



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

APPEAL CASE NO: AR160/2022

KZD CASE NO: D5893/2019

In the matter between:

MEDITERRANEAN SHIPPING COMPANY (PTY) LTD

APPELLANT

and

**COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICES**

RESPONDENT

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Balton J, sitting as the court of first instance):

1. The appellant is granted condonation for the late filing of its notice of appeal;
2. The appeal is upheld with costs, such costs to include the costs of senior counsel;
3. The order of the court *a quo* is set aside and replaced with the following order:
 - ‘1. The decision by the respondent, set out in its letter dated 28 June 2017, in terms of which it imposed liability on the applicant in terms of s 88(2)(a) of

the Customs and Excise Act 91 of 1964, in the amount of R521 442, is reviewed, declared invalid and set aside.

2. The question of the applicant's liability under s 88 of the Customs and Excise Act 91 of 1964, in respect of container MEDU6198771, is remitted to the respondent for reconsideration.
3. In reconsidering the issue of the applicant's liability, if any, under s 88 of the Customs and Excise Act 91 of 1964, the respondent is directed to consider and apply its published Customs Code of Instructions Manual, and, in particular, s 2.1 thereof which stipulates *inter alia* that forfeiture must only be demanded in instances where evidence exists of intentional fraudulent dealings.'
4. The respondent is directed to pay the costs occasioned by the application'.

JUDGMENT

DELIVERED ON 26 APRIL 2024

Henriques J (Poyo-Dlwati JP and Voormolen AJ concurring)

Introduction

[1] This is an appeal against the entire judgment and order of Balton J of 30 November 2021, in which she dismissed the application by the appellant (MSC), to review the decision of the respondent (SARS) made in terms of s 88 of the Customs and Excise Act 91 of 1964 (the Act). SARS had invoked s 88(2)(a) of the Act and imposed a penalty of R521 442 in lieu of forfeiture, amounting to the value of duty for certain goods said to have formed part of irregular and unlawful conduct by MSC.

[2] MSC advanced four grounds of review in the court *a quo*:

(a) it contended that the EDI release notification constituted a valid release in terms of the Act and SARS did not properly consider this and if it did so, made an error of law by not recognising this as a valid release;

- (b) SARS failed to have regard to the provisions of s 93 of the Act and its revised Customs Code of Instruction Manual (the Code) published in November 2002, which stipulated that forfeiture must only be demanded in circumstances when there is evidence of intentional fraudulent conduct. MSC contended that SARS did not consider this Code and that there was no evidence of fraud by MSC nor had SARS suggested that there was;
- (c) SARS failed to give consideration to what might be regarded as a reasonable amount for forfeiture in the circumstances, even if the EDI release had not been granted; and
- (d) SARS did not provide proper reasons for its decision as one would expect from an administrative body.

[3] The court *a quo* rejected all four grounds of review and dismissed the application. Leave to appeal was granted to the full court on 2 February 2022. The findings of fact and rulings of law appealed against, as well as its grounds of appeal, are set out in extensive detail in MSC's notice of application for leave to appeal as well as the notice of appeal.

Condonation for the late filing of the appeal

[4] Before dealing with the merits of the appeal, it is necessary to consider the request for condonation for the late filing of the notice of appeal. It is common cause that the notice of appeal was filed out of time and that SARS does not oppose the request for condonation. It appears that the late filing of the notice of appeal was as a consequence of confusion between the staff of the appeals offices in Durban and Pietermaritzburg, as to which centre was the correct one for the filing of the notice of appeal. The explanation advanced for the delay meets the requirements for the granting of condonation, and is accordingly granted.

Factual background

[5] It is necessary to set out the factual background against which SARS made its decisions, which prompted MSC to institute the review proceedings and which were placed before the court *a quo* when it dismissed the review application.

[6] MSC, an international shipping line and licensed container operator, undertook the carriage of goods which originated in Madagascar, a SADC member state (whose goods are not subject to duty), on behalf of the importer, Acorp Gift (Pty) Ltd (Acorp), in July 2016, on board the MSC Toronto in container MEDU6198771. Toll Global Forwarding SA (TGF) was the licensed clearing agent in terms of s 64B of the Act, and KRV Logistics (Pty) Ltd (KRV) was the transporter nominated by Acorp.

[7] On 28 July 2016, SARS placed a hold on its NAVIS system for the container as a result of which it could not be moved. On 29 July 2016, SARS issued a manual detention notice to MSC in respect of the container in terms of sections 4 and 88(1) of the Act. In terms of the detention notice, MSC was required to move the container via the scanner to a customs licensed depot in Durban for a physical examination.

[8] The detention notice indicated that a decision would be made once certain documents were received, being inter alia, the SAD500 import bill of entry, all other supporting documents, the agent's covering letter, SARS' release notification, clearing instructions, the supplier's commercial invoice, a detailed packing list, and a bill of lading.

[9] Ms Duduzile Madi, an employee of MSC who was tasked with handling detention notices, was on leave on the day the detention notice was issued and as a consequence, the detention notice was not uploaded onto MSC's system.

[10] On the same day, the hold on the NAVIS system was released. According to correspondence from SARS, the purpose of releasing the hold was to enable the container to be moved via the scanner to a licensed depot for inspection. When the hold

was removed, the NAVIS system was updated and the instruction to move the container to the depot was captured on NAVIS. On the same day, SARS also issued an EDI notification to TGF, reflecting that the container had been released.

