REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA

APPEAL CASE NO: A138/2023
Case Number: 34490/2021
DOH: 20 November 2024

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

..... **5 August 2025**
SIGNATURE **DATE**

In the matter between:

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

and

GLENCORE INTERNATIONAL AG **Respondent**

This Judgment was handed down electronically and by circulation to the parties' legal representatives' by way of email and shall be uploaded on CaseLines. The date for hand down is deemed to be on 05 August 2025.

JUDGMENT

Wanless J (Mngqibisa-Thusi J and Oosthuizen-Senekal AJ concurring)

Introduction

[1] This is an appeal to the Full Court of this Division (Pretoria) against the whole of the judgment and order granted by Retief AJ *(as she then was)* on the 7th of December 2022 *(leave to appeal having been granted by the court a quo on the 13th of April 2023).*

[2] The judgment on appeal is in respect of an application by GLENCORE INTERNATIONAL AG *("the Respondent")* in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000 *("PAJA")*, to review and set aside the decision of the COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE *("the Appellant")* on the 4th of September 2019 that, *inter alia*, goods imported by the Respondent were handled in a manner which is inconsistent with the provisions of the Customs and Excise Act 91 of 1964 *("the Customs Act")*.

[3] The total claim of the Appellant against the Respondent in the court *a quo*, as set out in two (2) demands and confirmed by the Internal Administrative Appeal Committee *("the IAAC")* was R9,273,668.15, made up as follows:

3.1 VAT: R 1 006 161.15;

3.2 VAT Penalty: R 100 615.00;

3.3 Penalty in terms of section 91 of the Customs Act: R 1 633 378.00;

3.4 Amount payable *in lieu* of forfeiture in terms of subsection 88(2)(a) of the Customs Act: R 6 515 514.00.

[4] The court *a quo* made an order in terms of which the Appellant's decision that the Respondent diverted the goods; the demand for payment of VAT and VAT penalties; the claim for an amount *in lieu* of forfeiture and the decision to refuse the Respondent's application for suspension of payment, was set aside. In addition, thereto, the Appellant was ordered to pay the costs of the application, such costs to include the costs consequent upon the employment of two (2) counsel, one being a senior counsel.

[5] In the course of the proceedings before the court *a quo* the Appellant conceded that the penalty in terms of section 91 of the Customs Act had not been correctly applied. In the premises, it was common cause that, for the purposes of this appeal, the amount of R 1 633 378.00 should be deducted from the amounts allegedly due by the Respondent to the Appellant. Hence, in the event of this Court upholding the appeal and finding for the Appellant in respect of all of the remaining claims the total amount payable by the Respondent to the Appellant would be R 7 640 290.15.

The facts

[6] The material facts of this matter were largely common cause between the parties in the court *a quo*. These common cause facts are as set out hereunder.

[7] During June and August 2016 the Respondent imported eight (8) consignments of lead/copper through two clearing agents, namely, Cargo Services (Pty) Ltd *("Cargo Services")* with offices in Beitbridge and Groblersbrug and Manica South Africa (Pty) Ltd ("*Manica*"). The goods were sold to the Respondent by Kamoto Mine in the Democratic Republic of Congo and were entered and cleared using the Kamoto Mine invoices.

[8] All of the eight (8) consignments of lead/copper imported by the Respondent were cleared by Cargo Services and Manica. Cargo Services at Beitbridge and Cargo Services at Groblersbrug are one entity, using the same License and Customs Codes.

[9] Cargo Services at Groblersbrug cleared one (1) consignment of the eight (8) as warehouse export *("WE")* and Manica cleared the other seven (7) consignments, also WE. Cargo Services at Beitbridge submitted bills for home consumption *("DP")* in respect of all eight (8) consignments.

[10] The WE entries classified the goods under Tariff Heading 7402.00(2) as "*unrefined copper anodes whilst* the DP entries classified the goods under TH7804.19(9) as "*lead plates*, sheets, *strip and foil lead powders and flakes*". The declared destination in respect of both the WE and DP entries was *"Access World"* in Johannesburg. The goods were first delivered at *"High Trade"* in Benoni. This was for the purposes of being *"smelted"* before the goods were finally delivered at Access World in Johannesburg.

[11] The WE entries declared the higher London Metal Exchange value of the goods, which the Appellant accepted for purposes of calculating value for duty purposes and the DP entries declared actual invoice values, which were lower. As a result, a lower amount of VAT was paid in respect of the DP entries.

[12] It was after the goods had been entered onto the Appellant's system WE and had passed the border into the Republic of South Africa that Cargo Services at Beitbridge, in each case, passed DP bills of entry *("BOE")* declaring the goods under a different tariff heading and value and Cargo Services at Groblersbrug and Manica, respectively, passed vouchers of correction *("VOC")* to cancel the WE entries as duplicates.

The findings of the court *a quo*

[13] The court *a quo* held that:

13.1 by issuing the VOCs, the Respondent had attempted to cancel the WE entries and substitute them with DP entries as the DP entries recorded the correct information to be declared;

13.2 it is irrelevant that the VOCs were issued only after the goods had been entered onto the Electronic Data Interchange System *("the EDI")* because subsection 40(3)(a)(i) of the Customs Act requires an importer to issue a VOC on discovering the error;

13.3 the Appellant has not withdrawn its approval or acceptance of the VOCs and therefore the WE entries remain cancelled and the only entries that remain are the DP entries;

13.4 the Appellant's reason for declaring the DP entries *null and void*, being that the Respondent was attempting to mislead the Appellant by the duplicate bills of entry, is irrational;

13.5 as a result, subsection 18(13) of the Customs Act does not apply and therefore there was no diversion of the goods. In the premises, the Appellant's decision is irrational and it stands to be set aside;

13.6 the Respondent had already paid VAT and therefore the decision by the Appellant to demand VAT and a VAT penalty, is also irrational and stands to be set aside.

