REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2025-016340

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

16/01/2026
DATE

[redacted]
SIGNATURE

In the matter between:

CONTRACT PACKING SOLUTIONS CC	Applicant
and	
SOUTH AFRICAN REVENUE SERVICE	First Respondent
MATLAGOLO RAYMOND LEKOANE	Second Respondent
HALEWOOD INTERNATIONAL SOUTH AFRICA (PTY) LTD	Third Respondent
ALTERNATIVE POWER (PTY) LTD	Fourth Respondent
DIAGEO SOUTH AFRICA (PTY) LTD	Fifth Respondent
THE MAGISTRATE FOR THE DISTRICT OF EKURHULENI CENTRAL HELD AT PALM RIDGE N.O.	Sixth Respondent

J U D G M E N T

This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploading it to the electronic file of this matter on Caselines. The date and time of hand-down is deemed to be 10:00 on 16 January 2026.

TEFFO, J:

Introduction

[1] The applicant seeks relief by way of urgency against the first respondent for the undisturbed resumption of its business operations of manufacturing and canning the non-alcoholic energy drinks. The relief sought is to operate as an interim order with immediate effect pending the finalisation of a review application to be instituted by the applicant against the first respondent within 30 days of the granting of this order, to set aside the warrant, conduct, actions and decisions of the first respondent originating from the warrant, and the subsequent conduct, actions and decisions of the officials of the first respondent as set out in the notice of motion.

[2] The applicant also seeks an order granting the reduction of the period stipulated in section 96(1)(a)(i) of the Customs and Excise Act[1] ("*the Act*") in terms of section 96(1)(c)(iii) of the Act to enable the matter to be heard on an urgent basis.

[3] The application is only opposed by the first and second respondents.

[1] Customs and Excise Act, 91 of 1964

The parties

[4] The applicant is Contract Packing Solutions CC. The first respondent is the South African Revenue Service ("*SARS*"). The second respondent is Matlagolo Raymond Lekoane, an official of SARS employed as an Investigator: Customs and Excise Investigations of the Tactical Analysis and Investigations. The second respondent also holds the designation of Customs Officer in terms of the Act. He has been cited in this application by virtue of his citation as the second applicant in the *ex parte* application under case no. 165/25 issued in the Magistrate Court for the District of Ekurhuleni Central held at Palm Ridge wherein he deposed to an affidavit for purposes of securing a warrant for the entry and search of the applicant's premises, which warrant forms the subject matter of this application.

[5] The third respondent is Halewood International South Africa (Pty) Limited ("*Halewood*"). The section 86(1) notice erroneously referred to Halewood as Halewood Breweries South Africa (Pty) Limited. Halewood is the proprietary holder of the ready to drink ("*RTD*") alcoholic beverages bottled and packed by the applicant.

[6] The fourth respondent is Alternative Power (Pty) Limited ("*Alternative Power*" or "*Switch*"). Switch is the proprietary holder of a non-alcoholic energy drink manufactured, canned and packed by the applicant.

[7] The fifth respondent is Diageo South Africa (Pty) Limited ("*Diageo*"). Diageo is the owner of a blended product referred to as Smirnoff Vodka First Stage Blend which is at the premises of the applicant.

[8] The sixth respondent is the Magistrate who authorised the search and seizure warrant ("*the warrant*") and his or her identity could not be established. I am informed that this application was served on the clerk of court of the Magistrate's Court held in Palm Ridge.

[9] The third to the sixth respondents have only been cited in this application by virtue of the interest they have in the subject matter of the warrant. No relief is sought against the third to the fifth respondents as they have been cited by virtue of their relationship as customers of the applicant and insofar as their rights in and to their property are affected by the warrant and the conduct and actions of the officials of SARS.

Nature of the applicant's business

[10] It is alleged that the applicant is a family established, run and owned business which has been in operation for approximately twenty (20) years. The business does bottling and packaging of energy drinks and alcohol products constituting ready to drink ("*RTD*") alcohol beverages. It is 24/7 hour operation with two shifts operating in its factory at any one time. It employs ± 70 employees comprising factory workers, factory supervisors, a factory manager, an administrative office worker, a driver responsible for the disposal of rubbish and members of the close corporation.

[11] The applicant avers that the business is registered in accordance with the required statutory registrations to operate it and holds a micro manufacturers' license issued by the Gauteng Liquor Board in terms of the

Gauteng Liquor Board Act[2] ("*the Liquor Board Act*"). It is not a distribution facility or a distribution or selling point of any alcohol products.

[12] Furthermore, the applicant claims that it renders the bottling, canning and packaging services to limited customers who are the third to the fifth respondents. It has a contract for the bottling of RTD alcoholic beverages on behalf of the third respondent (Halewood). Halewood delivers the bulk product already blended to it, the applicant in turn bottles and packages the product in a RTD format, whereafter the bottled and packaged product is collected, sold and distributed by Halewood. The applicant claims not to be involved in the manufacturing, sale or distribution of the product. This service to Halewood constitutes less than 2% (two percent) of the applicant's business and the applicant is paid a fee for the services rendered.

