In the High Court of South Africa
(Western Cape Division, Cape Town)

Case No: 21279/2023

In the matter between:

KARINO HOMELAND DISTRIBUTION (PTY) LTD **Applicant**

and

THE COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICE **Respondent**

Heard: 12 December 2023

Judgment delivered: 27 December 2023 (electronically)

JUDGMENT

LEKHULENI J

[1] This is an application in which the applicant seeks a partial upliftment of a lien imposed over its goods by the respondent *("Sars")* in terms of section 114 of the Customs and Excise Act 91 of 1964 *("the Customs and Excise Act")* as security for an admitted debt. The applicant contends that the value of the goods attached in terms of

the statutory lien far exceeds the debt it owes the applicant in that the lien cannot operate concerning subsequent debts that may have been incurred in favour of Sars. To this end, the applicant seeks an interdict compelling Sars to reduce the lien to an amount sufficient to serve as security for the debt in respect of which it was imposed. The applicant contends that Sars has abused the provisions of section 114 of the Customs and Excise Act to retain goods under lien more than is required to secure the applicant's debt to Sars regarding a consignment of goods destined for Mozambique.

[2] In addition, the applicant seeks an order for Sars to release a portion of the goods in bond to enable it to trade and generate sufficient income to discharge its indebtedness to Sars. Sars opposed the applicant's application and raised three preliminary points, namely: that the matter is not urgent, that the applicant did not comply with section 96 of the Customs and Excise Act, and that the applicant failed to comply with the provisions of section 24 of the Superiors Courts Act 10 of 2013. I will deal with these preliminary points later in this judgment. However, to fully understand the view I take in this matter, and the reasons that fortify my conclusion, I deem it prudent to sketch out briefly the facts underpinning the dispute between the parties.

THE FACTUAL BACKGROUND

[3] On 16 December 2022, the applicant imported into South Africa from Namibia a shipment of alcohol that was declared to be in transit to Mozambique. The customs value of the said consignment was R839 089.00. The consignment consisted of various

whiskeys, gins, and vodkas from King Robert distillery in Scotland. This consignment was in transit through South Africa and never destined for domestic sale or consumption; instead, it was destined for Mozambique. As a result, no levies or value-added tax was raised on import to South Africa. On importation to South Africa, under such circumstances, liability for duties and VAT is incurred but is deferred. When proof of due export, in this case to Mozambique, is provided to Sars, such liability is acquitted or extinguished in terms of section 18A(3) of the Customs and Excise Act.

[4] On 20 December 2022, Sars requested the applicant, via email, to provide the consignment's whereabouts and the liquor's full delivery address in Mozambique. The applicant indicated through its official that it was unaware of the shipment but would check it and revert. Sars forwarded a full description of the consignment to the applicant via email with all the details relating to the import. Despite several correspondences and email exchanges between the parties, the applicant failed to provide Sars with proof that the consignment imported from Namibia was indeed exported to Mozambique.

[5] Subsequently, Sars believed that the applicant diverted the consignment into local consumption in South Africa without duties and VAT being paid to the fiscus. Sars also held the view that had the said consignment been legitimately exported, the requested documentation would have been available for inspection by Sars. On 08 February 2023, Sars issued its letter of finding and notice of intention to raise a debt against the applicant. In the correspondence, Sars informed the applicant that it intended to hold them liable for duties and VAT, totalling R3,077,807.55. On 10 March

2023, Sars provided the applicant with additional information about the documents required for the shipment. These documents included the name of the transporter, the name of the individual who removed the goods from the bonded warehouse, a confirmation of the contract with the bonded warehouse where the goods would be stored, and details of the buyer in Mozambique. The applicant did not provide the required information. As a result, Sars issued a letter of demand on 13 June 2023, demanding payment of R3 077 807.55 for duties and VAT related to the liquor consignment.

[6] Subsequent thereto, on 21 July 2023, Sars detained the total stock value of the applicant's goods at Real Africa's Paarden Island warehouse facility and imposed a lien thereto, in terms of section 114(1)(a)(iv) of the Customs and Excise Act. The value of the goods subject to the lien was approximately R10 million, more than the amount of debt the applicant owes Sars. On 27 July 2023, the applicant, realising that it could not produce proof of exportation of the consignment to Mozambique that Sars required, admitted liability, and submitted a proposal request to settle the debt due to Sars. The applicant submitted a deferred payment arrangement application to Sars, which was considered and rejected.

