REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 25788/2022

(1)	REPORTABLE: Yes☐/ No ☒	
(2)	OF INTEREST TO OTHER JUDGES: Yes☐ / No ☒	
(3)	REVISED: Yes ☐ / No ☒	
Date:	27 October 2023	WJ du

In the matter between:

NU AFRICA DUTY FREE SHOPS (PTY) LTD	**APPLICANT**

and

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

JUDGMENT

DU PLESSIS AJ

[1] This is an order to review and set aside certain decisions made by the Respondent in terms of the Customs and Excise Act.[1]

[2] The Applicant is a licensee of a bonded warehouse and a clearing agent in terms of the Customs and Excise Act[2] (the "Customs Act"). The Respondent is the

[1] 91 of 1964

[2] 91 of 1964.

Commissioner of the South African Revenue Services, and the administrative head of the South African Revenue Services ("SARS").

[3] The Respondent raised customs duties, value added tax and VAT interests for goods sold *ex works* by the Applicant to a customer. The Respondent also raised a forfeiture penalty of R435 120 in terms of s 88(2) of the Customs Act. At the centre of this dispute is the forfeiture penalty. The Applicant alleges that the decision to raise the penalty is unreasonable and unlawful and that the same irregularities vitiate the decision of the internal administrative appeal committee to uphold the decision. They seek relief to declare the decision unconstitutional and unlawful and for the reviewing and setting aside of the decision in terms of PAJA and/or on the grounds of legality.

[4] Background

[5] On 5 March 2021, the Applicant sold a consignment of liquor for export to Prime Crowns *ex works*. Prime Works is a consignee or importer in Zimbabwe. In terms of the agreement, Prime Crown was responsible for transporting bonded goods, using their authorised and licensed remover, from the premise in South Africa to the port of entry/exit and from the port of entry/exit to a foreign country strictly under SARS rules and regulations. It was up to Prime Crowns to comply with safety rules and regulations during transit up to the port of entry and beyond. The truck loaded with the goods was to be sealed, the seals recorded, and not broken unless under customs supervision.

[6] Prime Crowns appointed Mega Bursts as the remover of goods. Mega Bursts is registered at the Respondent as a remover of goods. The Applicant states that it had no reason to take issue with Mega Bursts being appointed, as they have previously transported a consignment from the Applicant to Zimbabwe, and the Respondent approved this.

[7] When the first truck arrived to load the goods on 9 March 2021, a representative of the Applicant sent the first truck that came away, as it was not acceptable to export the consignment (it had a Zimbabwe number plate). Another truck arrived the next

day with a Gauteng number plate. The driver's licence and the passport information of the driver corresponded with the information the Applicant received from Prime Crowns.

[8] The goods were then loaded onto the truck in the presence of the Prime Crowns representative. The Applicant took all the necessary and reasonable steps to ensure the goods were secured and sealed in the truck when leaving the warehouse. The Applicant recorded the details in the custom clearance forms but omitted to enter the subcontractor's details. It is for this reason that they paid the administrative penalty later.

[9] Once the liquor left the warehouse, the Applicant avers it had no control or knowledge over what occurred between the truck leaving and being inspected by the border. It was, however, informed on 14 March 2021 that the truck arrived at the border but had to be parked until the duties were paid to the Zimbabwean authorities. It was informed on 13 April 2021 that the truck passed the first border post.

[10] On 14 April 2021, during a random border inspection five weeks after leaving the warehouse, the truck was stopped inside the customs control area for physical and document inspection. A representative of the Applicant was present. The Respondent noticed that the truck was different from what had left the warehouse, with a different driver. However, the export documentation was what the Applicant had given the driver who left the premises. What is more, energy drinks instead of the declared liquor consignment were found in the truck.

[11] The truck was then handed over to the SARS's Illicit Trade Unit for further investigation. This investigation confirmed that the truck that arrived at the border had an NW and not a GP number plate, and that no alcohol was found on the truck, nor anything else that indicated that the goods were exported. The documents used during this investigation were from the truck driver and/or the Applicant's representative.

[12] After this investigation, on 19 April 2021, the Respondent sent a letter to the Applicant requesting documents for the consignment of alcohol. The Respondent also informed the Applicant what happened at the border. The Respondent requested the Applicant provide all the information on or before 27 April 2021. The Respondent states that the Applicant did not provide the Respondent with this information.