[11] On 1 August 2016, the container left the terminal and was released to KRV by MSC on the strength of the EDI release. MSC adopted the view that, because of the valid EDI release notification, there was no basis upon which it could have refused to release the container to KRV and was of the incorrect assumption that the release was via a valid EDI release notification.

[12] SARS, however, contended that MSC had impermissibly released the container to the clearing agent. MSC acknowledged that the container did not move via the scanner to MSC's depot, owing to an unintentional administrative error because the detention notice had not been uploaded onto the system by Ms Madi.

[13] Correspondence was exchanged in August 2016 between SARS and MSC. MSC was required to book the container for an examination, which was not responded to. A follow-up email was sent by SARS on 19 October 2016, to which MSC responded advising that the container had been released by SARS via email correspondence. SARS then requested MSC to provide this email correspondence. MSC sent an email showing screenshots of NAVIS where the hold had been released, as well as the EDI release itself.

[14] On 10 April 2017, SARS sent MSC a letter of intent in terms of which it threatened forfeiture in terms of s 87(1), read with s 88 of the Act, as MSC had released goods to the importer despite a detention notice. Such letter of intent afforded MSC the election to be dealt with in terms of s 91, which provided for the imposition of a penalty for a contravention of the Act. The letter of intent allowed MSC to make representations regarding the penalty to be imposed and to provide any documentary evidence in support of its motivation, specifically in relation to SARS' *prima facie* findings that there had been a contravention of the Act.

[15] MSC responded to the letter of intent on 28 April 2017, wherein it disputed liability. In such representations, it challenged the penalty imposed in terms of s 88(2)(a) of the Act, as a grossly unreasonable forfeiture and it proposed that the matter be dealt with in terms of s 91 of the Act and tendered payment of R8 000 as an appropriate penalty. It was further stated that should SARS maintain its position that the penalty in terms of s 88(2)(a) of the Act would apply, then MSC requested that the matter be referred to the Internal Administrative Appeal Committee (IAAC).

[16] In such response, MSC accepted that a customs hold on the container was placed on NAVIS on 28 July 2016 and that MSC was instructed to move the container via the scanner to a licensed depot for physical examination. It maintained that due to an administrative oversight, the hold was not updated on its system and on the same day, an EDI notice was issued. As the container reflected on NAVIS as being released, MSC then released it to KRV and thereafter the container was delivered to Acorp. MSC indicated that it had inferred that the container had been released when the NAVIS hold was uplifted but did not infer that SARS had uplifted the manual detention notice.

[17] According to a MSC employee, Ms Rebecca Ndleleni, in her communication to SARS on 19 October 2016, it was made clear that all release documents were provided to MSC by TGF, and MSC incorrectly released the container on 1 August 2016 without any intent to prejudice SARS. Notably, in its response, MSC annexed the bills of lading together with other supporting documents, which demonstrated that the consignment was shipped and imported from Toamasina, Madagascar to Durban and was declared as 351 cartons of garments. Correspondence from the shipping manager of Acorp was annexed, which showed that the seal of the container on delivery to Acorp was intact when the cargo was unpacked. In addition, the packing list and commercial invoice were annexed, which also demonstrated that 351 cartons had been received, which had been cross referenced, and coincided with those manifested, and the number declared on the SAD500. Consequently, the cargo was not tampered with in any way.

[18] MSC maintained that the same goods which were declared were accounted for. SARS had not suffered a loss and therefore there was no need to impose a penalty in terms of s 88(2)(a). In the alternative, it tendered payment of R8 000 in terms of s 91 as an appropriate penalty. In addition, MSC proposed that the applicability of s 91 as an appropriate penalty was in line with the purpose and object of the Act and SARS' internal penalty guidelines, as there was no intention on MSC's part to deliberately ignore the detention notice.

[19] In addition, there had been no loss to SARS or the fiscus as the goods were declared for VAT and were exempt from duty, as they had emanated from a SADC country. MSC, in addition, was of the view that should SARS reject its proposal, then written reasons ought to be provided, showing how the penalty in terms of s 88(2)(a) had been applied, taking into consideration SARS' penalty guidelines.

[20] On 28 June 2017, SARS advised MSC of the findings of its investigation and issued a letter of demand in which it called for forfeiture. In terms of the findings, SARS informed MSC that the goods were detained in terms of s 88(1)(a) and that the detention notice required the container to move via the scanner to a licensed depot for physical examination. MSC had released the container to the importer without the container moving to the scanner or MSC's depot for inspection.

[21] SARS considered MSC to be in breach of s 44(5) and (6), read with the provisions of s 87 of the Act, as the goods had been dealt with irregularly and were thus liable to forfeiture in terms of s 88(2)(a). It claimed payment of R521 442, which was an amount equal to the value for the duty on the goods. MSC noted an appeal in terms of the Internal Administrative Appeal process on 8 August 2017, and disputed SARS' decision to impose forfeiture and implored it to reconsider its position.

[22] In its appeal, MSC emphasised that the goods were not irregularly dealt with and that it accepted responsibility for not ensuring that the goods were transmitted via the scanner for inspection. It highlighted the confusion created by the failure to upload the

detention notice (which it accepted was an error on its part) and the EDI release. It once again reiterated that the cargo had been released to Acorp's appointed cartage company on receipt of a valid EDI release notification.