[7] On 25 August 2023, Sars addressed a correspondence to the applicant and informed the applicant that the section 114 lien in terms of the Act, will remain in effect until the entire debt has been liquidated. Sars also informed the applicant that this is not negotiable and that whilst this measure may seem draconian, it deemed it necessary in

these circumstances of intentional fraudulent tax evasion. Sars further informed the applicant that these measures were necessary for this case. In addition, Sars informed the applicant that it was willing to release goods worth R 3,967,986.50, including interest, to be sold and the proceeds paid immediately to Sars to liquidate the debt. Upon extinguishing the debt, Sars stated, it would release all detained goods immediately. The applicant did not accept this proposal and made a counterproposal which Sars rejected. On 26 September 2023, Sars advised the applicant that it had calculated the customs value of the goods under lien, which amounted to R10 396 239.28. The applicant accepted the calculation as correct; however, several proposals were made to settle the debt, which Sars rejected.

[8] On 4 September 2023, the applicant emailed Sars a notice of intention to institute proceedings in terms of section 96(1)(a) of the Customs and Excise Act for the immediate lifting of the lien imposed over its goods under bond attached in terms of section 114 of the Customs and Excise Act. The applicant also informed Sars that in the intended legal proceedings, the applicant would request the court to make an order to lift the lien because countless acceptable and varied forms of security have been provided but have not been adjudicated by Sars. In response, Sars expressed its willingness to accommodate the applicant by partially releasing goods subject to the lien to retain goods to the customs value of the debt and interest plus 20 per cent. According to Sars, this concession was made on the understanding that the Mozambique debt was the only outstanding debt and that the applicant had otherwise complied with its obligations in terms of the Act.

[9] On 3 October 2023, Sars issued another notice to raise tax debt against the applicant for a different consignment that was destined for Zimbabwe. Sars informed the applicant that the letter of intent to raise a debt relates to another shipment of liquor that the applicant did not export but instead, diverted to South Africa without paying duties and VAT. The intended liability in terms thereof was for R3 997 749.23. Sars informed the applicant that this debt was due for the purposes of section 114. The applicant disputed liability regarding this debt and asserted that it provided Sars with all the required documentation and information as proof that the second consignment to Zimbabwe was properly exported. The applicant asserted that it also provided its bank statement as proof that the recipient in Zimbabwe indeed paid for the exported goods. On the other hand, Sars averred that the acquittal documents that the applicant provided have been falsified and forged.

[10] In addition, Sars contended that the applicant has failed to produce any evidence that the goods were indeed exported to Zimbabwe. Sars asserted that the applicant has not provided evidence or explanation for why it should not be held liable for the additional duties, VAT, and forfeiture regarding the second debt (Zimbabwe consignment). As a result, Sars incorporated the second debt as part of the section 114 lien concerning the Mozambique debt. The applicant did not admit liability for the second debt. In this application, the applicant seeks an order for Sars to reduce the lien on the applicant's attached property to R4350 042.49. In simpler terms, the applicant

requests that Sars be ordered to detain goods worth the admitted debt and to release the remaining goods to the applicant.

PRELIMINARY ISSUES

[11] As stated above, Sars has raised three points in *limine* to the applicant's application:

11.1 That the application is not urgent, alternatively, that the urgency was self-created.

11.2 That there has been non-compliance with section 96 of the Customs and Excise Act; and

11.3 That the applicant did not give it sufficient time to oppose the application as required by section 24 of the Superior Courts Act, 10 of 2013.

[12] For brevity and completeness, I will deal with these preliminary points, *ad seriatim*.

Urgency

[13] Sars took issue with the urgency with which this application was brought. Mr Peter, who appeared for Sars, submitted that the lien has been in place since July 2023 for almost five months, and there is no justification for the apparent urgency with which this application has been brought. If the applicant has cash flow difficulties, Counsel

contended, it ought to approach its bankers, whose function is to assess credit, obtain credit, and discharge its indebtedness to Sars. Mr Peter further contended that in the notice of intention to institute legal proceedings in terms of section 96 of the Customs and Excise Act, the applicant claimed urgency and requested Sars to consent to the reduction of the period of 30 days set out in the section to five days for the applicant to institute the proceedings. Even so, the applicant did not proceed with the threatened action but only instituted this application with a truncated period at the beginning of December 2023.

