IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 21471 /2020

In the matter between:

THE PETROLEUM OIL AND GAS CORPORATION OF SOUTH AFRICA (SOC) LTD	Applicant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	Respondent

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JUDGMENT

MAKHUBELE J

Introduction

[1] The applicant, who I will henceforth refer to as PetroSA is a wholly owned subsidiary of the Central Energy Fund which is a Major Public Entity as envisaged in Schedule 2 of the Public Finance Management Act 1 of 1999.

[2] On 17 April 2020 PetroSA instituted urgent proceedings against the Commissioner for the South African Revenue Service ('the Commissioner') and sought the following relief:

" 1. That this application be heard as an urgent application and that the normal rules pertaining to forms and service be dispensed with.

2. That, to the extent necessary, the period of 1 (one) month referred to in Section 96(1)(a)(i) of the Customs and Excise Act 91 of 1964, be reduced in terms of the provisions of Section 96(1)(c)(ii) of the said Act.

3. That, pending

(a) the finalization of all internal dispute resolution processes to be instituted in terms of Chapter XA of the Act contesting the refusal of the applicant's suspension of payment application on 26 March 2020 (and decisions contained in finding one of the demand dated 18 February 2020) and/or consequent review proceedings; and

(b) the finalization of the High Court proceedings, which will include an appeal to be instituted in terms of Section 47(9)(e) of the Act and declaratory relief, whichever occurs last;

payment of all amounts due under the respondent's letter of demand dated 18 February 2020 be suspended and the respondent be interdicted and prohibited from taking any enforcement and/or collection steps to enforce and collect the disputed amounts demanded by SARS as set out in the letter of demand dated 18 February 2020.

4. That, subject to paragraph 5 below, the costs of this application be costs in the appeal to be instituted by the applicant in terms of Section 47(9)(e) of the Act.

5. That in the event of this application being opposed, the respondent be ordered to pay costs of this application, including the costs of two counsel.

6. Further and/or alternative relief."

[3] The matter was setdown for hearing on 28 April 2020. It came before Kollapen J and the following order was issued:

" By agreement between the parties the following order is made:

1. *The application which is enrolled for hearing on 28 April 2020 , is removed from the roll and by agreement between the parties, the application will be re-enrolled for 19 May 2020;*
2. *Respondent is ordered to file its answering affidavit by noon on Wednesday 6 May 2020;*
3. *The costs occasioned by the postponement are reserved. "*

[4] The relief sought in paragraphs 3 and 4 of the Notice of was amended as reflected in the proposed draft order that I will reproduce hereunder. I was told that the amendment was intended to accommodated the points that were raised by the respondent, which the applicant considered to be persuasive. The first is that the applicant should be placed on terms to launch the application, within 20 days or else the interim relief will lapse. Secondly, If the interim relief is granted, the internal remedies sought in prayer 3 will become academic. The third point is that findings 2 and 3 can be attacked by statutory appeal to court, but finding 1 the applicant believed that it should not. It has, however been persuaded that it can too. If the interim relief is granted then all relief sought can be done in court.

[5] The proposed new prayer 3 and 4 now read as follows:

" *3. Pending the finalization of the High Court proceedings (an appeal in terms of section 47)(9)(e) of the Act and for declaratory relief) in terms of which the decisions embodied in the letter of demand will be disputed, payment of all amounts due under the respondent's letter of demand dated 18 February 2020 is suspended and the Commissioner is interdicted and prohibited from taking any enforcement and/or collection steps to enforce and collect the amounts demanded as set out in the letter of demand dated 18 February 2020.*

4. The proceedings in paragraph 3 shall be instituted within twenty (20) days of this order, failing which the interim relief shall lapse".

[6] Urgency was conceded a few moments after the applicant's counsel had started his submissions in this regard.

[7] With regard to costs, the respondent's view is that if I am inclined to grant the interim relief, costs should be reserved in line with the principles in the matter of EMS Belting v Lloyd 1983(1)SA 641(EC). This is about the inappropriateness of costs award (unless there are exceptional circumstances) in interim interdict proceedings.

[8] During roll call on 19 May 2020 I requested the both counsel for the parties to give me their time estimation for the hearing of the matter. They both agreed that it would take a maximum of three (3 hours). I duly allocated the matter for hearing on the next day (Wednesday, 20 May 2020) at 10:00.

[9] However, and to the detriment of my roll, the submissions took one and a half days, with the submissions of counsel for the respondent, Advocate Peter SC, taking about 80% of that time. His opponent, Advocate Vorster SC rightly raised a concern that he has argued the merits of the whole case.
Mr. Peter did acknowledge, much later though, almost at the end of his argument, that this judgment should be based on my *prima facie* view of the submissions on the facts and legal issues, without binding the court that will be seized with the main application where the parties' differing interpretation of the relevant legislative framework will be canvassed.