[23] MSC actioned such release when the NAVIS hold had been lifted and the EDI release notification had been produced. It emphasised that its employee had incorrectly assumed that the container had been released. It pertinently referred SARS to the Code, dealing with forfeiture in terms of sections 88(2) and 93 of the Act, which provided that

'forfeiture must only be demanded in instances where evidence exists of intentional fraudulent dealings.'

[24] MSC asserted its right to administrative action which was lawful, reasonable, and procedurally fair and relied on various case authorities for its appeal submissions. It emphasised that there was no fraudulent conduct; duty was not payable as the goods had emanated from a SADC member country, being Madagascar; that the goods had not been irregularly dealt with; and forfeiture ought not to have been the value for the duty of the goods.

[25] Needless to say, on 3 May 2018, SARS advised MSC that its internal appeal had been unsuccessful. In such letter, the Chairperson of the IAAC noted that the appeal related to the decision to impose a forfeiture amount in terms of s 88(2)(a), in circumstances where SARS had requested that the container be detained and moved via the x-ray scanner facility to a licensed depot for inspection.

[26] The relevant portion of the response from the IAAC reads as follows:

'Kindly note that after considering the case history, facts, circumstances, the relevant sections of the Customs and Excise Act, No. 91 of 1964 (the "Act"), as well as the appellant's mitigation, the committee has determined as follows:-

- The Committee considers the bypassing of X-Ray Scanner Facility and release to the Importer without due authorisation to be a serious offence.
- The Appellant's mitigation is deemed insufficient to warrant a partial or full remittance of

the Forfeiture.

- The Section 88(2)(a) Forfeiture amount of R521 442,00, in this matter, should therefore be maintained.'

[27] MSC was then advised in such letter to either apply for alternative dispute resolution (ADR) or to initiate litigation. Once the appeal failed, MSC followed the ADR process which was subsequently terminated. MSC then sought to review the decision of SARS in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

Analysis

[28] The parties agree that s 88(2) of the Act is a penal provision which allows SARS to impose a penalty equal to the value of goods which have been dealt with contrary to the Act. Section 93(2) of the Act affords SARS the power to remit any penalty. It is accepted that these powers are discretionary,¹ and any decisions made pursuant to such sections to impose a penalty and not to remit it, constitute administrative action which must meet the requirements of s 33 of the Constitution and PAJA in that the exercise of such administrative action must be lawful, reasonable, and procedurally fair.

[29] The Code requires 'forfeiture to be demanded in instances where evidence existed of intention fraudulent dealings'.² MSC maintains that the Code applied at the time when the decision was taken and would have impacted on the manner in which the decision for forfeiture had to be considered by SARS. SARS contends otherwise, specifically contending in its answering affidavit that the Code was an internal document, having no legal force or effect and had been withdrawn on 22 February 2018.

¹ *Commissioner of Customs and Excise v Tayob and others* 2002 (6) SA 86 (T) at 95H–96E; *Deacon v Controller of Customs and Excise* 1999 (2) SA 905 (SE) at 923E.

² Annexure 'K', vol 1, para 2.1 at page 68.

Review

[30] At the outset, the parties agree that the court *a quo* committed a misdirection when it dealt with the review application. From a reading of the judgment, the court *a quo* approached the review application as an appeal. In addition, they further agree that the court *a quo* impermissibly considered the reasons contained in the answering affidavit as the basis for SARS' decision, *ex post facto*, as opposed to considering the content of documents exchanged, which had actually formed the basis of the decision. Consequently, both parties are *ad idem* that this court is at large to approach the proceedings as a review and to consider the grounds advanced by MSC and the opposition thereto by SARS afresh, having regard to the documents exchanged which resulted in the decision.

[31] In dealing with the review, the parties accept that SARS is bound by the provisions of the PAJA.

Promotion of Administrative Justice Act 3 of 2000 (PAJA)

[32] The provisions of s 6 of PAJA deal with the judicial review of administrative action and provide for a court to review administrative action if 'the action was procedurally unfair',³ 'the action was materially influenced by an error of law',⁴ or in circumstances where the action was taken 'for a reason not authorised by the empowering provision',⁵ or 'because irrelevant considerations were taken into account or relevant considerations were not considered'⁶ or in circumstances where the administrative action

- '(ii) is not rationally connected to—
 - (aa) the purpose for which it was taken;
 - (bb) the purpose of the empowering provision;
 - (cc) the information before the administrator; or

³ Section 6(2)(c).

⁴ Section 6(2)(d).

⁵ Section 6(2)(e)(i).

⁶ Section 6(2)(e)(iii).

(dd) the reasons given for it by the administrator.’⁷

[33] In circumstances where a court finds the conduct reviewable, it may *inter alia* set aside the administrative action and remit ‘the matter for reconsideration by the administrator, with or without directions’⁸ or in exceptional cases, substitute or vary the administrative action or correct ‘a defect resulting from the administrative action’.⁹

[34] Importantly, s 5 of PAJA deals with the reasons for administrative action and provides for

‘Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action ... request that the administrator concerned furnish written reasons for the action.’

Subsection 3 provides that

‘If an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason.’