[14] Mr Peter submitted further that the case that the applicant makes for urgency is the necessity to trade over the Christmas period. Apart from the fact that this was self-created urgency, so the contention proceeded, the application overlooks the fact that the applicant has entirely within its own power to remove the lien by simply paying the debt it owes. The admitted debt in respect of the first transaction is over a year old and relates to imported goods that have never been accounted for since December 2022. To this end, Mr Peter argued that the urgency in this matter was occasioned by the applicant's failure to pay its statutory indebtedness.

[15] Mr Bothma, who appeared for the applicant, submitted that the urgency in this matter arises from the applicant's need to access the goods to trade during the festive season in December. Counsel submitted that should the applicant not be able to sell the goods (or at least such portion that is not necessary to secure Sars's debt), it will have disastrous consequences for its continued operation. It was submitted on behalf of the

applicant that the goods under lien, which mainly comprise of high-end liquor, is an ongoing expense for the applicant in the form of holding costs and was destined for sale over the December period. If a portion of the property, which is not necessary to secure Sars's debt, is not released from attachment, it would have disastrous consequences for the applicant's continued operation. Mr Bothma submitted that should the applicant not be able to trade over December, there is a high likelihood that it would face commercial insolvency, placing at risk not only its own business but the livelihood of its 12 employees. It was submitted that the delay in launching this application, which was occasioned by bona fide attempts to reach a practical settlement with Sars, cannot be held against the applicant about urgency.

[16] In terms of Rule 6(12) of the Uniform Rules of Court, an applicant is, in law, required to set out the circumstances which justify the hearing of an application on an urgent basis and the basis on which it contends that it would not obtain substantial redress at a hearing in due course. As correctly pointed out by Mr Peter, Rule 6(12)(b) requires two things of an applicant in an urgent application. *First,* the applicant must set forth explicitly the circumstances that he avers render the matter urgent and, *secondly,* the reasons why he claims that he would not be afforded substantial redress at a hearing in due course.

[17] It is irrefutable that the parties engaged in settlement negotiations in this matter. From the time Sars sent a demand to the applicant, the parties discussed the matter. The applicant made proposals for the payment of the debt and even made an

application for the deferred payment arrangement for the admitted debt. Among others, on 20 August 2023, the applicant proposed to settle the tax liability for the Mozambique consignment by paying the sum of R250,000 per month for three months while settlement negotiations between the parties were ongoing. The negotiations continued even after the notice to institute proceedings against Sars in terms of section 96 of the Act was issued. To be precise, the discussions between the parties continued ever since the lien was imposed until November 2023.

[18] Given all these considerations, it cannot be said that the urgency was self-created. The argument that urgency was self-created is hollow and is not supported by the objective facts. The applicant made efforts to resolve the issue without resorting to legal action, as evidenced by the correspondences submitted. In *Transnet Ltd vs Rubenstein* 2006 (1) SA 591 SCA, it was held that where a litigant had endeavoured to settle the matter and had brought an urgent application after the attempts to settle the matter because of the delay occasioned by the attempt to settle had failed, the applicant should not be deprived of his costs and that it could not be argued that a litigant had been the author of his own urgency.

[19] The same principle applies with equal force in this matter. Thus, a party who brings his application urgently under Rule 6(12) of the Uniform Rules after endeavouring genuinely in settlement negotiations should not be punished or prejudiced for non-compliance with this rule when he later brings the application after the negotiations have

fallen through. In such circumstances, as in this matter, it cannot be said that urgency is self-created.

[20] Whilst I note the applicant's indebtedness to Sars, which I will deal with in due course, I am of the view that the applicant was justified to bring this matter urgently as it did. Thus, Sars's first preliminary point must fail. I turn to consider the second preliminary point.

Did the applicant comply with section 96 of the Customs and Excise Act?

[21] For the sake of completeness, section 96(1) of the Customs and Excise Act provides as follows:

> "**96 Notice of action and period for bringing action**
>
> (1)(a)(i) No process by which any legal proceedings are instituted against the State, the Minister, the Commissioner or an officer for anything done in pursuance of this Act may be served before the expiry of a period of one month after delivery of a notice in writing setting forth clearly and explicitly the cause of action, the name and place of abode of the person who is to institute such proceedings (in this section referred to as the 'litigant') and the name and address of his or her attorney or agent, if any."
>
> …..
>
> (iii) No such notice shall be valid unless it complies with the requirements prescribed in the section…'
>
> (c)(i) The State, the Minister, the Commissioner an officer may on good cause shown reduce the period specified in paragraph (a)…'

[22] From a careful reading of this section, it is distinctly discernible that a taxpayer intending to institute proceedings against Sars for anything done in pursuance of the Customs and Excise Act must issue a written notice that must comply with section 96 of the Act. Legal proceedings may only be initiated after the expiration of one month from the date of delivery of the notice to Sars. The one-month period may be reduced by the Commissioner and failing which by the court where the interest of justice so requires.