[13] The applicant asserts that it manufactures, cans, and packages non-alcoholic energy drinks to the fourth respondent, Alternative Power or Switch. It does not own the raw materials, the packaging and the like are delivered by Switch to it. The final product belongs to Switch and it is collected, sold and distributed by Switch. The manufacturing, canning and packaging of these energy drinks constitutes approximately 98% of its business.

[14] It contends that currently it does not bottle, can, package or manufacture any products on behalf of the fifth respondent ("*Diageo*"). It is alleged that the applicant negotiated an agreement with Diageo relating to the bottling and packaging of a ready to drink alcoholic beverages with alcohol content of (5%) five percent. To facilitate this, on 17 January 2025, Diageo

[2] Gauteng Liquor Board Act 2 of 2000

delivered the Smirnoff stage one, vodka blend, being 30 501 litres of (94%) ninety four percent absolute alcohol (AA) at the applicant's premises. The product belongs to Diageo, and it can account for the origin and duty status of this alcohol. The applicant did not become, nor does it intend to become the owner of the product. Due to operational restraints (equipment failures), the applicant was not able to start with any process in respect of the envisaged RTD alcoholic product. It is alleged that this product is easily separated and distinct from the other operations and products of other customers and has no bearing on the relief sought or the future energy drink operations of the applicant.

[15] In terms of a contract it has with Reboost Beverage Company (Pty) Limited ("*Reboost*") it does similar work as it does for Switch, for Reboost of manufacturing a small portion of the non-alcoholic energy drinks called "*Original*".

[16] The applicant further alleges that its business is mainly conducted at Unit 7 and partially at Unit 6, Union Street. The warehouse at Unit 6, Union Street which is a separate premises from the warehouse at Unit 7, Union Street, is usually used for the storage of empty cans, packing material, retention stock and in some instances broken or unusable equipment. Unit 6 is not used in the manufacturing, bottling, canning or packaging of any product.

[17] The manufacturing, canning and packaging of the energy drinks (the "*canning line of the operation*"), is done at Unit 7 as well as the bottling and

packaging of the RTD alcoholic drinks using the already blended bulk product received from the third respondent referred to as the "*bottling line*").

[18] The alcoholic products constituting the RTD beverages are Buffelsfontein and Kola Mix, Belgravia dry lemon and gin mix which are bottled in 660 ml glass bottles using the bottling line.

Factual background

[19] Pursuant to a search and seizure warrant issued and authorised by the Magistrate's Court at Palm Ridge, on 23 January 2025, the officials of the first respondent entered the premises of the applicant at Unit 7, Union Street, Alberton North, on 28 January 2025 where they conducted their inspection, examination, enquiry or search and eventually detained plant machinery and goods of the applicant in terms of section 88(1)(a) of the Act. In terms of section 4(12) of the Act, the officials of the first respondent also closed down and secured the entire business premises of the applicant including Unit 6. They refused to allow the applicant to continue its business operations.

[20] SARS officials also prohibited the applicant access to its business premises. They sought the services of Royal Security to guard the premises of the applicant.

[21] The applicant's business premises and warehouse remained closed. On 30 January 2025 SARS officials returned to the applicant's business premises and attended to the inventory of the alleged illicit products. Subsequently, on 31 January 2025, the applicant received a copy of the inventory from SARS.

[22] While on the applicant's premises on 30 January 2025, the applicant's legal representatives pleaded with SARS officials not to continue to shut down the entire business operation of the applicant but to allow it to operate the non-alcohol energy drink business. However, that was not permitted and the entire business operation of the applicant continued to be closed.

[23] Following the detention notice from SARS in terms of which the applicant was invited to make written submissions to SARS should it wish to mitigate the possibility of liability for forfeiture with supporting documentation within seven working days of the date of the notice, the applicant made written representations and provided supporting documents to SARS as well as submissions in the form of the DA96 notification which included a notice in terms of section 96(1) of the Act. The documentation was served on SARS on 3 February 2025.

[24] In response thereto a meeting was held between the applicant's legal representatives and SARS on 5 February 2025 to avoid litigation. On the same day SARS requested more information from the applicant granting it until 14 February 2025 to furnish the documentation without indicating when a decision to continue with the business operations would be made. This conduct by SARS prompted the applicant to launch this application on an urgent basis.

Urgency

[25] The issue of whether a matter should be enrolled and heard as an urgent application is governed by the provisions of Uniform Rule 6(12). The Rule provides as follows:

"*Rule 6(12)(a) In urgent applications the Court or judge may dispense with forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it seems meet.*

(b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.