(i) Letter of intent to raise debt

[13] On 6 July 2021, the Respondents sent a letter of intent to the Applicant. The letter of intent (LOI) sets out the following:

i. It made a *prima facie* finding on whether the Customs Act has been complied with and found that the goods were not exported from South Africa to Zimbabwe; the goods were introduced into the South African market without the payment of the applicable duties and VAT. Ss 18A(9)(a) and 20(4) read with Rule 20(4) of the Customs Act have been breached or not complied with, and the conduct constitutes an offence in terms of ss 80(c) and (o) and s83 of the Act. The goods have been dealt with irregularly as contemplated by s 87(1) of the Act; s 44(4), which holds the manufacturer, owner, seller or purchaser of any excisable goods liable for the duty of such goods until the goods have been duly entered and the duty due thereon paid.

   This means the Applicant is liable for payment of duties, VAT and forfeiture amounts of the goods not found, and this allows the Respondent to demand payment of an amount equal to the export value of such goods plus unpaid duty.

ii. Mega Burst Oil and Fuels submitted that their company is registered to trade in petroleum, and they have truck horses and tankers. Their registered remover bond is for removal or fuel. The company is also unaware of the transaction and does not know how the alcohol will fit in a tanker.

[14] The Respondent makes it clear that it gave the Applicant an opportunity to make representation before raising the penalty, which it did not do. However, the Applicant states it could not make representations by the deadline to challenge the penalty, as its senior employees contracted Covid-19.

(ii) Letter of demand

[15] In the absence of the Applicant supplying reasons, the Respondent, on 23 July 2021, issued a letter of demand ("LOD") to the Applicant, requiring them to pay the duties, interest, and forfeiture penalty. In the LOD the Respondents stated that it was satisfied that there was sufficient evidence to prove the *prima facie* findings and that the Applicant is therefore held liable in terms of s64B and s99(2) as clearing agent and bonded warehouse. These findings were based on the absence of proof to the Respondent that the goods reflected on the declaration had been exported and that the goods were nowhere to be found.

[16] The Applicant replied five days later, conceding the duties, VAT and VAT Interest but not the forfeiture penalty. They also denied being involved in the diversion of goods.

[17] The reasons for the decision

(i) Initial reasons for a forfeiture penalty

[18] On 12 August 2021, the Applicant's attorneys addressed a letter to the Respondent, clarifying the Applicant's concession and confirming payment, indicating that the Applicant disputed liability for the forfeiture penalty, requesting a suspension of payment, and requesting reasons for the Respondent's decision. Reasons were provided five days later. The reasons were as follows:

i. The Applicant sold and declared goods in bond to a foreign entity and thus remains liable for the non-fulfilment of the obligations as per provisions of ss 64B, 98, 99(1) and (2) of the Customs Act; there was an intentional act, purposefully aimed at defrauding the State; the Applicant failed to comply

with ss 64B and 99(2) of the Customs Act and was liable for the forfeiture penalty.

[19] The Applicant says that these are not reasons. They thus launched a PAIA request to understand the basis on which the forfeiture penalty was imposed, but they were refused the information.

(ii) Appeal Committee reasons

[20] After that, the Applicant's attorneys lodged an internal appeal against the Commissioner's decision, where they set out the factual background and denied that they were liable for the forfeiture penalty. They stated that the reasons that were given were inadequate and that the reasons did not indicate whether the Respondent considered joint liability.

[21] The Appeal Committee gave the following reasons for its decision:

i. The goods were not exported and introduced into the South African market without payment of duties and VAT; ss 18A(9)(a) and 20(4) read with Rule 20(4) had not been complied with (which constitutes an offence); the goods were dealt with irregularly as contemplated in s 87(1) of the Customs Act; the Applicant is liable for the payment of the duties, VAT and forfeiture penalty in terms of ss 44(8) and 88(2)(a) as the goods could not be found; the Applicant is liable in terms of ss 64B(5) and 99(2).

Thus, the prima facie evidence shows that they may have contravened the above sections, as well as ss 103 and 44A and 39(4) of the Value Added Tax Act 89 of 1991.

[22] In coming to these decisions, the Applicant avers that the Respondent and the Appeal Committee only had *prima facie* evidence that they may have violated the provisions and did not have evidence to support a firm finding that the Applicant violated these Acts. The reasons also did not state that the Applicant was involved in diverting the goods (and that there was no evidence to this effect).

[23] The internal appeal committee ("Appeal Committee") upheld the forfeiture penalty and refused the Applicant's request to suspend payment. The Applicant made the payment of the forfeiture penalty under protest.

(iii) This application

[24] When the Applicant brought the proceedings, the Respondent gave further reasons. The Applicant states that it is impermissible for a decision-maker to supplement or give different reasons for a decision in their answering affidavit. The decision-maker is bound to the reasons it provides when making its decision.