[23] Crucially, the notice must comply with three requirements: *First*, the notice must set forth clearly and explicitly the cause of action an applicant relies on. Thus, when a notice is given, the proceedings that follow must have been set forth clearly and explicitly in the notice, and relief cannot be claimed on a basis other than what is set out in the notice. *Secondly,* the notice must set forth the details of the litigating party (his name and place of abode). *Thirdly*, the notice must set out the name and address of the litigating party's attorney or agent, if any.

[24] In this case, Sars does not take issue with the details of the litigating party or with the names of its attorneys but instead contends that the section 96 notice delivered to Sars did not set out the cause of action that is relied upon by the applicant in this application. In other words, Sars contends that the cause of action set out in the section 96 notice, differs materially from the cause of action set out in the application. Mr Peter contended that the applicant's section 96 notice issued to Sars on 3 September 2023 did not set out the cause of action relied upon by the applicant in this application. As such, this court cannot entertain the applicant's application. Mr Peter further submitted that the claim that Sars has abused or acted unreasonably under section 114 in either placing the initial detention or continuing to retain the goods in the face of offers from

the applicant, was never the cause of action in the section 96 notice. According to Mr Peter, the section 96 notice was limited to a constitutional challenge to the provisions of section 114. I do not agree with this proposition.

[25] Throughout the various correspondences exchanged between the parties, specifically the section 96 notice, the applicant expressed its view that Sars abused its lien in terms of section 114 of the Customs and Excise Act. It expressed the view that Sars cannot attach its goods to the debt for the Mozambique consignment and still use the same lien to attach goods for a different consignment. The applicant further informed Sars that it has a right in terms of section 22 of the Constitution to trade and that Sars's interpretation of section 114 of the Customs and Excise Act infringes on this right for which it has no alternative remedy. To this end, the applicant sought an interdict effectively compelling Sars to permit it to trade by releasing some of its stock under attachment.

[26] While I note the constitutional grounds raised in the section 96 correspondence, I am of the view that a contextual reading of the section 96 notice sets out a consistent cause of action that the applicant relied on in its application. My conclusion on this preliminary point is that the cause of action relied upon by the applicant in this application is clearly set out in the section 96 notice. Thus, Sars's second preliminary point must fail. I turn to consider the nature and import of section 24 of the Superior Courts Act and how it should be applied.

Did the applicant comply with section 24 of the Superior Courts Act?

[27] Mr Peter submitted that the applicant sought final relief in these proceedings without complying with the provisions of section 24 of the Superior Courts Act 10 of 2013. Counsel further submitted that in terms of section 24, the time allowed for entering an appearance to civil summons to be served outside the area of jurisdiction of the division in which it was issued, shall not be less than one month if service takes place more than 150km from the court out of which it was issued and two weeks in any other case. According to Mr Peter, the notice of motion in this application was issued out of the Western Cape High Court. It was served upon the respondent in Pretoria, more than 150km from the courthouse. The applicant did not allow the *dies* provided in section 24 of the Superior Cours Act.

[28] Simply put, Mr Peter argues that a party is not entitled to bring an urgent application for final relief against a respondent who resides outside of the jurisdiction of the court from which the application is brought where there was no compliance with the notice period set out in section 24 of the Superior Courts Act. Counsel relied on *Shield Insurance Co Ltd v Van Wyk* 1976 (1) SA 770 (NC), a matter in which the full court held that the term 'civil summons' in section 27 of the Supreme Court Act 59 of 1959 also referred to motion proceedings on account of the definition of the term "civil summons" in the Act. As a result, Counsel argued, pursuant to the *Shield Insurance Co Ltd v Van Wyk* decision, the consequence was that no urgent application for final relief could be brought without compliance with the notice period set out in that section.