(c) …"

[26] The applicant who approaches the court on urgency basis must apply for an order condoning the non-compliance with the rules. He or she must set forth explicitly the circumstances which render the matter urgent. First and where necessary, require that the matter be heard outside of the court's usual urgent procedures. The applicant must show an absence of substantial redress if not heard as a matter of urgency.

[27] Whether an applicant will not be able to obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his or her case in that regard. The fact that the applicant wants the matter to be resolved urgently, does not render the matter urgent. The correct and crucial test is whether, if the matter was to follow its normal course as laid down by the rules, an applicant will be afforded substantial redress. If he cannot be afforded substantial redress at a hearing

in due course, then the matter qualifies to be enrolled and heard as an urgent application. If, however, despite the anxiety of the applicant, he can be afforded substantial redress in an application in due course, the application does not qualify to be enrolled and heard as an urgent application[3].

[28] The absence of substantial redress that is required by the rules is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. The applicant may still obtain redress in an application in due course, but it may not be substantial[4].

[29] The Constitutional Court in *Chief Lesapo v North West Agricultural Bank and Another*[5], held that the right to approach the court for urgent relief is inextricably tied to a litigant's rights under section 34 of the Constitution, an important purpose of section 34 is to guarantee the protection of judicial process to persons who have disputes that can be resolved by law.

[30] As far as urgency is concerned, the applicant relied on a legal argument, and a number of arguments pertaining to facts which have been disputed by the first respondent in its answering affidavit and upon, which in these proceedings, one is unable to make a finding.

[31] Basically, the applicant contends that the conduct of SARS in closing down its entire business operation is *ultra vires*, unlawful, unreasonable, unconstitutional and irrational. It asserts that SARS has abused the warrant and powers in terms of the CEA to close down its business operation. It

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[3] *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* [2012] JOL 28244 (GSJ) at [7] and [9]. See also *Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd; Commissioner, South African Revenue Services v Hawker Aviation Partnership and Others* 2006 (4) SA 292 (SCA) at [9]

[4] *East Rock Trading (Pty) Ltd and Another v Eagle Valey Granite (Pty) Ltd and Others* at [7]

[5] 2000 (1) SA 409 (CC) at para [13]

claims that at the time its business operation was forced to close down, a mixture of the energy drinks was in the process of being prepared in the preparation tank. The preparation and process is time sensitive and consequent to the closure of the business operation, the prepared mixture of the energy drink has become unusable. Each day the production of the energy drinks is halted, results in the loss of approximately R3 504 592,00 (Three million five hundred and four thousand five hundred and ninety two rand) per week of income which runs into millions of rands per month. All the factory employees have been placed on indefinite unpaid leave and are not receiving any remuneration for as long as the energy operations remained closed.

[32] The applicant further contends that it is fast approaching commercial insolvency with irreversible and far-reaching consequences all of which can be prevented if the urgent relief is granted. Moreover, apart from the dire consequences for the employees, a substantial economic loss will be suffered as the applicant will not be able to pay or meet its tax obligations.

[33] Furthermore, the applicant contends that prior to obtaining the warrant and closing its business operations, and since February 2024 SARS had knowledge of the nature of and extensive information concerning its business. Post closure of the business, SARS is calling for the same information. SARS had and used other means to obtain information and investigate the activities of the applicant and could do so with due compliance with the enshrined principle of giving a citizen an opportunity to heard prior to any detrimental actions taken against it. If SARS had fears of contraventions of the CEA, it

should have acted pursuant to its earlier investigations of February 2024 and not wait until January 2025 to act as it has done.

[34] SARS disputes the allegations and contends that the application is not urgent.

[35] The urgency of commercial interests may justify the invocation of Uniform Rule 6(12) no less than any other interests. Each case must depend upon its own circumstances[6].

[36] Where allegations are made relating to abuse of power by a Minister or other public officials which may impact upon the rule of law, and may have a detrimental impact upon the public purse, the relevant relief sought ought normally to be urgently considered.

[37] Based on the above I am persuaded on the papers that there is justification for the application to be heard on urgent basis.

Section 96(1) of the Act

[38] Section 96 of the Act provides as follows:

> "*(1)(a)(i) No process by which any legal proceedings are instituted against the state, the Minister, the Commissioner or an officer for anything done in pursuance of this Act may be served before the expiry of one month after delivery of a notice in writing setting forth clearly and explicitly the cause of action, the name and place of abode of the person who is to institute such proceedings (in this section referred to*

[6] *Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W) at 586G

as the 'litigant') and the name and address of his or her attorney or agent, if any.

…

…

(iii) No such notice shall be valid unless it complies with the requirements prescribed in this section …

(c)(i) The State, the Minister, the Commissioner or an officer may on good cause shown reduce the period specified in paragraph (a) …

(ii) If the State, the Minister, the Commissioner or an officer, refuses to reduce or extend any period as contemplated in subparagraph (i), a High Court having jurisdiction may, upon application of the litigant, reduce or extend any such period where the interest of justice so requires."

