



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case no: 180/2025

In the matter between:

QI LOGISTICS (PTY) LTD

APPELLANT

and

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

RESPONDENT

Neutral citation: *QI Logistics (Pty) Ltd v The Commissioner for SARS* (180/2025)
[2026] ZASCA 96 (3 July 2026)

Coram: ZONDI DP, SMITH and UNTERHALTER JJA, SERITI and MOLITSOANE
AJJA

Heard: 21 May 2026

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for the handing down of the judgment is deemed to be 11:00 on 3 July 2026.

Summary: Customs and Excise Act 91 of 1964 – statutory obligations of clearing agents appointed under s 64B – proof required to acquit goods entered for removal in bond or in transit – Commissioner's assessment of proof of export – liability for duties and levies – separate discretion under s 88(2) to demand an amount in lieu of forfeiture –

distinction between procedural rationality and procedural fairness – review under the principle of legality and s 6(2)(f)(ii) of the Promotion of Administrative Justice Act 3 of 2000 – remittal to the Commissioner.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Davis J sitting as court of first instance):

- 1 The appeal is upheld with costs, including the costs of two counsel where so employed.
- 2 The order of the high court is set aside and replaced with the following order:
‘1. The respondent’s decisions to hold the appellant liable for import duties and to demand an amount in lieu of forfeiture under the letter of demand dated 3 July 2019, are reviewed and set aside.
2. The matter is remitted to the respondent for reconsideration.
3. The respondent is directed to pay the costs of the application, including the costs of two counsel where so employed.’

JUDGMENT

Smith JA (Zondi DP, Unterhalter JA, Seriti and Molitsoane AJJA concurring):

Introduction

[1] On 31 July 2020, QI Logistics (Pty) Ltd (QI), a licensed clearing agent under the Customs and Excise Act 91 of 1964 (the Act), instituted proceedings in the Gauteng Division of the High Court, Pretoria (the high court) to review and set aside the decisions of the Commissioner for the South African Revenue Service (the Commissioner) holding it liable for import duties and levies arising from imported fuel, and requiring it to pay an amount in lieu of forfeiture (the impugned decisions). The Commissioner’s letter of demand, which was issued pursuant to the impugned decisions, was based on the assertion that QI had failed to provide the information and documents required to prove that the fuel had been duly exported in accordance with the statutory declarations it had processed. The letter required QI to pay R35 080 475,35.

[2] QI contended that it acted only as a 'sub-agent' in relation to 67 consignments of fuel moved from Mozambique to Zimbabwe and Botswana under removal in transit and removal in bond procedures. It asserted that it prepared the necessary transit documentation but had no proprietary interest in the goods and exercised no control over their transport, sale, or delivery. According to QI, the export documents obtained in the ordinary course of business showed that the goods had in fact been exported, and there was no reason to doubt their authenticity or accuracy.

[3] In its judgment of 8 August 2024, the high court rejected QI's contention that it avoided liability because it was not the principal clearing agent and had played only a limited role in the movement of the fuel. The high court held that the decisive enquiry under the Act was not the extent of QI's commercial involvement, but whether QI had satisfied the statutory requirements for exemption from liability. On the high court's approach, QI failed to establish due export after the notices of intent were issued and did not bring itself within the exculpatory requirements of s 99(2) of the Act. The high court accordingly held that QI remained liable under the Act. The appeal is with the leave of the high court.

[4] QI contended that the impugned decisions constitute administrative action. It therefore brought the review application under the Promotion of Administrative Justice Act 3 of 2000 (PAJA), alternatively as a rationality review under the principle of legality. On appeal, however, the issues have narrowed. QI no longer persists with the argument that its liability was limited because it acted only as a 'sub-agent', had no proprietary interest in the fuel, and was not involved in its transportation or export. That concession was correctly made. Although the affidavits dealt at some length with whether QI had furnished adequate proof of export and whether it attracted liability despite its limited role, the appeal is now directed to the rationality of two decisions: the decision to hold QI liable for import duties, and the decision to demand an amount in lieu of forfeiture. The central question is therefore whether the Commissioner's decisions conform to the standards of rationality under PAJA or the principle of legality.