The reasons for the court *a quo's* findings

[14] The court *a quo* relied on the facts as follows:

14.1 the Respondent instructed Cargo Services at Beitbridge, which was expecting goods from the DRC to South Africa, to clear a consignment of "*bundles of lead anodes*" and to prepare a DP bill of entry, which it did, with number 5024339 dated 28 July 2028, reflecting *"the correct purpose, tariff heading, values, description and purpose for home use, free for circulation and not to be held in bond pending exportation as such purpose no longer existed*";

14.2 the consignment did not arrive within the expected seven (7) days in terms of subsection 38(1)(a) of the Customs Act. Cargo Services at Beitbridge's investigations revealed that "*the same consignment crossed the border as per tracker alert vehicle transporting the consignment from the DRC and entered the boarder at Groblersbrug border post instead of the anticipated port at Beitbridge*.";

14.3 "*The evidence indicates that Cargo BBR (Cargo Services at Beitbridge), after the goods had already been cleared, submitted the DP bill of entry and the VAT. This resulted in two bills of entry, pertaining to the same consignment co-existing on the system. This created a duplication of entry albeit that such entries were submitted on a different premise*.";

14.4 to rectify the position, Cargo GRB *(Cargo Services at Groblersbrug)* passed a VOC in terms of subsection 40(3)(*a*)(1) *cancelling* the WE entry on the basis that the consignment had already been cleared at Beitbridge and VAT had been paid to the Appellant;

14.5 the VOC had already been approved by way of a paperless EDI notification *("EDI")*. Thereafter, Cargo Services at Beitbridge requested the Appellant to mark the DP entry for arrival, as if the goods had entered this country on such basis;

14.6 the remainder of the seven (7) consignments followed an almost identical entrance and clearance pattern as described above in that "*the consignments were entered and cleared contrary to the clearing instructions provided to Cargo BBR* (Cargo Services at Beitbridge) *for home consumption sent by Glencore. These consignments too, never reached the port at Beitbridge who, anticipated their arrival*."

[15] The Court *a quo* then found that:

15.1 if the Appellant accepted that both WE and DP BOEs were submitted to Customs in respect of the eight (8) consignments the Appellant must have accepted that two BOEs existed on its system and therefore, as a consequence, a duplication

was apparent and the fact that the information on the respective BOEs differed, does not detract from this fact;

15.2 the information disparities trigger the application of the provisions of subsection 40(3)(a)(ii) of the Customs Act in terms of which an otherwise invalid BOE may be corrected or adjusted;

15.3 the cancellation of the WE entries using the VOCs was in compliance with the above requirement;

15.4 the DP entries, although already on the system, after the VOC correction was submitted and accepted, constituted a substitution of the WE BOEs;

15.5 the need for the substitution as contemplated in terms of subsection 40(3)(a)(i)(bb)(B) of the Customs Act was therefore not necessary, because this type of correction would not have eliminated the duplication the application was trying to correct;

15.6 the DP BOEs reflected the intended purpose of the consignments and in consequence thereof the declaration of the goods cannot logically be measured by the WE BOE's alone;

15.7 the fact that all the VOCs were passed and accepted by the Appellant after the goods were in the Republic of South Africa is not a relevant factor, because in terms of subsection 40(3) of the Customs Act the correction must take place on discovery of the error.

[16] The court *a quo* then rejected the Appellant's argument that the VOCs are *null and void* because they were based on a fabricated factual basis and that, in any event, an EDI is not a decision. Further, the court *a quo* found that the VOCs had effectively cancelled the WE entries and that the only BOEs on the system pertaining to the consignments are the DP BOEs and that the Respondent had paid the VAT in respect thereof.

[17] Following thereon, it was held by the court *a quo* that:

17.1 the reason put forward by the Appellant in declaring the DP BOEs *null and void* as a result of the alleged misleading reason provided for correction, being that of duplications of the entries for the same consignments, is irrational;

17.2 subsection 18(3) of the Customs Act cannot rationally be applied to the goods, so, no diversion of goods held in bond applies.

The Appellant's grounds of appeal and submissions as to why the court *a quo* erred.

Duplicate entries

[18] It was submitted on behalf of the Appellant that the court *a quo* erred in finding that there was a duplication of entries in respect of the eight (8) consignments of goods and that the respective sets of bills of entry only had information disparities.

[19] Further, it was submitted that, as a matter of fact:

19.1 the warehouse export *(WE)* bills of entry classified the goods under Tariff Heading 7402.00(2) as "*unrefined copper anodes.*";

19.2 the duty paid *(DP)* bills of entry classified the goods under TH7804.19(9) as "*lead plates, sheets, strip and foil lead powders and flakes*" and not as "*bundles of lead anodes*" as the court *a quo* found;

19.3 the value of the goods declared on the WE bills of entry was the higher London Metal Exchange value of the goods and not the value reflected on the invoice, whereas the value declared on the DP entries was the actual invoice value, which was lower than the WE value;

19.4 the DP bills of entry were framed but only submitted to the Appellant after the goods had already been entered and cleared, WE and no goods entered the Republic of South Africa on the basis of such bills of entry. The court found to that effect;

19.5 the WE bills of entry were submitted to the Appellant. Thereafter, the goods entered the Republic of South Africa and were cleared on the basis of such bills of entry (the WE bills of entry). The court found to that effect.