[35] That the requirements of PAJA apply to the exercise of the discretion by SARS to impose penalties is not in dispute. The duty to provide reasons is integral to the constitutional duty to act fairly. The failure to provide proper or adequate reasons would ordinarily render the disputed decision reviewable. In addition, the reasons must be apparent at the time the decision was taken or which the record demonstrates had actuated and informed the decision at the time it was made. In other words, it must be self-evident from the documents provided and from the correspondence exchanged between MSC and SARS, that SARS provided reasons for its decision. Our apex courts have stressed that reasons need to be both true and adequate.¹⁰

⁷ Section 6(2)(f)(ii).

⁸ Section 8(1)(c)(i).

⁹ Section 8(1)(c)(ii).

¹⁰ See for example *Minister of Social Development and others v Phoenix Cash and Carry – Pmb CC* [2007] ZASCA 26; [2007] 3 All SA 115 (SCA) para 23; *National Lotteries Board and Others v South African Education and Environment Project* [2011] ZASCA 154; 2012 (4) SA 504 (SCA) para 27.

[36] The Supreme Court of Appeal held in *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd*¹¹ as follows:

‘What constitutes adequate reasons has been aptly described by Woodward J, sitting in the Federal Court of Australia, in the case of *Ansett Transport Industries (Operations) Pty Ltd and Another v Wraith and Others* (1983) 48 ALR 500 at 507 (lines 23 - 41), as follows:

“The passages from judgments which are conveniently brought together in *Re Palmer and Minister for the Capital Territory* (1978) 23 ALR 196 at 206 - 7; 1 ALD 183 at 193 - 4, serve to confirm my view that s 13(1) of the Judicial Review Act requires the decision-maker to explain his decision in a way which will enable a person aggrieved to say, in effect: “Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging.” This requires that the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement. Often those factors may suggest a brief statement of one or two pages only.”

To the same effect, but more brief, is Hoexter *The New Constitutional and Administrative Law* vol 2 at 244:

“(I)t is apparent that reasons are not really reasons unless they are properly informative. They must explain *why* action was taken or not taken; otherwise they are better described as findings or other information.” (Underlining is my emphasis.)

[37] What is most noteworthy about the submissions in this matter in relation to the reasons for the decision, is the fact that MSC submitted that adequate reasons were not provided at the time when the decision was taken, and were provided for the first time in SARS’ answering affidavit.

¹¹ *Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA); [2003] 2 All SA 616 (SCA) para 40.

[38] The Constitutional Court in *National Energy Regulator of South Africa and another v PG Group (Pty) Ltd and others*¹² held the following:

‘...reasons formulated after a decision has been made cannot be relied upon to render a decision rational, reasonable and lawful.’

[39] In *National Lotteries Board and others v South African Education and Environment Project*¹³ the following was held:

‘The duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly. And the failure to give reasons, which includes proper or adequate reasons, should ordinarily render the disputed decision reviewable. In England the courts have said that such a decision would ordinarily be void and cannot be validated by different reasons given afterwards - even if they show that the original decision may have been justified. For in truth the later reasons are not the true reasons for the decision, but rather an ex post facto rationalisation of a bad decision.’ (Footnote omitted.)

[40] The following was also held in *Jicama 17 (Pty) Ltd v West Coast District Municipality*:¹⁴

‘It is not open to the first respondent to raise the other defences raised for the first time in its answering papers. The applicant has come to court in order to deal with the reason which was conveyed to it as being the basis on which the decision to cancel the tender had been made.’

Submissions

[41] Ms Annandale SC, who appeared for MSC, submitted that the enquiry which this court must embark on, is to establish whether there is evidence from the record that SARS properly considered MSC's submissions and arguments relating to the following:

- (a) the EDI, its existence, its effect (which is not in dispute), that the EDI was issued, and that it may constitute a release;
- (b) MSC's explanation of how the container was released, that it was an innocent

¹² *National Energy Regulator of South Africa and another v PG Group (Pty) Ltd and others* [2019] ZACC 28; 2020 (1) SA 450 (CC) para 39.

¹³ *National Lotteries Board and others v South African Education and Environment Project* [2011] ZASCA 154; 2012 (4) SA 504 (SCA) para 27.

¹⁴ *Jicama 17 (Pty) Ltd v West Coast District Municipality* 2006 (1) SA 116 (C) para 11.

administrative error which arose as a consequence of an employee being on leave, and not uploading the detention notice onto MSC's system;

(c) that on SARS' own version, it made no finding of fraud or malicious intent on MSC's part; and

(d) that as a matter of law, whether SARS can decide to impose forfeiture; and if it decides to impose forfeiture, whether it was appropriate to remit the amount that it did as a penalty in the circumstances.

[42] She submitted that the record must show that there was a consideration of all four of these aspects and that the record, at present, does not show that there was a proper, or even any, consideration of MSC's submissions. There are four key documents which she relies on and which form part of the record:

(a) the letter of intent from SARS dated 10 April 2017;

(b) MSC's response thereto dated 28 April 2017;

(c) SARS' response, which is contained in the letter of demand dated 28 June 2017; and

(d) MSC's appeal submissions, and the response thereto, as contained in the letter from the Chairperson of the IAAC, Mr F Essop, dated 3 May 2018.