[5] QI advances two related complaints about defects in the Commissioner's decision-making process. The first concerns the treatment of the material submitted in response to the notices of intent. QI asserts that the contemporaneous record does not show that the Commissioner engaged rationally with that material, or explain why it was insufficient to prove due export of the fuel. The second concerns the separate decision under s 88(2) to demand an amount in lieu of forfeiture. QI contends that it was not afforded a proper opportunity to make representations directed to the exercise of that discretion, and that no reasons were provided when they were requested.

[6] I address those issues in the following sequence. First, I set out the material facts. Secondly, I consider the statutory obligations imposed on clearing agents under the Act. Thirdly, I examine the principles governing procedural rationality and, insofar as the s 88(2) decision is concerned, procedural fairness. Fourthly, I consider whether the reasons advanced by the Commissioner were rationally connected to the impugned decisions. Fifthly, I deal with the significance of the Commissioner's failure to furnish reasons after QI requested them. And finally, I consider the issue of a just and equitable remedy.

Factual background

[7] In 2018, QI received instructions from another clearing agent to process the removal in transit and removal in bond on behalf of several import and export companies, for the clearance of fuel shipments by road through the Komati border into Botswana and Zimbabwe. During the period April 2018 to August 2018, QI processed the required customs forms (SAD500) to clear certain consignments of the fuel imported from Mozambique. The imported fuel constituted goods for removal in transit for export to Zimbabwe and for removal in bond for export to Botswana, the latter being a member of the South African Customs Union.

[8] In 2019, the Commissioner informed QI that he was auditing goods transported in transit through the Republic from Mozambique to Zimbabwe during the period 1 April 2018 to 31 August 2018. He requested QI to submit the relevant clearance documents for consignments processed during that period. In response, QI provided

copies of the acquittal and related documents in its possession. The Commissioner thereafter issued a first notice of intention to raise debt (notice of intent), alleging contraventions of ss 18(13) and 75(19) of the Act and claiming approximately R47 million in duties, levies and penalties, in terms of ss 80, 88(2) and 91 of the Act.

[9] In broad terms, these provisions regulate the movement and acquittal¹ of goods removed in transit or in bond, the consequences where such goods are not duly accounted for or are diverted from their declared destination, the liability for duties and other charges that then arise, and the Commissioner's power to claim forfeiture or an amount in lieu of forfeiture. The Commissioner claimed that QI was liable on the basis that certain entries lacked endorsements recording arrival and exit at the relevant border posts, with the result – according to the Commissioner – that the goods had to be treated as diverted from their declared destinations or delivered within South Africa.

[10] QI, through its representative, Custex Consulting (Custex), submitted detailed representations in response, together with four lever-arch files of acquittal documents. There is no evidence that the Commissioner engaged with those representations. Instead, he issued a second notice of intent that substantially repeated the earlier allegations and sought to hold QI liable for R12 719 955,52 in duties and penalties in respect of 26 consignments of fuel.

[11] On 3 July 2019, the Commissioner issued the letter of demand, holding QI liable for R14 199 139,35 in duties and R20 881 366 in penalties in lieu of forfeiture. The reasons stated in the letter of demand were sparse and repeated only that some entries were not endorsed for arrival and exit.

[12] On 15 August 2019, Custex requested reasons why the documents were said to be insufficient to prove due acquittal and on what basis the Commissioner had decided

¹ In this context, to 'acquit' in customs and excise parlance means to establish, through supporting export documents, that the transit entry was properly discharged and that the goods in fact left the Republic as declared.

to demand payment of a sum of money in lieu of forfeiture. It is common cause that the Commissioner never furnished any reasons.

[13] The Commissioner has since accepted that some of the fuel consignments listed in the schedule to the letter of demand were duly exported. Those consignments have subsequently been removed from the schedule.

