

SOUTH AFRICA / JUDGMENT

Van Der Merwe and Others v UTI South Africa Proprietary Limited and Others (11033/2014) [2014] ZAKZDHC 61 (17 December 2014)

[2014] ZAKZDHC 61**COURT**

Kwazulu-Natal High Court, Durban

BEFORE

Annanbale

CASE / FILE NUMBER

11033/2014

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record**IN****THE HIGH COURT OF SOUTH AFRICA****KWAZULU-NATAL****LOCAL DIVISION, DURBAN****CASE NO. 11033/2014****REPORTABLE****In the matter****between:**VAN DER MERWE,
LIEBENBERG
DAWID RYK N.O.

.....1st

Applicant

MONYELA KGASHANE
CHRISTOPHER N.O.

.....2nd

Applicant

JACOBS, WELCOME
NORMAN N.O.

.....3rd

Applicant

LUKHELE MOTSWANA
GRACE N.O.

.....4th

Applicant

MAHANYELE JOHANNA
NINI N.O.

.....5th

Applicant

[the first to fifth
 applicants are cited in their capacity
 as Joint provisional
 liquidators of the sixth applicant]
 PELA PLANT
 PROPRIETARY
 LIMITED.....6th
 Applicant
 (IN LIQUIDATION)
 and
 UTI SOUTH AFRICA
 PROPRIETARY
 LIMITED.....1st
 Respondent
 TRANS-MED SHIPPING
 CC
2nd
 Respondent
 COMMISSIONER SOUTH
 AFRICAN
 REVENUE SERVICE
3rd
 Respondent
 ABSA BANK
 LIMITED.....4th
 Respondent
 FIRSTRAND BANK
 LIMITED.....5th
 Respondent
 BIDVEST BANK
 LIMITED.....6th
 Respondent

JUDGMENT

ANNANBALE AJ:-

- [1] The main issue in this case is whether the Commissioner, South African Revenue Services (“SARS”) enjoys what might be called a “super preference” in respect of unpaid duty and VAT on the liquidation of a company liable to pay such charges.

The background

facts

- [2] The issue arises in the following circumstances. The first to fifth applicants are the joint provisional liquidators of the sixth applicant, to which I will refer as “the company”. Prior to its liquidation, the company had sent 23 items of heavy duty earth moving equipment to the Democratic Republic of Congo for operations in that country. Some of the equipment is subject to instalment sales agreements with the fourth to sixth respondents with the usual reservations of ownership.
- [3] When the company’s operations in the Congo were complete, the equipment was returned to South Africa. The first respondent acted as the company’s clearing and forwarding agent in respect of the importation of the machinery which was entered for storage with deferment of customs duty and VAT in the second respondent’s customs and excise storage warehouse when it arrived back in South Africa. The second respondent acted as the first respondent’s sub-agent in this regard. The company was unable to secure the release of the property at that time due to its inability to pay duties and levies to SARS.
- [4] Thereafter the company was placed under winding-up because it was unable to pay its debts. Upon their appointment, the liquidators
- became obliged in terms of section 391 of the Companies Act 61 of 1973¹ forthwith to recover and reduce into their possession all the assets and property of the company and apply them in satisfaction of the costs of the winding-up and the claims of creditors. By virtue of section 84 of the Insolvency Act 24 of 1936² ownership of the equipment subject to the instalment sales agreements passed to the liquidators who became entitled to claim possession of that equipment wherever it might be found³.
- [5] SARS, which is the third respondent, refuses to enter the equipment for home consumption and release it to the liquidators, contending that provisions in the Customs and Excise Act, 91 of 1964 (“the Customs Act”) and the Value Added Tax Act 89 of 1991 prevent it from doing so unless and until duty and VAT are paid.
- [6] The first and second respondents align themselves with SARS’ interpretation of the Customs Act. They refuse to release the goods until the liquidators pay customs duty and VAT as well as the fees and charges due to them in respect of clearing and storage of the equipment. The total amounts due as at August 2014 were said to be in the region of R12 million in respect of duty and VAT and some R2 million for storage, which was accruing at R12 000 a day. They also contend that by virtue of section 83 of the Insolvency Act, they are entitled to retain possession of the equipment until the second meeting of creditors and would be entitled to sell the equipment themselves until that meeting is convened.

- [7] It is not in dispute that the company, as importer of the equipment, is obliged by section 39 of the Customs Act to pay duty. There is some dispute about whether VAT is payable but that is not a question that falls to be decided in these proceedings. To the extent that VAT is payable, section 13(6) of the VAT Act stipulates that the provisions of the Customs Act relating to importation and clearance of goods and payment and recovery of duty apply *mutatis mutandis* to the payment of VAT.