[43] MSC further submitted that the deponent to the answering affidavit had no personal knowledge of the matters which formed the subject matter of the review, which further exacerbates SARS' failure to properly consider MSC's submissions, and further demonstrates that SARS never properly considered MSC's contentions, if regard is had to the four documents identified. MSC further submitted that it is evident that no reasons were provided by SARS for its decision to impose forfeiture and the terse reasons provided were not adequate for purposes of SARS arriving at its decision. She submitted that forfeiture was not appropriate in the circumstances, given the provisions of the Code, and even if SARS was entitled to impose forfeiture, the amount imposed was unreasonable.

[44] Mr Pammenter SC, who appeared for SARS, submitted that the responses from SARS demonstrate that it had properly applied its mind to the submissions and properly considered imposing forfeiture and the penalty. He acknowledged that during the course of the proceedings, he made a concession that SARS had a discretion in terms of s 93(2) of the Act to mitigate or remit the penalty. He indicated that this concession emanated from a proper understanding of how the Act operates. One is dealing with two separate chapters of the Act, the first being chapter 5, which deals with the importation and clearing of goods, which is to be read together with rule 38,¹⁵ which sets out the procedures for clearing goods through customs. It involves a paperless notification, an EDI notification being issued where the importer submits information to SARS, with the relevant duty and VAT being paid, after which SARS issues an EDI release, which means that the imported goods can pass through the harbour.

[45] Chapter 11 deals with the penalty provisions of the Act. Section 87 deals with forfeiture, and s 88(1)(a) deals with the detention of goods to ascertain if they are liable for forfeiture. Section 88(2)(a) allows SARS, where goods are liable to forfeiture, to demand payment of an amount equivalent to the value of the imported goods. Up until this stage, SARS does not enjoy a discretion to remit or reduce the penalty. The only time SARS can reduce or remit a penalty is when the provisions of s 93 are invoked, and provided an applicant demonstrates 'good cause'.

[46] The various grounds of review will now be considered.

Is there evidence that there was a proper consideration by SARS of MSC's submissions?

[47] This ground of review is inextricably linked to the other grounds of review. In the letter of intent, SARS notified MSC of the *prima facie* findings of its investigation. In essence, SARS set out what transpired on 28 and 29 July 2016. It recorded that it had placed a hold on the NAVIS system for the container and on 29 July 2016, issued a

¹⁵ GN R1874, GG 16860, 8 December 1995.

detention notice for an inspection to be conducted of the container. Because the container was released to KRV, in breach of the detention notice, SARS contended that the goods were dealt with irregularly. However, despite the detention in terms of s 88(1)(a), the container was not moved via the scanner to a licensed depot for physical examination but was released. SARS' detention notice required MSC to make available documentation in order for SARS to satisfy itself that the goods had been dealt with regularly.

[48] If one has regard to MSC's response dated 28 April 2017, it pertinently drew SARS' attention to the fact that the container did not move via the scanner to MSC's depot due to an unintentional administrative error. Because the hold on NAVIS had been uplifted, the container was then inadvertently released to KRV and did not go past the scanner. MSC pertinently stated that it at no stage sought to infer that SARS had uplifted the manual detention notice and did not attempt to deliberately dissuade SARS that the NAVIS release amounted to an upliftment of the detention.

[49] MSC annexed correspondence from Ms Rebecca Ndleleni of MSC to SARS, in which all relevant documents were provided to SARS to satisfy itself that the goods were not dealt with irregularly. The documentation evidenced that the goods emanated from Madagascar and were not subject to duty, the number of cartons shipped corresponded with the number delivered to the importer, and that the seal was still intact on delivery to the importer. All the documentation submitted equally corresponded with the SAD500.

[50] All this was done to demonstrate that the goods were not dealt with irregularly and that the fiscus had not suffered any loss and that consequently, there would be no need to impose forfeiture and to apply a penalty in terms of s 88(2)(a). SARS' attention was specifically drawn to its internal penalty guidelines as well as the applicable case law. MSC requested that a s 88(2)(a) penalty not be imposed and requested written reasons as to how the penalty was applied, taking into account SARS' penalty guidelines, should MSC's proposal be rejected.

[51] SARS' response to this was to issue a letter of demand. If regard is had to the letter of demand, none of the submissions in relation to the imposition of the penalty were considered by SARS, nor were the accompanying documents, which evidenced that the goods had not been dealt with irregularly. On receipt of the documents, SARS, interestingly, did not take the view that the goods had been dealt with irregularly or that there was any intent by MSC to fraudulently deal with the goods. There is simply no reference to this in the demand.

[52] What is evident from paragraph 31 of the response from MSC was that it pertinently indicated that it had no intention to cause any loss to SARS or the fiscus, that the goods were declared for VAT and were not dutiable, and that the container was released as a consequence of an administrative error. It is for these reasons that it implored SARS not to impose a penalty in terms of s 88(2)(a) of the Act. None of this was dealt with by SARS and there is no reference made to any of this in the subsequent letter of demand. SARS' only response was the letter of demand.

[53] When one considers the letter of demand, it does not appear to reflect any acknowledgement of the content of the response from MSC or why it rejected MSC's submissions and imposed the penalty. There is no answer or response to MSC's contentions. The only difference between the letter of intent and the letter of demand is that a final decision imposing forfeiture in terms of s 88(2)(a) had been made. There is no reference to the circumstances under which the container was released, and there is no reference in the letter of demand to MSC's contention that it did not say that there was a valid release. There is no reference at all to the explanation provided by MSC.