Statutory responsibilities of clearing agents

[14] The Act imposes exacting responsibilities on licensed clearing agents. Section 64B permits only a licensed clearing agent to make entries or submit bills of entry for reward on behalf of a principal. But the role is not merely mechanical. A clearing agent does more than lodge entries and supporting documents: by acting in that capacity, it assumes defined statutory responsibilities for customs compliance.

[15] Those responsibilities are particularly important where goods are entered for removal in bond. Section 18(2) provides that a clearing agent is liable for duty on such goods. If the goods are destined for export, that liability falls away only when the agent shows that they were duly exported in accordance with the relevant statutory declaration. Section 18(3) accordingly requires the agent to obtain, retain, and produce documentary proof that the goods were properly acquitted.

[16] The proof of acquittal is central because the Act treats unexplained non-acquittal seriously. Section 18(13)(a)(i) prohibits bonded goods from being diverted to a destination other than that declared on entry, or from being delivered within the Republic, without the Commissioner's permission. Where the agent cannot produce valid proof that the goods were acquitted in accordance with the declaration, the goods may be treated as unlawfully diverted.

[17] Section 99(2)(a) creates a further and distinct basis on which a clearing agent may be liable for its principal's obligations under the Act, including duties and related charges. The agent may avoid that liability only by showing acquittance or bringing itself within the

statutory exception: it must prove that it was not party to the non-fulfilment, that it reported the non-compliance to the Commissioner as soon as reasonably practicable, and that it took all reasonable steps to prevent the breach. The section therefore places the burden on the clearing agent to establish the facts necessary to bring itself within the statutory exception.

[18] Finally, the Act separately addresses the consequences where goods liable to forfeiture cannot readily be found. Section 88(2)(a)(i) empowers the Commissioner, in those circumstances, to demand an amount in lieu of forfeiture. It provides:

‘If any goods liable to forfeiture under this Act cannot readily be found, the Commissioner may, notwithstanding anything to the contrary in this Act contained, demand from any person who imported, exported, manufactured, warehoused, removed or otherwise dealt with such goods contrary to the provisions of this Act or committed any offence under this Act rendering such goods liable to forfeiture, payment of an amount equal to the value for duty purposes or the export value of such goods plus any unpaid duty thereon, as the case may be.’

This provision is discretionary in form. It therefore becomes important, later in the analysis, to distinguish the liability that may arise from non-acquittal from the separate decision whether to demand an amount in lieu of forfeiture.

Procedural irrationality

[19] Procedural rationality concerns whether the decision-making process is rationally connected to the purpose for which the power was conferred, the empowering provision, the information before the administrator and the reasons given. Both the principle of legality and s 6(2)(f)(ii) of PAJA,² guard against arbitrary or capricious decision-making. Procedural rationality must, however, be distinguished from substantive rationality.

² Section 6(2)(f)(ii) provides that a court or tribunal has the power to judicially review administrative action if:

‘the action itself—

(ii) is not rationally connected to—

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator.’

Procedural rationality concerns the process by which the decision was reached; whereas substantive rationality concerns the rationality of the outcome of that process.

[20] The Constitutional Court has made clear that procedural rationality is an incident of the principle of legality. In *Democratic Alliance v President of the Republic of South Africa*,³ the Court explained that both the process by which the decision is made and the decision itself must be rational. An irrational step in that process may therefore taint the ultimate decision and render it reviewable.

[21] The distinction between procedural rationality and procedural fairness is also important. Procedural rationality concerns whether the steps taken by the decision-maker bear a logical connection to the decision that has been taken. Procedural fairness, by contrast, concerns the treatment of the affected party, including whether that party was given a proper opportunity to be heard. *Albutt v Centre for the Study of Violence and Reconciliation (Albutt)*.⁴

[22] The Constitutional Court has also emphasised that the reasonableness test and that of rationality must be kept conceptually distinct. That is because '[r]easonableness is generally concerned with the decision itself.'⁵ Although reasonableness and rationality may overlap, they are conceptually different. As the Constitutional Court explained in *Albutt*:⁶

'The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether

³ *Democratic Alliance v President of South Africa and Others* [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC).

