

SOUTH AFRICA / JUDGMENT

Biskit (Pty) Ltd v Commissioner for the South African Revenue Services (6156/2023) [2025] ZAFSHC 71 (13 March 2025)

[2025] ZAFSHC 71

COURT

Free State High Court, Bloemfontein

BEFORE

P.J. Loubser, I. Van Rhyn

CASE / FILE NUMBER

6156/2023

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FLYNOTES:

TAX – Search and seizure – Duty
on cigarettes –
Claim
that cigarettes were bought duty paid – Given multiple
opportunities to provide proof of duty payment but failed
to do so
– Notice of intent to seize did not qualify as
administrative action and not reviewable – Applicant
had
failed to rebut presumption that excise duty had not been paid –
Unable to produce proof as required by Act –
SARS acted
fairly – Seizure decision procedurally fair –
Application dismissed – Customs and Excise Act
91 of 1964,
ss 89(1) and 102(4).
IN
THE HIGH COURT OF SOUTH AFRICA
FREE
STATE DIVISION, BLOEMFONTEIN
Reportable/Not
reportable
Case
number: 6156/2023
In

the matter between: BITSKIT
 (PTY) LTD
 APPLICANT
 And
 THE
 COMMISSIONER FOR THE SOUTH AFRICAN
 REVENUE
 SERVICES
 RESPONDENT

Coram: Loubser J et Van Rhyn, J

Heard: 25 November 2024

Delivered: 13 March 2025

Summary: Application for the review and setting aside of a
 decision by SARS officials to seize a cargo of cigarettes where the
 Applicant
 contends it had bought the cigarettes from the manufacturer
 ‘duty paid’.
 ORDER
 1.
 The application for review and setting
 aside is dismissed with costs, the costs of counsel to be on scale C.

JUDGMENT

LOUBSER J (Van Rhyn J concurring)

- [1] This is an application in terms of Uniform Rule 53 for the review and setting aside of certain decisions made by the Respondent to seize a cargo of cigarettes belonging to the Applicant. In the Notice of Motion, the following relief is sought:
1. That the decision of the Respondent taken on 18 July 2023, detailed in the letter of intent to seize cigarettes detained at Aliwal North, FA5 to the founding affidavit, be reviewed and set aside.
 2. That the decision of the Respondent taken on 31 August 2023 contained in the seizure notice, FA7 to the founding affidavit, be reviewed and set aside.
 3. That the Respondent be ordered to release the seized cigarettes to the Applicant within 3 days from the date of the order made in terms of prayer 1 and/or 2.
 4. That the Respondent be ordered to pay the costs of this application.

- [2] Mr. Suleman Panchbhaya, the sole shareholder and director of the Applicant, deposed to the founding affidavit on behalf of the Applicant. He indicates that the principal place of business of the Applicant is situated in Lenasia, Gauteng. The impugned decisions to seize the cigarettes were taken in Ladybrand in the Free State Province by officials of the Respondent, he says. He further points out that the application is brought in terms of Section 89(1) of the Customs and Excise Act[1].
- [3] According to Mr. Panchbhaya, the Applicant conducts business as a distributor of cigarettes. It buys cigarettes from various local manufacturers and wholesalers, and sells them to retailers countrywide. The cigarettes in question formed part of a larger consignment of cigarettes bought from Adriatic Trade and Invest (Pty) on 30 March 2023. This company is a wholesale trader, and it had, in turn, bought cigarettes from Gold Leaf Tobacco Corporation (Pty) Ltd, a licensed South African manufacturer of cigarettes, and the manufacturer of the cigarettes in issue.
- [4] It is further asserted in the founding affidavit that the Applicant had bought the cigarettes 'duty paid', that is on the basis that the excise duty and VAT payable thereon had been paid by the manufacturer at the time when they were manufactured. In terms of the so-called 'duty at source' provisions of the Customs and Excise Act, the legal obligation to pay the excise duty and VAT on cigarettes, is on the manufacturer thereof, who must do so on production thereof, before the cigarettes leave the manufacturing warehouse. The effect hereof is that cigarettes are always bought 'duty paid', and the buyer thereof, who would be a wholesale or retail trader, would be legally justified to accept that the duty payable thereon have been

paid. Such wholesale or retail trader, like the Applicant, would have no means to verify whether it has in fact been paid, it is stated.

