

SOUTH AFRICA / JUDGMENT

Glencore International AG v Commissioner for the South African Revenue Services (34490/2021) [2022] ZAGPPHC 951 (7 December 2022) [2022] ZAGPPHC 951

COURT

North Gauteng High Court, Pretoria

BEFORE

L.A. Retief

CASE / FILE NUMBER

34490/2021

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IN THE HIGH
COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)

Case No.
34490/2021

REPORTABLE: NO
OF INTEREST
TO OTHER JUDGES: NO

DATE: 07 DECEMBER 2022
In the matter

between: GLENCORE
INTERNATIONAL
AG Applicant
and
THE
COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE
SERVICES Respondent

JUDGMENT

This matter has been heard in open Court. In terms of the directives of the Judge President of this Division the judgment and order are accordingly published and distributed electronically.

RETIEF AJ

INTRODUCTION

- [1] The applicant, Glencore International AG (“Glencore”) seeks to review and set aside a decision taken by the respondent (“SARS”) that it diverted eight consignments of goods (“goods”) as envisaged in terms of Section 18(13) of the Customs and Excise Act 91 of 1964, as amended (“the Act”). Such goods were duly imported into the Republic of South Africa (“SA”) from the Democratic Republic of Congo (“DRC”).
- [2] The relief sought by Glencore includes, inter alia, the setting aside of SARS’s decision to impose a forfeiture amount in terms of Section 88(2)(a)(i), the payment of Vat and Vat penalties, totalling an amount to R 7 640 290.15.
- [3] The administrative decisions taken by SARS are set out in two letters of demand addressed to Glencore dated 14 September 2019 marked FA5 and FA17. The decisions taken by SARS, as set out in the respective demands, were confirmed by SARS’s Internal Administrative Appeal Committee (“Committee”).
- [4] It is common cause that SARS no longer seeks payment of the Section 91 administrative penalty.
- [5] Glencore brings this review application in terms of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) and as such, the Court’s enquiry in terms of Section 6(2) of PAJA applies. SARS referred the Court to the application of the legislative principles as set out in *Dragon Freight (Pty) Ltd and Others v The Commissioner for South African Revenue Services and Others* [2002] 1 All SA 883 (GP), in which the Court reaffirmed that the role of a Court in review proceedings, namely:

“[14] In review proceedings, PAJA constitutes the prism through which a Court can determine whether an administrative decision was rational, reasonable or procedurally correct. This is the essence of the Court’s review function. [...].”
- [6] Save for a procedural complaint raised by Glencore in terms of Section 6(2)(e)(iii) of PAJA, as against the Committee, no further procedural complaints are in issue.
- [7] The chronology of the facts which resulted in the decisions to be set aside requires consideration.

THE

FACTS

- [8] Glencore is a private company which is incorporated and trades in terms of the laws of Switzerland. It is however registered in SA for Vat purposes and as an importer and exporter for customs purposes. Glencore is a commodity trading entity purchasing a wide range of commodities, including trading in mineral products, for the purpose of on-selling the products to customers around the world including locally.
- [9] In circumstances when Glencore imports such commodities into the SA for on-selling to customers, such commodities are moved, including stored in bond pending exportation, from SA by Glencore via the premises of Access Freight International Pty (Ltd) ("Access World"). Access World is a licenced custom and excise storage warehouse. Access World is a subsidiary of Glencore.
- [10] Glencore entered into an agreement with Kamoto Copper Company SA ("Kamoto") to purchase lead in blocks and anode sheets. Kamoto is a copper and cobalt mining company registered and situated in the DRC.
- [11] On the 20 July 2016 and again on the 31 May 2016 Glencore purchased a total of 8 consignments described as per invoice, as "bundles of lead anodes" from Kamoto. The decisions taken by SARS in respect of the manner in which these 8 (eight) consignments were entered and cleared by the clearing agents and the consequence thereof, is the subject for review.
- [12] During the period of June to August 2016, these consignments were cleared by two clearing agents namely Cargo Services Beitbridge (Pty) Ltd ("Cargo Services") and Manica Africa (Pty) Ltd ("Manica"). Both Cargo Services and Manica are licenced clearing agents in terms of Section 64(B) of the Act. Cargo Services has offices situated at Beitbridge and Groblersbrug and associate offices in Johannesburg, Komatipoort and Durban. According to Cargo Services the offices at Beitbridge and Groblersbrug operate as separate offices and run without a linked server.
- [13] According to Cargo Services office at Beitbridge ("Beitbridge") it received an email from Glencore stating that a certain number of vehicles would be moving from the DRC to SA and that such vehicles were to be cleared and released at the Beitbridge border post. Beitbridge received a pre-clearance email with an invoice, packaging list, manifest and clearing instruction for home consumption (DP entry) for each consignment from Glencore. As the loads moved closer to the border a tracking pre-alert was sent to Beitbridge together with documents to be cleared for loads moving.