[25] The new reasons include:

i. The truck inspection at the border was the Applicant's;

ii. The three bills of entry had one invoice number – but this was not relied on to impose the penalty;

iii. It had asked Mega Bursts whether it had a relationship with Prime Crowns and Mr Sibara (Prima Crowns' representative). Mega Burst stated that it had no relationship with them. However, the Respondent never relied on this correspondence in the LOD or its reasons (nor was this brought to the Applicant's attention).

iv. It and the Appeal Committee did find that the Applicant was involved in the diversion of goods in that:

a. Even after the Applicant submitted its appeal, it did not provide the Respondent with enough evidence that it was not involved in the diversion; it did not provide the Respondent with an explanation and evidence to support its assertion that it was not part of diverting the goods from being exported; it merely asserts it was not part of diverting the goods but supplied no information to demonstrate this; thus the Appeal Committee was not persuaded about the Applicant's alleged lack of involvement in the diversion process.

b. Also, with the facts before the Respondent, and the Applicant's failure to provide the Respondent with evidence to dispute its involvement in the diversion entirely, the Respondent concluded that the Applicant was involved in the diversion.

[26] The Respondent avers that the Applicant is incorrect. They have provided this information as background to demonstrate what the investigation process entailed and what information the Respondent took into account when making the decision.

[27] Even if these were the reasons provided, the Applicant states that the decision is arbitrary and irrational as:

i. The Respondent merely asserts without foundation that the Applicant was involved in diverting the goods;

ii. It has no direct or circumstantial evidence to make such an assertion – in fact – they do not have *prima facie* evidence of such;

iii. The Respondent requires the Applicant to disprove its assertion and provide evidence to its satisfaction that the Applicant was not involved in the diversion of the goods – which requires the Applicant to prove a negative.

iv. Instead, the Respondent, as the alleging party, must prove, with evidence, that the Applicant was involved in a diversion of the liquor.

[28] However, these were *not* the reasons for imposing the penalty and upholding the appeal.

[29] I did not consider the above reasons for the decision to decide on this matter. The reason for the decision is thus the reasons as set out above. What is left is for this court to determine whether the decision to impose the forfeiture penalty and the appeal committee's decision to uphold the penalty are administrative actions that comply with the Promotion of Administrative Justice Act[3] or, if not, whether they adhere to the principle of legality.

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[3] 3 of 2000.

[30] The arguments: grounds for review

[31] The Applicant goes to great lengths to say it was *bona fide* in transacting with Prime Crowns and Mega Burst. The omission of certain information on the clearance document was a bona fide error. The Applicant has no information on what happened with the truck that left the warehouse, and they do not have any evidence of what happened with the goods. They state categorically that the Applicant did not divert the goods; they do not know about the diversion and are not involved. They also note that there was no direct contention that the Applicant diverted the goods or acted fraudulently. However, the appeal committee seems to suggest that they have such evidence, but they do not say what it is based on.

[32] They also state that the reasons given were not adequate. Adequate reasons would have included how the decision-maker understands the law, the findings it makes, the reasoning process it had and how it links with the evidence and giving unambiguous reasons with the appropriate level of detail. Instead, they quote the law but do not say how they applied it, and they make tentative factual findings with no explanation of how it is linked to evidence or say indeed that they have evidence. This while it is undisputed that the Applicant did not divert the goods.

[33] Giving reasons is an important element of an administrative action captured in s 33(2) of the Constitution and laying the foundation of a culture of justification that our Constitution seeks to foster. It serves as the justification for the administrative action. This is then given effect in terms of s 5 of PAJA. Reasons explain the decision. In this case, the Respondent set out the law that its decision is informed by, the facts it is based on, and how it came to its conclusion. While this might not be the reasons that the Applicant wanted, it is the reasons.

[34] The Applicant points out that the Respondent lists the contraventions in various sections without stating that the Applicant's conduct resulted in the contraventions. With this in mind, the Applicant avers that the decision taken by the Respondent to impose the forfeiture penalty and the Appeal Committee's decision to uphold the penalty are unlawful and unconstitutional. They state so for the following reasons:

i. The decisions are arbitrary insofar as the Respondent accepted Mega Burst's version that it did not know Prime Crowns, rather than The Applicant's version, with no justification for doing so – like cases are not treated alike;

ii. The decision was unlawful and irrational in terms of s6(2)(e)(iii) and s6(2)(f)(ii)(cc) of PAJA, in that the Respondent and the Appeal Committee failed to consider relevant factors, including

a. That The Applicant was not involved in diverting the goods, and that Mega Burst is the registered remover of goods, which is relevant for joint and several liability in terms of s 64D(3A)(b);

b. Whether to impose joint liability with Mega Bursts;

iii. The penalty has a disproportionate impact on the Applicant and is unreasonable (s 6(2)(h) PAJA) because the Applicant acted in good faith and was not responsible for the diversion and

iv. The decisions are materially influenced by an error of fact (s 6(2)(e)(iii) and s6(2)(i)) in that they were involved in the diversion.