[10] I am mentioning the issues of time allocation and unnecessary submissions because I heard this application under extreme pressure, not only because it was allocated in a normal urgent roll with many other applications, but also because the respondent had to be asked on a daily basis to extend the undertaking that it had given to the applicant not to take enforcement steps until the next day, and finally until I deliver my judgment.

Background facts and chronology of events leading to this application

[11] The following common cause facts appear from the affidavits filed on behalf of the both parties. In setting out the factual background below, I am

alive to the respondent's contentions that the dispute of law arises from these facts. The lawfulness of certain practices is at the core of the dispute.

[12] The applicant holds a Customs and Excise Manufacturing Warehouse ('VM') licence issued in terms of the provisions of the Customs and Excise Act, 91 of 1964 ('the Customs Act'). It is a refinery of what is commonly known as Gas-to-liquids and manufactures fuel levy goods as defined in section 1 of the Customs Act. The Warehouse (VM) is located in Mossel Bay in the Western Cape Province.

[13] It owns and operates storage depots in Bloemfontein and Tzaneen, situated in the Free State and Limpopo provinces respectively. These storage depots are not licensed as Customs and Excise Storage Warehouses in terms of the Customs Act.

[14] The fuel manufactured in the VM is transported by rail from the Manufacturing Warehouse in the Western Cape to the Bloemfontein depot for storage. It also purchases duty paid fuel from other Manufacturing Warehouses in Durban, Kwa-Zulu Natal, and another refinery in Gauteng, as well as refineries of BP Southern Africa (Pty) Ltd and Sasol Oil (Pty) Ltd situated at Durban and Sasolburg respectively.

[15] The fuel purchased from Durban is transported by pipeline to storage facilities in the Island View Area at the port of Durban. It is also injected into the New Multi-Purpose Pipeline ('NMPP') network and pumped to storage facilities Gauteng Province which is operated and owned by Transnet. It is known as 'Tarlton'. It is also not a licensed Customs and Excise Storage Warehouses in terms of the Customs Act.

[16] The fuel from Tarlton is stored in dedicated product tanks and is supplied to inland fuel retailers, wholesalers and also loaded for export by rail and road to consignees in African countries including Botswana and Zimbabwe.

The audit findings and Notice of Intention to Assess

[17] SARS Excise conducted an audit of PetroSA for the period 2015/05 to 2017/03 during August 2017. On 16 August 2019 SARS issued a notice of intention to assess PetroSA DA 160 account ('Notice of Intention').

The notice was issued in terms of section 3(2) of the Promotion of Administrative Justice Act, No 3 of 2000. It reads in part as follows:

> *" The purpose of this letter is to inform you of the status and prima facie findings of our review as carried out to establish whether the activities of The Petroleum Oil and Gas Corporation of South Africa (Pty) Ltd abbreviated to "PetroSA " as a licensee were in compliance with the provisions of the Customs and Excise Act, No.91 of 1964, as amended (hereinafter refereed to as "the Act") . and to afford you the opportunity to respond thereto",*

[18] PetroSA was also provided with a summary of amounts for the proposed assessments in the event that liability is determined. The amounts are;

ITEM	TOTAL
Petrol	R342,714,135.06
Diesel	R808,362,667.95
Total duties & levies disallowed	R1,151,076,803.00
Penalty (on total disallowed)	(to be determined)
Interest	(to be determined)

[19] Three prima facie findings with implications of assessment were made. The fourth finding relates to risk and does not entail assessment. It does not form part of the dispute before me .

[20] Finding 1: DA 160 Account under-declaration / incorrect declaration of litres /duties

The exercise performed by the case officers entailed inter alia drawing up schedules under categories of mode of travel and pipeline movement for each month and comparing this to the totals as declared on the DA160 excise account. Several variances were found after making corrections of errors that could explain the differences. The finding of under declaration was

based on the documentation provided by PetroSA and the conclusion was that there has been underpayment of duties and levies in the DA 160 account.
The amount of the undeclared fuel was indicated as 13 679 233 litres for petrol and 68 967 937 litres for diesel

[21] Finding 2: Export Acquittal documentation absent, inadequate or not provided in substantiation of DA160 Account set-off.

Schedule D to the Notice of intention is a list of export acquittal entries/transactions intended to be disallowed. Some of the examples of the inadequacies identified were that (a) PetroSA did not seek permission from SARS to provide affidavits for various exports as it is required to do., (b) SAD500 Bills were not produced, and where they were available they were not stamped on both sides of the borders as required, (c) there were no commercial invoices to confirm the identity of the purchaser or to whom the exported consignment was delivered.
The issues raised in Finding 2 are also relevant for the finding 3 below.