[20] It was submitted on behalf of the Appellant that as a matter of law:

20.1 in terms of subsection 47(1) of the Customs Act, duty shall be paid in accordance with the provisions of Schedule No. 1 at the time of entry for home consumption of such goods;

20.2 in terms of subsection 47(3)(*a*) of the Customs Act, any rate of duty other than the general rate specified in respect of any heading or subheading in any column of Part 1 of Schedule No. 1 shall apply to imported goods to which such heading or subheading relates;

20.3 in terms of subsection 38(1)(*a*) of the Customs Act, every importer of goods shall within seven days of the date on which such goods are, in terms of section 10 deemed to have been imported, make due entry of those goods as contemplated in section 39;

20.4 in terms of subsection 39(1)(*a*) of the Customs Act the person entering any imported goods shall deliver to the Controller a bill of entry setting forth the full particulars as indicated on the form and according to the purpose to be specified on such bill of entry for which the goods are being entered;

20.5 in terms of subsection 40(1) of the Customs Act no entry shall be valid unless the description and particulars of the goods and the marks and particulars of the packages declared in that entry correspond with the description and particulars of the goods and the marks and particulars of the packages as reported on the arrival of the goods in terms of section 12 of the Customs Act.

[21] So, it was submitted, on behalf of the Appellant, that the court *a quo,* having found, on the facts that:

21.1 all of the eight (8) consignments were cleared and, thereafter, entered the Republic of South Africa on the basis of the warehouse export bills of entry *(WEs);*

21.2 in each case, the duty paid bills of entry *(DPs)* were submitted and VAT paid to the Appellant only after the goods entered the Republic of South Africa on such basis; and

21.3 that no due entry was made in terms of the duty paid bills of entry *(DPs)* in terms of subsection 38(1)(a) of the Customs Act, in that the goods, as described, classified and valued in terms of the DP entries, never crossed any border of this country.

21.4 the court *a quo* erred in finding, nevertheless, that at any given time there were two sets of bills of entry which co-existed on the Appellant's system involving the same consignments.

[22] Counsel for the Appellant therefore submitted that the court *a quo* erred in finding, in this regard, that the Appellant must have accepted that two bills of entry existed on its system and that in those circumstances a duplication was apparent, because:

22.1 a duplication cannot be apparent on the Appellant's system where the goods on the bills of entry are defined and classified differently, valued differently and the purpose for the entry of the goods is different;

22.2 a duplication cannot be apparent on the Appellant's system where there was only one entry of goods as contemplated in terms of subsections 38(1)(*a*) and 40(1) of the Customs Act based on the WE bills of entry;

22.3 a duplication cannot be apparent on the Appellant's system where, on the court's own finding, the DP goods never entered the Republic of South Africa and therefore due entry as contemplated in terms of subsections 38(1)(*a*) and 40(1) of the Customs Act in respect of those goods was never made.

[23] Further, it was argued by the Appellant that the fact that the bills of entry involve the same consignment of goods was not known to the Appellant when the respective bills of entry were submitted to the Appellant. The court *a quo* did not find otherwise and the sequence of events which were not in dispute, establishes this fact.

[24] In the premises, it was submitted that the Appellant only became aware that the two (2) sets of entries involved the same goods when the Illicit Trade Division of the Appellant investigated the series of vouchers of correction *(VOC)* passed to cancel the warehouse export entries *(WEs).*

[25] Finally, it was submitted that the Respondent passed the various VOCs and asked the Appellant to validate the DP entries, approximately a month after the goods entered the Republic of South Africa. This, it was submitted, negates the finding of the court *a quo* that there was a duplication.

The vouchers of correction (VOCs)

[26] Counsel for the Appellant submitted that the Court *a quo* erred in finding that "*the information disparities*" on the two sets of bills of entry "*triggered the application of the provisions of section 40(3)(a)(ii)*" which was the reason for the passing of the vouchers of correction, because, on the facts:

26.1 the VOCs passed by the Respondent were not passed to adjust any errors on any of the bills of entry, either on the WE bills of entry or on the DP bills of entry;

26.2 the vouchers of correction were passed to cancel the WE bills of entries, which had already been properly executed with the acquittal documents showing that the goods were delivered at High Trade, Benoni and not the declared Access World warehouse in Johannesburg;

26.3 it is only after the VOCs were confirmed by the EDI that the Respondent requested the DP bills of entry to be validated by being marked for arrival, when, in fact, no goods entered the Republic of South Africa on that basis.

[27] It was submitted that the Court *a quo* erred in this regard because:

27.1 there is no provision in subsection 40(3) of the Customs Act *(and the Rules promulgated in terms thereof)* in terms of which a bill of entry may be cancelled.

27.2 subsection 40(3)(*a*)(ii) provides for the adjustment of a bill of entry by way of a voucher of correction where there is an error or instance of non-compliance with subsection 40(1) of the Customs Act;

27.3 subsection 40(3)(*a*)(ii)(*bb*) provides for cancellation of a bill of entry where there is substitution with a fresh bill of entry. There was no substitution of the WE bill of entry with a *"fresh"* DP entry as the Respondent claims since these co-existed;

27.4 rule 40.2 provides that for the purposes of subsection 40(3)(*a*)(ii) the substituting bill of entry shall be delivered to and accepted by the Controller before the original bill of entry is cancelled by a voucher of correction and a voucher of correction cancelling the original bill of entry shall indicate how the goods concerned were accounted for and reflect the substituting bill of entry number and date. This, submits the Appellant, did not happen.

[28] The Appellant submitted that as the court *a quo* had established on the facts, even if the DP entries were to be regarded as the "*substituting bills of entry*" in terms of rule 40.2, the Respondent only sought to validate these DP entries after the VOC was passed, contrary to what the Rules and the Customs Act contemplate.

[29] It was therefore submitted that the court *a quo* erred in finding that the "*not yet validated*" DP bills of entry accounted for how the goods entered the Republic, in circumstances where, as a matter of fact, they did not.

[30] It was also submitted by the Appellant that the court *a quo* further erred and misdirected itself by finding that the VOCs were valid only on account of the EDI notification and not on the basis that the Respondent's purported "*cancellation*" of the WE bill of entry in fact complies with the provisions of subsection 40(3).

[31] Appellant's Counsel submitted that the finding that the substitution as contemplated in terms of subsection 40(3)(a)(i)(bb)(B) was therefore not necessary, because this type of correction would not have eliminated the duplication.