- [14] To illustrate the actions taken by Beitbridge for the consignment bought on the 20 July 2016: on the 28 July 2016 Beitbridge received a copy of invoice PBAN000051, relating to a consignment of “bundles of lead anodes” purchased by Glencore on 20 July 2016. As per Glencore’s instruction Beitbridge prepared bill of entry number 5024339 marked duty paid (DP entry). According to Glencore this bill of entry correctly reflected the description, tariff heading, values and purpose of the consignment.
- [15] Glencore explained that subsequent to the date of purchase of the consignment from Kamoto on the 20 July 2016, Glencore found a buyer for the goods. This was echoed in the instructions given to Beitbridge on the 28 July 2016 who were to prepare the bills of entry reflecting the correct purpose, tariff heading, values, description and purpose for home use, free for circulation and not to be held in bond pending exportation as such purpose no longer existed. Beitbridge prepared the DP bill of entry for submission.
- [16] In terms of Section 38(1)(a) the seven day window period for entry of this consignment was imminent and the consignments did not, as per instruction from Glencore, reach the Beitbridge port for clearance and due entry. Beitbridge investigated the position by requesting the tracking service which sent them the pre-alert on the consignment’s proximity to the boarder, to trace its whereabouts.
- [17] Beitbridge’s investigations revealed that on 2 August 2016 this same consignment crossed the border as per the tracker pre-alert vehicle transporting the consignment from the DRC and entered the boarder at Groblersbrug post instead of the anticipated port at Beitbridge.
- [18] Groblersbrug receiving the consignment and without the knowledge of the Beitbridge instruction dated 28 July 2016, cleared the consignment bond entry for “warehouse export” under bill of entry 5000694 (WE entry) using customs code E:42:00. Groblersbrug entered the goods using the information on the Kamoto invoice PBAN000051 as the source document. The Kamoto invoice indicated that the consignment was to be transported to the premises of Access World to be held in bond pending exportation. This appeared to be the position as at date of purchase.
- [19] As a result of the port entry confusion, Groblersbrug was waiting for the “goods received note” from Access World to acquit the WE entry and Beitbridge simultaneously was waiting to clear the same consignment as duty paid. The evidence indicates that Beitbridge, after the goods had already been cleared, submitted the DP bill of entry and the Vat. This resulted in two bills of entry, pertaining to the same consignment, co-existing on the SARS system. This created a duplication of entry albeit that such entries were submitted on a different premise.
- [20] To rectify the position Groblersbrug passed a voucher of correction (“VOC”) in terms of in terms of Section 40(3)(a)(i) cancelling the WE entry on the basis of the consignment had already been cleared at the Beitbridge office and Vat had been paid to SARS.
- [21] The VOC was approved by SARS by way of a paperless EDI notification.