[39] The applicant served SARS with the section 96(1) notice on 3 February 2025 and subsequently on 6 February 2025, it launched this application. It alleges that it requested SARS to reduce or extend the period envisaged in section 96(1)(a)(i) of the Act. However, SARS refused to reduce or extend the period referred to in section 96(1) resulting in the applicant requesting this Court to condone non-compliance thereof by either reducing or extending the period envisaged in section 96(1)(a)(i) of the Act.

[40] The court can only condone that period where the interest of justice so requires. Mr Peter SC for the respondents submitted that it will not be in the

interest of justice to reduce the period stipulated in section 96(1) of the Act as the applicant is seeking the urgent interim relief without challenging the detention of the goods by the officials of SARS. Further that SARS received the section 96(1) notice on 3 February 2025 and the application was served upon it on 6 February 2025 after it had requested additional information from the applicant on 5 February 2025. He claimed that SARS has a valid detention which entitles it to conduct its investigations. It must be given a reasonable opportunity to conduct its investigations. It was only given 3 days instead of one month to conduct its investigations.

[41] Relying on the judgment of *Henbase 3392 (Pty) Ltd v Commissioner, South African Revenue Service and Another*[7], Mr Peter SC argued the rules of natural justice do not apply to a detention. The purpose of a detention is to assert control and security of the goods pending investigation and until the applicant has been given an opportunity to satisfy it that it has not contravened the Act and the goods are not liable for forfeiture.

[42] Mr Peter further submitted that while SARS is investigating, it should be entitled to retain physical control of the applicant's goods and assets. On the other hand Mr Barnard SC for the applicant submitted in the section 96(1)(a)(i) notice, the applicant indicated its intention to bring an application to set aside the warrant, the detention and the actions of the officials of SARS at a later stage and that in the interim it seeks urgent relief to operate its energy drink business as it contends that its detention and closure was unlawful, subject to secure SARS' rights and interest to do the investigation.

[7] 2002 (2) SA 180 (T)

[43] He further submitted that in the section 96(1)(a)(i) notice, proposals were made as to how to deal with the matter pending the finalisation of the investigation process by SARS. He argued that there is no statutory provision that says detention is only valid for a certain time or that the investigation must be completed within a certain time frame. He referred to similar matters where investigations took more than a year and argued that the alcohol business can remain detained and be separated from the non-alcohol business which comprises the energy drinks and which the applicant contends is a legitimate business which was unlawfully detained.

[44] Mr Barnard SC further submitted that SARS had sufficient notice and ample opportunity to address the issues before court and could have avoided this application. He urged the court to order the truncation of the period stipulated in section 96(1)(a)(i) of the Act and allow the application to be heard by way of urgency.

[45] The court in *Commissioner for the South African Revenue Service and Others v Dragon Freight (Pty) Ltd and Others*[8] had this to say regarding the purpose of section 96(1)(a)(i) of the Act:

> "*[33] The purpose of section 96(1) is self-evident: to allow SARS, the organ of state charged with the administration of the Act, to investigate or review the merits of the intended legal proceedings and decide what position to adopt in relation thereto. It may, for example, in an appropriate case decide to resolve the dispute before the institution of*

[8] [2022] 3 All SA 311 (SCA)

legal proceedings, to avoid unnecessary and costly litigation at public expense.

[34] SARS is a large and complex institution with extensive administrative responsibilities and high workloads. Its functions are not confined to the levying of customs and excise duties under the Act but include the recovery of taxes under the Income Tax Act 58 of 1962 and the administration of the Value-Added Tax Act 89 of 1991. The section 96(1) notice enables SARS to ensure that a matter is brought timeously to the attention of the appropriate official for investigation or review. In my opinion, section 96(1)(a) of the Act promotes the efficient and economic use of resources, in accordance with the basic values and principles governing public administration set out in section 195 of the Constitution of the Republic of South Africa, 1996 ('the Constitution')."

[46] My understanding of the purpose of section 96(1) of the Act as outlined above is that the section is peremptory and the applicant who intends abridging the period stipulated therein must furnish reasons why the period should be truncated. The applicant in this application has also sought the relief for the truncation of the period provided for in section 96(1) and furnished reasons thereof which in my view coincide with the reasons for bringing the application in the urgent court. Having ruled that the matter is urgent, I find that it is in the interest of justice to reduce the period stipulated in section 96(1) and hear this application on urgent basis

The interim interdict and applicable law

[47] The requirements for the granting of an interim interdict are trite. The applicant is required to establish: a *prima facie* right, a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted, that the balance of convenience favours the granting of an interim relief, and that the applicant has no other satisfactory remedy[9]. Holmes JA[10] had this to say:

> "*The granting of an interim relief pending an action is an extraordinary remedy within the discretion of the court. Where the right which it is sought to protect is not clear, the court's approach in the matter of an interim interdict was lucidly laid down by INNES, J.A., in Setlogelo v Setlogelo, 1914 AD 2221 at p. 227. In general, the requisites are:*
>
> *(a) a right which, 'though prima facie established, is open to some doubt';*
>
> *(b) a well-grounded apprehension of irreparable injury.*
>
> *(c) the absence of ordinary remedy.*
>
> *In exercising its discretion, the court weighs, inter alia, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience.*

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[9] *Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton and Another* 1973 (3) SA 685 (A); see also *LF Boschoff Investments (Pty) Ltd v Cape Town Municipality, Cape Town Municipality v LF Boschoff Investments (Pty) Ltd* 1969 (2) SA 356 (C) at 267B-E

[10] *Eriksen Motors supra* at 691

The foregoing considerations are not individually decisive, but are interrelated: for example, the stronger the applicant's prospects of success, the less his need to rely on prejudice to himself. Conversely, the more the element of 'some doubt', the greater the need for the other factors to favour him. The court considers the affidavits as a whole, and the interrelation of the foregoing considerations, according to the facts and probabilities; see Olympic Passenger Service (Pty) Ltd v Ramlagan 1957 (2) SA 382 (D) at p. 383D-G. Viewed in that light, the reference to a right which, 'though prima facie established, is open to some doubt' is apt, flexible and practical, and needs no further elaboration."

[48] Where the right is clear "*… the remaining questions are whether the applicant has also shown:*

(a) an infringement of his right by the respondent; or a well-grounded apprehension of such an infringement.

(b) the absence of any other satisfactory remedy.

(c) that the balance of convenience favours the granting of an interlocutory interdict[11]*.*"

[49] In considering the harm involved in the grant or refusal of a temporary interdict, where a clear right to relief is not shown, the court acts on the balance of convenience. If though there is prejudice to the respondent, and

[11] *Knox D'Arcy Ltd and Others v Jamieson and Others* 1995 (2) SA 519 (W) at 592-593

that prejudice is less than that of the applicant, the interdict will be granted, subject if possible, to conditions, which will protect the respondent[12].

Clear right/*prima facie* right

[50] The applicant contends that it cannot have its entire business operation closed. It claims that the closure of its canning operation which relates to the canning and packing of the non-alcoholic energy drink it does on behalf of Switch is *prima facie* unlawful. The canning operation according to it falls outside the scope and ambit of the Act and SARS' investigation. Furthermore, the warrant and SARS' conduct were only aimed at the alcohol products which relate to its bottling operation.

[51] It asserts that the canning operation and the relief sought have no effect on SARS' detention of the canning plant and equipment. The detention in respect thereof remains in place and the validity and lawfulness of that detention will be addressed later in the main application. It contends that it only seeks relief to use the canning plant and equipment, pending the finalisation of SARS' investigation and/or adjudication by a court in due course of the validity and lawfulness of the detention.

[52] The applicant contends that the interim relief sought pending the institution of the main application, will not in any way or manner hamper or restrict SARS' investigations and it is able to separate and secure the bottling operations and alcohol products from the energy drinks canning operations.

[12] *Webster v Mitchell* 1948 (1) SA 1186 at 1189

[53] The applicant avers that it has furnished SARS with laboratory tests that confirm that the finished energy drinks, manufactured with the recipe for the product have a sugar content below the threshold and therefore confirm that the energy drinks were never subject to the SBL and the future energy drinks will also not fall within the ambit of SBL.

[54] In its heads of argument it was submitted on behalf of the applicant that the question as to whether the applicant as opposed to Switch should be registered as a sugary beverage manufacturer and if such registration is required, is academic because the energy drinks do not fall within Part 7A or any of the products in item 191 of Part 7 of Schedule 1 to the CEA.

[55] SARS contends that the applicant has contravened various provisions of the CEA in that it has engaged in activities which may be conducted at a licensed customs and excise manufacturing warehouse. The activities according to SARS include the mixing and blending of the alcohol spirits as well as the manufacture of sugary beverages subject to the Health Promotion Levy ("*HPL*").

[56] SARS claims that it obtained the warrant based on the information it had acquired concerning a large delivery of highly concentrated alcohol which the applicant confirms receipt of (a delivery of more than 94% of absolute alcohol ("*AA*")).

[57] SARS denies that the alcohol received in that form is ready to drink. It contends that the applicant confirms the existence of an agreement to bottle and package the ready to drink alcohol with an alcohol content of 5%. It avers that the applicant received a delivery of 30,501 litres of 94,96% AA which

when blended and diluted would yield more than 575,000 litres at 5% AA. The alcohol blending plant and equipment was being serviced on the day of the visit by the officials of SARS.

[58] SARS claims that when its officials were on the premises, they observed pallets of empty 300 ml bottles of Smirnoff consisting of about 2226 unites per pallet with 209 pallets in the bottles as recorded in the detention inventory. There were also boxes of labels that were to be affixed to the bottles and plastic shrink wrap packaging for both Smirnoff and Smirnoff spin.