The Questions Arising

- [8] The principal question is whether the respondents are entitled or obliged by legislation to retain possession of the imported equipment until duty and VAT are first paid in full or whether they can be ordered to release the equipment to the liquidators and then prove and be paid then' claims in terms of a liquidation and distribution account compiled in accordance with the provisions regarding preference, security and the ranking of claims prescribed by the Insolvency Act.

Relevant provisions of the Customs Act

- [25] Section 38 of the Customs Act provides that every importer of goods is obliged to make due entry of those goods as contemplated within section 39 which sets out the procedure and documents required for entering imported goods for any purpose in terms of the Customs Act.
- [26] Section 47A of the Customs Act stipulates that “subject to the provisions of this Act; no person shall remove, receive, take delivery or deal with or in any imported or excisable goods or fuel levy goods unless such goods have been duly entered”.
- [27] Section 20(1)(a) of the Customs Act permits dutiable imported goods to be entered for storage in a customs and excise warehouse with deferment of payment of duty. Section 20(1)(b) of the Customs Act stipulates that such entry shall be “deemed to be due entry in respect of such goods ... for the purposes of the Customs Act”. It would appear that the need for a deeming provision arises from the fact that section 39(1)(b) of the Customs Act requires the payment of duties at the same time due entry is made. In the case of entry in terms of section 20(1)(a), duty is deferred. The effect of section 20(1)(b) is therefore that goods entered for storage are duly entered even though duty has not yet been paid.
- [28] In the present case the equipment has been entered for storage with deferment of duty in the second respondent's customs and excise warehouse. By virtue of the deeming provision in section 20(1)(b), the equipment has been duly entered. Section 47A does not therefore constitute an impediment to the relief sought by the liquidators.
- [29] Section 20(4) goes on to provide¹⁶ “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 — (a) home consumption and payment of duty thereon”.

- [30] As the equipment has been duly entered, it is only if the words “and payment of duty” mean that such payment is a precondition to release of goods that section 20(4) might be said to prohibit the release of the equipment at present.
- [31] Section 20(4) specifically refers to the purposes for which goods may be removed. The plain wording of the provisions does not require payment of duty prior to removal for home consumption. Mr King SC, who appeared together with Mr Gilbert for the applicants, submitted that had the legislature intended payment of duty to be a precondition it could have said so quite easily: “home consumption upon payment of duty thereon” or words to similar effect. I agree.
- [32] By itself then, section 20(4) does not in my view create an embargo which disentitles the liquidators to the relief they seek. Section 20 (4) cannot however be viewed in isolation.
- [33] Section 47(1) of the Customs Act provides for duty to be paid “at the time of entry for home consumption”. Mr King SC submitted that those words do not mean the duty must be paid before imported goods are entered for home consumption, they merely record the point of time at which SARS becomes entitled to actually require payment. Mr Pammenter SC however submits that the words of section 47 constitute a form of embargo upon goods being cleared for home consumption and points to the provisions of section 39(l)(b) of the Customs Act which requires payment of duty at the time of entry.
- [34] Section 47 commences with the words “subject to the provisions of this Act”. Section 20(1) (a) and (b) create exceptions to the ordinary regime of payment of duty upon entry to which sections 39(l)(b) and 47 speak. Section 47 must consequently be read subject to that exception and thus likewise does not debar the liquidators from the relief they claim.
- [35] SARS also relies on section 107(2)(a)(i) which reads: “Subject to the provisions of this Act, the Commissioner shall not except on such conditions, including conditions relating to security; as may be determined by him or her, allow goods to pass from his or her control until the provisions of this Act or any law relating to the importation, exportation, trans-shipment or transit carries through the Republic of goods, have been complied with in respect of such goods”.
- [36] Upon a plain wording of that section, it is not an absolute embargo. On the contrary, the fact that the Commissioner may impose conditions relating to security and then allow goods to pass from his or her control before the provisions of the Customs Act had been complied with, indicates in my view that sections such as section 20(4) and 47(1) are not absolute embargos.
- [37] Finally SARS relies on a statutory lien as evidence that payment of duty must precede the release of the equipment for home consumption.

[38] Section 114(l)(aC) creates a lien in favour of SARS over any dutiable goods stored in a customs and excise warehouse as security for the duty on such goods¹⁷. Section 114(l)(b)(i) goes on to provide that the claims of the State shall have priority over the claims of all persons upon anything

subject to a lien contemplated in terms of paragraph (aC) and may be enforced in accordance with the provisions of section 114 if the debt is not paid.

