IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED: NO
08 April 2024

Date Signature

Case Number:

58541/2020

In the matter between:

NU AFRICA DUTY FREE SHOPS (PTY) LTD Applicant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge or her Secretary. The date of this judgment is deemed to be 08 April 2024.

JUDGMENT

COLLIS J

INTRODUCTION

1. This is an opposed review application wherein the Applicant seeks the following relief:

> 1.1. Reviewing and setting aside the Respondent's decisions dated 20 December 2019, refusing the Applicant's two applications for a special storage warehouse, which applications were received by the Respondent on 21 October 2019;
>
> 1.2 Reviewing and setting aside the Respondent's decision dated 30 June 2020, being the Customs and Excise National Appeals Committee's confirmation of the decision referred to in paragraph 1.1 above;

1.3 Remitting the matters back to the Respondent for reconsideration in terms of section 8(1)(c) of PAJA.

THE PARTIES

2. The Applicant is Nu Africa Duty Free Shops (Pty) Ltd (*'Nu Africa'*), a private company with limited liability registered and incorporated in terms of the company laws of the Republic of South Africa, with its principal place of business situated at Unit 33 E, Scientia Techno Park, Meiring Naude Lynwood. The Applicant is inter alia, in the business of duty-free shops and also licenced to operate a special storage warehouse ("SOS"), as well as a storage warehouse ("OS").

3. The Respondent is the Commissioner for the South African Revenue Service (*"SARS")*, appointed in terms of the South African Revenue Service Act, 34 of 1997, with its head office situated at Lehae La Sars, 299 Bronkhorst Street, Niew Muckleneuk, Pretoria.

4. In terms of section 2(1) of the Customs and Excise Act 91 of 1964 (*"the CEA*"), the Respondent is charged with the administration of the CEA, including the interpretation of the schedules thereto.

5. In terms of section 21 of the Customs Act[1] the Commissioner may, subject to such conditions as he may in each case, impose, licence any place in the Republic as a special customs and excise warehouse ("SOS warehouse").

6. In terms of Rule 19A.02 (read with section 19A of the Customs Act) the person applying for the registration of an SOS warehouse, must submit a form DA185 and the relevant annexures.

7. A licence may be granted even where a transgression was committed, provided that the transgression was inadvertent without fraudulent intent or gross negligence.[2]

8. In casu, SARS refused two applications submitted by Nu Africa for the licensing of two special customs and excise warehouse ("SOS warehouse"). Subsequently, Nu Africa's internal appeal to the National Appeals Committee was unsuccessful.

9. As a result of the refusal of the two applications, Nu Africa seeks the review and setting aside of SARS' decisions, as well as the decision of the Appeals Committee.

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[1] Customs & Excise Act 91 of 1964 ("Customs Act").
[2] Customs Rule 60.04(2)(c).

10. It is the contention of the Applicant that the decisions so taken by SARS were arbitrary and capricious. That SARS failed to consider several relevant considerations and took irrelevant considerations into account. It is further the Applicant's case that the decisions are therefore liable to be set aside in terms of PAJA.[3]

BACKGROUND

11. Nu Africa is the licensee of various customs and excise warehouses in the Republic of South Africa. During 2018 the Respondent, the Commissioner for the South African Revenue Services ("the Commissioner") conducted an extensive investigation and audit into wrongdoing by the Applicant with reference to the SOS and OS warehouses. At the end of an extensive investigation, the Commissioner found that the Applicant had, without the written permission of the Commissioner, diverted goods entered for delivery at a customs and excise warehouse to a destination other than the destination declared on the entry of such goods.

12. On 3 August 2018 the Commissioner raised a debt against Nu Africa for an amount of R36 291 907.59 ("R36 million").[4] Nu Africa denies liability for the debt and instituted an internal appeal against the demand.

[3] Promotion of Administrative Justice Act 3 of 2000 ("PAJA").
[4] Annexure SARS [CaseLines 004-73].