[59] According to SARS the blended 575,000 litres at 5% AA would fill more than 1,9 million 300 ml bottles of ready to drink alcohol. There were also 88 pallets of 660 ml empty bottles that were detained. SARS contends that all these activities are required to take place in a licensed customs and excise manufacturing warehouse. The applicant's premises are not licensed at all.

[60] The second respondent, Mr Lekoane alleges in the answering affidavit that while at the premises of the applicant with the other officials of SARS, they also observed large storage, mixing and blending tanks and 62 bags of 1 ton Hullet sugar. It appeared that a different product in the form of refined sugar is used in the production of the liquor as part of the blending.

[61] SARS denies that the applicant only bottles ready to drink alcohol as it claims.

[62] Regarding the sugar beverages and HPL, SARS contends that the sugar threshold for the HPL is 4 g per 100 ml or 40 g per litre. It referred to annexure FA11 attached to the founding affidavit of the applicant and

submitted that it indicates that one of the Switch products exceeds the sugar threshold. This annexure came as a result of a test that was done by the applicant's employees at the premises on its own Anton Paarl instrument. The results of the test performed revealed that the mass concentration of sugar was 48,1 g per litre. This, according to SARS is evident that the applicant conducts activities that are required to take place in licensed warehouse premises.

[63] Mr Peter for SARS argued that based on the activities that were found to be conducted at the applicant's premises, the applicant's premises should have been licensed, and the applicant should have been registered as a manufacturer of sugar beverages as well as for alcohol. He disagreed with Mr Barnard for the applicant that the Act does not apply if the sugar content is less than 4 grams per 100 ml. He referred to Rule 54(1) and submitted that if a person is manufacturing tax free drinks using more than 500 kilos of sugar per year, he must register and if he is using less, he must apply for an exemption.

[64] Mr Peter referred the court to three emails attached to the replying affidavit of the applicant, all dated 1 March 2024 which I will deal with later and argued that the applicant blends alcohol. It gets a concentrate and mixes it. The alcohol it received is not ready to drink and for the mixing and blending, the applicant must have a VMS (the manufacturing licence for the premises). Furthermore, he submitted, the applicant uses sugar both for alcohol and sugary drinks. The applicant is blending in alcohol and using the same equipment in the alcohol production as it is using in the sugary

beverage production. Although not disputed in the papers, Mr Peter submitted the two cannot be distinguished to say the court should not look at this alcohol side of the business and only concentrate on the sugary beverage side.

[65] He submitted that regarding the relief sought, the applicant wants to use the same equipment it has been using for the alcohol production for the sugar beverage production. Further that SARS is entitled to detain the entire business operation as it did under section 88 of the Act. The applicant was served with a detention notice which it wants the court to ignore. It is not challenging the detention. However, it wants to resume its sugar production. Moreover, SARS is entitled to lock up the premises if it has reason to believe that unlawful activities are taking place. In this regard, he relied on the provisions of section 4(12) of the Act.

[66] After referring to sections 27, 54I, Rule 54I.02 and Part 2 of Schedule 1, Mr Peter submitted that all laws applicable to the importation, payment of duty, manufacture and entry for home consumption, including, manufacture that apply to excisable goods apply *mutatis mutandis* to health promotion levy (HPL) goods. He argued that even though the health promotion levies do not fall within the definition of excisable goods and section 27 says you cannot manufacture excisable goods unless you register in a warehouse, section 54I says if it is a health promotion levy, it is excisable *mutatis mutandis*, and that is the reason why SARS maintains that the applicant needs a warehouse.

[67] Mr Peter further submitted that the applicant did not challenge the detention as being unlawful, it does not have a *prima facie* right to obtain the relief sought. It cannot operate its business as it has been stopped from

operating in terms of a valid warrant. Their rights are subject to the statutory powers of detention.

[68] The applicant concedes in its papers that alcohol is an excisable product. It does not challenge its detention and investigation by SARS. However, it maintains that the closure of its energy drink operation which comprises 98% of its business is *prima facie* unlawful and it is a serious violation of its constitutional right. It contends that it has a clear right to protect its constitutional right.

[69] Regarding the submission made about annexure FA11 that indicates that the sugar content on the energy drinks was above threshold, Mr Barnard submitted that the annexure was mistakenly added to the founding papers and that the results thereof are not from a laboratory as required by the Act. He argued that the document is inadmissible because it is not what the statute determines how the sugar content should be calculated. He submitted that the intention was to attach a document attached to the Replying Affidavit (RA3) which is a report that complies with the Act that says the sugar content was below the threshold (being 3.78). He also referred to two more certificates which all indicate that the sugar content on the energy drinks was below the threshold.

[70] Mr Barnard referred to item 191.00 in section A of Part 7 of Schedule No. 1 and argued that the Switch product does not fall within the ambit of item 191. It is therefore not a sugary beverage as contemplated in Rule 54(I).01(c)(vii). He disagreed with Mr Peter's submission and argued that if the legislature wanted to include all sugary beverage, it should have said so.