[32] In the premises, it was submitted on behalf of the Appellant that the finding that the VOCs passed by the Respondent had validly cancelled the WE bills of entry without a concomitant finding stating that such entries were substituted by the DP entries, is not based on any provisions of the Customs Act and is, therefore, legally incorrect.

The validity of the DP entries

[33] The Appellant submits that the Court *a quo* erred in finding that the DP entries were valid for the following reasons:

33.1 section 39 of the Customs Act requires a bill of entry, amongst other things, to be submitted to the Controller with transportation documents before the goods enter the Republic of South Africa;

33.2 once an entry is submitted and accepted by the Appellant, such entry is validated when the goods enter the Republic of South Africa and are marked for arrival as required in terms of subsections 38(1) and 40(1) read with section 12 of the Customs Act;

33.3 at the time the Respondent sought to submit the DP bills of entry the goods, in each case, had already entered the Republic of South Africa on the basis of the WE bills of entry;

33.4 the requirements in section 39 and subsection 40(1) were not complied with and could not be complied with *(as submitted earlier by the Appellant);*

33.5 except by way of the provisions under subsection 40(3)(a)(ii)(*bb*) of the Customs Act, there is no other provision in the Customs Act in terms of which the cancellation of the WE entries could, as a consequence, validate the DP entries.

[34] The court *a quo* found that the DP entries were valid, even though, on the facts as established, there were no trucks that entered the Republic of South Africa with goods that were classified under tariff heading TH7804.19(9), described as "*lead plates, sheets, strip and foil lead powders and flakes*" and valued on the basis of the invoices *(as appears on the respective DP bills of entry)*. In fact, the court *a quo* went as far as accepting "*that the consignments did not... reach the Beitbridge port for clearance and due entry.*"

[35] The court *a quo's* finding that the DP entries were valid is therefore not based on any fact or the provisions of the Customs Act and is, therefore, legally incorrect.

The goods were diverted and therefore liable to forfeiture

[36] It was submitted by the Appellant that valid entry in respect of the eight (8) consignments was through the WE entries. In terms of those entries the goods should have been delivered at the Access World licensed warehouse, in Johannesburg, where they would be stored and then exported, in the format they were entered, to destinations outside the Republic, as declared.

[37] The delivery of the goods at the High Trade Foundry in Benoni and the subsequent smelting, formatting and exporting of the goods, submits the Appellant, constituted the diversion of the goods in terms of subsection 18(13) of the Customs Act.

[38] Counsel for the Appellant drew the attention of this Court to the fact that the court *a quo* did not consider the decision in the matter of *SARS V Desmonds Clearing & Forwarding Agents CC*[1] where the Supreme Court of Appeal *("the SCA")* considered, *inter alia*, subsection 18(13) of the Customs Act and confirmed the principle that, when goods are entered, whatever route they may take, they must eventually be delivered

[1] *[2006] JOL 16955 (SCA).*

at the declared destination. If not, the Appellant must authorise the change of destination, otherwise the goods are deemed to be diverted for purposes of the Customs Act.

[39] Relying on *Desmonds* the Appellant submitted that the goods were therefore liable for forfeiture and because the goods could not be found at the time of the Appellant's investigation the Appellant was entitled to demand payment of the value of the goods *in lieu* of forfeiture, plus VAT on such value, in terms of subsection 18(13)(a)(iii) read with subsection 88(2)(a)(i) of the Customs Act.

Discussion

[40] In making the findings that it did the court *a quo* adopted what may broadly be described as a *"practical"* approach when deciding whether to review and set aside the decision of the Appellant on the 4th of September 2019 that, *inter alia*, goods imported by the Respondent were handled in a manner which is inconsistent with the provisions of the Customs Act. The Respondent, in supporting the approach as adopted by the court *a quo*, also submits that when considering the statutory context within which the parties' opposing contentions should be evaluated, the *object* of the Customs Act is of particular relevance to this appeal.

[41] As is clear from the Appellant's grounds of appeal and the submissions made on behalf of the Appellant in support thereof, it is *(broadly speaking)* the case for the Appellant that the court *a quo,* in making the findings that it did, erred and misdirected itself in the manner in which it interpreted and applied the provisions of the Customs Act to the relevant facts. The approach adopted by the Appellant *(and which the Appellant submits should have been adopted by the court a quo)* can broadly be described as a more *"detailed"* approach when compared to that as followed by both the court *a quo* and the Respondent. Whichever approach is ultimately followed, it is clear that this appeal turns largely on matters of law rather than fact. Indeed, as set out earlier in this judgment and, as will become apparent hereunder, most of the relevant facts *(as found by the court a quo)* are common cause between the parties.

[42] In determining whether the court *a quo* erred or misdirected itself when making the findings that it did and whether, as a result thereof, this Court *(sitting as a court of appeal)* is entitled to interfere with those findings, it is necessary not only to consider the judgment of the court *a quo* and the Appellant's grounds of appeal but also, where applicable, the submissions of the Respondent in respect thereof. In doing so, it may well be necessary for this Court to consider, when taking into account the various submissions made on behalf of the respective parties, the proper interpretation and application of various provisions of the Customs Act. However, prior to undertaking this exercise, it is essential to consider *(as submitted on behalf of the Respondent)* the statutory context within which the parties' opposing contentions should be evaluated.

The statutory context within which the appeal must be considered.

[43] The importation and exportation of goods into and out of South Africa, as well as duties payable and the tax implications thereof, are governed by the Customs Act. This is common cause between the parties. It was emphasised by the Respondent that the object of the Customs Act which is of particular relevance to this appeal, as appears from its preamble, is "*to provide for the levying of customs and excise duties*". Whilst the Appellant agreed with this submission, it was also submitted, on behalf of the Appellant, that in addition to the collection of duties the object of the Customs Act is also the control of the importation and exportation of goods.