- [22] Thereafter, Beitbridge requested SARS to mark the DP entry for arrival, as if the goods were entered on such basis.
- [23] After the consignment entered at Groblersbrug and on the instruction of Glencore to SLS transports, the consignment was taken to High Trade Foundries (“High Trade”) in Johannesburg. At the foundry, the lead anodes were to be converted into lead blocks. According to Glencore the smelting process was required so that they could fulfil their obligation to supply lead blocks to their customers situated in China and India. The lead blocks were transported to Access World from High Trade awaiting exportation. Although Access World confirmed in writing that they never issued a letter of acceptance for these goods to be held by them in bond they did confirm under oath that they received and store goods from High Trade, however not in bond. According to the exportation documents which reflected Access World details, the lead blocks were released for export to India and China.
- [24] The remaining 7 (seven) consignments purchased on the 31 May 2016 as per invoices PBAN000001 to PBAN000006 too, had been sold by Glencore after the date of purchase and followed an almost identical entrance and clearance pattern as described above in that, such consignment where entered and cleared contrary to the clearing instructions provided to Beitbridge for home consumption (DP entry) sent by Glencore. These consignments too, never reached the port at Beitbridge who, anticipated their arrival.
- [25] In the anticipation of the arrival Beitbridge prepared and submitted duty paid bills of entry numbers 5013198, 5013199, 5013335, 5013285, 5013284, 5016776 (DP entry) according to the instructions received from Glencore.
- [26] The consignments which were conveyed by Transhunt where entered and cleared by Manica on the 13th and 14th of June 2016 for export warehousing (“WE entry”) on the strength of the corresponding Kamoto invoices. Such bills of entry numbers were: 5012006, 5012523, 5011857, 5011858, 5012609, 5011938 and 5013270.
- [27] As per invoice and declaration the consignments were to go to Access World to be held in bond pending exportation. This being the purpose as at date of purchase.
- [28] On discovering that the consignments had been entered and cleared contrary to the instructions received by Beitbridge from Glencore,
- Manica passed VOCs in terms of Section 40(3)(a)(i) cancelling each and every WE entry submitted by it on the basis of a duplication.
- [29] The respective VOCs were approved by SARS by way of a paperless EDI notification.
- [30] Thereafter, Beitbridge requested SARS to mark the DP entry for arrival, as if the goods were entered on such basis.

- [31] The consignments were delivered to the premises of High Trade and Access World confirmed in writing that they never issued any letters of acceptance for such goods to be held in bond. They did however confirm under oath that they received and stored consignments, not in bond from High Trade.
- [32] As a direct result of the number of VOC entries in respect of the consignments to cancel WE entries and to validate the DP entries and mark them for arrival after the goods were already in the country, the Illicit Trade Division of SARS was requested to look into the entries and verify whether such complied with the provisions of the Act.
- [33] SARS after conducting their investigation concluded that Glencore had contravened Section 18(13)(a)(i) of the Act by diverting the goods. SARS made a decision to forfeit the goods and to impose penalties, demanded the payment of Vat and Vat penalties on the basis that Glencore had not paid Vat on the goods. The total amount demanded from Glencore was R 7,640,290.15 (excluding the penalty in terms of Section 91 which SARS has now excluded amounting to R 1,633,378.00).
- [34] On 4 September 2019 SARS issued two letters of demand on the same date, one addressed to Cargo Services offices Groblersbrug concerning the consignment purchased on the 20 July 2016 and the other letter addressed to Manica in respect of the remaining 7 (seven) consignments purchased on the 31 May 2016.
- [35] On 6 November 2019, Glencore submitted an internal administrative appeal in respect of the SARS letters of demand to the Committee, which appeal, was dismissed on 30 June 2022.
- [36] The Court now turns to deal with the Commissioner's decisions on review.

THE COMMISSIONER'S DECISION

- [37] The Commissioner having regard to all the facts and supporting documents found that the 8 (eight) consignments were handled in a manner which was inconsistent with the provisions of the Act. In particular that the goods were diverted as they were delivered at a place other than the declared destination as reflected on the WE bill of entry and as a consequence, therefore Glencore was

liable for forfeiture in terms of Section 18(13) of the Act ("the decision").

- [38] As a result of the decision, the Commissioner raised a debt being for forfeiture in lieu of the goods as the goods had already been processed for exportation at the time of the decision.
- [39] In deriving at the decision, which confirmed by the Committee the Commissioner reasoned in FA5, as follows:

39.1 the 8 (eight) consignments entered SA using WE entries for subsequent exportation;

39.2 the DP bills of entry were submitted to customs for the same 8 (eight) consignments;

39.3 the WE bills of entry and the DP bills of entry were not duplications because the tariff headings, description of goods, declared values and purpose codes were dissimilar. SARS was therefore misled when the VOC's were submitted to request for cancellation of entry due to duplication;

39.4 as a result of the DP entries are null and void;

39.5 the WE entries are to apply as SARS was under the impression that the goods were bonded for warehousing. The goods were never held in bond at the declared warehouse, Access World

- as such the goods were diverted.