[39] Statutory liens such as those created by section 114(l)(aC) are not dependent upon the lien holder being in possession of the goods. Section 83 read with section 95 of the Insolvency Act ensure that such party's claim to security is retained despite their relinquishing possession of goods to the liquidators. (See also *Roux en Andere v Van Rensburg* NO

[1996] ZASCA 54; 1996 (4) SA 271 AA at 276 F - I). In *Roasx's* case, the Appellate Division, as it then was, approved of and applied what had been said in *Kahan* NO v *Hydro Holdings (Pty) Ltd* 1980

(3) SA 511 (T) 514 to 515, which is instructive also in the present matter. In *Kahan* the court was dealing with whether a person claiming an improvement lien over immovable property in an insolvent estate was required to relinquish possession to the trustee. The lien holder had sought to argue that the duty to relinquish possession of goods by the holder of a real right over an asset in the insolvent estate extended only to movables and not immovables. King J rejected this contention because, were it right it would have "the result that a trustee could not and cannot fulfil his duty to realise assets and finalise an estate, and an estate would remain alive at the whim of a creditor holding real right over immovable property".

[40] Mr King SC submitted that the very existence of such a statutory lien supports the notion that the Customs Act was never intended to create an embargo against clearance for home consumption unless duty and VAT were first paid in full. If such an embargo existed, he submitted, there would be no need for any such lien. At a level of logic there is much force in that submission.

[41] The genesis of section 114 (l)(aC) is also instructive. It appears to have been introduced to accord SARS security in goods where duty and VAT have not been paid but because the goods had not been detained under the provisions of section 114(1)(iv) of the Customs Act, SARS was left only with a claim which was unsecured and subject to the limited preference afforded by section 99 of the Insolvency Act. That was the situation which arose in *Secretary for Ciastoros and Excise v Millman* NO 1975

(3) SA 544 (A) and section 114(l)(aC) was inserted into the Customs Act some years later.

[42] I am satisfied that, in the scheme of the Customs Act as a whole and given the protection afforded by sections 83 and 95 of the Insolvency Act, the statutory lien created by section 114(l)(aC) serves only to provide SARS with additional security and is not a bar to the relief sought by the liquidators.

[43] In my view it follows then that properly construed, the Customs and VAT Acts do not preclude the respondents from releasing the equipment to the liquidators.

[44] It will have been apparent from the consideration of the statutory provisions referred to above that there is a degree of uncertainty

and ambiguity which arises when the provisions of the Old Companies Act and the Insolvency Act are considered together with the Customs Act. Although I have found that, properly interpreted, the provisions in the Customs Act upon which the respondents rely are not a bar to the relief sought by the liquidators, it is as well in the light of the apparent tension between the various provisions to consider the result which would be produced were section 47(1) interpreted as imposing an embargo against entry for home consumption until duty was paid. To the extent that there is uncertainty or ambiguity, I should in any event prefer an interpretation which does not result in “some injustice, absurdity, anomaly or contradiction”.¹⁸

[45] In my view, interpreting section 47(1) as an embargo provision is likely to cause injustice to other creditors of the insolvent estate of the company and lead to a potentially absurd result.

[46] As companies in liquidation are almost always unable to pay their debts, there will ordinarily be no prospect that the liquidators could, out of the insolvent company's own resources, pay customs duty and VAT before disposing of the equipment. Ordinarily, the logical source of funds with which to pay customs duty and VAT would be the proceeds of the sale of the equipment itself. Few purchasers would be willing first to pay SARS before being able to take delivery of the equipment which they have bought. Of course no purchaser would be prepared to pay SARS if the value of duties and VAT outstanding exceeded the value of the equipment itself. In that event, if the respondents' interpretation of the legislation is correct, the goods would likely never be realised because there would not be enough money to overcome the embargo. That would result in the equipment ending up in a state warehouse to be sold by SARS in terms of section 43 of the Customs Act.

[47] That is in my view an absurd result, particularly given the purpose of the insolvency regime which is to realise all the property of the company at best value in the interests of all creditors. It was precisely these types of difficulties that caused the court in *London and South African Exploration Co v Official Liquidator of North-Eastern Biltfontein and The Registrar of Deeds* (1895) 12 SC 225, to read a provision which apparently created an embargo on transfer of property before certain payments were made, as applying

only to voluntary transfers, not those consequent upon insolvency.

[48] The interpretation contended for by the respondents also results in the anomaly that assets which form part of the insolvent estate are dealt with not by the liquidators but by SARS (which need not even prove a claim) and without any input from or control by the liquidators or other creditors. It could not have been the intention of the legislature that assets of an insolvent estate, in respect of which other creditors also have real rights, should be dealt with completely outside the machinery of insolvency.

[49] I am therefore satisfied that any other interpretation of the relevant provisions would lead to these absurd and anomalous results and so, to the extent that there is uncertainty or ambiguity in the wording of the sections themselves, my interpretation must be correct.

[50] In the light of the conclusion I have come to in relation to the embargo question, it is necessary to consider whether the liquidators are entitled to claim possession of the equipment before the second meeting of creditors in the light of section 83 of the Insolvency Act.