⁴ *Albutt v Centre for the Study of Violence and Reconciliation and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (2) SACR 101 (CC); 2010 (5) BCLR 391 (CC).

⁵ *Democratic Alliance v President of the Republic of South Africa* para 29.

⁶ *Albutt* para 51.

there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution.’

[23] Two principles guide the rationality enquiry. The first concerns the duty to engage with relevant material. As the Constitutional Court made clear in *Democratic Alliance v President of the Republic of South Africa*,⁷ a failure to consider material relevant to the exercise of public power may render the process irrational. That is because the decision-maker then fails to take account of information that bears directly on the purpose for which the power was conferred. That principle is directly engaged here because the Commissioner’s decision to hold QI liable depended on an assessment of the very documents and representations submitted in response to the notices of intent. The same principle is also relevant to the s 88(2) decision. Because that provision confers a discretion, the Commissioner had to consider the factors that could rationally bear on whether an amount in lieu of forfeiture should be demanded at all, including the nature of the alleged contravention, QI’s role, the explanation advanced, any prejudice to the fiscus and whether the severe consequence of forfeiture was proportionate.

[24] The second principle concerns the limited role of a reviewing court. A court does not substitute its own view of the facts merely because a different conclusion may have been open.⁸ That limitation is important in this appeal because this Court is not called upon to decide whether each consignment was in fact duly acquitted or whether the Commissioner ought, on the merits, to have accepted QI’s documents. Nor is it for this Court to decide for itself whether forfeiture, or an amount in lieu of forfeiture, would have been appropriate. The question is narrower: whether the Commissioner acted lawfully and rationally on the material before him, and whether the contemporaneous reasons disclosed a rational path from that material to the decisions taken. These two principles

⁷ *Democratic Alliance v President of South Africa and Others* paras 39 – 40.

⁸ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

therefore require scrutiny of the decision-making process without converting the review into a merits appeal.

QI's liability for duties and an amount in lieu of forfeiture

[25] The abovementioned principles must now be applied separately to the two decisions implicated in this appeal. Although the two impugned decisions formed part of the same letter of demand and arose from the same underlying transactions, they are legally distinct. The decision to hold QI liable for duties and related charges depended principally on whether the statutory requirements for liability were met and whether the Commissioner rationally assessed the proof of export placed before him. The decision to demand an amount in lieu of forfeiture under s 88(2) involves a distinct discretionary power, requiring a separate consideration of whether the forfeiture-related demand should be made at all and, if so, on what basis. The distinction matters because the procedural requirements attaching to those decisions are not identical.

[26] In the circumstances of this case, the question of substantive rationality does not arise. This is so because the alleged defect lies at an earlier stage, namely that there is no contemporaneous record showing that the Commissioner undertook a rational evaluation of the documentary evidence before reaching the impugned conclusions. In particular, whether the record discloses how the Commissioner considered the material furnished by QI, through Custex, or why that material was rejected. Those documents were tendered to establish due acquittal and the export of the fuel and therefore bore immediately on the legal basis for the demand. Whether the Commissioner rejected or accepted them, he was required to do so after a rational evaluation of their contents, reliability and legal sufficiency. A mere repetition that some entries lacked arrival or exit endorsements does not explain whether the other acquittal material was considered, why it was inadequate, or how the statutory requirements remained unsatisfied.

[27] The enquiry is not whether the material placed before the Commissioner was, on its own, sufficient to establish due acquittal, nor whether an adverse conclusion could ultimately have been reached on a properly considered record. Those are merits related

questions. The relevant question is more confined: whether the contemporaneous reasons disclose why the Commissioner rejected QI's acquittal documents. That required some indication whether the documents were considered incomplete, unreliable, legally insufficient, inconsistent with other customs records, or deficient for some other identified reason. In the absence of that explanatory link, the Court cannot test whether the decision-making process was rationally connected to the decision taken by the Commissioner. Any attempt to assess the rationality of the outcome itself would therefore be speculative and would risk converting this review into an impermissible merits determination on an incomplete record.