[29] Mr Bothma, on the other hand, submitted that Section 24 of the Superior Courts Act has not yet enjoyed judicial consideration but contended that this section does not apply to motion proceedings. Mr Bothma further submitted that because the term 'civil summons' is not defined in the Superior Courts Act to include motion proceedings, its ordinary meaning should apply. He submitted that section 24 of the Superior Courts Act must be interpreted to apply only to action proceedings. Counsel noted that urgent applications for final relief brought against a respondent who resides out of the jurisdictional area of a particular division should be determined in accordance with the provisions of Rule 6(12) of the Uniform Rules and the safeguards that apply in that regard. In his view, interpreting section 24 of the Superior Courts Act to exclude motion proceedings is also in step with a modern constitutional dispensation that envisages the right of access to courts.

[30] In addition, Mr Bothma submitted that the contention that a litigant who seeks urgent relief by motion proceedings must travel to the court of the respondent does not advance the spirit of the Constitution as it effectively ousts the jurisdiction of a court to assist litigants in circumstances where it would otherwise have such jurisdiction. To this end, Counsel submitted that this could never have been the legislature's intention.

[31] Before I can consider the correct interpretation of section 24 of the Superior Courts, I deem it prudent to set out the provisions of this section verbatim. This section provides as follows:

“Time allowed for appearance

24. The time allowed for entering an appearance to a civil summons served outside the area of jurisdiction of the Division in which it was issued, shall not be less than–

(a) one month if the summons is to be served at a place more than 150 kilometres from the court out of which it was issued; and

(b) two weeks in any other case.”

[32] Section 27 of the Supreme Court Act 59 of 1959, which preceded section 24 of the Superior Courts Act, provided as follows:

> “The time allowed for entering an appearance to a civil summons served outside the area of jurisdiction of the court in which it was issued shall be not less than –
>
> (a) twenty-one days if the summons is to be saved at a place more than 100 miles from the court out of which it was issued; and
>
> (b) 14 days in any other case.”

[33] Section 1 of the Supreme Court Act 59 of 1959, defined civil summons as follows –

> “any summons whereby civil proceedings are commenced, and includes any rule *nisi*, notice of motion or petition the object of which is to require the appearance before the Court out of which it is issued of any person against whom relief is sought in such proceedings or of any person who is interested in resisting the grant of such relief.”

[34] Notably, the Superior Courts Act does not define the word ‘civil summons’. In interpreting the provisions of this section this court is bound by the principles espoused in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18, where the court stated that the interpretation of legislation or documents must be made considering the language of the Act, its context and purpose together with the potential consequences of different interpretation. In my view, in addition to this authority, there is also an injunction in section 39(2) of the Constitution which enjoins

courts, when interpreting any legislation, to promote the spirit, purport, and objects of the Bill of Rights. An interpretation of this provision that better promotes the spirit, purport and objects of the Bill of Rights must be adopted.

[35] Consistent with the tenets of statutory interpretation set forth above, section 24 of the Superior Courts Act must be given its grammatical meaning unless doing so would result in an absurdity. See *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) para 28. This should be done consistent with the three interrelated riders to this general principle, namely: that statutory provisions should always be interpreted purposively; the relevant statutory provisions must be properly contextualised; and that all statutes must be construed consistent with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity.

[36] As explained above, in *Shield Insurance Co Ltd v Van Wyk (supra),* the court relied on the definition of civil summons in the Supreme Court Act 59 of 1959 in concluding that the words civil summons in section 27 also referred to motion proceedings. Section 24 of the Superior Courts Act sets out the time allowed for entering an appearance to a civil summons served outside the area of jurisdiction of the court in which it was issued. In my considered view, the section is intended to allow an opposing party who is situated outside the court's jurisdiction where the process is issued sufficient opportunity to enter its appearance if it intends to oppose or defend an

application. This is consistent with the right of access to courts in terms of section 34 of the Constitution.

[37] Crucially, section 24 of the Superior Courts Act refers to 'entering an appearance', which, in my view, applies with equal force in both action and motion proceedings. Filing a notice of intention to defend or filing a notice to oppose equates to entering an appearance. The section does not refer to delivering a notice of intention to defend, which exclusively applies in action proceedings. It refers explicitly to 'entering an appearance'. The 'entering of an appearance' envisaged in section 24 of the Superior Courts Act may be a notice of intention to defend. It may also be a notice of intention to oppose an application in terms of rule 6.

