted in the goods that were meant for truck 1605, as reflected in SAD 500, not being found. The circumstances prevailing at the time may indeed have led to the human errors. It does not help the respondent to capitalise on the shortcomings in the answers provided by the applicant as it understood the root causes at the time. Clearly, the applicant was conveying hearsay evidence. The court takes note that there were challenges not only with backlogs at the harbour, as set out in SARS media statements, Customs warehouses had to contend with work beyond their capacities. The repercussions on human capital cannot be ignored.

58. I conclude that it is in the interests of justice to admit the hearsay evidence substantiating the exportation of the goods as declared. Flowing from the admission of hearsay evidence, reinforced by the statement under oath by Ntumba, this court accepts that, regard being had to the circumstances at the time, the goods had not been diverted.

59. The final point to consider has to do with the respondent's complaints regarding Ntumba's evidence. The respondent complains that the deponent fails to provide details of his employment and his duties at the mine at the time the goods were delivered; that he does not provide proof of delivery of the goods; that he does not state when the missing goods were delivered; and that the invoice referred to in his affidavit is in Mandarin and thus cannot be verified. In fairness to the respondent, it is correct that Ntumba does not provide these details. But, I disagree that these complaints, whether taken individually or

cumulatively, water down his evidence. The material aspects of his evidence make business sense. In this regard, the deponent confirms having overseen the off-loading of the trucks, with reference to the invoice. After confirmation of receipt of the whole order, payment was authorised. This is direct evidence which cannot be ignored. The court accepts the evidence as confirmation that the goods were exported as declared to Customs.

60. Fortifying this court's views are the words of the court in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others* v *Chief Executive Officer of the South African Social Security Agency and Others*:

> ' Assessing the materiality of compliance with legal requirements in our administrative law is, fortunately, an exercise unencumbered by excessive formality. It was not always so. Formal distinctions were drawn between "mandatory" or "peremptory" provisions on the one hand and "directory" ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance. That strict mechanical approach has been discarded. Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision.'[25]

61. There is no doubt that the Customs duties serve an important public purpose as encapsulated in *Gaertner and Others* v *Minister of Finance and Others*, where the court said:

> 'Customs duty is levied, primarily, to: (a) raise revenue; (b) regulate imports of foreign goods into South Africa; (c) conserve foreign exchange, regulate the supply of goods into the domestic market; and (d) provide protection to domestic industries from foreign

[25] (CCT 48/13) [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) (29 November 2013), paragraph 31.

competition.'[26]

62. The court is satisfied that the purpose of the Act has not been undermined in the circumstances of this case.

Whether this court should grant condonation to the applicant for the late filing of this application

63. It is now appropriate to decide the question of condonation. The court in this regard is asked to exercise its discretion. [See in this regard the discussion on discretion in *Trencon Construction (Pty) Limited* v *Industrial Development Corporation of South Africa Limited and Another* (CCT198/14) [2015] ZACC 22, paragraphs 82-89.] The test is the interests of justice. In my view, the interests of justice will be better served by granting condonation. Fortifying my reasoning is the following: One is dealing with a delay of six months. This is not eggrigious. The issues involved in this case are important. The circumstances at the time the human error occurred were extra-ordinary, including the period when the applicant was still interacting with SARS in connection with the appeal and the ADR. The prospects of success favour granting condonation. I cannot see any impact on the administration of justice, and in the event there is, it is negligible. The prejudice to the respondent too is not pronounced in that, from the onset, they knew that the applicant had paid the penalties and the amount in lieu of forfeiture under protest. It is unlikely that SARS would have accounted for the amount paid as revenue, without

[26] (CCT 56/13) [2013] ZACC 38; 2014 (1) SA 442 (CC); 2014 (1) BCLR 38 (CC); 76 SATC 69 (14 November 2013), paragraph 53.

making an allowance for the risk of remittal in the event the court finds in the applicant's favour. Whatever, the case, the amount on its own is negligible and would unlikely cause a major upheaval to the fiscus. Overall, based on the reasoning set out in this judgment, it is in the interests of justice to grant condonation.

Conclusion

64. The court is satisfied that the applicant has demonstrated that the goods were not diverted. Thus, an order will be issued directing the Commissioner to remit the penalties raised against the applicant, including the amount claimed in lieu of forfeiture.

Order

1. Condonation is granted to the applicant for the late filing of this application.
2. The application succeeds with costs.
3. The respondent's demand of 25 July 2020 is hereby set aside.
4. The Commissioner is ordered to remit the penalties and the amount paid in lieu of forfeiture.
5. Condonation is granted for the late filing of the answering and replying affidavits.

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N.N BAM

JUDGE OF THE HIGH COURT, GAUTENG DIVISION, PRETORIA

Date of Hearing:	**26 November 2024**
Date of Judgment:	**26 May 2025**

Appearances:

Counsel for the Plaintiff:	**Adv D.H Wijnbeek, with him AVd S.P Mbatha**
Instructed by:	Faber, Goërtz Ellis Austin Inc c/o Phillip Venter Attorneys Lynnwood, Pretoria
Counsel for the Defendant:	**Adv C Naude SC**
Instructed by:	MacRobert Attorneys Brooklyn, Pretoria