[71] Rule 54(I).01(c)(ii) provides that "*sugary beverage means a beverage manufactured or imported in the Republic in terms of item 191 of section A of Part 7 of Schedule 1*".

Mr Barnard submitted the rule is limited to that specific type of sugary beverages. He further argued that in terms of the definition of sugar beverage, it will only be a sugar beverage content of above 4 grams per 100 millilitres. Furthermore, he submitted that the applicant does not manufacture such a sugary beverage, it does not have to register nor have a license. That is why the legislature requires a laboratory test report to measure the sugar content on the product or assume that it is 20 grams per 100 millilitres. Mr Barnard went on to say that because the applicant says there is a *prima facie* indication that the energy drinks are not subject to the sugar beverage levy, the detention and continued detention, and the prohibition for it to operate its business should be protected on an urgent basis. The detention can remain in place even on the equipment used for the sugar beverages, until such time as the whole process has been finalised. However, in the interim it will bring a substantive application that will deal with all the issues.

[72] At paragraph 16.31.9 of the founding affidavit the applicant states that in confirmation of the sugar content of the Switch energy drink is attached as "*FA11*" a copy of the test report from SANAS/ILAC as required in terms of Note 5(a) of the notes to section A of Part 7A of Schedule 1 to the CEA, confirming that the product is not a sugary beverage as contemplated in item 191.

[73] It is correct that what is on FA11 does not support the allegations made by the applicant. I do not understand the reasons behind the fact that FA11 was attached to the papers by mistake, it is not admissible as it is not a report from the laboratory as required by law and that it has now been corrected in the replying affidavit. As at the time of the entry to the premises for the search and detention those were the results that were furnished to SARS officials and the tests according to Mr Lekoane were done in their presence. SARS in my view cannot be faulted for acting on the basis of that information at the time. Furthermore, according to what is stated in the founding affidavit, annexure FA11 is a copy of the report from SANAS/ILAC which is a requirement in terms of the Act

[74] Three emails dated 1 March 2024 have been attached to the replying affidavit on pages 02-226 – 02-228. These emails are addressed to the three different customers of the applicant from the applicant. The first one on page 226 is addressed to Halewood from Ms Lynn-Smith. It states the following:

> "*Herewith is the process for Halewood Breweries.*
>
> 1. *Contract Packing will receive an order to manufacture.*
>
> 2. *Halewood will send us tankers of 20.000 litres of Ready Mix Syrup which we will just add water at a dilution ratio of 1+3. …*"

[75] The second email is addressed to Alternate Power/Switch and relates to the process of manufacturing the Switch energy drinks. It states:

> "*1. The Alternate Power Company will send us a forecast for a month at a time as per the attached sample.*

2. All the raw materials and packaging will get delivered to us.

3. Contract Packing will then blend the raw materials as per the flavour receipt supplied by Alternate Power Company (Attached Blending Sheet).

…

[76] The third letter is addressed to Brown Forman Netherlands and states the following:

"*1. …*

2. Brown Forman USA will send a tanker of Whiskey which is duty paid on entry at the port.

3. Contract Packing will call off from the Brown Forman Suppliers for Glass, Bottle Tops, Bottle Labels, 4 pack wraps and Trays and flavours.

4. Contract Packing will purchase the sugar for the production.

5. Contract packing will then blend according to the Jack Daniels formulation …"

[77] A reading of these e-mails is a clear indication of the mixing and blending of the alcohol and the sugary beverages. It is not for me to give a finding regarding this and the disputes relating to the sugary beverages content or measurements that are in the energy drinks but there is in my view prima facie evidence for SARS to believe that unlawful activities have been

taking place at the applicant's premises although the allegations are disputed. SARS contends that the applicant uses sugar for both alcohol and sugary drinks and the allegations are denied by the applicant. It cannot be said that the applicant has established a clear right in relation to the business of the energy drinks.

[78] Can it be said that the applicant has established a *prima facie* right for the relief it is seeking?

[79] In an application for a temporary interdict, the applicant's right need not be shown by a balance of probabilities; it is sufficient if such right is *prima facie* established, though open to some doubt. The proper manner is to take the facts as set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute and to ask whether, having regard to the inherent probabilities, the applicant could on these facts obtain final relief at a trial. The facts set up in contradiction by the respondent should then be considered, and if serious doubt is thrown upon the case of the applicant, he could not succeed[13].

[80] Mr Barnard submitted that there is *prima facie* indication that the energy drinks are not subject to the sugar beverage levy, the detention and continued detention and the prohibition for the applicant to operate its business should be protected on an urgent basis.