1 Which remains applicable to the winding-up of companies unable to pay their debts by virtue of item 9(1) and schedule 5 to the

Companies Act, 2008

2 Which applies by virtue of s339 of the Old Companies Act

4 Natal Joint Municipal Pension Ftdm v Endumeni Municipality 2012

(4) SA 593 (SCA) at [18]

5 Endumeni supra

6 Walker v Syfret 1911 AD 141 at 166

7 Estate Reynolds and others v Commissioner for Inland Revenue 1937 AD 57 at 70

8 Section 90 of the Insolvency Act reads : “Land Bank not affected by this Act - the provisions of this Act shall not affect the provisions of any other law which confer powers and impose duties upon the Land and Agricultural Bank of South Africa in relation to any property belonging to an insolvent estate”

9 In terms of s43 of the Customs Act.

10 Matanzima however dealt with income tax, not duty or VAT although s101 of the Insolvency Act accords SARS a similar preference in relation to income tax as s99 does in respect of duty and VAT

11 Which reads in relevant part as follows: “(1) A registrar of deeds may not register the transfer of property except on production to that registrar of deeds of a prescribed certificate - (a)

.....

(b) Which certifies that all amounts that became due in connection with that property for municipal services fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years preceding the date of application for the certificate have been fully paid.”

11 Which reads in relevant part as follows:

“(1) A registrar of deeds may not register the transfer of property except on production to that registrar of deeds of a prescribed certificate -

(a)

(b) Which certifies that all amounts that became due in connection with that property for municipal services fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years preceding the date of application for the certificate have been fully paid.”

12 Section 89(4) of the Insolvency Act provides: “(4) Notwithstanding the provisions of any law which prohibits the transfer of any immovable property unless any tax as defined in subsection 5 due thereon has been paid, that law shall not debar the trustee of an insolvent estate from transferring any immovable property in that estate for the purpose of liquidating the estate, if he has paid the tax which may have been due on that property in respect of the periods mentioned in subsection (1) and no preference shall be accorded to any claim for such tax in respect of any other period”

12 Section 89(4) of the Insolvency Act provides:

“(4) Notwithstanding the provisions of any law which prohibits the transfer of any immovable property unless any tax as defined in subsection 5 due thereon has been paid, that law shall not debar the trustee of an insolvent estate from transferring any immovable property in that estate for the purpose of liquidating the estate, if he has paid the tax which may have been due on that property in respect of the periods mentioned in subsection (1) and no preference shall be accorded to any claim for such tax in respect of any other period”

13 The statement in *City of Johannesburg v Even* Grand 6 CC 2009(2) SA 111 (SCA) at [10] that the transfer of the properties was not subject to the provisions of s.89 of the Insolvency Act, refers to the fact that the transfers in that case occurred pursuant to s34(2) of the Administration of Estates Act. The court was not concerned with the transfer of a property by a trustee of an insolvent estate.

14 “(3) The registrar shall not register a transfer of a unit or of an undivided share therein, unless there is produced to him-(a) A conveyancer’s certificate confirming that as at date of registration-(i)(aa) if a body corporate is deemed to be established in terms of section 36(1), that body corporate has certified that all moneys due to the body corporate by the transferor in respect of the said unit have been paid, or that provision has been made to the satisfaction of the body corporate for the payment thereof; ”

14 “(3) The registrar shall not register a transfer of a unit or of an undivided share therein, unless there is produced to him-(a) A conveyancer’s certificate confirming that as at date of registration-(i)(aa) if a body corporate is deemed to be established in terms of section 36(1), that body corporate has certified that all moneys due to the body corporate by the transferor in respect of the said unit have been paid, or that provision has been made to the satisfaction of the body corporate for the payment thereof; ”

15At 135 C – D and 136 C-D

16 (subject to section 19A which does not apply in this case)

17 The section reads as follows: “(aC) Any dutiable goods of whatever nature, which are stored in any customs and excise warehouse licensed for any purpose under this Act shall be subject to a lien, as if the goods are detained in accordance with the provisions of subsection (2), as security ...”

17 The section reads as follows:

“(aC) Any dutiable goods of whatever nature, which are stored in any customs and excise warehouse licensed for any purpose under this Act shall be subject to a lien, as if the goods are detained in accordance with the provisions of subsection (2), as security ...”

18 E A Kellaway, Principles of Legal Interpretation at p160

19 Millman supra at 678 G to H

20 Pretoria City Council v Levinson 1 949

(3) SA 305 at 317; Fourie v Edkins 2013

(6) SA 576 SCA at [112]

21 Millman supra at 679 A to D

22 See Wells NO supra at 483 B to C quoted with approval in Soane supra at 186 G to 187 A

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAKZDHC/2014/61.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/van-der-merwe-and-others-v-uti-unknown-topic-akzdhc-2014>

Prepared on 9 October 2026 · Esheria