13. On 20 August 2018, Nu Africa requested the Commissioner to suspend the payment of the debt which was granted on 21 February 2019.[5]

14. Nu Africa first exhausted its internal remedies (internal appeal and ADR proceedings), whereafter it launched an action against SARS in the High Court, Gauteng Division (case number 48405/2019) on 7 July 2019, seeking the setting aside of the demand.[6]

15. Nu Africa was preparing applications for the licensing of two SOS warehouses and approached officials from SARS for advice on completing the DA 185 application forms. On 1 October 2019, Mr Phokane, an Executive in the SARS Customs & Excise Licensing Unit[7] sent an e-mail to the Applicant proposing that a meeting be held to discuss the way forward.[8]

16. On 4 October 2019 Ms Prudence Shongwe and Mr Vusi Shongwe met with Mr Phokane and Mr Phupheli from SARS.[9]

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[5] Annexure PLS10 [CaseLines 001-407]
[6] See Particulars of Claim Annexure RA3 [CaseLines 003-18]
[7] 004-40, par.2
[8] 004-51.par.15.
[9] Supplementary Founding Affidavit para 30 [CaseLines 003-10].

17. At the meeting Mrs Shongwe on behalf of the Applicant mentioned that she is in the process of making application for the licences in question, referred to her previous problems with SARS and wanted guidance from Messrs Phokane and Phupheli as to how she should deal with the history of the Applicant's relationship with SARS, in these applications.[10]

18. On 17 October 2019 Ms Shongwe addressed a further e-mail to Messrs and Phokane and Phupheli to which was attached the Applicant's application for the Business Type 5 SOS Warehouse.[11] The e-mail concludes as follows:

> "Kindly advise if all in order before we submit as we fear another
>
> rejection.
>
> We would kindly appreciate it if you highlight if we have errors that need rectifying."

19. Shortly thereafter Mr. Phupheli responded saying he had ran his eyes through the application and advising the Applicant to submit the application as discussed. He further stated:

[10] Answering affidavit, 004-11, par. 20. Lines 1-6.
[11] 001-450.

> "My technical team will duly advise my office on your applications before any rejection, and that will allow our engagement to ensure whatever need to be corrected is corrected"

20. The Applicant followed Mr Phupheli's advice and submitted the two DA185 applications for the licensing of SOS warehouses (business type 5[12] and business type 7[13]) on 19 October 2019. These applications were submitted in terms of Sections 19A and 21 of the Customs Act, read with the Rules thereto.

21. The written application forms *inter alia*, required the Applicant to make a full and frank disclosure relating to past dealings. In particular, it was required from the Applicant to disclose any contravention by it of the provisions of the Customs Act in the 5 years preceding the date of the application.

22. On the same date, Nu Africa also applied to SARS to register it as a "registered agent", namely an agent on behalf of a foreign principal.[14]

[12] Annexure PLS1[CaseLines].
[13] Annexure PLS2[CaseLines 001-116].
[14] Annexure PLS3 [CaseLines001-191].

23. Box 12 of the application forms (DA185) requires an applicant to indicate whether, during the preceding five years, it has contravened the Customs Act or failed to comply with the provisions of the said Act. For all three applications, Nu Africa answered the questions in the negative.[15] According to Nu Africa, this was consistent with the advice given to Mrs Shongwe by the SARS officials,[16] a contention which is denied by SARS.

24. On 23 October 2019 and 29 October 2019 SARS vetted the two applications for the SOS warehouses. [17] Both vetting reports were reviewed by Mr Michael Malindi from SARS.[18]

25. On 19 November 2019 SARS approved the application for a "registered agent".[19] On 20 December 2019, SARS refused the SOS warehouse licencing applications.[20]

26. It is the Applicant's case that had Mr Phupheli honoured his undertaking to engage the Applicant to ensure whatever needs to be corrected is corrected, before any rejection, the present dispute would not have arisen.

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[15] CaseLines 001-24; 001-118 and 001-194.
[16] Supplementary Founding Affidavit para 30.3 [CaseLines 003-10].
[17] See vetting reports at CaseLines 002-170 and CaseLines 002-181.
[18] Record at pages 174 and 185, see [CaseLines 002-174 and 002-185]
[19] CaseLines 001-289.
[20] Annexure PLS5 [CaseLines 001-290].

27. Mr Phupheli however did not inform that Applicant of any issues to be corrected prior to the refusal of the applications.[21]

28. This argument advanced by the Applicant that as a result of Mr Phupheli to inform the Applicant on whether that which had been disclosed in its application forms was properly recorded, is somehow an excuse for its failure to complete the application forms frankly and honestly, I cannot agree with. This I say so for the following reasons:

28.1 It is solely the applicant's obligation and not that of the officials of the Commissioner, to ensure that it completes the application forms correctly; and

28.2 secondly, it is common cause that the application forms were not to be considered by Mr Phupheli himself, but rather by other officials employed by the Commissioner.