[44] Value Added Tax *("VAT")* which is payable in respect of goods imported into South Africa is regulated by the Value Added Tax Act 89 of 1991 *("the VAT Act")*. The object of the VAT Act which is relevant to this appeal, as appears from its preamble, is "*to provide for taxation in respect of ... the importation of goods*".

[45] Goods imported into South Africa *potentially* attract the payment of customs duty in terms of the Customs Act. Whether customs duty is payable in respect of the importation of goods *(in this case the goods imported from the DRC)* depends on the tariff heading within which such goods are classified in Part 1 of Schedule 1 to the Customs Act.

[46] As appears from the relevant page of Part 1 the importation of lead plates and other articles of lead do *not* attract the payment of any customs duty. This explains why no customs duty was ever demanded by the Appellant from the Respondent.

[47] Despite the aforegoing, when setting out its case in the court *a quo* the Appellant stated the following:

> *"22. In terms of section 18(2) of the Customs Act, the* ***applicant is liable for duty on all goods*** *which are ... entered and ... removed in bond. In terms of section 18(3)* ***liability for duty shall cease if*** *among other things, the goods exported have been duly accounted for in the country of destination ...*
>
> *41. It must be noted that the South African tax system,* ***including the collection of customs duties****, is one of self-assessment. The Commissioner relies on the integrity of documentation submitted to SARS* ***in order to determine the duties owed, and thus enforce the Customs Act effectively and efficiently****.*
>
> *42. By not dealing with the goods in a manner as contemplated in terms of the Customs Act, the Commissioner has no control over the goods therefore* ***making the enforcement of Custom Laws and the collection of duty ineffective, with detrimental effect to the fiscus as a whole***".[2]

[48] In the premises, it was submitted, on behalf of the Respondent *(correctly in the opinion of this Court)* that, irrespective of whether the WE bills of entry are applicable *(as contended by the Appellant)* or whether the DP bills of entry are applicable *(as contended by the Respondent)*, no customs duty was payable in respect of the imported goods.

[49] So, the emphasis by the Appellant on the collection of customs duties and the detrimental effect to the fiscus if customs duties are not collected, is irrelevant to the

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[2] *Emphasis added.*

case at hand. There were no customs duties to collect and, on the facts of the present matter, the fiscus suffered no detrimental effect whatsoever. It is also common cause that export duty was paid by the Respondent in respect of the goods when they were exported to India and China.

[50] The fallacy of the argument put forward on behalf of the Appellant is further apparent by the concession made, before this Court on behalf of the Appellant, that in terms of the tariff headings used in both the WE and DP entries, duty is not payable. Despite the aforesaid concession the Appellant seeks to support the decision made by the Appellant on the basis that provisions of the Customs Act as to the declaration and entry of the goods, must be complied with. In that regard, it was submitted on behalf of the Appellant that the manner in which the goods were dealt with by the Respondent *"poses a risk"* to the efficient enforcement of customs control in South Africa and that this ultimately affects *"trade statistics"*. These submissions were based on the fact that the imposition of duty is not only to collect duty but also to *"monitor and enforce trade framework and policy in order to give effect to the objects of the Custom Act and the country's compliance with its trade obligations"*. Whilst this Court must accept *(and even admire)* this underlying rationale and the need for the Appellant to jealously safeguard the payment of duties in terms of the Customs Act, it is difficult to understand how this should have played a role in the decisions of the Appellant and of the court *a quo*.

Duplicate entries

[51] The reasoning and findings of the court *a quo*[3] and the Appellant's submissions in respect thereof[4], have already been set out earlier in this judgment. This issue, namely whether there was a duplication of entries, is important, in that it was fundamental in the court *a quo's* finding that the VOCs were valid, which had the effect of cancelling the WE entries and resulting in the fact that there could be no diversion of the goods.

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[3] *Paragraphs [14] to [17] ibid.*

[4] *Paragraphs [18] to [25] ibid.*

[52] The Respondent submits that the Appellant, in attacking the judgment of the court *a quo*, places much reliance on the word "*duplication*" or "*duplicated*" when, in fact, the Customs Act contains no provision dealing with duplication of entries. This word found its way into the application before the court *a quo* because the reason provided in the VOCs was to cancel the WE entry as it was a *"duplication"* or was *"duplicated"* with the DP entry. The Respondent also used this terminology *(perhaps inadvisedly)* in its application papers and its Heads of Argument before the court *a quo*.

[53] A VOC may be submitted for a number of reasons, namely:

53.1 in respect of a bill of entry that does not comply with section 39 of the Customs Act, a VOC may be issued to adjust that bill of entry, or to substitute that bill of entry with another bill of entry and to cancel the original bill of entry;[5]

53.2 in respect of a bill of entry that is invalid, a VOC may be issued to adjust that bill of entry, or to substitute that bill of entry with another bill of entry and to cancel the original bill of entry;[6]

53.3 in respect of a bill of entry that has been passed in error by reason of duty having been paid on goods where no duty is in fact due on those goods, a VOC may be issued to adjust that bill of entry, or to substitute that bill of entry with another bill of entry and to cancel the original bill of entry;[7]

53.4 in respect of a bill of entry that an importer or manufacturer requests substitution by another bill of entry, on good cause shown, a VOC may be issued to adjust that bill of entry, or to substitute that bill of entry with another bill of entry and to cancel the original bill of entry;[8] and

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[5] *Subsection 40(3)(a)(i)(aa) of the Customs Act.*

[6] *Subsection 40(3)(a)(i)(bb) of the Customs Act.*

[7] *Subsection 40(3)(a)(i)(aa) of the Customs Act.*

[8] *Subsection 40(3)(a)(i)(bb) of the Customs Act.*

in respect of a bill of entry where the purpose for which the goods have been entered as specified on the bill of entry is not correct, a VOC may be issued to substitute that bill of entry with another bill of entry and to cancel the original bill of entry.[9]

[54] The Customs Act makes provision for the substitution of a bill of entry with a new bill of entry. Therefore, the Customs Act provides for the situation where, at a specific point in time, two bills of entry for the same consignment may exist on the Appellant's system. The Respondent submitted that rule 40.02 provides guidance on how this is to be dealt with.