[28] This case is therefore properly resolved as one of procedural irrationality and fairness. Once the process is shown to be irrational because relevant material was not demonstrably considered, the reasons are inadequate and no proper basis for the exercise of the forfeiture discretion is disclosed, both the decision to hold QI liable for unpaid duties and the demand for an amount in lieu of forfeiture must be remitted for reconsideration. Whether a substantively rational outcome may yet be reached is for the Commissioner to determine, on proper engagement with the record, and not for this Court to pre-empt in review proceedings.

[29] QI's challenge to the rationality of the decision to hold it liable for import duties — and therefore to the letter of demand itself — turns on the adequacy of the reasons given for that decision in the notices of intent and the letter of demand. There is no contemporaneous record indicating that any additional reasons were considered.

[30] The letter of demand – which repeats the reasons stated in the notices of intent – contains no more than bare assertions that certain entries were not endorsed for arrival and exit. The following excerpt from that letter demonstrates the full extent of the reasons provided by the Commissioner:

'Upon analysing the said documents our office established that some of the entries were not marked for arrival and exit at both ports of exit which is Beitbridge border post for goods removed in transit (RIT) and Botswana borders, for goods removed in bond (RIB). On the

27th of August 2018 letters requesting documents regarding movement of the trucks/haulers concerned were sent and to date no response has been received from your office providing such documents or clarity of issues raised.'

The letter of demand further records that the Commissioner issued the demand because QI had allegedly failed to provide the requested documents.

[31] The Commissioner gave a detailed treatment to the liability issue in his answering affidavit, but this in turn triggered a series of further affidavits of reply and rebuttal - none of which can cure the failure of procedural rationality in respect of the letter of demand. This is because an irrational decision cannot ordinarily be saved by *ex post facto* rationalisation in litigation, as this Court emphasised in *National Lotteries Board v South African Education and Environment Project*.⁹ In this case, the Commissioner had already committed himself to the reasons stated in the notices of intent and the letter of demand. QI's later request for reasons gave him a further opportunity to explain or elaborate on that position, but he did not do so. The attempted *ex post facto* justification in the answering affidavits must therefore be disregarded, and those further reasons need not be considered.

[32] It is manifest that the contemporaneous reasons advanced by the Commissioner do not demonstrate rational engagement with the documents provided, nor do they explain why the material failed to prove due acquittal. That omission is significant in the context of this case because QI's liability depended not simply on the absence of endorsements on some entries, but on whether the documents submitted in response to the notices of intent were capable of establishing that the fuel had in fact been exported in accordance with the relevant declarations. The Commissioner was therefore required to consider the acquittal documents, identify any material deficiencies in them, and explain why they did not satisfy the statutory requirements.

⁹ *National Lotteries Board v South African Education and Environment Project* [2011] ZASCA 154; [2012] 1 All SA 451 (SCA); 2012 (4) SA 504 (SCA).

[33] A bare statement that certain entries were not marked for arrival and exit does not show that this evaluative task was performed. Nor does it disclose whether the Commissioner rejected the documents because they were incomplete, unreliable, inconsistent with customs records, or legally insufficient. The defect is compounded by the Commissioner's failure to provide reasons when requested. On this footing, the letter of demand lacks a demonstrated rational connection between the information before the Commissioner, the reasons given and the decision to hold QI liable for the unpaid duties. It accordingly falls to be reviewed and set aside on this basis.

[34] The same procedural defect affects the decision to demand an amount in lieu of forfeiture under s 88(2) of the Act. Liability for duties and levies may arise *ex lege* once the statutory requirements are met. By contrast, s 88(2) confers a discretionary power. If goods liable for forfeiture cannot readily be found, the Commissioner *may* (my emphasis) demand payment of an amount equal to their value for duty purposes or their export value, together with any unpaid duty. The Commissioner must therefore determine whether the jurisdictional facts for forfeiture exist, whether a demand in lieu of forfeiture should be made and, if so, the amount to be demanded within the statutory limit.