[35] They thus seek an order declaring the initial decision and appeal decision to be connotationally invalid and to review and set aside the decisions.

[36] The essence of the Respondent's argument is that there was *prima facie* evidence that it presented to the Applicant for response. When the Applicant did not respond, it sent a letter of demand and raised the forfeiture amount. The amount was raised because as an exporter of the goods, even on an ex-work basis, the Applicant had a duty to prove that the goods were indeed exported, and if failed to do so. There is thus no merit in the contention that the decision by the Respondent is unconstitutional and unlawful and should be reviewed and set aside. It maintains that it conducted the investigation with an open and inquisitive mind, as is expected of them.[4]

[4] *Public Protector v Mail and Guardian Ltd* 2011 (4) SA 420 (SCA).

[37] Discussion

(i) The Customs Act

[38] The Respondent found that the following provisions have not been complied with, which constitutes an offence. These are ss 18A(9)(a) and 20(4) read with Rule 20(4)

> 18A. Exportation of goods from customs and excise warehouse - (9) (a) No person shall, without the permission of the Commissioner, divert any goods for export to a destination other than the destination declared on entry for export or deliver such goods or cause such goods to be delivered in the Republic or any other country in the common customs area.
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> S 20. Goods in customs and excise warehouses - (4) Subject to section 19A, no goods which have been stored or manufactured in a customs and excise warehouse shall be taken or delivered from such warehouse except in accordance with the rules and upon due entry for any of the following purposes-
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> […]
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> (d) export from customs and excise warehouse (including supply as stores for foreign-going ships or aircraft).
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> Rule 20.04 The licensee of any customs and excise warehouse into which goods are received shall ensure that such goods have been duly entered for warehousing in such warehouse and, unless proof that such goods have been so entered is in his possession at the time of receipt of such goods, he shall keep such goods separated from other goods in such warehouse and make a written report to the Controller forthwith.

[39] These three provisions deal with when goods are exported from a customs and excise warehouse, the goods may not be diverted to another destination than what is declared without the permission of the Respondent. The goods may further only be removed following the proper procedure as laid down in the Act. S 18(9)(b)(i) has a deeming provision where goods are deemed to be diverted where there was no permission to divert it, and the person concerned fails to produce valid proof and other information and documents to the Commissioner.

[40] Liability of the Applicant was premised on the following provisions:

> 64B. Clearing agent licences (5) A licensed clearing agent shall be liable in respect of any entry made or bill of entry delivered as contemplated in section 99 (2).

S99 (2) (a) An agent appointed by any importer, exporter, manufacturer, licensee, remover of goods in bond or other principal and any person who represents himself to any officer as the agent of any importer, exporter, manufacturer, licensee, remover of goods in bond or other principal, and is accepted as such by that officer, shall be liable for the fulfilment, in respect of the matter in question, of all obligations, including the payment of duty and charges, imposed on such importer, exporter, manufacturer, licensee, remover of goods in bond or other principal by this Act and to any penalties or amounts demanded under section 88 (2) (a) which may be incurred in respect of that matter: Provided that, except if such principal has not been disclosed or the name of another agent or his own name is stated on the bill of entry as contemplated in section 64B (6) or the principal is a person outside the Republic, such agent or person shall cease to be so liable if he proves that—

(i) he was not a party to the non-fulfilment by any such importer, exporter, manufacturer, licensee, remover of goods in bond or other principal, of any such obligation;

(ii) when he became aware of such non-fulfilment, he notified the Controller thereof as soon as practicable; and

(iii) all reasonable steps were taken by him to prevent such non-fulfilment.

[41] These provisions deal with the liability of the clearing agents, the responsibility for paying taxes and fees, and penalties and charges, including that in s 88(2) of the Act.

[42] The Respondent states that the goods were dealt with irregularly in terms of s 83, which states

83. Irregular dealing with or in goods.—Any person who—

(a) deals or assists in dealing with any goods contrary to the provisions of this Act; or

(b) knowingly has in his possession any goods liable to forfeiture under this Act; or

(c) makes or attempts to make any arrangement with a supplier, manufacturer, exporter or seller of goods imported or to be imported into or manufactured or to be manufactured in the Republic or with any agent of any such supplier, manufacturer, exporter or seller, regarding any matter to which this Act relates, with the object of defeating or evading the provisions of this Act, shall be guilty of an offence and liable on conviction to a fine not exceeding R20 000 or treble the value of the goods in respect of which such offence was committed, whichever is the greater, or to imprisonment for a period not exceeding five years, or to both such fine and such imprisonment, and the goods in respect of which such offence was committed shall be liable to forfeiture.