[55] Arising from the aforegoing, it was submitted, on behalf of the Respondent, that whether the Court *a quo* erred in finding that two bills of entry existed on the Appellant's system at the same time, or whether the Court *a quo* was correct in this regard, is ultimately of no consequence. This is simply because the *real* question is whether the incorrect bills of entry were duly cancelled. It was further submitted that the incorrect bills of entry were indeed duly cancelled because the Appellant approved the VOCs and cancelled the WE entries, leaving the DP entries as the bills of entry for the goods. This Court has no hesitation in accepting the correctness of these submissions.

The vouchers of correction (VOCs)

[56] Once again, the reasoning and findings of the court *a quo*[10] and the Appellant's submissions in respect thereof[11], have already been set out earlier in this judgment.

[57] The submissions of the Respondent in relation to the VOCs in this appeal are both pertinent and instructive. After dealing with the provisions and purpose of subsections 38(1)(a) and 39(1)(a) of the Customs Act the Respondent concludes *(correctly)* that a bill of entry is therefore the prescribed document whereby an importer declares to SARS the full particulars of the goods and the purpose for which the goods are being entered. From these two characteristics, the correct rate of duty can be ascertained.

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[9] *Proviso to subsection 40(3)(a)(ii) of the Customs Act.*

[10] *Subparagraph 15.7 to paragraph [16] ibid.*

[11] *Paragraphs [26] to [32] ibid.*

[58] With this purpose and object in mind, the next consideration is the purpose of subsection 40(3) of the Customs Act., which is the provision dealing with VOCs. Subsection 40(3) of the Customs Act reads as follows:

> "*(a) Subject to the provisions of sections 76 and 77 and on such conditions as the Commissioner may impose and on payment of such fees as he may prescribe by rule-*
>
> *(i) an importer or exporter or a manufacturer of goods shall on discovering that a bill of entry delivered by him or her-*
>
> *(aa)* ***does not in every respect comply with section 39****; or*
>
> *(bb) is invalid in terms of subsection (1) of this section, adjust that bill of entry without delay by means of-*
> *(A) a voucher of correction; or*
> *...*
>
> *(ii) if-*
>
> *(aa) a bill of entry has been passed in error by reason of duty having been paid on goods intended for storage or manufacture in a customs and excise warehouse under section 20 or for purposes of use under rebate of duty under section 75; or*
>
> ***(bb) an importer, exporter or manufacturer on good cause shown, requests substitution thereof by another bill of entry in circumstances other than those contemplated in item (aa),***
>
> *the Commissioner may allow the importer, exporter or manufacturer concerned to adjust that bill of entry by substitution of a fresh bill of entry and cancellation of the*

original bill of entry, provided such goods, where a rebate of duty is being claimed, qualified at the time the duty was paid in all respects for that rebate:

Provided that where the purpose for which the goods are entered as specified on a bill of entry is not correct, such bill of entry must be adjusted in terms of subparagraph (ii), and provided further that acceptance of such voucher or fresh bill of entry shall not indemnify such importer or exporter or manufacturer against any fine or penalty provided for in this Act."[12]

[59] It was submitted that it is clear that the object and purpose of the statutory provisions dealing with VOCs is to correct errors on a bill of entry so that the bill of entry reflects the correct and full particulars of the goods and the purpose for which the goods are being entered, so that the importer pays the correct customs duty in respect of those goods.

[60] Following therefrom, it was further submitted on behalf of the Respondent that, in the present matter, the goods were intended to be entered duty paid upon importation, meaning that the goods were intended to be entered for home use and free circulation. The goods were not entered for removal in bond or imported with a deferral of payment of duty.

[61] Also, it was submitted that only one of the WE entries reflected the incorrect particulars of the goods. The description of the goods, tariff code and marks or numbers of the goods were correct in respect of each of the WE entries submitted by Manica. Only the WE entry submitted by Cargo Services incorrectly recorded the goods as copper, which was subsequently corrected by a VOC on 22 August 2016. All of the WE entries reflected the incorrect purpose for which the goods were being entered in that these entries described the purpose for which the goods were being entered as for storage in a customs warehouse for subsequent exportation from South Africa.

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[12] *Emphasis added.*

[62] VOCs, which were issued by the Respondent and approved by the Appellant, corrected the position so that the WE entries were cancelled. The remaining DP entries for the same goods reflected the correct and full particulars of the goods and the purpose for which the goods were being entered in that:

62.1 the DP entries described the goods as *"Lead plates, sheets, strip and foil; lead powders and flakes; Other"* under tariff heading 7804.19(9);

62.2 the DP entries recorded that the goods were entered for home use and free circulation.

[63] In the premises, it was submitted that the steps taken by the Respondent in issuing the VOCs and specifying that the purpose of such VOCs was to cancel the WE entries on account of their *"duplication"* with the DP entries, which entries correctly reflect the purpose for which the goods were entered, were effective when measured against the objects of the legislature. The Respondent submitted that the aforegoing can be ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirements in particular. This Court is in agreement therewith.[13]

[64] The *dicta* of the Constitutional Court in the matter of *Liebenberg NO v Bergrivier Municipality*[14] are apposite. In this regard, it was held:

> *" Therefore, a failure by a municipality to comply with relevant statutory provisions does not necessarily lead to the actions under scrutiny being rendered invalid. The question is whether there has been substantial compliance, taking into account the relevant statutory provisions in particular and the legislative scheme as a whole."*

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[13] *Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at paragraph [18]; Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others [2021] 3 All SA 647 (SCA).*

[14] *2013 (5) SA 246 (CC) at paragraph [25]*

[65] Also, the Constitutional Court has held, in the matter of *Allpay Consolidated Investment Holdings (Pty) Ltd v CEO, SASSA*:[15] that the correct approach to determining whether there has been compliance with statutory requirements, is as follows:

> *"Assessing the materiality of compliance with legal requirements in our administrative law is, unfortunately, an exercise unencumbered by 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 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. In this court O'Regan J succinctly put the question in ACDP v Electoral Commission as being "whether what the applicant did constituted compliance with the statutory provisions viewed in the light of the purpose"."*

The validity of the DP entries

[66] As is the case when this Court dealt with the duplicate entries and VOCs the reasoning and findings of the court *a quo*[16] and the Appellant's submissions in respect thereof, in relation to the validity of the DP entries[17], have already been set out earlier in this judgment. Insofar as the Respondent's submissions in respect of the validity of the DP entries is concerned, these submissions have largely been dealt with herein when considering the Respondent's submissions in relation to other grounds upon which this appeal is based. In the premises, these submissions will form part of this Court's reasoning when reaching its conclusions in this matter.

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[15] *2014 (1) SA 604 (CC) at paragraph [30].*

[16] *Subparagraphs 13.1 to 13.3; paragraphs [14] to [16] ibid.*

[17] *Paragraphs [33] to [35] ibid.*

The goods were diverted and therefore liable to forfeiture

[67] The reasoning and findings of the court *a quo*[18] and the Appellant's submissions in respect thereof[19], have, once again, already been set out earlier in this judgment.

[68] From the contents of the letters of demand and of the Appellant's Answering Affidavit, it can be accepted that the amount *in lieu* of forfeiture was demanded by the Appellant on the basis that the goods were liable for forfeiture and that the Appellant had the power to demand the amount in question. This must be so, because the Appellant's entire case on appeal is based on the premise that the goods were dealt with by the Respondent contrary to the provisions of the Customs Act. This approach, submits the Respondent, disregards the discretionary nature of the exercise of that power.

[69] In support of the said submission the Respondent points out *(correctly in this Court's opinion)* that there is no suggestion in the letters of demand; the decisions of the IAAC or the Appellant's Answering Affidavit that the Appellant demanded payment of the amount *in lieu* of forfeiture after it *(more particularly the Commissioner)* had considered all relevant considerations and had concluded that it was appropriate, in all of the circumstances, to demand the amount *in lieu* of forfeiture, as the Appellant did.

[70] In view of the emphasis placed by the Commissioner on the importance of collecting customs duties, as dealt with earlier in this judgment,[20] one could possibly have understood the demand for the payment of the amount in question in the event of the Respondent having, for example, evaded the payment of customs duties. However, as also dealt with earlier in this judgment,[21] no customs duties were evaded as none were payable. An important justification relied upon by the Appellant for imposing the amount *in lieu* of forfeiture is that, according to the Appellant, the goods were diverted in contravention of subsection 18(13) of the Customs Act.

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[18] *Subparagraphs 13.5 and 17.2] ibid.*

[19] *Paragraph [36] ibid.*

[20] *Paragraphs [43]; [49] and [50] ibid.*

[21] *Paragraphs [48] and [49] ibid.*

[71] It was submitted, on behalf of the Respondent, that the goods were never diverted in the sense that is required in terms of subsection 18(13) of the Customs Act. Further, it was submitted to this Court that, even if what had happened to the goods did indeed constitute a diversion, the demand of R 6.5 million *in lieu* of forfeiture would, on the undisputed evidence, still be grossly unreasonable. This submission was made on the basis that, *inter alia*, instead of the goods having been taken directly to Access World's bonded warehouse in Johannesburg the goods were first taken to the foundry of High Trade in Germiston for processing in order to satisfy the foreign buyers' requirements. The goods were thereafter taken to Access World's warehouse and exported from there. This, says the Respondent, did not prejudice the fiscus at all.

[72] As set out above. the Appellant's case is that the goods were diverted in contravention of subsection 18(13) of the Customs Act. Subsection 18(13)(a)(i) of the Customs Act states:

> *"No person shall, without the permission of the Commissioner, divert any goods* ***removed in bond*** *to a destination other than the destination declared on entry for removal in bond or deliver such goods or cause such goods to be delivered in the Republic except into the control of the Controller at the place of destination."*[22]

[73] In the premises, subsection 18(13)(a)(i) of the Customs Act and the concept of diverting goods, applies only to *"goods removed in bond"*. Goods that are entered DP upon importation are not *"removed in bond"*. Only goods that are imported with a deferral of payment of duty, such as goods entered WE, are "removed in bond" as contemplated by the said subsection of the Customs Act.

[74] In addition to the aforegoing, subsection18(13)(a)(ii) of the Customs Act provides three (3) instances in which goods shall be deemed to be diverted, namely:

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[22] *Emphasis added.*

"(i) no permission to divert such goods has been granted by the Commissioner as contemplated in subparagraph (i) 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 (3) (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."

[75] It was submitted by the Respondent *(once again, correctly in the opinion of this Court)* that none of the above apply to the present matter.

[76] Also, in the matter of South *African Revenue Service (Customs and Excise) v Desmonds Clearing and Forwarding Agents CC*[23] the SCA, when dealing with the definition of "*divert*" in terms of subsection 18(13)(a) of the Customs Act, held:

"(t)he section does not proscribe a detour; it proscribes a deviation to another destination. 'Destination' is defined in The Shorter Oxford English Dictionary as 'the intended end of a journey or course'. A driver who, while transporting goods in bond, deviates from the normal route between, say, Durban and Harare, for whatever reason, but who intends to continue with his journey, does not make himself guilty of a contravention of s 18(13)." [24]

[77] The goods were not diverted to another destination but were taken to High Trade to be smelted into lead blocks. This was clearly a detour and the goods were finally stored at Access World's premises prior to and pending export to India and China, as declared by the Respondent on the bills of entry. The reliance by the Appellant on

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[23] *2006 (4) SA 284 (SCA) at paragraph [16].*

[24] *Emphasis added.*

Desmonds[25] and the failure of the court *a quo* to specifically deal with this decision in its judgment, does not assist the Appellant with the submissions made that the goods were diverted within the true meaning of the Customs Act.