[40] Considering the how the Commissioner derived at the decision that the goods were diverted, the following inescapable relevant material common cause facts must apply: that the goods entered SA using WE bills of entry for exportation, that the DP bills of entry were for the same consignments, the VOC's for the cancellation for all the WE bills of entries were duly submitted and that the reason provided for the cancellations was as a result of duplications.

[41] The thrust of the Commissioner's issue lay in the reason proffered for such corrections. The Commissioner reasoned that the duplication of entries was misleading as the information recorded on the WE bills of entry compared with the information recorded on the DP bills of entry differed. As such, no duplication existed. If no duplication existed then SARS was misled by the reason for submission of the VOC's corrections. The consequence of being misled rendered the DP bills of entry null and

void as a result of which, SARS "validated" the "cancelled" WE bills of entry and penalised Glencore.

[42] Logically and applying the common cause facts, if SARS accepted that both WE and DP bills of entry were submitted to customs in respect of the same 8 (eight) consignments, SARS must have accepted, albeit realised that two bills of entry co-existed on the SARS system for each such consignment. As a consequence, a duplication was apparent. The fact that the information on the WE bills may have differed (tariff headings, description of goods, declared values and purpose codes) from the DP bills, does not detract from the fact that according to their records, two bills of entry for the same consignments co-existed on their system. Therein

lies the duplication.

[43] The information disparity between the respective bills certainly could create confusion and appear misleading on the face of it. However, it is in the very avoidance of confusion and to avoid misleading SARS that the mandatory statutory obligation by an importer, in this case Glencore, in terms of Section 40(3)(a)(i) is triggered.

- [44] The Commissioner accepted that the VOC's were duly submitted but rejected the reason proffered for such corrections. SARS in argument advanced the Committee's stance that, in the event that corrections were necessitated, the preferred manner of correction was to cancel each WE bill of entry and to substitute each one with a fresh bill, as catered for in Section 40(3)(a)(i)(bb)(B). Simplified: to cancel the existing WE bills of entry and substitute them with the fresh DP bills of entry, in so far as the DP bills of entry recorded the correct information to be declared. This, in essence, was what Glencore tried to do.
- [45] Glencore as the importer explained that the DP entries de facto recorded the declared information. Bearing in mind SARS's contention that the SA tax system, including the collection of custom duties, is one of self-assessment and that the Commissioner relies on the integrity of the documents submitted to SARS, it flows that in the process of self-assessment, Glencore complied with its mandatory obligation when it submitted the VOC's to effect the cancellation of bills of entry which were not correct.
- [46] Expanding on the reason and manner of the correction. In circumstances where two bills of entry already co-exist on the SARS system pertaining to the same consignment and when a correction is necessitated, surely the DP bills of entry although already on the system, after the VOC correction was submitted and accepted, constituted a "substitution" of that WE bill? The need for substitution in terms of Section 40(3)(a)(i)(bb)(B) was therefore not necessary. In hindsight Section 40(3)(a)(i)(bb)(B) may have been preferred provided, no duplication existed at the time of the correction. This correction would not have eliminated the duplication of entries already on the system. The situation Glencore intended to remedy.
- [47] SARS raises in argument that the DP entries after the submissions of the VOC's still do not correctly reflect the position as the trucks carrying the loads did not enter the port at Beitbridge. This is indeed correct, but this issue was never raised nor dealt with as the reason for the decisions standing to be set aside on review. Nor did the Committee deal with an enquiry into the port of entry as an issue. The validity of the bills of entry was measured according to the provisions of Section 40. Furthermore, the proposed Section 40(3)(a)(i)(bb)(B) correction proposed by SARS still would not cure the apparent duplication on the system.
- [48] Of importance is that the DP bills of entry reflected the intended purpose of the consignments. In consequence, and not only for this reason alone, the declaration of the goods cannot logically be measured by WE bills of entry.
- [49] The Court now turns to deal with the VOC corrections.
- [50] The time when such VOC corrections are submitted is catered for in Section 40(3)(a)(i) which states that:

"An importer or exporter or a manufacturer of goods shall on discovering that a bill of entry delivered by him or her –" (own emphasis)