[43] In other words, engaging in any dealings with goods contravening the Act is an offence, and the goods are then subject to forfeiture.

[44] Liability for forfeiture is dealt with in s 87, which states

> 87. Goods irregularly dealt with liable to forfeiture.—(1) Any goods imported, exported, manufactured, warehoused, removed or otherwise dealt with contrary to the provisions of this Act or in respect of which any offence under this Act has been committed (including the containers of any such goods) or any plant used contrary to the provisions of this Act in the manufacture of any goods shall be liable to forfeiture wheresoever and in possession of whomsoever found: Provided that forfeiture shall not affect liability to any other penalty or punishment which has been incurred under this Act or any other law, or liability for any unpaid duty or charge in respect of such goods.

[45] The penalty was levied in terms of s 88(2)(a)(i), that states that

> 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.

[46] In other words, if the goods are liable to forfeiture but cannot be located, the Respondent can demand payment from any persons involved in importing, exporting, manufacturing, warehousing, removing or otherwise dealing with the goods contrary to the Act. It emphasises the seriousness of dealing with goods irregularly under the Act.

[47] Duties were levied in terms of s 44 of the Customs Act, which provides

> (8) The manufacturer, owner, seller or purchaser of any excisable goods or fuel levy goods shall, subject to the provisions of Chapter VII, be liable for the duty on such goods, and his liability shall continue until such goods have been duly entered and the duty due thereon paid.

[48] And all this constitutes an offence in terms of s 80

> 80. Serious offences and their punishment. —(1) Any person who—
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> (c) removes or assists in or permits the removal of goods in contravention of any provision of this Act;

(o) contravenes the provisions of section 4 (12A) (b), 18 (13), 18A (9), 20 (4)bis, 21 (3) (d), 35A (2), (3) and (4), 37 (9), 37A (1) (c), 37A (4) (a), 48 (1A) (b), 54 (2), (3) and (4), 60 (1), 63 (1), 75 (7A), 75 (19), 88 (1) (bA), 99A, 113 (2), 113 (8) (c), 114 (2A) or 114 (2B);

(ii) Administrative review

[49] The legality principle is part of the "rule of law", one of the founding values of the Constitution,[5] and considered a fundamental principle of constitutional law.[6] Legality applies to all the exercise of public power. It acts as a safeguard should an action not qualify as an administrative action for the purpose of PAJA.[7] Since the decision in this case is an administrative action, it is unnecessary to go into this inquiry.

[50] With the facts clearly set out along with the provisions, it must now be determined whether the Respondent acted in line with the prescripts of PAJA.

Arbitrary and irrational

[51] The Applicants state that decision-making requires that like cases be treated alike. The Respondent and the Appeal Committee violated these administrative justice principles, as they treated the Applicant differently from Mega Burst. This is because the Respondent accepted the version of Mega Bursts that it was unaware of the transaction, that it only transports fuel, and does not know Prime Crowns. This was accepted without any further investigation or interrogation.

[52] In answering, the Respondent stated that it had no reason to probe further if the version provided was accurate and that it was not for the Respondent to second guess or corroborate a version that a party provided during its investigation process. In fact, the Respondent stated, that when a party provides the Respondent with information, it accepts that information as is unless there is a reason why it should disbelieve the information it has been given.[8]

[5] S 1(c).

[6] *Fedsure Life Insurance v Greater Johannesburg Transitional Metropolitan Council* (1999 (1) SA 374 (CC) para 68.

[7] Hoexter, C. (2021). *Administrative Law in South Africa*, Juta and Company Ltd. p 357.

[8] Supplementary Answering Affidavit, para 22 p 001-253.

[53] In contrast, in relation to the Applicant, the Respondent and the Appeal Committee imposed and upheld the forfeiture penalty against the Applicant. The Applicant avers that the Respondent was unsure about the Applicant's version, whether it was involved in the diversion of goods, and now seeks to negate the Applicant's version. The Respondent thus second-guessed the Applicant and now seek to corroborate a version that was provided by them, and they did not accept the Applicant's information, while it had no reason to disbelieve the information it had been given. Thus, like cases were not treated alike: the Respondent accepted Mega Bursts version on its say-so, rejecting the Applicant's version, and in the answering affidavit required the Applicant to prove a negative.

[54] Further reasons for irrationality include that Mega Bursts alleges that it only transports oil and petrol. However, in February 2021, custom clearance documents attached to the Applicant's affidavit show that Mega Bursts transported liquor. If the Respondent interrogated Mega Burst, it would have come across this information on their systems, giving them a reason to disbelieve what Mega Burst said in their emails.