VAT and the VAT penalty

[78] In the judgment of the court *a quo* it was held that the Respondent had already paid VAT and therefore the decision by the Appellant to demand VAT and a VAT penalty, is also irrational and stands to be set aside.[26]

[79] The Respondent, in its Founding Affidavit, stated that it had cleared the goods duty paid using the values on the invoices from Komoto and had paid the VAT on the entry of the goods into South Africa. Further, it was confirmed by the Respondent that the values on the invoices represented the amount actually paid for the goods when sold to the Respondent Glencore export to the Republic of South Africa.

[80] In the Appellant's Answering affidavit, it was contended that to the extent that the Respondent may have paid any VAT in respect of the DP entries, such payment will stand to the Respondent's credit and may be refunded. However, the Appellant further contends that this VAT is not applicable and may not be used as credit for purposes of Glencore's liability in respect of the WE entries.

[81] The Respondent explains in its Replying Affidavit that it paid VAT on the DP customs entries and claimed that VAT back on its VAT return for that month. It is then averred by the Respondent that the Appellant is not at liberty to determine which VAT credits may be applied to which VAT liabilities. Before this Court, it was submitted on behalf of the Respondent that there is no legal basis upon which the Appellant could refuse to credit the Respondent with the VAT that it paid and points to the fact that no such basis is established in the Appellant's Answering Affidavit.

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[25] *Paragraphs [38] and [39] ibid.*

[26] *Subparagraph 13.6 ibid.*

[82] In rebuttal of the aforegoing, it was submitted by the Appellant that VAT was paid by the Respondent in respect of invalid entries which cannot be regarded as payment for the WE entries.

[83] It is clear from the judgment of this Court that the findings by the court *a quo (either directly or indirectly)* that the entries were valid, are correct. Arising therefrom, this Court accepts the submissions made on behalf of the Respondent; rejects those made on behalf of the Appellant and finds that the court *a quo* did not err or misdirect itself when it found that the Respondent had already paid VAT and therefore the decision by the Appellant to demand VAT and a VAT penalty, is also irrational and stands to be set aside.[27]

Conclusion

[84] The crux of this matter is whether or not the court *a quo* erred or misdirected itself when finding that the Appellant's decision that the Respondent diverted the goods; the demand for payment of VAT and VAT penalties; the claim for an amount *in lieu* of forfeiture and the decision to refuse the Respondent's application for suspension of payment, was set aside. In deciding the aforegoing it is implicit that this Court, sitting as a court of appeal, make a finding as to whether or not, when the goods were imported by the Respondent, the Respondent complied with the provisions of the Customs Act.

[85] As is clear from the contents hereof, this Court is satisfied that the Respondent did indeed comply substantially with the provisions of the Customs Act. This is particularly so when considering the relevant facts of this matter and the provisions of the Customs Act. The actions of the Respondent *", constituted compliance with the statutory provisions viewed in the light of purpose".*[28] When interpreting and applying the provisions of the Customs Act the approach adopted by the Appellant is too strict; literal and formalistic. Most importantly, in adopting this approach, the Appellant has misconstrued the purpose of the Customs Act. Whilst it is true that the purpose of the

[27] *Paragraph [78] ibid.*

[28] *Paragraphs [64] and [65] ibid.*

Customs Act is , *inter alia*, to provide for *"the levying of customs and excise duties"* for the benefit of the fiscus, it is just as important to take into consideration the *manner* in which these duties are levied when considering and giving effect to the Customs Act. If a far too strict, literal and formalistic approach is taken, this may well have the unfortunate result of deterring the import and export of goods into and out of the Republic of South Africa. Of course, this would have a detrimental effect on the fiscus and be contrary to the very purpose of the Customs Act. When one accepts these principles, it is clear that the Respondent has satisfied the real test, that is, whether there has been compliance with the relevant prescripts in such a manner that the objectives of the statutory instruments concerned have been achieved.[29]

[86] Following thereon, it must be concluded that the court *a quo* was correct when finding that the decision of the Appellant should be reviewed and set aside in terms of section 6 of PAJA. In the premises, the court *a quo* did not err or misdirect itself to the extent that this Court, as a court of appeal, would be entitled to interfere with the court a quo's judgment and order made on the 7th of December 2022. In the premises, the appeal must be dismissed.

Costs

[87] It is trite that costs should normally follow the result unless unusual circumstances exist. Further, it is trite that an award for costs falls within the general discretion of the court.

[88] No circumstances justifying a departure from the *"norm"* were drawn to the attention of this Court. Neither were any submissions pertaining to, *inter alia*, the scale of costs and why costs should not include the costs of two counsel, made to this Court. There is no justification for an award of costs on a punitive scale. Furthermore, in light of, *inter alia*, the volume and complexity of the matter, together with the fact that both parties employed two (2) counsel, this Court is of the opinion that, in the exercise of its discretion, it would be just and equitable if the Appellant was ordered to pay the

[29] *Liebenberg (supra) at paragraph [22].*

costs consequent upon the dismissal of the appeal, such to include the costs of two (2) counsel, one being a senior counsel.

Order

[89] This Court makes the following order:

1. The appeal is dismissed.

2. The Appellant is to pay the Respondent's costs, such to include the application for leave to appeal and the costs of two (2) counsel, one being a senior counsel.

BC WANLESS
JUDGE OF THE HIGH COURT
GAUTENG DIVISION

APPEARANCES

For the Appellant:	Adv MPD Chabedi SC
	Adv S Mokgara
Instructed by:	Mothle Jooma Sabdia Inc
For the Respondent:	Adv JP Vorster SC
	Adv LF Laughland
Instructed by:	Macrobert Attorneys
Date of hearing:	20 November 2024
Date of Judgment:	05 August 2025