- [5] Mr. Panchbhaya then goes on to describe how the cigarettes in question became the subject-matter of interest of the Respondent. On 30 March 2023 the Applicant sold the cigarettes to a business in King Williamstown in the Eastern Cape Province. On the same day, the Applicant was to deliver the cigarettes to the said business. Whilst enroute to King Williamstown, the delivery vehicle

was stopped at a roadblock set up by the South African Police Service at Aliwal North. In response to a request for documentation proving the status of the cigarettes, the police officers were provided with the invoice issued by Adriatic, reflecting the sale to the Applicant, by the driver of the vehicle. He also provided the officers with the delivery note reflecting the delivery to the customer in King Williamstown.

- [6] The police officers then called on the Respondent to come and assist them with confirming the status of the cigarettes. A number of officials of the Respondent arrived at the scene, and they insisted that the Applicant must provide the Respondent with proof that the duty payable on the cigarettes was indeed paid. Because the cigarettes were bought 'duty paid' from Adriatic, who had bought them 'duty paid' from Gold Leaf, it was simply not possible

for the Applicant to provide the type of proof demanded by the officials of the Respondent, it is submitted in the founding affidavit.

- [7] As a result, the driver was instructed to proceed to the warehouse of the Respondent in Ladybrand, where the cigarettes and the delivery vehicle were detained in order to determine whether they were liable for forfeiture in terms of Section 88(1)(a) of the Act. The delivery vehicle was subsequently released.
- [8] It is also pointed out in the founding affidavit that the cigarettes in question consisted of 350 master cases of cigarettes. Needless to say, this consignment was of substantial value and the Applicant did not want it to become forfeited. On 3 April 2023 the Respondent afforded the Applicant a further opportunity to provide proof of payment of the duty. The very next day the Applicant responded in a letter, pointing out that it was not the manufacturer of the cigarettes, and that it was consequently not in a position to prove payment of the duty. After a further exchange of emails and letters between the parties, the Respondent issued a “Letter of Intent to seize the Cigarettes at Aliwal North” on 18 July 2023. In this letter the Applicant is given the opportunity to submit evidence on why the goods should not be seized. According to the Applicant, this letter clearly showed that a final decision to seize had already been taken, which decision had already affected the rights of the Applicant.
- [9] This letter was followed by a seizure letter issued by the Respondent on 31 August 2023. In the letter, the finding that the cigarettes have been dealt with irregularly, is based on the failure of the cigarette manufacturer to prove compliance with the Act. The Applicant maintains that it is not the manufacturer, and submits that Section 102(1) of the Act only requires of the Applicant “to produce proof as to the person from whom the goods were obtained.” For that reason, the Respondent has failed to prove that the cigarettes have been dealt with irregularly, as provided in Section 87(1) of the Act, the Applicant says.
- [10] A reading of the answering affidavit, deposed to by Mr. Teboho Paul, a manager in the offices of the Respondent in Ladybrand, shows that the factual matrix of the events are mostly common cause between the parties. It is only the legal conclusions sought to be drawn that remain in dispute between the parties. Mr. Paul states in his affidavit that, after considering the representations of the Applicant and after investigating the manufacturer, the Respondent took a decision on 31 August 2023 to seize the detained cigarettes in terms of Section 88(1)(c) read with Section 87 and 102 of the Act. This decision was made on the basis that the Applicant and the manufacturer were unable to prove that excise duties had been paid on the detained cigarettes.
- [11] Mr. Paul further mentions in his affidavit that the Applicant provided the Respondent on 4 April 2023 with the name, cell number and e-mail address of a person at Gold Leaf Tobacco Corporation with whom they could speak regarding the payment of the excise duty of the cigarettes. In addition, the attorneys of the Applicant provided the Respondent with a copy of the excise account of Gold Leaf for the February 2023 period, as well as proof of the payment of that account. However, Mr. Paul states that these documents did not prove that

excise duties have been paid on the specific detained cigarettes. To put it differently, they did not show whether the detained cigarettes formed part of the cigarettes declared in the excise account for February 2023.

