

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

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

Case No: 9726/2021

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| SIGNATURE | DATE |

In the matter between:

PREMIER PLASTICS (PTY) LTD

Applicant

And

THE COMMISSIONER FOR THE SOUTH AFRICAN

Respondent

REVENUE SERVICE

SUMMARY

[1] The applicant, a manufacturer of plastic carrier bags and flat bags, instituted an appeal against a decision of the respondent in terms of which the respondent held the applicant liable for environmental levies, penalties and interest in the sum of R3 393 626.46. The respondent alleged that the applicant removed the

plastic bags from its manufacturing warehouse into the local market without due entry and payment of environmental levies thereby contravening section 20(4) read with rule 54F.12 of the Customs and Excise Act 91 of 1964. The Court was required to determine whether the plastic bags in question were environmental levy goods.

- [2] The compulsory specification for wall thickness of plastic carrier bags and flat bags in South Africa is 24 microns. The manufacture, trade and commercial distribution of domestically produced and imported plastic carrier and plastic flat bags of less than 24 microns is prohibited for use within the Republic in terms of the Environment Conservation Act 73 of 1989. However, plastic bags less than 24 microns may be manufactured in the Republic for use outside the Republic.
- [3] Plastic carrier bags and flat bags with a wall thickness of 24 microns or more are subject to an environmental levy in terms of Part 3 of Schedule 1 of the Customs and Excise Act. However, plastic carrier bags and flat bags of less than 24 microns do not fall under Part 3 of Schedule 1 and are not environmental levy goods. Furthermore, there is no provision in the Act or the Schedules that provide for an environmental levy payable on plastic carrier bags and flat bags less than 24 microns.
- [4] The applicant submitted that it manufactures plastic carrier bags for export at less than 24 microns which were therefore not subject to environmental levies. The respondent contended that in terms of an environmental levy audit SARS conducted in 2019, the applicant manufactured plastic products of 24 microns or more and marked these goods for export. The respondent further submitted that the plastic bags were not exported by the applicant directly, but sold to three of the applicant's local customers. As such, the goods entered the local market for "home consumption" in terms of section 20(4)(a) of the Customs and Excise Act and were subject an environmental levy.

- [5] In determining whether the plastic bags in question were environmental levy goods, the Court considered additional evidence adduced by the applicant. In this regard the respondent submitted that there was no sufficient proof that the new information was a contemporaneous record of the applicant's accounts in respect of environmental levies during the audit period and that this information was not provided to SARS at any time during the audit, nor was it made available to SARS during its engagement with the applicant.
- [6] The Court considered the case of *Pahad Shipping CC v Commissioner for the South African Revenue Services*,¹ in which the SCA held that where further evidence is required to bring a dispute to finality, new evidence has to be adduced. The Court also considered *Levi Strauss v the Commissioner for the South African Revenue Service*² in which the court clarified the approach to appeals against SARS' determinations. In that case the court found that SARS' determinations were very much preliminary assessments done in a forensically less exacting basis. The Court found that in this appeal, the applicant was exercising a statutory right and opportunity for a full evidential determination of the correctness of information put before SARS. The Court held that it had a duty to hear the appeal *de novo* as a wide appeal and to substitute its decision for that made by SARS. As such, the Court considered the additional evidence adduced by the applicant.
- [7] In terms of the additional evidence, the applicant introduced an affidavit deposed to by an employee responsible for the sales and marketing of the applicant's products. Part of her responsibilities included retaining samples of all plastic carrier bags manufactured for a particular customer in its file for the applicant's internal records. She also provided documentary proof, including export documentation, that clearly demonstrated that the products were exported from South Africa to Eswatini and Lesotho. The samples of the plastic carrier bags were independently verified by an expert metrologist who also provided an affidavit confirming that each of the plastic bags in question had a wall thickness below the dutiable level of 24 microns.

¹ [202] 2 ALL SA 246 (SCA).

² [2017] ZAGPPHC 990.

- [8] On the basis of this evidence the Court held that it was satisfied that the plastic bags had a wall thickness of less than 24 microns and therefore were not environmental levy goods subject to environmental levies. Furthermore, the Court held that it was clear from the evidence that the plastic bags were manufactured with the sole purpose of being exported to Lesotho and Eswatini even though the applicant did not directly export the product to these two countries.
- [9] In terms of the respondent's submission that since the goods were sold to three local customers it therefore entered the local market for home consumption, the Court held that there was clear documentary evidence which showed the entire supply chain of the disputed plastic bags and the fact that they were indeed exported to Lesotho and Eswatini. Hence the bags were not released into the local market for home consumption and were not subject to an environmental levy.
- [10] The respondent also disputed that the applicant be considered an exporter for the purposes of the Act. The Court held that in interpreting the word "exporter" it must attribute meaning to the words used in the legislation, having regard to the context provided, by reading the particular provision in the light of the document as whole and the circumstances attendant upon its coming into existence. The Court found that the applicant carries a number of risks in relation to the plastic bags exported to Lesotho and Eswatini. As manufacturer and seller, the applicant carries the risks associated with product liability. The Court found that interest is not limited to the vested or contingent interest of an owner and since the applicant had a beneficial interest in the sale of the goods, this qualified the applicant as an exporter within the meaning of the statute. As such, the Court found that due entry of the goods was made on removal from the applicant's warehouse and the applicant was not in contravention of the Act.
- [11] The appeal was upheld and the respondent's decision was set aside.