[38] The legislature intentionally distinguished 'entering an appearance' and delivering the notice of intention to defend. That distinction, in my view, was for a reason. If this section was exclusively meant to apply to action proceedings, as suggested by Mr Bothma, the legislature would have made that very clear. In my view, a purposive attribution of meaning to the phrase 'entering an appearance' includes delivering a notice to defend or a notice to oppose.

[39] Furthermore, even though the definition of 'civil summons' has not been repeated in the Superior Courts Act, it is notable that the same syntax and terminology used in the previous section 27 of the Supreme Court Act 59 of 1959 has been transplanted into the new section 24. Thus, the legislature was aware of the *Shield Insurance Co Ltd v*

Van Wyk (supra) decision when the Superior Courts Act was passed. Hence, it referred to 'entering an appearance' in section 24, which applies to both action and motion proceedings.

[40] In addition, Rule 19 of the Uniform Rules refers explicitly to a defendant in every civil action being allowed ten days after service of summons to deliver a notice of intention to defend, either personally or through an attorney. Clearly, a notice of intention to defend applies in action proceedings. To enter an appearance as envisaged in section 24 of the Superior Courts Act is generic and includes a notice to oppose in motion proceedings. To this end, I agree with the submission of Mr Peter that the provisions of section 24 and the policy underlying such section are to guarantee a fair and adequate access to courts on the part of a defendant or respondent who is required to appear and contest or oppose the relief sought in the court of other jurisdiction far from the place where the processes served. In my view, it does not infringe or limit the right of access to court, but instead, it guarantees the right of access to court to a respondent who is based outside the court's jurisdiction to have ample time to place his case adequately before court.

[41] In my view, the words 'civil summons' in section 24 must be read contextually with the other text in the whole section and not in isolation or in a piecemeal fashion. In that way, it leads one to an inevitable conclusion that it applies in both motion and action proceedings. Mr Botham argued that urgent applications for final relief brought against a respondent who resides out of the jurisdictional area of a particular Division,

should be determined in accordance with the provisions of Rule 6(12) and the safeguards that apply in that regard. I do not agree with this proposition. Rule 6(12) cannot trump a statutory provision set out in section 24 of the Act.

[42] In my view, Rule 6(12) of the Uniform Rules is subject to the provisions of section 24 of the Superior Courts Act. As correctly pointed out by Sars's Counsel, the effect of section 24 of the Superior Courts Act in cases of urgency, would require the plaintiff or applicant to issue process out of the court where the defendant or respondent is situated if the plaintiff or applicant does not wish to allow for the *dies* outlined in section 24 of the Superior Courts Act for entering and appearance. Consequently, no urgent applications for final relief could be brought where there is no compliance with the notice periods set out in that section. However, this statutory prohibition does not apply to cases where interim relief is sought through *ex parte* applications. See *Turquoise River Incorporated v McMenamin* 1992 (3) SA 653 and *Scott Hough* (3) SA 425 (OFS)

[43] The applicant is seeking a final relief in this matter. It has not given the respondent a period of one month, as envisaged in section 24 to file opposing papers. Instead, the applicant instituted this application in terms of Rule 6(12) and gave the respondent three days to enter an appearance. Rule 6(12) does not empower this court to condone and dispense with the statutory provision set out in section 24. In any event, there was no application for such condonation. Rule 6(12) only applies to a period laid down by the rules in respect of intra-jurisdictional service. My conclusion on this preliminary point is that this court cannot consider this matter in terms of Rule 6(12) as

the applicant failed to comply with the provisions of section 24 of the Superior Courts Act. Notwithstanding this finding, for the sake of completeness, I deem it necessary to consider this application on the merits.

Should Sars release a portion of the goods attached in terms of section 114?

[44] The applicant's application is hinged on the application of section 114 of the Customs and Excise Act. Section 114(a)(iv)(aa)(A) of the said Act identifies the category of goods that may be subjected to a lien. The relevant part of the section provides as follows:

> "(iv)(aa)(A) Any imported or excisable goods, vehicles, machinery, plant or equipment, any goods in any customs and excise warehouse, any goods in a rebate store room, any goods in the custody or under the control of the Commissioner and any goods in respect of which an excise duty or fuel levy is prescribed, and any materials for the manufacture of such goods, of which such person is the owner, whether imported, exported or manufactured before or after the debt became so due and whether or not such goods are found in or on any premises in the possession or under the control of the person by whom the debt is due, may be detained in accordance with the provisions of subsection (2) and shall be subject to a lien until such debt is paid".