29. It then must follow, that even if Mr Phupheli had given an undertaking that the applications were properly completed, the decision ultimately did not rest with him, nor was it to have been taken by him nor was it within his purview to take.

[21] 003-11, par.30.7 which is not dealt with in the answering affidavit 004-35, par 87.

30. SARS however had indicated that the reason for the refusal of the SOS warehouse licencing was that Nu Africa “has previously contravened the Customs Act”. On the basis that the Applicant had falsely completed the forms as if there was no contravention at all by the Applicant, resulted in the applications being refused. According to SARS, this was misleading, as SARS had raised a debt against Nu Africa for about R36 million on 3 August 2018 and yet the Applicant had failed to disclose this in its forms.[22]

31. On 20 April 2020 Nu Africa instituted an internal administrative appeal against the refusals.[23]

32. On 30 June 2020 the Customs and Excise National Appeals Committee refused the internal appeal.[24] The appeal was refused on the basis that Nu Africa allegedly failed to declare on the DA185 forms the liability raised on 3 August 2018 (R36 million). The committee concluded that because of the non-compliance, contravention of the Act, as well as “the outstanding schedule”, the applications were refused.

[22] See SARS response to the request for reasons dated 4 March 2020 (Annexure PLS8) [CaseLines 001-370].
[23] Annexure PLS9 [CaseLines 001-389.]
[24] Annexure PLS11 CaseLines 001-408]

33. The Applicant’s reasons for its failure to disclose previous wrongdoing with reference to the Customs Act was said to be that the Applicant does not accept the findings arrived at by the Commissioner and has challenged the Commissioner’s findings. When the internal challenges failed, the Applicant instituted a High Court action in order to challenge the findings arrived at by the Commissioner.

34. On this basis the Applicant contends that it is entitled to be presumed innocent until proven guilty, and on that basis, it denies that it had not made honest and correct applications to the Commissioner for the issuing of further licences.

35. The above argument is refuted by the Commissioner on the basis that there was a duty upon the Applicant to at least disclose the existence of the dispute, by referring to the fact that the Commissioner had concluded that there was a violation by the Applicant of the provisions of the Customs Act, but that the Applicant is challenging the Commissioner’s findings.

36. However, instead of making such a full and frank disclosure and alert the officials of the Commissioner who were tasked to consider the applications, the Applicant was content not to mention a single word

about the existence of the more than R36 million debt created by the Commissioner's demand.

37. This argument advanced by the Respondent this Court is in agreement with. In terms of the Customs Act, there is an obligation on a taxpayer to make a full and frank disclosure to the Commissioner. This obligation rests on all taxpayers and failure to make such a disclosure cannot be condoned and certainly will not be condoned by this Court.

38. In addition it is necessary to consider that the statutory process for the Commissioner for the recovery of the debt is sui generis. The Commissioner has been given extensive statutory powers to collect debts by means of an administrative process.

39. This process entails, that the Commissioner would first issue to a prospective debtor a letter of intent, affording the prospective debtor an opportunity to controvert the Commissioner's *prima facie* findings. The Commissioner is then obliged to consider the response received after the letter of intent, and if the Commissioner is not satisfied that its *prima facie* findings are wrong, after having considered the responses, then the Commissioner is entitled to simply issue a letter of demand. Once such a letter of demand is issued a debt is created that must be paid. The

Commissioner is further entitled to have the debt entered in the judgment register of the Clerk of the Magistrate's Court, or the Registrar of the High Court.

40. After the letter of intent has been issued, a debtor can ask the Commissioner to suspend the obligation to pay, pending an appeal or a challenge against the imposition of the debt. In this instance the Applicant successfully applied for a suspension of the obligation to pay.

41. The granting of a suspension by the Commissioner of the obligation to pay does not mean that there is no longer a debt. The debt is the result of conclusions by the Commissioner that there was a contravention by the Applicant of the provisions of the Customs Act. The debt stands. So too, at least for the moment, the findings by the Commissioner that the Applicant contravened the provisions of the Act. The fact that the Commissioner granted a suspension of the obligation to pay does not have the effect that the debt disappears nor does it have the effect that the findings by SARS that the Applicant contravened the provisions of the Customs Act, are no longer valid.