- [12] On 24 Augustus 2023 officials of the Respondent visited Gold Leaf Tobacco Corporation by appointment where they spoke to the person suggested earlier by the Applicant. This person then confirmed that they were the manufacturers of the detained cigarettes, but he was unable to link them to any excise accounts to show that they formed part of duty paid cigarettes. The Respondent then took the decision to seize the detained cigarettes on 31 Augustus 2023, it is said in the affidavit.
- [13] I now turn to the provisions of the Act that appear to be relevant to the issues before the Court. To begin with, however, I refer to the SARS External Policy on Tobacco Products, which was published by the Respondent and became effective on 22 June 2020. In terms of par. 2.1(a) tobacco products are liable to payment of excise duty in South Africa. In terms of par.2.1(d) the liability for excise duty in the tobacco industry is assessed and collected on a duty at source (DAS) basis. This clearly means that the manufacturer of cigarettes carry the liability to pay the excise duty on the cigarettes it manufactures.
- [14] Section 89(1) of the Act provides that, whenever any proceedings are instituted to claim any goods which have been seized under the Act, the claim must be instituted by the person from whom they were seized, or by the owner of the goods or the owner's authorised agent.
- [15] Section 87(1) of the Act provides that any goods manufactured, removed or otherwise dealt with contrary to the provisions of the Act shall be liable to forfeiture wheresoever and in possession of whomsoever found. Section 88(1)(a) provides that an officer or member of the police force may detain any goods at any place for the purpose of establishing whether those goods are liable to forfeiture under the Act. Section 87(1)(c) provides that if such goods are liable to forfeiture under the Act, the Commissioner may seize those goods.
- [16] Section 102(1) provides that any person selling or dealing in excisable goods, or any person removing the same, shall, when requested by an officer, produce proof as to the person from whom the goods were obtained, and if he is the manufacturer, as to the place where the duty due thereon was paid, the date of payment, the particulars of the entry for home consumption and the marks and numbers of the cases, packages or bales, which marks and numbers shall correspond to the documents produced in proof of the payment of the duty.
- [17] Section 102(4) provides for the following presumption: If the question arises in any dispute whether the proper duty has been paid, it shall be presumed that such duty has not been paid or that the goods have not been lawfully manufactured, removed or otherwise dealt with. It speaks for itself that this presumption burdens the person like the Applicant in the present case with the onus of proving that the duty has been paid, or that the cigarettes have been lawfully manufactured, removed or otherwise dealt with.

[18] Now the first question arising is whether the notice of intention to seize dated 18 July 2023 was issued by the Respondent in a procedurally unfair manner, which renders it reviewable. In the notice, the Applicant is informed that it has failed to provide the Respondent with proof that excise duties were paid on the applicable goods detained and in the Respondent's custody. The notice goes on to inform that, subject to the Applicant's response, the Commissioner intends to seize the cigarettes as provided for in Section 88(1)(c) of the Customs Act. The following is stated: "Before a final decision is taken whether to seize the abovementioned goods, you are hereby afforded the opportunity to by no later than 16:00 on 28 July 2023 furnish this office in writing with such evidence and/or submissions as you may deem necessary to substantiate any argument as to why the goods

should not be seized."

[19] On behalf of the Applicant it was submitted before us that the notice of intention showed a finding that the goods have been dealt with irregularly, and that such finding affected the rights of a person or persons. As such, so it was argued, the notice constitutes

administrative action as defined in the Promotion of Administrative Justice Act (PAJA).[2] On this basis, the notice of intention was procedurally unfair because the Respondent failed to give prior notice of its intention to issue a notice of intent. This was required by Section 3(2)(b) of PAJA, it was submitted.