[54] If one has regard to the letter of demand, specifically paragraphs 30 and 31, SARS' position is that, as a fact, there has been a contravention, and it is imposing the penalty. There is no reference to any fraudulent conduct by MSC nor is there any reference made to the penalty guidelines or why it has rejected MSC's submissions in that regard.

[55] Similarly, when one considers the grounds of appeal, a detailed explanation is contained therein. Once again, SARS' attention was drawn to the response to the letter of intent. In addition, SARS' attention was pertinently drawn to the fact that the goods were released as a consequence of an oversight and that MSC admitted to an administrative contravention, and that having regard to the documents annexed to its response to the letter of intent, there was no question of the goods having been dealt with irregularly. SARS' attention is once again pertinently drawn to the Code, and that forfeiture ought only to be demanded in instances where intended fraudulent dealings exist.

[56] Reference was made to various decisions as well as the provisions of PAJA and s 88 of the Act. The reasonableness of the penalty is once again raised by MSC. SARS' response to the appeal is contained in the letter from the IAAC. The sum total of such response to MSC's submissions is that SARS considered the 'case history, facts, circumstances, the relevant provisions of the Customs and Excise Act and the appellant's mitigation but the committee considered the bypassing of the x-ray scanner facility and the release to the importer without authorisation to be a serious offence and that the appellant's mitigation was insufficient to warrant a partial or full remittance of the forfeiture.'

[57] Having regard to the response from the IAAC, it is not evident what was considered, and which facts and circumstances informed its decision. What one is able to ascertain is that what it considered was that because the container bypassed the scanner and was released to the importer without the upliftment of the detention notice, it constituted a serious offence warranting forfeiture.

[58] I agree with the submission of MSC that there was no engagement by SARS with any of the grounds advanced or MSC's explanation for how the container had been released. None of the explanations advanced by MSC were dealt with in any of the responses by SARS. In fact, if one has regard to the responses, it is clear that there was no consideration of these matters at all. If there had been, SARS would have said so in either the letter of demand or in the outcome of the appeal by the IAAC. An

examination of these four documents indicates that SARS did not apply its mind to any of the submissions when arriving at the decision to impose forfeiture of the full amount of the value of the goods.

[59] There was no consideration of the relevant facts, which implies that the decision was not rationally connected to the information SARS had before it when it took the decisions in the letter of demand and in dismissing the appeal.

[60] Having found that there was no proper consideration of the content of the correspondence exchanged, this then brings me to the second ground of review, namely, can it then be said that SARS provided proper reasons for its decision?

Did SARS provide proper reasons for its decisions?

[61] One of the main complaints of MSC, which also overlaps with the other grounds of review, is that SARS did not provide proper reasons for its decisions. Prior to the delivery of the answering affidavit, MSC submitted that SARS had not furnished reasons which dealt with its contentions relating to the EDI release. In addition, none of its contentions in relation to the fact that no duty was payable on the goods were ever addressed or pertinently disputed by SARS. MSC submitted that it was presented with a series of findings and conclusions of law, as opposed to reasons, which it was entitled to.

[62] Ms Annadale submitted that once SARS failed to furnish adequate reasons, and in the absence of proof to the contrary, the administrative action is presumed in terms of s 5(3) of PAJA to have been taken without good reason. As a consequence, the failure by SARS to provide reasons for its decision renders the decision reviewable on its own. Mr Pammenter submitted that this contention by MSC is without substance. According to him, the letter of 28 June 2017, which is the decision taken by SARS, dealt fully with MSC's various submissions.

[63] Mr Pammenter submitted that although the reasons were terse, the reasons supplied were sufficient and there was nothing wrong with the reasons, as MSC was able to make out a reasonable case on appeal. The facts were set out, the relevant provisions of the Act were referred to, as well as the conclusions drawn by SARS.

[64] In addition, he relied on the provisions of s 77D which provide that an aggrieved party can request reasons. It was submitted that MSC could have requested further reasons in the event that it was not satisfied with the reasons provided. He submitted that the terse reasons of the IAAC indicated that it had considered the law and the reasons and that it came to the conclusion that there was no basis for mitigating the decision to impose forfeiture and to impose the relevant penalty.

[65] He further submitted that the provisions of s 5 of PAJA were available to MSC and it could have requested 'further' reasons if it was dissatisfied with those supplied. MSC countered these submissions and reiterated that these were not reasons but conclusions arrived at by SARS. An organ of state is obliged to give reasons for its decision. The provisions of s 77D, properly construed, do not make provision for 'further and better reasons'. Properly interpreted, they allow an aggrieved party to request reasons if no reasons have been supplied, and thus SARS' reliance on the provisions of s 77D is misplaced.

[66] Mr Pammenter submitted that the reasons given in the letter of demand and by the IAAC in relation to the outcome of the appeal had met the threshold for adequate reasons. In support of his contention, he relied on *Koyabe and others v Minister for Home Affairs and others (Lawyers for Human Rights as amicus curiae)*.¹⁶

[67] I have considered *Koyabe*. Mokgoro J said the following:
'Although the reasons must be sufficient, they need not be specified in minute detail, nor is it necessary to show how every relevant fact weighed in the ultimate finding. What constitutes

¹⁶ *Koyabe and others v Minister for Home Affairs and others (Lawyers for Human Rights as amicus curiae)* [2009] ZACC 23; 2010 (4) SA 327 (CC) paras 63-64.

adequate reasons will therefore vary, depending on the circumstances of the particular case. Ordinarily, reasons will be adequate if a complainant can make out a reasonably substantial case for a ministerial review or an appeal.¹⁷ (Footnotes omitted.)

