

IN THE KWAZULU- NATAL HIGH COURT, DURBAN**REPUBLIC OF SOUTH AFRICA**

CASE NO: 12262/2012

In the matter between:

ISLAND VIEW STORAGE LIMITED**APPLICANT**

and

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

JUDGMENTDATE DELIVERED: 08 APRIL 2014

CHILI, AJ

[1] The applicant brought an application for an order in the following terms:

- (1) that the determination by the respondent that the stolen ethanol forming the subject matter of the present application does not qualify for a rebate in terms of rebate item 624.50 in schedule 6 to the Customs and Excise Act 91 of 1964 (herein after the 'Act') to be set aside on appeal and the said determination be replaced with the determination that the stolen ethanol does qualify for the said rebate.

(2) in the alternative to prayer 1 above, that it be declared that the said ethanol qualifies for a rebate in terms of item 624.50 in schedule 6 of the said Act.

(3) in the further alternative, that the decision of the respondent that the said ethanol does not qualify for a rebate in terms of the said rebate item, be reviewed and set aside.

(4) in the further alternative that it be declared that the duties and levies which the applicant will have to pay in the event of an adverse decision by the honourable court in terms of prayers 1-3 above, will qualify for the refund in terms of section 76(2) (d) of the Act.

(5) that the demand by the respondent made on 22 June 2012 in terms of which the applicant is held liable for payment of duties and interest in the amount of R4 090 892, 88 be set aside.

(6) that the respondent be ordered to pay the costs of this application.

(7) further and / or alternative relief.

PARTIES

[2] The applicant conducts business as a third party liquid bulk storage facility at 142 Wharfside Road, Durban, within the port of Durban. For this purpose the applicant's storage facilities are licensed by the respondent as customs and excise storage warehouses in accordance with the provisions of sections 19, and 21 of the Act.

[3] The respondent (hereinafter referred to as "the Commissioner") who is in the employ of South African Revenue Services (herein after 'SARS') is charged with the administration of the Act including the interpretation of the schedule thereto. ¹

¹ . See section 2(1) of the Act.

FACTUAL BACKGROUND

[4] The applicant is in the business of storing ethanol which attracts excise duty the payment of which very briefly is deferred when stored by the applicant's warehouse in terms of the Act. The applicant alleges in its founding affidavit that on 21 June 2009, it discovered a loss of 35 839 kg of ethanol in its warehouse. I deal in detail with circumstances surrounding the loss of ethanol later in my judgment. Following on the investigation conducted by or on behalf of the applicant, the applicant concluded that the ethanol was stolen by certain individuals in collaboration with one of its employees. A case of theft was reported to SAPS Maydon Wharf on 1 July 2009.

[5] The police conducted their own investigation which led them to a storage house in Pinetown where ethanol weighing approximately 13 000 kg which had been stored in containers was recovered. On 15 July 2009 samples of the said ethanol were tested by INTERTEK Surveyors and it was established that the said samples "were 99.99% ethanol." On 20 July 2009 the said ethanol was removed from the Pinetown Warehouse to the applicant's premises where it was stored. Theft of ethanol was subsequently reported to SARS on 24 July 2009. Following on that report SARS addressed a letter of intent to raise a debt for the loss of the ethanol to the applicant on 1 March 2010. Pursuant to that letter, the applicant (through its attorneys) and SARS, exchanged numerous correspondence. Ultimately on 31 May 2010, SARS addressed a letter to the applicant demanding payment of R3 469 308.41 in respect of excise duties in terms of section 20 (5) of the Act.

[6] The stance taken by SARS was that the ethanol in question did not qualify for a rebate of duty in terms of the applicable rebate item 624.50 in schedule 6 to the Act citing the following reasons:-

- “(i) the loss of alcohol was not sustained under circumstance due to viz major,
- (ii) the summary of the circumstances surrounding the loss of the ethanol has not been found to be exceptional ; and
- (iii) there is no assurance that the ethanol in question was not placed into home consumption.”

[7] Responding to a request for reasons by the applicant, SARS forwarded a letter to the applicant stating:

“This office maintains that whilst IVS [the applicant] has furnished a detailed chronological sequence of events leading up to the loss of the ethanol, IVS (the applicant) has failed to furnish the most crucial piece of information- the actual underlying cause of the loss incurred. Noting that the actual underlying causes of the loss suffered by IVS (the applicant) has not been established and furnished, this office considers the loss to be mysterious and unfortunate. The loss of ethanol suffered by IVS (the applicant), which cannot be accounted for is therefore not deemed to be exceptional.

Further the SARS maintains that while IVS (the applicant) has failed to furnish in detail underlying causes of the loss incurred; and that the ethanol thus lost remains unaccounted for, IVS(the

applicant) is not in a position to give SARS any assurance that the lost ethanol has not been placed into home consumption².”