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[13] *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189, *Manong & Associates (Pty) Ltd v Minister of Public Works and Another* 2010 (2) SA 167 (SCA) at 180

[81] The Constitutional Court in *National Gambling Board v Premier, KwaZulu Natal and Others*[14] defined an interim relief as follows:

> "*An interim interdict is by definition 'a court order preserving or restoring the status quo pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination.*"

[82] The court further had this to say[15]:

> "*The dispute in an application for an interim interdict is therefor not the same as that in the main application to which the interim interdict relates. In an application for an interim interdict the dispute is whether, applying the relevant legal requirements the status quo should be preserved or restored pending the decision of the main dispute. At common law, a court's jurisdiction to entertain an application for an interim interdict depends on whether it has jurisdiction to preserve or restore the status quo. It does not depend on whether it has the jurisdiction to decide the main dispute.*"

[83] Having considered the facts in this matter I find merit in SARS argument that the applicant does not have a *prima facie* right to resume its energy drinks operation in that that right has now being affected by the detention by SARS which has not been challenged in these proceedings.

<u>A well-grounded apprehension of irreparable harm and the balance of convenience</u>

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[14] 2002 (2) SA 715 (CC) at para [49]
[15] *National Gambling Board v Premier, KwaZulu Natal and Others, supra* at [49]

[84] The second requirement which the applicant must satisfy is to show that there is a reasonable apprehension of irreparable harm and imminent harm eventuating should the order not be granted. The harm must be anticipated or ongoing. It must not have taken place already[16].

[85] The applicant contends that the closure of its business is seriously detrimental to it, its employees and clients. If it continues, it is fast approaching commercial insolvency, approximately 70 employees will lose their livelihoods, and preventable irreparable harm and damages to machinery, equipment, products and business, running to millions of rand, will be suffered and the effect is accumulating every day. It claims that the potential prejudice to SARS, the fiscus and the general economy, if the interim relief is granted, is minimum to the point of being non-existent. Further that the balance of convenience substantially favours the granting of the interim relief.

[86] It was submitted on behalf of SARS that the detention grants it rights to detain the goods, equipments and the machinery and also keep them out of the premises. SARS is currently busy with its investigations. It will not be able to conduct its investigations and also perform some tests on the goods detained if the applicant is allowed to resume its operations and suddenly the product it has detained disappears. Mr Peter submitted that the rules of natural justice are not applicable to the detention because the detention aims to assert control and security of the materials until the applicant has been given an opportunity to show why the goods are not liable for forfeiture.

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[16] See *Tshwane v City Afriforum* 2016 (6) SA 279 (CC) at 360B-C

[87] It was further submitted that although the interim interdict is couched in form, the application is in substance a final interdict to set aside a detention effected in terms of section 88 of the Act and thereby frustrate the Commissioner in his efforts to establish whether the detained goods are liable for forfeiture under the Act, and put the applicant back into the position to continue unlawful manufacturing activities in its premises contrary to the provisions of the Act.

[88] In weighing these two scenarios, one must avoid a rigid belief that the State is more powerful than individuals or juristic persons such as companies and that for example financial prejudice to the State is less serious than financial prejudice to so-called private entities, because the State's money does not belong to anybody in particular and its resources are almost unlimited. The State has a duty to the public as a whole and to all individuals to collect taxes diligently, not only to meet its responsibilities in terms of the enormous need for resources inside South Africa, but also in order to be fair to those individuals and juristic persons who do pay their taxes (in the wide sense of the word) in a law abiding and diligent manner[17].

[89] There is no doubt that the applicant is suffering and will suffer if the interim interdict is not granted. However, in my view the prejudice or harm that SARS will suffer if the interim interdict is granted far outweighs the irreparable harm that the applicant will suffer if the interim interdict is not granted. I therefore do not agree with the applicant that SARS will not suffer any irreparable harm should the interdict interim be granted. The balance of convenience does not therefore favour the granting of the interim interdict.

[17] *Henbase supra*

Alternative remedy

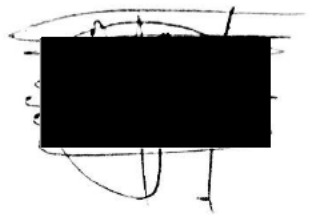
[90] The applicant contends that its rights to claim damages remain reserved. Further that it is entitled to claim compensation for losses or damages arising out of the actions of any officer of SARS which are not *bona fide*. I am persuaded that the applicant has an alternative remedy to claim damages or any loss as a result of the actions of SARS officials should there be any.

[91] In conclusion I find that the applicant has failed to satisfy the requirements for the granting of the interim relief.

Costs

[92] Mr Peter requested costs for two counsel on Scale C. Having considered the matter, I grant costs for the employment of two counsel, one on Scale C and one on Scale B.

[93] Consequently, I order that this application is dismissed with costs which include the costs for the employment of two counsel, one on Scale C and one on Scale B.



M J TEFFO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances

For the applicant	J M Barnard
Instructed by	Wright Rose-Innes Inc c/o Macintosh Cross & Farquarson
For the first and second respondents	J R Peter
Instructed by	MacRobert Attorneys