42. Furthermore, the findings by the Commissioner – that the Applicant contravened the provisions of the Customs Act, and the imposition by the

Commissioner of a demand against the Applicant – are the results of the exercise of a statutory power vested in the Commissioner and in exercising the statutory powers the Commissioner performed administrative actions.

43. It is trite that administrative actions, even if wrong and unlawful, remain standing and valid until duly set aside by an appropriate power.[25]

SARS REFUSAL IRRATIONAL AND ARBITRARY

44. Counsel for the Applicant submitted that the exercise of public power must be underpinned by plausible reasons which must justify the action taken. If action is taken for no reason or no justifiable reason, the decision is arbitrary.[26] In addition, impermissible differentiation and unequal treatment of persons constitutes arbitrary decision-making.[27] The enquiry into arbitrariness is closely related to the enquiry into rationality.[28]

[25] Oudekraal Estates (Pty) Ltd v City of Cape Town (2004) 3 All SA 1 (SCA) 28 May 2004 at par.36.
[26] Minister of Justice v SA Restructuring and Insolvency Practitioners Association ("SAPIRA') 2018 (5) SA 349 9(CC) at para 49.
[27] SAPIRA at para 52.
[28] Airports Company South Africa SOC Ltd v Imperial Group Ltd 2020 (4) SA 17 (SCA) at para 30.

45. Counsel further contended that by refusing the two SOS warehouse applications but granting the application for a “registered agent”, on the same information provided, the Commissioner was acting inconsistently and in an unpredictable, arbitrary manner. On this basis the Applicant contends that it was therefore irrational on the part of the Commissioner to grant the application for the licence for a registered agent.

46. In reply counsel for the Respondent had submitted that the applications for the two licences, i.e. the licence for a SOS warehouse and a licence to be a registered agent differ fundamentally.

47. In this context, the Commissioner explained that SARS is a very big organisation. It employs a vast number of employees. Further that the application for a registered agent does not go through the vetting process, such as with the application for the SOS warehouse licence, because in the instance of a registered agent there is no bond which is required, and the licence of a registered agent merely enables the registered agent to deal with foreign importers and exporters.

48. The Commissioner further explained that the officials employed by SARS who consider the granting or refusal of an application for a registered agent are not in a position to know if there are any previous

contraventions by the proposed licensee and in such instance these officials depend heavily upon what the prospective licensee declares in the DA185 application form, read with Section 12 of the declaration.

49. On this basis the Respondent therefore contends that the Applicant cannot use the approval of the licence for a registered agent as a precedent, or a basis to launch its argument that therefore the other two applications, which relate to vastly different licence types, had to have been approved as well.

50. The applications for an SOS warehouse requires a bond to be in place. The purpose of the bond is to afford the Commissioner an easy recourse if goods are dealt with irregularly and say be removed from the bond store without paying the duties. For such an important licence each and every case is dealt with on its own merits and the vetting process is far more stringent and is carefully and thoroughly scrutinised.[29]

51. To the argument advanced by the Respondent that the applications, for a registered agent and that for an SOS warehouse are different in nature and that the approval of the one would not of necessity result in the approval of the other, the Applicant replied that it found this answer in

[29] Answering Affidavit para 7 & 8 p 004-6.

relation to the process of registration of a registered agent as unconvincing. Furthermore, it denied that a registered agent cannot be held liable for the duties of its principal. [30]

52. Before this Court, the Applicant was unable to deny that the process for considering registration of a registered agent differs from the application for an SOS warehouse. Absent such denial, this Court must accept the evidence placed before it by the Respondent in this regard, namely, that the processes for the two licences, i.e. the licence for a SOS warehouse and a licence to be a registered agent are fundamentally different.

53. The process being different it cannot be argued that the approval of an applicant to act as a registered agent must result in the approval of an SOS licencing warehouse application premised on the same application. On this basis I cannot concluded that SARS's decision was irrational and arbitrarily.

REASONS PROVIDED FOR REFUSAL

[30]Replying Affidavit para 40 & 41 p 005-11.