[68] The court went on at para 64 to state the following, and relied on *Maimela*¹⁸ which set out the factors to be considered in determining the adequacy of the reasons:

“the factual context of the administrative action, the nature and complexity of the action, the nature of the proceedings leading up to the action and the nature of the functionary taking the action. Depending on the circumstances, the reasons need not always be “full written reasons”; the “briefest *pro forma* reasons may suffice”. Whether brief or lengthy reasons must, if they are read in their factual context, be intelligible and informative. They must be informative in the sense that they convey why the decision-maker thinks (or collectively think) that the administrative action is justified.”

The purpose for which reasons are intended, the stage at which these reasons are given, and what further remedies are available to contest the administrative decision are also important factors. The list, which is not a closed one, will hinge on the facts and circumstances of each case and the test for the adequacy of reasons must be an objective one.’ (Footnotes omitted.)

[69] I do not agree with the submission of Mr Pammenter that sufficient reasons were provided on the particular facts of this matter. To say that the reasons provided were ‘terse’, is an overly generous description. It does not behove SARS to say that the provisions of s 77D are available. The authorities make it clear that proper and adequate reasons must be provided at the time the decision is made. The letter of demand does not appear to have considered the submissions made by MSC in relation to the circumstances under which the EDI notification was interpreted by it. It fails to consider that the EDI notification may constitute a release.

[70] It did not consider the submission by MSC that the failure to retain the container pursuant to the detention notice was an innocent administrative error and was not intended to cause harm to SARS. In any event, and most importantly, what was not

¹⁷ Ibid para 63.

¹⁸ *Commissioner, South African Police Service, and others v Maimela and another* 2003 (5) SA 480 (T).

factored into the equation by SARS was the fact that no duty was payable on these goods, that VAT had already been paid, and that the fiscus did not suffer any financial harm, nor did the release of the container to the importer cause any prejudice to SARS.

[71] In the response to the letter of intent, detailed submissions were made by MSC as to the circumstances under which the container was released, and various documents were annexed. None of this is dealt with in the letter of demand nor in the results of the outcome of the appeal by the IAAC.

[72] If one has specific regard to the content of the letter from the IAAC, MSC is correct that these are conclusions of law. I do not agree with Mr Pammenter that the fact that the letter states that it had regard to the facts and the documents constitutes proper reasons. Specificity was required and whether it rejected the fact that the goods were not dutiable. What also needed to be dealt with was whether it applied the penalty policy and if not, the reason why. Consequently, it must follow that I do not accept that SARS provided proper reasons for its decision.

[73] I agree with the submission of Ms Annandale that the first time that the issue arose as to whether the goods were dutiable, was in SARS' answering affidavit. SARS never advanced the argument in its decision-making process that the goods were dealt with irregularly, nor did it indicate that it did not accept the documentation submitted to indicate where the goods originated from. I agree that SARS cannot blindside MSC by raising this for the first time in its answering affidavit, and this appears to be an attempt by SARS to *ex post facto* provide reasons for its decision.

The failure by SARS to apply its own Code

[74] It is common cause between the parties that, from time to time, SARS had a Code. Although SARS indicates that it was an internal document which had no legal force or effect, MSC submitted that when deciding to impose forfeiture, it did so while ignoring the provisions of its Code. SARS, in its answering affidavit, contended that the document was an internal one, had no legal force or effect, was finally withdrawn on 22

February 2018, and had no relevance to the matter. Ms Annandale submitted that such response implies that SARS did not even consider the Code. It was raised in the appeal as one of the grounds of appeal and ought to have been considered.

[75] Mr Pammenter submitted that the Code did not apply, as although the letter of demand was delivered prior to the date of the impugned decision, it was never a final decision and was subject to review or amendment by the IAAC. Because the decision of the IAAC was made on 3 May 2018, the Code no longer had any effect. He submitted, in addition, that, having regard to the reasons given by the IAAC, despite them being terse, consideration was given to mitigating the penalty imposed in terms of s 93(2) of the Act. The submissions of SARS seem to suggest that the only time the provisions of the Code ought to have been considered, if it applied, would be at the s 93 stage. He also submitted that the withdrawal of the policy was retrospective and was not binding.

[76] Firstly, it is not correct that the Code did not apply when the decision was taken in 2017, neither was its withdrawal retrospective. The relevant section of the Code stipulates that 'forfeiture must only be demanded in instances where evidence exists of intentional fraudulent dealings'. In *Commissioner, South African Revenue Service v Formalito (Pty) Ltd*¹⁹ the court found that the exercise of a discretion relating to forfeiture must be informed by the relevant policy. SARS ought to have considered whether or not the Code applied and in the absence of any evidence that SARS considered the Code, one must accept that it did not consider that it had to apply the Code.

[77] Two questions arose for determination in *Formalito*. The first being whether the declaration of the tariff codes on the bill of entry was false. The court found that they were false and that the incorrect tariff codes were used to maximise the monetary benefit to Formalito, to the financial detriment of the Commissioner. The second question which arose for determination was whether the imposition of the penalty was reasonable. It found that it was not, as the decision maker did not have regard to the

¹⁹ *Commissioner, South African Revenue Service v Formalito (Pty) Ltd* 2005 (5) SA 526 (SCA) ('Formalito').

policy which had been in place at the time when making the decision.