[55] The Respondent denies this in the answering papers. It repeats that Mega Burst informed them that they only transport oil and fuel and send documents to prove it, and this was communicated to the Applicant in the LOI and LOD and the Appeal Committee outcome.

[56] The essence of the Applicant's argument is that the Respondent did not treat like cases alike in that they treated Nu Africa differently from Mega Burst. As authority, the Applicant relies on the English Privy Council case of *Matadeen v MGC Pointu*,[9] that states

> Their Lordships do not doubt that such a principle is one of the building blocks of democracy and necessarily permeates any democratic constitution. Indeed, their Lordships would go further and say that treating like cases alike and unlike cases differently is a general axiom of rational behaviour. It is, for example, frequently invoked by the courts in proceedings for judicial review as a ground for holding some administrative act to have been irrational.

[9] [1998] UKPC 9 at 8 – 9.

[57] It thus rests on the idea of equality before the law.

[58] The Applicant states that the Respondent accepted Mega Burst's version without further interrogation and required Nu Africa to prove its version – this is unequal treatment. The Respondent disagrees, saying it investigated with an open and enquiring mind. It is not in dispute that Nu Africa sold the consignment to Prime Crown for export and that Nu Africa finalised all the information and signed off on it before sending it to the border. The truck driver provided the SARS border officials with a manifest completed and signed by Nu Africa, and the truck was inspected in the presence of a Nu Africa agent representative. Mega Burst denied being able to transport alcohol and said they did not do business with Prime Crown. This is what its decision was based on. On appeal, Nu Africa did not provide sufficient information as to why they should not be liable in these instances in terms of s18A.

[59] This is not arbitrary or irrational. In general, s18A attaches liability for the payment of duty upon the person who exports the goods.[10] S18A(9)(a) prohibits the diversion of goods, and s18A(9)(b)(i) deems the goods to be diverted if there was no permission granted for the diversion and the person concerned failed to produce valid proof and other information and documents for inspection to the Commissioner (Respondent). The Applicant was the exporter of the goods. In terms of the Customs Act, the Applicant is deemed to have diverted the goods. The Respondent asked for valid proof and other information that it was not so diverted in line with s18A(9). When it did not receive the information, it deemed the goods diverted. On appeal, it considered the information and remained with its decision. Not so much because it rejects the Applicant's version, it seems, but rather because it does not deem its version to absolve it from the deeming provision.

[60] The *ex works* provision also does not help the Applicant in this regard. *Ex works* means that the buyer assumes all responsibility for the goods once all the cargo is packed in export packaging and collected. It places a minimum obligation on the

[10] *Standard General Insurance Company Ltd v Commissioner for Customs & Excise* [2004] 2 All SA 376 (SCA).

seller.[11] The seller's obligation is limited to making the goods available for collection at its premises, along with other obligations that a seller normally has, namely supplying invoices and other documents, pay and costs incurred in placing the goods at the buyer's disposal. The risk of loss and damage is on the buyer.[12]

[61] *Ex works* only pertains to the relationship between the buyer and the seller and does not absolve the seller from its liability in the Customs Act. In terms of the Act, the seller (the Applicant in this case) remains liable until the goods are exported. If the goods are not exported, and the Applicant cannot prove that the goods were exported, then the liability remains. This is further bolstered by the fact that the Applicant remained involved in the process since it kept in touch with Mega Burst regarding the whereabouts of the trucks and had a representative present at the border.

[62] Accordingly, the decision of the Respondent to impose and uphold the forfeiture penalty is not arbitrary, irrational and unlawful on this ground.

Failure to consider relevant considerations and irrationality

[63] The Respondent and the Appeal Committee had to consider all relevant considerations for a lawful decision to impose a penalty, the Applicant states. However, they failed to take into consideration various factors, as is clear from their reasons, namely:

i. They had no evidence before them to make a finding that the Applicant was not involved in diverting the goods.

ii. They did not consider whether Mega Bursts, as a registered remover of goods, should have been held jointly and severally liable for the forfeiture penalty in terms of s 64D(3A)(b) read with s 64D(6)(a) of the Customs Act.

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[11] J Coetzee “Incoterms: Development and legal nature – A brief overview” (2002) 13 *Stell LR* 155 at 120.

[12] Srivastava, Ajendra, and Ajendra Srivastava. "Standard Trade Terms." *Modern Law of International Trade: Comparative Export Trade and International Harmonization* (2020): 51-78.

They merely accepted Mega Burst's say so that it had no relationship with Mr Sibara or Prime Crowns.

[64] The Respondent and the Appeal Committee should have considered these factors in reaching their decisions, and none of the documents shows that they have.