54. In addition counsel had argued that the Appeals Committee did not provide cogent reasons for its refusal of the internal appeal. Nu Africa was also not previously informed of any “outstanding schedule”.[31]

55. On the basis that the Committee failed to provide informative and substantial reasons, contrary to what it is required in terms of section 5(2) of PAJA,[32] its decision refusing the SOS warehouse applications ought to be set aside in terms of section 6(2)(e)(vi) of PAJA.[33] For the same reason, the decision of the Appeals Committee ought to be set aside as well.

56. The Respondent denied that the Applicant was not previously informed of the outstanding schedule recording the debt. If this had not been the position, it argued, that the Applicant would not have known when to lodge an appeal and an application for a suspension of payment.[34]

57. Furthermore, even if SARS granted the application suspending the payment of debt, this does not translate into a setting aside or a rescinding of the schedule but merely a postponement of the obligation to pay.

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[31] Founding Affidavit para 27 [CaseLines 001-13].
[32] Founding Affidavit para 28 [CaseLines 001-13].
[33] Act 3 of 2000 (“PAJA”).
[34] Answering Affidavit para 51 p 004-23.

58. It is the Respondent's contention that when the Commissioner refused the two licencing applications on 20 December 2019 he stated the following in his letter to the Applicant:

"2. During the verification of the statements made by applicant within the DA185 application form, we have identified that the applicant has previously contravened the (CEA). Section 60(2)(a)(ii)(aa) of the Act provides that the Commissioner may refuse any application for a new licence if the applicant has contravened the provisions of the Act.

3. The applicant has further failed to inform the Commissioner of the contraventions. Instead, the applicant opted to provide misleading statement by stating that the applicant has not contravened the Act during the preceding 5 years. Section 60(2)(a)(i)(bb) of the Act provides that the Commissioner may refuse any application for a new licence if the applicant has made a false or misleading statement with respect to any material facts or omits to state any material fact which was required to be stated in the application for a licence."

59. Despite the Commissioner having already furnished reasons for the refusal of the applications by means of the letter dated 20 December 2019, the Applicant still submitted a request for reasons. In a letter dated 4 March 2020 the Commissioner further explained the basis for the refusal of the applications as follows:

59.1. The letter of demand dated 3 August 2018 that was issued to the Applicant claiming payment of an amount of R36 291 907.59 for "contravening several sections of the (CEA)".

59.2. "Box 12 of the application forms (DA185) requires an applicant to indicate whether, during the preceding 5 years, it has contravened the Act or failed to comply with the provisions of the Act. In this regard, the applicant made a cross in the no column.[35]

60. Based on what has been set out above, it is clear that SARS had provided reasons for its refusal and it is further a finding of this Court that such reasons were good and solid reasons to refuse the applications for the licences of the SOS warehouses. It is further a finding of this Court that SARS' decision in this regard was clearly rational and correct.

[35] Founding affidavit, par.21

COMMISSIONER DID NOT PROPERLY APPLY HIS MIND AND FAILED TO CONSIDER RELEVANT CONSIDERATIONS.

61. The Applicant further argued that the Commissioner did not properly apply his mind and failed to consider relevant considerations. Section 6(2)(e)(iii) of PAJA provides for judicial review where action was taken because irrelevant considerations were taken into account, or relevant considerations were not considered.

62. In support of this contention, the Applicant relied on the Bangtoo Bros v National Transport Commission,[36] decision wherein it was held that if a decision maker was to regulate a factor of obvious and paramount importance to one of insignificance and give another factor a weight far in excess of its true value, this would amount to a failure to apply the mind properly to the matter.

63. The Applicant further argued that SARS is wrong in contending that Nu Africa made a material non-disclosure in the applications by failing to disclose the R36 million debt raised by SARS in 2018:

[36] 1973 (4) SA 667 (N) at 685A-D; applied by the SCA in Esau v Minister of Co-Operative Governance and Traditional Affairs 2021 (3) SA 593 (SCA) at para 104 and Maharaj v Mandag Centre of Investigative Journalism NPC 2018)1) SA 471 (SCA) at para 25.