[8] Following on further representations made by the applicant, SARS finally addressed a letter to the applicant whereby it stood its ground and made *inter alia* the following additional remarks:

“Ad para (8): Your client (the applicant) is liable vicariously for the conducts of its employees. One of them caused the ethanol alcohol to be stolen through his negligent if not fraud. Even if ‘any negligence or fraud on the part of the person liable for the duty’ is construed not to include the conduct of your client’s (the applicant’s) employee, but matters such as your client’s security and control, your client has failed to prove the requirements of proviso (ii). (It is assumed that “loss” includes theft, but as a matter of law it is doubtful).

Ad para (9): Secondly, it is overwhelmingly probable that the ethanol stolen (or lost) from your client’s special storage warehouse has entered into consumption. No evidence has been presented to the Commissioner that the ethanol did not enter into consumption³.”

[9] I am satisfied that all the internal processes relating to appeals were exhausted and that the application is properly before court.

² . See letter dated 31 May 2010 at page 70 of the bundle of documents.

³ . See letter dated 22 June 2012 at pages 93 and 94 of the bundle of documents.

ANALYSIS

[10] There are two questions that have to be determined and these are firstly, whether it has been established that rebate item 624.50 In schedule 6 of the Act is applicable (in so far as paragraphs 1, 2 and 3 of the Notice of Motion are concerned,) and secondly whether section 76(2)(d) of the Act finds application (in so far as paragraph 4 of the Notice of Motion is concerned). I deal first with the question whether the rebate item 624.50 is applicable.

The rebate item 624.50 in schedule 6 of the Act provides for a rebate of duty in the following terms:

“Goods in respect of which the excise duty, together with the fuel levy and Road Accident Fund levy where applicable, amounts to not less than R2 500.00, proved to have been lost, destroyed or damaged, on any single occasion in the circumstances of viz major or in such other circumstances as the Commission on good cause shown deems exceptional while such goods are-

- (a) in any customs and excise warehouse or under the control of the office;
- (b) being removed with deferment of payment of duty or under rebate of duty from a place in the Republic to any other place in terms of the provisions of this Act;
- (c) being stored in any rebate storeroom;

Provided that –

- (i) no compensation in respect of the excise duty or fuel levy and Road Accident Fund levy on such goods has been paid or is due to the owner by any other person;
- (ii) such loss, destruction or damage was not due to any negligent or fraud on the part of the person liable for the duty; and
- (iii) such goods did not enter into consumption.

[11] in my view the words in the above proviso, to the following effect, "in such other circumstances...as the Commissioner ... deems exceptional...", imply that the Commissioner has a discretion when deciding whether or not the circumstances of a given case warrant a conclusion that the goods in question are rebatable in terms of rebate item 624.50 in schedule 6 of the Act. The word "deem" in Concise English Dictionary (Eleventh Edition, Revised) is interpreted to mean:- "regard or consider in a specific way". It follows therefore (in light of the view I take) that the court of appeal can only interfere with the Commissioner's decision if it is satisfied on a balance of probabilities, that the Commissioner's discretion was exercised either capriciously or wrongly.

[12] Regard being had to the opportunities SARS afforded the applicant when making representations in support of its claim that the lost ethanol was rebatable in terms of rebate item 624.50 in the schedule 6 of the act, I am satisfied that the Commissioner was not capricious in the exercise of his discretion. The question that remains to be decided therefore is whether the Commissioner was wrong, given the facts that were presented to him, in concluding that the lost ethanol was not rebatable.

[13] The ultimate view taken by the Commissioner was that the applicant failed to furnish SARS with the underlying cause of the loss of ethanol which in the Commissioner's view, was the crucial piece of information. Let me revert to the

circumstances surrounding the loss of the ethanol according to the applicant's version. It would appear, according to the averment made by one Gavin Schaffer (hereinafter Mr Schaffer) who deposed to the applicant's founding affidavit, that the person who was on duty when an amount of 35 736 kg of ethanol was lost on the 21st June 2009, was one Mr Mtshali⁴. It seems to me that the said Mr Mtshali was charged with dipping the applicant's tanks during the evening of the 20th to the 21st of June 2009. When the tank was dipped by someone else at 07h15 (the morning of the 21st of June 2009), it was established that there was loss of 35 839 kg of ethanol. Further tests done on the day, one after the other, confirmed the findings by the previous employees of the applicants.

[14] At best what Mr Schaffer is able to say in his founding affidavit with some degree of certainty is that the ethanol in the amount of 35 839 kg was lost during the evening of 20/21 June 2009. The circumstances surrounding the loss of the said ethanol though are in my view nothing more than a conjecture and hearsay information.