[65] The Respondent respond to this effectively as follows: *ex works* do not absolve the Applicant from liability – s 18A(9)(a) of the Customs Act also places liability on the exporter. It cannot merely pass the blame on Mega Burst. It is uncontested that the goods were not exported, and it was for the Applicant to prove that the goods were exported. Absent this, the Applicant is liable for the forfeiture amount in terms of s88(2)(a).

[66] S 6(2)(e)(iii) of PAJA provides for review if "the action was taken because irrelevant considerations were taken into account or relevant considerations were not considered". This speaks to a failure of the administrator to apply their minds.

[67] Where the legislature has not given guidelines on what needs to be taken into account when exercising a discretion, it is for the court to decide which considerations are relevant while being careful not to become the administrator.[13] In *MEC for Environmental Affairs and Development Planning v Clarison's CC*[14] the court stated:

> The law remains, as we see it, that when a functionary is entrusted with a discretion, the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide, and if he acts in good faith (and reasonably and rationally) a court of law cannot interfere.

[68] In terms of s 6(2)(f)(ii) of PAJA

> A court or tribunal has the power to judicially review an administrative action if the action itself is not rationally connected to
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> […]
>
> (cc) the information before the administrator; or

[13] Hoexter, C. (2021). *Administrative Law in South Africa*, Juta and Company Ltd. p 440.

[14] 2013 (6) SA 235 (SCA) para 22.

[69] Rationality requires that the decision be objectively capable of furthering the purpose for which the power was given and for which the decisions were purportedly taken. This must, importantly, be supported by the evidence and information before the administrator and the reasons given for it. In *Carephone v Marcus NO*[15] it was explained that the test requires

> in one way or another, asking the question: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at?

[70] In this case, the Respondent considered the representations from the Applicant and Mega Burst and concluded that the Applicant should be responsible for the penalty fee because the Applicants could not show that the goods were exported, and did not present enough information to refute the deeming provision that the goods were so diverted.

[71] The Applicant states that they did so on no evidence that the Applicant was involved in diverting the goods nor considering joint liability of Mega Burst. However, s 18A(9) of the Customs Act holds the Applicant as exporter liable for the exportation of the goods. If the goods were not exported, and the Applicant cannot account for it, it is liable. The Respondent then may, in terms of s 88(2)(a)(i), demand payment of an amount of the goods so diverted. This the Respondent did, based on the information before it, as set out above.

[72] The Respondent thus acted lawfully and rationally in this respect.

Disproportionate

[73] The Applicants state that the forfeiture penalty is disproportionate in that the Applicant was not involved in the diversion of the goods, and the Respondent and the Appeal Committee never found it was; the Applicant had previous interactions with Mega Bursts before it was appointed by Prime Crowns, and had no reason to doubt its appointment; the Applicant conceded its error in completing the customs

[15] [1998] ZALAC 11.

clearance documentation and accepted its liability for the duties, VAT and VAT interest.

[74] The Respondent answered that the amount is equal to the amount of alcohol that was diverted by the Applicant and that was not exported to Zimbabwe, and they were custodians of the goods until they were meant to reach their final destination.

[75] But, the Applicant replies, neither the Respondent nor the Appeal Committee found that the Applicant diverted the liquor, and they had no evidence of this. The goods were further sold *ex works*, and Prime Crowns was responsible as the appointed remover of goods. The Applicant took no control over the goods once they left its premises and took the appropriate steps within its power to ensure that the goods arrived at their destination.

[76] Thus, the penalty is disproportionate and unreasonable and should be set aside in terms of s 6(2)(h) of PAJA.

[77] Again, the Respondent states that the fact that the goods were exported *ex works* is irrelevant. S 88(2)(a) also holds the exporter liable for the payment of the forfeiture amount. This is even more so since the Applicant was beneficially interested in how the goods are exported and kept in touch with various representatives, plus had a representative at the border. This is because they have a financial interest and was aware of s18A of the Customs Act.

[78] A reasonable decision is rational and proportional. This means considering the nature of the decision, the impact of the decision on those affected by it, and whether other means would be used to achieve the same purpose which does not have an adverse impact (or a less adverse impact) on those affected by it.

[79] S 6(2)(h) states:

> A court or tribunal has the power to judicially review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.

[80] In *Medirite (Pty) Limited v South African Pharmacy Council,*[16] the Supreme Court of Appeal recognised proportionality as a ground of review within the ambit of s 6(2)(h), finding that the rule in that instance was unreasonable as it was disproportional to the end it sought to achieve.