63.1 First, it is apparent from the record filed in the Rule 53 proceedings that SARS was aware of the action instituted by Nu Africa challenging the demand.[37]

63.2 Second, Nu Africa included in the applications a copy of the letter dated 21 February 2019, wherein the Commissioner granted Nu Africa a suspension of payment for the R36 million, pending the finalisation of the dispute.[38] This is accepted by SARS.[39] To the extent that the Commissioner was unaware of the alleged transgressions (which is denied), he was made aware thereof by means of the letter of suspension.

64. Thus, counsel had argued that there is no basis for SARS to contend that Nu Africa has misled the Commissioner in any way.

65. Counsel further submitted that SARS failed to consider the following relevant considerations:

65.1 Nu Africa is challenging the R36 million debt raised by SARS against it by virtue of High Court litigation.[40]

[37] The Particulars of Claim is included as item 58 in the record, see [CaseLines 002-6].
[38] Annexure PLS10 [CaseLines 001-407]
[39] Answering Affidavit para 47 [CaseLines 004-21].
[40] Supplementary Foundinf Affidavit para 31.2 [CaseLines 003-12].

65.2 SARS suspended payment of the R36 million. Nu Africa included in the application forms a copy of the letter dated 21 February whereby SARS suspended payment.[41]

65.3 In terms of Rule 60.04(2)(c) a license may be granted even where a transgression was committed, provided that the transgression was inadvertent, without fraudulent intent or gross negligence. [42] SARS has not contended that any of Nu Africa's directors had been involved in fraud or acted with wilful intent.[43]

65.4 The vetting reports noted that there is no income tax, VAT or PAYE outstanding. Also, there are no risks to report.[44]

66. It is on this basis that the Applicant had argued that had SARS considered these facts, it would have concluded that there is no debt "payable" for purposes of customs and excise, similar to income tax and VAT. Therefore, it cannot be said that Nu Africa is a non-complaint taxpayer.

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[41] Supplementary Founding Affidavit para 31.1 [CaseLines 003-12].
[42] Founding Affidavit para 23.5 [CaseLines 001-12]
[43] Supplementary Founding Affidavit para 34 [CaseLines 003-13].
[44] Supplementary Founding Affidavit paras 12,13, 18 [CaseLines 003-5, 003-6].

67. In addition SARS took the following irrelevant considerations into account namely:

67.1 The suspicious Activity Report (“SARS”) with report number 3422786 contains an allegation that Nu Africa made certain false acquittals amounting to R 1 508 373.43.[45] At the time when the applications were considered, this allegation was still “under investigation”. Nu Africa was however not given an opportunity to make representations regarding these allegations.[46]

67.2 The National Appeals Committee considered the inadvertent reference to a “clearing agent” in the internal appeal (instead of a “registered agent”) as” misleading”.[47] This mistake is trivial.[48]

67.3 The National Appeal Committee considered the Letter of Demand issued by SARS for the R36 million on 29 April 2019.[49] However, this demand was simply a repetition of a demand for the same alleged debt in

[45] Supplementary Founding Affidavit para 21 [CaseLines 003-7].
[46] Supplementary Founding Affidavit para 23[CaseLines 003-8], Replying Affidavit paras 21-23 [CaseLines 005-8].
[47] Supplementary Founding Affidavit para 24.1 [CaseLines 003-7].
[48] Supplementary Founding Affidavit para 36-38 [CaseLines 003-13].
[49] Supplementary Founding Affidavit para 24.2 [CaseLines 003-7]

exactly the same amount, dated 3 August 2018.[50] The letter demand of 29 April 2019 was issued after the suspension of payment was granted on 21 February 2019. The only justifiable inference is that SARS overlooked the fact that payment of the debt had been suspended.

68. As a consequence of SARS' failure to give proper consideration to the relevant factors listed above, the refusals of the SOS warehouse applications are liable to be set aside and ought to be referred back to the Commissioner for reconsideration.

69. On behalf of the Respondent it was argued that it follows logically that for so long as there is a finding by SARS, albeit challenged, that an Applicant contravened the Act, then within the context of the empowering legislation there is in respect of that person a contravention of the Act. This position this Court agrees with.

70. That is so because the Commissioner had arrived at such a finding, it has consequences and effect must be given to it, until set aside by a court of law. To date the decision of the Commissioner stands.

[50] CaseLines 004-73.

71. In addition, in any event, it was incumbent upon the Applicant to at the very least disclose in the application forms that although the Commissioner had arrived at a conclusion that there was a contravention of the Act, the Applicant is challenging the finding and that therefore that finding ought not to be held against the Applicant for the licensee. This the applicant had failed to do and instead it omitted to stipulate same.