[45] In terms of this section, Sars has the right to exercise a lien over the goods which are subject to a duty wherever they may be found as further security for its debt. To activate the lien, Sars is required to act in terms of section 114(2) of the Customs and Excise Act, which provides as follows:

> "(2)(a) The Commissioner or an officer may detain anything referred to in subsection (1)(a) by sealing, marking, locking, fastening or otherwise securing or impounding it on the premises where it is found or by removing it to a place of security determined by the Commissioner…"

[46] Section 114(1)(a)(i) provides that any amount of any duty, interest, penalty, or forfeiture payable under the Act is a debt due to the State when it becomes due. Section 114 (1)b)(i) provides that Sars's claim over the property subject to a lien has priority over the claims of all the other persons. The section offers Sars the power to detain imported or excisable goods under the control of the Commissioner, which is owned by the person by whom the debt is due. Where such detention is effected, they are subject to a lien until the debt is paid. Section 114 creates a mechanism by which Sars obtains a preferred claim over a debtor's property as a security for the payment of a tax liability due by the debtor. Even at common law, the fiscus enjoyed hypothec over the property of citizens for the taxes and dues owing to the State. See *Secretary for Customs and Excise v Millman,* No 1975 (3) SA 544 (A) at 548H.

[47] The applicant contends that Sars is not entitled to place a lien over all its assets to secure payment of a debt for which only a portion would provide sufficient and reasonable security. In a nutshell, the applicant argues that the debt owing to Sars is R3 967 986.50 and relates to the import of goods destined for Mozambique. It conceded liability for this debt as it accepted that it is unable to discharge the onus required of it in respect thereto. In addition, the applicant contended that after these proceedings were instituted, Sars raised another debt for a similar sum of R3 997 749.23 concerning a consignment of goods imported into South Africa and destined for Zimbabwe. The

applicant stated that it does not admit liability of this debt. The applicant contended that this must be separate from the lien that Sars imposed in terms of section 114 regarding the Mozambique consignment. I disagree with this submission for the reasons that follow.

[48] It is not in dispute that the amount in respect of the Zimbabwe consignment has been demanded. This amount has become due and payable in terms of section 114 of the Act. The applicant disputes the claim and avers that it has furnished the applicant bank statements proving that the goods have been delivered in Zimbabwe. Sars disputed this and stated that the bank statement does not prove whether the goods were exported or not. Furthermore, Sars argued that the documents the applicant furnished concerning this consignment were fraudulent.

[49] Significantly, section 77G of the Customs and Excise Act defeats completely the applicant's case. This section provides:

> "Notwithstanding anything to the contrary contained in this Act, the obligation to pay to the Commissioner and the right of the Commissioner to receive and recover any amount demanded in terms of any provision of this Act, shall not, unless the Commissioner so directs, be suspended pending finalisation of any procedure contemplated in this Chapter or pending a decision by the court."

[50] In my view, this section relates to the 'pay now and argue later' rule. In *Metcash Trading Ltd v Commissioner for South African Revenue Services,* 2000 (1) SA 1109

(CC) at para 46ff, the Constitutional Court held that 'the pay now, argue later rule' within the context of section 36 of the Value Added Tax Act 89 of 1991 was constitutional and is not an invasion of the debtor's rights. If it were, the Constitutional Court held that the invasion was justifiable under section 36 of the Constitution.

[51] In *casu,* even though the applicant disputes the Zimbabwe claim, the payment of this claim is not suspended by the dispute the applicant lodged with Sars. In terms of section 18A(1) of the Act, the amount became due when the goods left the warehouse to Zimbabwe if indeed it was exported. This tax liability also became payable when the demand was made. The tax liability to Sars could only be discharged if the applicant could prove that the goods had been exported. To this end, section 18A(1) of the Act provides that:

> "Notwithstanding any liability for duty incurred thereby by any person in terms of any other provision of this Act, any person who exports any goods from a customs and excise warehouse to any place outside the common customs area shall, subject to the provisions of subsection (2), be liable for the duty on all goods which he or she so exports".

[52] The argument presented by the applicant's Counsel is that the detention of goods and imposition of a lien applies only to the goods intended to be covered by the lien. Counsel argued that if a future liability arises with the same debtor, as was the case in this matter, the lien does not cover it. In my view, this argument is misplaced and unsustainable. This conclusion is borne out by the fact that if a tax liability is due by a

taxpayer, it is a debt due to the state. Sars is empowered in terms of section 114 of the Act to impose a lien over those goods to secure payment of the debt even in respect of the second debt.