> It has been stated that 'proportionality is a constitutional watchword' and […] unreasonable administrative action includes 'those that are oppressive in the sense that they "have an unnecessarily onerous impact on affected persons or where the means employed (albeit for lawful ends) are excessive or disproportionate in their result"'.[17]

[81] The Applicant avers that the penalty disproportionately impacts the Applicant, who acted in good faith and was not responsible for the diversion. The Respondent states, as before, that if the Applicant cannot show that it had permission to divert the goods, it is deemed diverted contra the Act's provisions and, therefore, liable. This might be so, the Applicant admits, with the duties, but not with the penalty. In the case of the penalty, the Respondent has a discretion whether to levy it or not.

[82] Based on the above reasoning, the *ex works* provision is applicable between the Applicant and the buyer and does not give the Applicant a way out of the provisions of the Customs Act, in terms of which it is liable. The discretion to levy or not is not prescribed by the Customs Act. In terms of the provisions cited above, the Respondent is entitled to levy the forfeiture penalty when the goods were diverted. The decision is not so unreasonable that no reasonable person could have so exercised the power or performed the function.

Influenced by a material error of fact

[83] There is no evidence to demonstrate that the Applicant was involved in the diversion, and it was not for The Applicant to prove a negative. The Respondent and the Appeal Committee are thus mistaken about whether the Applicant was involved in a diversion. This fact is uncontentious and objectively verifiable, which finds a review based on a material mistake of fact.

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[16] *Medirite (Pty) Limited v South African Pharmacy Council* [2015] ZASCA 27.

[17] *Medirite (Pty) Limited v South African Pharmacy Council* [2015] ZASCA 27 para 20.

[84] S 6(2)(i) A court or tribunal has the power to judicially review an administrative action if the action is otherwise unconstitutional or unlawful.

[85] Mistakes of fact as a ground of review must be carefully considered not to blur the distinction between review and appeal. In *Dumani v Nair*[18] Cloete JA, in a separate concurring opinion, stated that as a ground of review, "mistake of fact" does not entitle a reviewing court to consider the matter afresh or to substitute its view as to what the finding should be. The ground can only be employed where the fact is established, meaning it is uncontentious and objectively verifiable.[19] However, where the functionary had to exercise judgment, such as assessing contested evidence or the weighing up of evidence, it is not reviewable.[20]

[86] This case falls in the latter category, where the Respondent gathered information, weighed it, and decided based on the facts. It did consider the Applicant's version that it was not involved in the goods, but this was not enough to refute the deeming provision. The Applicant's reliance on *MV 'TARIK III' Credit Europe Bank N.V. v The Fund Comprising the Proceeds of the Sale of the MV Tarik III*[21] is misplaced – that case dealt with a claim in terms of an agreement and the question on whom the onus rests on proving the termination of the contract. It does not deal with a deeming clause.

[87] In this case, a deeming provision deems the Applicant to have diverted the goods without permission, which, in the structure of the Act, makes the Applicant liable under certain circumstances. In other words, if the goods are diverted back into South Africa without the permission of the Respondent, the Applicant breached the Customs Act. This is set out in the LOI, LOD and Appeal Committee reasons. The decision is lawful.

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[18] *Dumani v Nair* [2012] ZASCA 196; 2013 (2) SA 274 (SCA); [2013] 2 All SA 125 (SCA)

[19] See discussion of this in Hoexter, C. (2021). *Administrative Law in South Africa*, Juta and Company Ltd. 425.

[20] *Airports Company South Africa v Tswelokgotso Trading Enterprises CC* [2018] ZAGPJHC 476; 2019 (1) SA 204 (GJ) para 12.

[21] (1294/2021) [2022] ZASCA 136; [2022] 4 All SA 621 (SCA)

[88] Conclusion

[89] The Applicant stated that the *Biowatch*-principle[22] should apply, should they not be successful, as they were enforcing their constitutional right to just administrative action. Normally, costs follow the event, but a judge has a discretion as to whether to make a cost award and what that award should be. *Biowatch* is applicable in constitutional litigation, where a private party seeks to assert a constitutional right against the government. In terms of *Biowatch*, even if such a party is unsuccessful, each party should bear its own costs. The focus is on the issues, and whether they advance constitutional justice, not just for the party before the court, but for the wider society. This is not such a case. I see no reason to depart from the rule that cost follows the result.

[90] Order

[91] I, therefore, make the following order:

1. The application is dismissed, with costs.

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WJ DU PLESSIS

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be sent to the parties/their legal representatives by email.

Counsel for the Applicant:	Mr M De Beer
Instructed by:	Savage Jooste and Adams
Counsel for the Respondent:	Mr M Musandiwa
Instructed by:	MacRobert Attorneys
Date of the hearing:	04 September 2023

[22] *Biowatch Trust v Registrar Genetic Resources* (2009 (6) SA 232 (CC).

Date of judgment: 27 October 2023