- [51] In consequence, the fact that the VOC submissions pertaining to all 8 (eight) consignments were submitted and accepted by SARS after the goods were in the SA is not a relevant factor. Such correction must take place on date of discovery. According to Glencore and the respective clearing agents this occurred after the WE entries had been submitted and the goods had been released into SA.
- [52] The fact that the Commissioner accepted, as a fact, that the VOC's were submitted but now rejects their effectiveness was expanded in argument. Counsel for SARS relied on an unreported decision of South African Breweries (Pty) Ltd vs The Commissioner for the South African Revenue Service and SDL Group CC (GP) consolidated case number: 01740/21, 38889/21 and 7772/21 at 30-32 in which the Court determined that an electronic clearance and release performed electronically on SARS's system is a clerical act and not a decision. Relying on the matter, SARS argued that the submission and acceptance of the VOC's via an EDI paperless system relied on by Glencore to validate the cancellation of the WE entries is merely a clerical act and not a decision taken by SARS. The relevance of the point is unclear.
- [53] Accepting the clerical nature of the EDI "decision", SARS has, to date, not withdrawn the submitted VOC corrections relied on in terms of Section 3 of the Act which, specifically caters for both decisions and clerical notifications. In consequence, the clerical notifications albeit decisions, stands to be interpreted. As such then WE entries have been cancelled are no longer applicable for "validation" nor resurrection. It flows that the WE bills can't be applied by SARS. The only bills of entry pertaining to the consignments left on the system are the DP bills of entry and Glencore has paid the vat.
- [54] The reason proffered by the Commissioner in declaring the DP bills of entry null and void as a result of the misleading reason provided for correction, being that of duplications of the of entries for the same consignments, is irrational.
- [55] The inevitable consequence is that Section 18(13) can't rationally be applied to the goods and so, no diversion of goods held in bond applies. The Commissioner's decision that the goods have been diverted and forfeiture of goods or a penalty in lieu of forfeiture stands to be set aside.
- [56] The remaining issue is whether but for the decision, is SARS entitled to raise Vat and penalties? According to the Committee and in argument SARS contended that in terms of Section 40(3)(a)(ii)(bb) notwithstanding a necessitated corrections, Glencore is not indemnified from any fine or penalty that SARS is entitled, at its discretion, to raise. SARS does did not expand on what penalty it would lawfully be able to raise in such circumstance nor did Glencore deal with this aspect.
- [57] What is clear is that the penalties imposed by SARS where levied as a result of the diversion of the goods and the "validation" of the WE bills of entry and not as a result any acceptance by them of a necessitated correction in terms of Section 40. Moreover, SARS's argument in

favour of the decision on review is premised on the fact that the corrections submitted are of no consequence as a result of being misled. It is therefore illogical that SARS now seeks and, for that matter, argues that it conversely is entitled, on these papers, to seek the payment of penalties in terms of Section 40(3)(a)(ii)(bb).

[58] It is common cause that Glencore has already paid the Vat due on the DP bills of entry and raising Vat and Vat penalties for none payment under the circumstances is unlawful and the decision stands to be set aside.

[59] Lastly, Glencore raised in argument that the manner in which the Committee came to its decision was procedurally unfair in that they did not have all the documents. This was not expanded in argument and as a result of the findings by the Court has lost its potency. The Court's necessity to deal with this issue and the need to deal with, what appears to be, a decision by SARS not

to suspend the payments levied, notwithstanding Glencore's application for suspension, no longer exists.

Having regard to all the circumstances, the following order is made:

1. That the Commissioner's decisions contained in annexures "FA5" and "FA17" and confirmed by the Internal Administrative Appeal Committee in annexures "FA9" and "FA21" to founding papers, that the Glencore diverted the goods, are hereby set aside;
2. That the Commissioner's decisions contained in annexures "FA5" and "FA17" and confirmed by the Internal Administrative Appeal Committee in annexures "FA9" and "FA21" to founding papers, to demand the payment of VAT and VAT penalties are hereby set aside;
3. That the Commissioner's decisions contained in annexures "FA5" and "FA17" and confirmed by the Internal Administrative Appeal Committee in annexures "FA9" and "FA21" to founding papers, to demand an amount in lieu of forfeiture, are hereby set aside;
4. The Commissioner's decision to refuse the Glencore's application for suspension of payment is set aside;
5. The Commissioner is ordered to pay the costs of this application, such costs to include the costs consequent upon the employment of two counsel, one being a senior counsel.

L.A. RETIEF

Acting Judge of the High Court, Pretoria

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