[20] In terms of Section 1 of PAJA administrative action means any decision taken, or any failure to take a decision by an organ of state, which adversely affects the rights of any person and which has a direct, external legal effect. However, upon a proper interpretation of the language and the words used in the notice of intent, it is patently clear to this Court that no decision was yet taken. The decision to seize or not to seize was obviously held over until the Applicant has availed itself of the opportunity to submit arguments or reasons why such a decision should not be taken. The papers before us show that the Applicant had indeed submitted such arguments and reasons. The point is that the notice of intention to seize was not a decision, and therefore it did not constitute an administrative action. The result is that it is not capable of being reviewed under PAJA. Prayer 1 of the Notice of Motion therefore stands to be dismissed.

[21] The next question is whether the decision to seize was procedurally fair. On behalf of the Applicant it was contended that it was not, because the Respondent should have informed the Applicant of the evidence obtained from Gold Leaf Tobacco Company, and then have afforded the Applicant the opportunity to make submissions on why that evidence did not justify seizure before the decision to seize was taken.

[22] This argument loses sight of the presumption contained in Section 102(4) of the Customs and Excise Act. In terms of this section, it shall be presumed that the duty has not been paid whenever the question arises whether the proper duty has been paid. This is the only question in the present dispute between the parties. In addition, the Applicant knew this right from the beginning when the cigarettes were confiscated at Aliwal North and

throughout the whole process that followed. For instance, the notice of intent confirmed without any doubt that the question whether the duty was paid formed the only issue in the dispute. The presumption that the duty was not paid, had to be rebutted by the Applicant. The Respondent went so far as to send its officials to the manufacturer to establish whether there was any link between the duty paid and the specific batch of cigarettes confiscated from the Applicant. The manufacturer could not show any such link. Having regard to the fact that the duty to confirm such a link rested on the Applicant, it speaks for itself that it could have visited the manufacturer by its own accord to find evidence of the required link. It did not need an invitation to make submissions on the lack of evidence found by the Respondent's officials.

- [23] In any event, no new evidence was obtained from the visit to the manufacturer. The visit only confirmed that there are no documents to prove that excise duty was paid on the detained cigarettes. To use the words of Schippers JA in *CSARS v Dragon Freight (Pty) Ltd*[3]: “The attack on the ground of procedural unfairness can be dealt with briefly. It has no merit. Throughout the course of the complex

administrative process that led to the seizure, the respondents were given adequate notice of the administrative action that SARS was considering taking and a reasonable opportunity to make representations before any decision was taken.”

- [24] Having regard to all the facts before us, it is clear that the Applicant was unable, to this day, to rebut the presumption in Section 102(4). It was unable to produce proof of the marks and numbers of the cases, packages or bales, which marks and numbers ought to correspond to the document produced in proof of the payment of the duty, as expressly required by Section 102(1) of the Customs and Excise Act. Prayers 2 and 3 of the Notice of Motion therefore cannot be granted. I might add that, in broad terms, this

conclusion

corresponds with the finding of the Supreme Court of Appeal in *Commissioner, South African Revenue Service v Saleem*.[4]

- [25] The following order is made:

1. The application for review and setting aside is dismissed with costs, the costs of counsel to be on scale C.

P.J. LOUBSER, J

I concur:

I. Van Rhyn, J

For the Applicant: Adv. J. A. Meyer SC Instructed by RHK Attorneys, Sandton c/o Hendre Conradie Inc (Rossouws Attorneys) Bloemfontein For the First Respondent: Adv. N. K. Nxumalo Instructed by: Maponya Inc, Pretoria c/o Honey Attorneys, Bloemfontein

[1] Act 91 of 1964

[2] Act 3 of 2000

[3] [2022] 3 All SA 311 (SCA) at page 323 par 50

[4]

[2008] ZASCA 19; 2008

(3) SA 655 (SCA)

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