[35] That discretion is not merely mechanical. It involves a distinct and reviewable exercise of public power, which must be undertaken lawfully and rationally, consistently with the purpose of the forfeiture provisions: to protect the revenue and the integrity of customs control without imposing arbitrary or disproportionate punishment. Where the decision to hold QI liable for duties is vitiated by procedural irrationality, the forfeiture-related demand cannot stand on that foundation. A valid determination of duty liability is logically anterior to the exercise of the discretion under s 88(2). But the converse does not follow: even where liability for duty has properly been established, the Commissioner must still consider independently whether the jurisdictional facts for s 88(2) exist and whether, in the circumstances, it is appropriate to demand an amount in lieu of forfeiture.

[36] While procedural fairness does not arise in relation to the Commissioner's decision to hold QI liable for duties – because QI does not assert non-compliance with the *audi*

alteram partem principle – the position is different in relation to the decision under s 88(2). The relationship between the two decisions may be stated in two propositions. First, a valid determination of duty liability is logically anterior to a demand for an amount in lieu of forfeiture. Secondly, such a demand is not an automatic consequence of duty liability: it involves a separate discretion that must be exercised independently. Because that discretion required the Commissioner to decide whether, and on what terms, the power should be exercised, QI had to be afforded a proper opportunity to make representations directed to that issue. It is common cause that no such invitation was extended before the s 88(2) decision was taken.

[37] That was necessary because, as explained above, the considerations relevant to that discretionary sanction differ from those relevant to liability for duties. Although some reasons were advanced for holding QI liable for duties – inadequate though they may be – no reasons whatsoever were provided for demanding an amount in lieu of forfeiture under s 88(2). That omission supports the inference that the Commissioner proceeded on the mistaken view that liability for duties automatically triggered the severe consequences of forfeiture or payment of an amount in lieu thereof.

[38] In conclusion, the evidence discloses no indication that the Commissioner treated forfeiture as a distinct issue requiring separate consideration. In particular, there is no indication that he invited QI to make representations on forfeiture, had considered the relevant factors before deciding whether a forfeiture-related demand was appropriate, or identified the basis for demanding an amount in lieu of forfeiture. In the absence of any disclosed basis showing how the s 88(2) discretion was exercised, that decision too is irrational and liable to be set aside.

The failure to provide reasons

[39] The Commissioner's failure to provide reasons when requested to do so is not without consequence. The duty to give reasons serves both individual and institutional purposes. It enables the affected person to understand why the decision was taken and to decide whether to challenge it. It also promotes accountability, transparency and

rational administration. As the Constitutional Court explained in *Koyabe and Others v Minister for Home Affairs and Others*,¹⁰ reasons are central to the constitutional culture of justification. Section 5 of PAJA gives affected persons a right to reasons where their rights have been materially and adversely affected by administrative action. Once reasons are properly requested, the administrator must provide adequate written reasons within the prescribed period, unless a lawful exception applies. The reasons need not be elaborate, but they must be intelligible and informative enough to disclose the administrator's reasoning path.¹¹

[40] Where reasons are absent or inadequate, and the contemporaneous record does not reveal the basis for the decision, a court may infer that the administrator failed to engage with relevant material or failed properly to exercise the power conferred. In terms of s 5(3) of PAJA, if an administrator fails to furnish adequate reasons for an administrative action, it must, subject to subsection (4)¹² and in the absence of proof to the contrary, be presumed that the administrative action was taken without good reason. And as explained above, failure to provide reasons can ordinarily not be remedied by an *ex post facto* rationalisation in litigation.