[78] This accords with the submission of MSC, that given the circumstances under which the goods came to be released and the fact that SARS did not allege or conclude that MSC was involved in any fraudulent dealings, it ought to have exercised its discretion by applying the Code in an appropriate manner. It ought to have also done so when MSC alleged that the imposition of the forfeiture amount was unreasonable in the circumstances.

[79] This was the same issue which the Supreme Court of Appeal had to grapple with in *Formalito*. Paragraph 12 of *Formalito* is incisive in this regard. The court had found that a deviation from SARS' policy was grossly unreasonable, as the official who took the decision believed that the guidelines did not apply and simply ignored them. It was for this reason that the Supreme Court of Appeal held that the decision could not stand and that the matter had to be referred to SARS for reconsideration.

[80] The court in *Formalito*²⁰ held the following:

'In determining the monetary value of the penalty, Denyssen ignored *the Customs Offences and Penalty Policy of the South African Revenue Service*. Those guidelines, the purpose of which is

"to define the policy and procedure for customs offences and to provide guidelines for the uniform imposition of penalties to declarants that are non-compliant with customs law",

stipulate, for a contravention of this kind, a penalty of "50% of the underpayment with a minimum of R500". Had those guidelines been invoked the penalty in this case would have been less than 20% of the value of that actually declared forfeit by SARS. A deviation to that extent from its own policy by SARS is grossly unreasonable. Denyssen, who took the decision, believed, without advancing any plausible justification, that those guidelines did not apply. She accordingly ignored it. That decision plainly cannot stand. On this aspect of the case, the matter must accordingly be referred back to SARS for reconsideration...'

²⁰ Ibid para 12.

[81] In my view, this is a further basis on which the decision of SARS is reviewable. Firstly, it is self-evident from its answering affidavit that it did not consider the Code which applied at the time it made the decision to invoke the forfeiture provisions of the Act. Secondly, the imposition of the penalty, in my view, was not reasonable as SARS failed to have regard to its own Code. Given the circumstances under which the container was released and the fact that SARS did not find any intentional fraudulent dealings on behalf of either the importer or MSC, the penalty imposed was unreasonable and without any plausible justification.

[82] Mr Pammenter attempted to suggest that the forfeiture provisions of sections 87 and 88 must be read separately from that of s 93. He submitted that it is only when one is making a decision to impose the forfeiture amount, that mitigating circumstances apply. This approach was rejected by Horn AJ in *Deacon v Controller of Customs and Excise*,²¹ and I find myself in agreement with the conclusions reached. The court in *Deacon* took the view that the seizure and forfeiture provisions in sections 87 and 88 are not to be separated from the mitigation and remission procedures in s 93. *Deacon* recognised that throughout the process, an aggrieved party has the right to just administrative action and the rules of natural justice.

[83] Once one accepts that this is the position which prevails, then it is self-evident that SARS did not have regard to its Code, as it was of the view that it did not apply, and secondly, it did not have proper regard to the mitigating submissions made by MSC. It is for these reasons that the decision taken was irrational and arbitrary and cannot stand.

Remedy

[84] What, then, is the appropriate order in the circumstances? It is, in my view, not appropriate for this court to substitute its decision for that of the decision maker as no exceptional circumstances exist to warrant such intervention. None were also presented

²¹ *Deacon v Controller of Customs and Excise* 1999 (2) SA 905 (SE) ('*Deacon*').

for consideration. The most appropriate order would be to remit the matter to SARS for proper consideration. Neither Ms Annandale nor Mr Pammenter suggested otherwise.

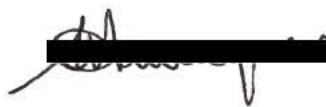
Costs

[85] It is evident that given MSC's success on appeal, there is no reason to depart from the usual order in relation to the award of costs, and once again, neither party suggested otherwise. Given the nature of the issues in the matter, the use of senior counsel was warranted.

Order

[86] In the result, the following order will issue:

1. The appellant is granted condonation for the late filing of its notice of appeal;
2. The appeal is upheld with costs, such costs to include the costs of senior counsel;
3. The order of the court *a quo* is set aside and replaced with the following order:
 - '1. The decision by the respondent, set out in its letter dated 28 June 2017, in terms of which it imposed liability on the applicant in terms of s 88(2)(a) of the Customs and Excise Act 91 of 1964, in the amount of R521 442, is reviewed, declared invalid and set aside.
 2. The question of the applicant's liability under s 88 of the Customs and Excise Act 91 of 1964, in respect of container MEDU6198771, is remitted to the respondent for reconsideration.
 3. In reconsidering the issue of the applicant's liability, if any, under s 88 of the Customs and Excise Act 91 of 1964, the respondent is directed to consider and apply its published Customs Code of Instructions Manual, and, in particular, s 2.1 thereof which stipulates *inter alia* that forfeiture must only be demanded in instances where evidence exists of intentional fraudulent dealings.
 4. The respondent is directed to pay the costs occasioned by the application."



HENRIQUES J

Case Information

Date of Argument	:	21 April 2023
Date of Judgement	:	26 April 2024
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