[15] An averment that the ethanol was in all probabilities stolen from the applicant's warehouse hinges on the information that was supposedly received from a Mr Mtshali. Let me point out that there is no affidavit by Mr Mtshali filed of record. The applicant avers that when Mr Mtshali was confronted he admitted having participated in theft of ethanol from the applicant's warehouse. He was thereafter subjected to a disciplinary enquiry where he pleaded guilty to the charges leveled against him and summarily

⁴ . See Schaffer's founding affidavit, page 15 para 8.4 of the bundle of documents.

dismissed. In support of this averment Mr Schaffer attached to his answering affidavit a document titled "Outcome of Disciplinary Enquiry⁵." In paragraph 7 of his answering affidavit Schaffer states that Mr Mtshali was charged with "gross misconduct for falling asleep while on duty and/or fraud in manipulating the dip figures and/or theft⁶." What Mr Schaffer states seems to be in harmony with what is contained in the document referred to *supra*, a document purporting to be a charge sheet. What is strange though is that under the heading "Guilt Finding" there is recorded the word "Guilty", without specifying whether the person charged is guilty as charged or guilty on certain counts.

[16] Mr Schaffer avers that Mr Mtshali made certain admissions to MESSRS Kumaren Arnajallam and Graham Scullard. In support of this averment Mr Schaffer attached to his founding affidavit a piece of paper purporting to be a "statement by Mr Mtshali⁷." All Mr Mtshali is alleged to have said is that:

"(1) he was interviewed by Graham on 26 June 2009

(2) he informed Graham that he was asleep between 02h00 and 05h00 on 20 June 2009,

(3) When he woke up he realized that it was too late to dip his tanks, so he just put in computer figures to look like he dipped the tanks'.

⁵ . See document at page 160 of the bundle of documents.

⁶ . It is worth mentioning that Mr Schaffer had not mentioned in the founding affidavit what Mr Mtshali was charged with and convicted for.

⁷ . See document at page 48 of the bundle of documents

Immediately below the above information are inscribed words SIFISO MTSHALI with some marking nearby probably representing Mr Mtshali's signature. It is worthy to be noted that no affidavit was obtained from either Scullard or Arnajallam.

[17] Mr Schaffer suggests in his founding affidavit that it was established during the cause of the investigation that the people who participated in the theft of ethanol were Mr Mtshali and other security guards. However, it seems as though no follow up was made regarding the involvement of the other security guards who are alleged to have acted in collaboration with Mr Mtshali. Instead a decision was made that the ethanol recoverd from Pinetown warehouse, which in all probabilities according to the applicant itself, is "the ethanol" stolen in its warehouse on 21 June 2009, be returned to the warehouse in Pinetown⁸.

[18] Before I conclude let me hasten to deal with the relief sought in paragraph 4 of the Notice of Motion, "that it be declared that the duties and levies which the applicant will have to pay in the event of the adverse decision by this court in respect of prayers 1 to 3, will qualify for a refund in terms of section 76 (2) (d) of the Act. Section 76(2)(d) of the Act provides :

"s76 (2) the Commissioner shall subject to the provisions of subsection (4) consider any application for a refund or payment from any applicant who contents that he has paid any duty or other charge for which he was not liable or that he is entitled to any payment under this act by reason of –

⁸ . I might just add that no attempts were made to obtain an affidavit from the lessee of the Pinetown a Mr Grant Dodd.

- (a) ...
- (b) ...
- (c) ...
- (d) the goods concerned having been damaged, destroyed or irrecoverably lost by circumstances beyond his control prior to the release thereof for home consumption.”

[19] My problem in so far as the applicability of section 76(2) (d) supra is concerned is that the section deals with goods that have been ‘irrecoverably lost’ and goods that are meant for ‘home consumption.’ Regard being had to the applicant’s own version that the ethanol that disappeared from its warehouse was subsequently recorded from a warehouse in Pinetown, I am unable to say that the said ethanol was irrecoverably lost. Furthermore, it is the applicant’s own version that the said ethanol was not meant for home consumption. For the above reasons I am of the view that section 76 (2) (d) does not find application.

[20] In conclusion therefore I am not persuaded that the commissioner was wrong in arriving at a determination that the ethanol stolen from the applicant’s warehouse on 21 June 2009 does not qualify as a rebatable item in terms of item 624.50 in schedule 6 of the Act. I am not persuaded either that the applicant entitled to any of the relief sought in the alternative. For the above reasons, I make the following order:

ORDER

[21] The application is dismissed with costs, such costs to include costs consequent upon the employment of Senior Counsel.

CHILI, AJ

APPEARANCES

Case Number : 12262/2012

Applicant : Island View Storage Limited

Represented by : C J Pammenter SC

Applicants' Attorneys : Shepstone and Wylie
24 Richefond circle
Ridgeside Office Park, Umhlanga Ridge

Respondent : The Commissioner for the South African Revenue
Services

Represented by : John Peter SC

Respondent's Attorneys : State Attorney, Pretoria
C/o State Attorney Durban

Date of Hearing : 14 November 2013

Date of Filing of Judgment : 08 April 2014