[41] The absence of reasons assumes particular significance where, as here, the decision involves the exercise of a discretion. In such a case, reasons perform an essential explanatory function. They enable a court to determine whether the decision-maker identified and considered the relevant factors, excluded irrelevant considerations, and exercised the discretion in a manner rationally connected to the statutory purpose and the information before the administrator.

¹⁰ *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)* [2009] ZACC 23; 2010 (4) SA 327 (CC); 2009 (12) BCLR 1192; see also: *Mphahlele v First National Bank of SA Ltd* 1999 (2) SA 667 (CC).

¹¹ *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* 2003 (6) SA 407 (SCA) and *National Lotteries Board v South African Education and Environment Project* fn 9.

¹² Subsection 5(4) provides: 'An administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances, and must forthwith inform the person making the request of such departure.'

[42] In the circumstances of this case, the Commissioner's failure to provide reasons justifies the inference that he did not engage properly with the material furnished by QI or exercise the discretion under s 88(2) in the manner required by law. QI responded to the notices of intent with detailed representations and extensive acquittal documents. It later asked specifically why those documents were said to be insufficient and why an amount in lieu of forfeiture had been demanded. The Commissioner gave no answer. Nor does the contemporaneous record disclose any evaluation of the documents, any finding that they were unreliable or legally inadequate, or any consideration of the factors relevant to the exercise of the s 88(2) discretion.

[43] The absence of reasons leaves unexplained both the rejection of QI's submitted proof of export and the separate decision to impose a forfeiture-related demand. In those circumstances, the only proper inference is that the Commissioner failed to demonstrate the rational engagement and discretionary judgment required by law before the letter of demand could lawfully be issued.

Just and equitable remedy

[44] What remains then is the question of an appropriate remedy under s 8 of PAJA. In terms of s 8(1) of PAJA, a reviewing court has wide powers to determine a just and equitable remedy but 'substituting or varying the administrative action or correcting a defect resulting from the administrative action' is only allowed in 'exceptional cases'. As the Constitutional Court explained in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*,¹³ substitution is, even under common law, an exceptional remedy, while remittal remains the ordinary course. That approach accords with the earlier decision of this Court in *Gauteng Gambling Board v Silverstar Development Ltd and Others*,¹⁴ which held that a court should ordinarily refer a matter back to the administrator unless exceptional circumstances justify departure from that rule.

¹³ *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC).

¹⁴ *Gauteng Gambling Board v Silverstar Development Ltd and Others* 2005 (4) SA 67 (SCA).

[45] Substitution is generally inappropriate where the administrator has not yet properly performed the evaluative task entrusted to it by statute, where the contemporaneous record is incomplete, and where the court is not in as good a position as the decision-maker to assess the customs documentation, determine whether the goods were duly acquitted, and decide whether a penalty should be imposed. Those difficulties are all present here and weigh heavily against substitution. Nor can it be said on the present record that the outcome is a foregone conclusion. The identified defects go to the rationality of the decision-making process, not to the inevitable substantive result.

[46] For these reasons, and mindful of the separation of powers, the matter should be remitted to the Commissioner for reconsideration. The appeal must therefore succeed to this extent.

[47] In the result the following order is made:

- 1 The appeal is upheld with costs, including the costs of two counsel where so employed.
- 2 The order of the high court is set aside and replaced with the following order:
 - ‘1. The respondent’s decisions to hold the appellant liable for import duties and to demand an amount in lieu of forfeiture under the letter of demand dated 3 July 2019, are reviewed and set aside.
 2. The matter is remitted to the respondent for reconsideration.
 3. The respondent is directed to pay the costs of the application, including the costs of two counsel where so employed.’

J E SMITH
JUDGE OF APPEAL

Appearances:

For the appellant: C E Puckrin SC, J M Barnard and L D Haskins

Instructed by: Shepstone & Wylie, Durban

MM Hattingh Attorneys Inc, Bloemfontein

For the respondent: M P D Chabedi SC and W N Mothibe

Instructed by: Ledwaba Mazwai Attorneys, Pretoria

Honey Attorneys, Bloemfontein.