72. If there had been a full and frank disclosure, the Commissioner would have attracted a discretion to grant a licence, even if a transgression was committed. But in such instance the Commissioner must be satisfied that the transgression was “inadvertent”, without fraudulent intent or gross negligence.[51]

73. In casu, counsel for the Respondent had argued, that it is abundantly clear that the Applicant cannot rely upon Rule 60.04(2)(c) because the transgression as found by the Commissioner was surely not under circumstances where the transgression was inadvertent, without fraudulent intent or gross negligence. In fact, according to the letter of demand, the Applicant wilfully and fraudulently mislead the Commissioner. This stance this Court agrees with.

[51] Rule 60.04(2)(c).

74. With reference to the finding arrived at by the Appeals Committee, counsel for the Respondent had submitted that the Applicant argues that the Appeals Committee had not given sufficiently good reasons for its decision. This is refuted as it is abundantly clear that the Appeals Committee stated the following, and these reasons are with respect sound and solid:

> "6. Based on the documentary evidence before the Committee you are advised as set out below:
>
> 6.1 the Committee's view is that the refusal to licence the two warehouses in question centres on your failure to declare on your DA185's that, in terms of a letter dated 3 August 2018 …
>
> Conclusion:
>
> 7. Based on the facts before the Committee the conclusion is as follows:
>
> 7.1 the Customs & Excise Trader Registration's decision is confirmed, due to non-compliance, contravention of the Act, as well as the outstanding schedule."

75. It is on this basis that it was therefore submitted that the Commissioner acted rationally and that it had a sound basis in law upon

which to refuse the applications. This position, this Court is also in agreement with.

76. Therefore, in view of the fact that the Applicant failed to persuade this Court that the decision of the Commissioner is reviewable, in terms of PAJA, this Court cannot conclude that the decision so taken by the Respondent was wrong, or that the decision maker failed to exercise his power and discretion honestly and properly.

77. On the reasons alluded to above and having regard to the statutory provisions this Court concludes that the Commissioner had a solid and sound basis to refuse the applications for the licences. As alluded to above, the Applicant contravened the provisions of the Act and on that basis alone the Commissioner was fully justified to refuse its applications for the licences.

78. But, even if one assumes, at best for the Applicant, that the Commissioner's findings that the Applicant had contravened the Act are subject to a judicial challenge, then at the very least the Applicant ought to have explained and disclosed its prior unpleasant interactions with the Commissioner. There was a duty on the applicant to disclose the findings

arrived at by the Commissioner. This the Applicant had failed to do and this Court draws a negative inference in this regard.

UNREASONABLE CONDUCT

79. Lastly, the Applicant also contends that administrative action may also be set aside in terms of section 6(2)(h) of PAJA if the decision is one that a reasonable decision-maker could not reach.[52]

80. On this basis it was submitted that the Commissioner's refusal of the SOS warehouse license applications, on the mere basis that SARS has previously issued a demand against Nu Africa (which is disputed in the High Court litigation), is unnecessarily disproportionate and unduly onerous.[53] As such, counsel had argued that the decisions ought to be set aside and referred back to SARS for reconsideration.

81. On the conspectus of the evidence placed before this Court, I cannot conclude that the decision so taken by the Commissioner amounted to an unreasonable conduct, which decision ought to be referred back SARS for reconsideration.

[52] Bato Star Fishing (Pty)Ltd v Minister of Environmental Affairs 2004(4) SA (CC) at para 33.
[53] Ehrlich v Minister of Correctional Services 2009 (2) SA 373 (E) at paras 43-44.

82. For the reasons alluded to above, this Court concludes that the Commissioner correctly refused the applications.

ORDER

83. In the result the application is dismissed with costs, including the costs of two counsel where so employed.

_____

C.J. COLLIS

JUDGE OF THE HIGH COURT

GAUTENG DIVISION PRETORIA

COUNSEL FOR THE APPLICANT: Adv. J. Vorster SC

Adv E. Muller

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Adv M. Masilo

INSTRUCTED BY: MacRobert Attorneys.

DATE OF HEARING: 03 November 2022

DATE OF JUDGMENT: 08 April 2024