[53] In this case, after the lien in respect of the Mozambique shipment was imposed, another debt owed by the applicant became due and payable to Sars. It cannot be expected of Sars to release the goods in respect of the first debt and still detain them for the second debt. We need to remind ourselves that the statutory lien that Sars has is the right of control to withhold the goods until any indebtedness in terms of section 114(1)(a) of the Customs and Excise Act due by the applicant or a debtor is paid in full.

[54] To this end, I agree with Mr Peter that there is no requirement for a lien to be exercised over only so much of the value of the property as is equal to the indebtedness. Furthermore, nowhere does section 114 provide an amount concerning the lien. Importantly, it is goods that are subject to a lien and not the value of the goods. I must emphasise that the detention of a customs debtor's goods establishes the statutory lien that confers preference on the Sars's claim.

[55] The debt concerning the Zimbabwe consignment is a debt in terms of the Customs and Excise Act. The fact that this indebtedness did not exists at the time the applicant's goods were first detained and the lien was imposed is immaterial. The Zimbabwe consignment also gave rise to a debt due to the Sars. Sars cannot be expected to impose a second lien over the applicant's goods. The applicant must pay its

debt and challenge Sars for the Zimbabwe debt if it so wishes. Significantly, the fact that the applicant disputes the debt does not erode Sars's powers to impose a lien over the debtor's goods for the exaction of taxes.

[56] Accordingly, I share the views expressed in *McKesson Corporation v Division of Alcoholic Beverages and Tobacco, Department of Business Regulation of Florida,* 496 US 18 (1990), where the United States Supreme Court stated that 'it is well established that a State need not provide pre-deprivation process for the exaction of taxes, allowing taxpayers to litigate their tax liabilities before payment might threaten a government's financial security'. The court noted further that 'to protect the government's strong interest in financial stability in this context, it has long held that the State may employ various financial sanctions and summary remedies, such as distress sales, in order to encourage taxpayers to make timely payments prior to the resolution of any dispute over the validity of the tax assessment.'

[57] In the same way, the sphere in which section 114 of the Customs and Excise Act is utilized is of great importance. It is intended to be used for debt collection in the form of tax in cases where the debtor has already failed to comply with tax obligations and has been called upon but neglected or refused to do so.

[58] As previously stated, the applicant admitted the debt with respect to the Mozambique consignment. As a result, any goods that have been seized must be held as collateral until the debt is fully settled. If another debt is discovered against the same

debtor, as was the case with the Zimbabwe debt, from the broader scheme of the Customs and Excise Act, Sars would still be allowed to rely on the lien it has as a security for the payment of both debts. I repeat, section 114 empowers the Sars to detain imported or excisable goods, under the control of the Commissioner which are owned by the person by whom the debt is due. Where such detention is effected, the goods are subject to a lien until the debt is paid.

[59] Lastly, it is concerning to note that the applicant could not provide any reasonable explanation or proof of the export regarding the Mozambique consignment. If this shipment was exported, relevant documents and delivery notes would have been readily available. While I appreciate that the applicant wants to trade to remain commercially viable, I must, however, stress that the applicant must ensure that it pays its taxes or proverbially give to Caesar what belongs to Ceaser.

[60] Given all these considerations, I am of the view that the applicant failed to establish a case for the relief sought in the notice of motion and that its application must fail.

COSTS

[61] It is trite that the question of costs is a matter of the court's discretion. Generally, costs follow the result, and successful parties should be awarded their costs. This rule should be departed from only where good grounds for doing so exist. *Gamlan*

Investments (Pty) Ltd v Trilion Cape (Pty) Ltd 1996 3 SA 692 (C). One of the fundamental costs principles is to indemnify a successful litigant for the expense put through in unjustly having to initiate or defend litigation. See *Union Government v Gass* 1959 4 SA 401 (A) 413. I am of the view that the respondent must be indemnified for the costs it incurred to oppose the applicant's application.

ORDER

[62] Consequently, the following order is granted.

62.1 The application is dismissed, and the applicant is ordered to pay the costs hereof, including the costs of senior Counsel.

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LEKHULENI JD

JUDGE OF THE HIGH COURT

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