[22] Finding 3: Export from an unlicensed facilities "SOS"

The Tarlton and Bloemfontein depots are not licensed as indicated above. PetroSA is said to have set-off volumes under the heading "Deductibles/Acquittals" on their monthly excise account whereas the Removals Outward on the DA160 does not show exports to BLNS or otherwise.
The case officers were unable to verify that the duties had originally been paid on the exports. They made enquiries from PetroSA's Production Accountant, Ms Elsabe Odendaal in this regard. She advised them that; (a) the fuel was supplied by SAPREF via pipeline to Tarlton, (b) Tarlton is owned by Transnet and has the necessary loading of trucks and rail carts (c) All fuel is stored in shared tanks and upon orders being placed, it is loaded in trucks/rail carts, and (d) all operations at the depot are carried by Spoornet.

Response to the Notice of Intention to Assess

[23] PetroSA replied to the notice of intention on 29 November 2019.

With regard to Finding 1, PetroSA made representations which resulted in a reduction of the volumes of under-declared petrol from 13 679 233 litres to 332 925 litres and diesel from 68 967 937 litres to 5 511 581 litres.
PetroSA accepts that it has under-declared petrol by 332 925 litres in respect of the February 2017 period. It tenders an amount of R1 470 868.40.

[24] With regard to diesel, it contends that the now reduced under-declared volume of 5 511 581 litres is still incorrect. The explanation as to how this amount came about is that it sold fuel to one of its customers (Astron Energy Pty (Ltd) during April 2016. The fuel was pumped overnight, commencing on 30 April 2016,and ending on 1 May 2016. The customer insisted to be invoiced in May 2016. The volumes processed by the applicant on SAP in April 2016 were reversed as returns on SAP dated 1 May 2016by way of three credit notes and re-invoiced on 1 May 2016. No fuel was returned. The credit notes were issued to enable that an invoice be dated in May.

[25] Finding 2: The applicant provided SARS with sets of acquittal documents in respect of each transaction which they had received from the clearing agent in respect of which only an affidavit was had been provided as proof of the exports during the audit process.
The applicant contends that Rule 19A4.04(e) makes provision for filing of an affidavit and does not require the approval of the Commissioner to use affidavits.

[26] Finding 3: PetroSA contends that the issue about export or removal of fuel from its unlicensed Bloemfontein and Tarlton depots concerns the statutory interpretation of and application of the phrase '*practice generally prevailing*' in section 44(11A) of the Customs Act and that it has been exporting fuel levy goods from these depots with the knowledge of the Commissioner since September 2012 to October 2013 and by rail and by road from 01 November 2013 . It specifically consulted SARS and presented its business model pertaining to the exports from Tarlton and Tzaneen depots prior to commencing its operations in 2012. SARS did not , at any point,

indicate that exports from such facilities would not qualify for set-off as they are not licensed.

[27] It also complained about a duplication of demands with regard to the exports from Tarlton. On 02 February 2018, SARS issued a letter of demand for an amount of R1 015 567.77 which it paid in full. In the current demand an amount of R404 051.77 is being claimed.

[28] In the event that the defence of 'practice generally prevailing' is found not to have come into existence, PetroSA contends that it intends to challenge the constitutional validity of some of the provisions in the Rules on the basis of legality and irrationality. The Rule in question is Rule 19A4.4 that requires that fuel levy goods be removed or exported from storage tank owned by or under the control of a licensee of a Customs and Excise manufacturing warehouse. The Rule is alleged to ignore the exigencies relating to the export of fuel in South Africa.

The letter of demand

[29] I have already addressed the remaining dispute with regard to un-declared petrol and diesel in Finding 1. The applicant concedes liability for the reduced volumes for petrol but still deny the correctness of the one for diesel.

[30] Finding 2: SARS indicated that more discrepancies were found in the documents submitted in response to the Notice of Intention, such as different dates in the SD500, some transactions did not have Customs stamps on the export side and absence of commercial invoices.

[31] Finding 3: The disallowance with regard to removals and exports from unlicensed premises were not altered. The duplicate demands that PetroSA complained about were removed.

[32] PetroSA was advised that these entries had already been set off from the DA160 account by PetroSA in the June and August 2015 DA160 accounts.

Request to suspend payment

[33] The applicant's attorneys wrote to the Commissioner on 28 February 2020 and submitted an application for suspension of payment of the amount demanded pending finalization of the dispute.

[34] It is common cause that the powers of the Commissioner to suspend payment are derived from the following provisions of section 77G of the Customs Act read with Rule 77H.03 and Section 47(9)(b)(i).
The relevant sections have been extensively quoted during the parties' submissions and I do not deem it necessary to reproduce them here. I will deal with the provisions when discussion the submissions.

[35] The applicant placed the following factors to satisfy the requirement of 'good cause'77G. Some of them are:

(a)As a going concern, there are uncertainties regarding its liquidity and solvency and one of the reasons is the decrease in available indigenous gas reserves, which are close to depletion and expected to reach technical cut-off point for use by the Gas to liquids refinery by December 2020.

(b) The shortages of natural gas has started since about 2013 and the applicant has sustained net losses to an extent that it is unable to finance a capital amount of R10 billion for a turnaround strategy.

[36] The submissions with regard to factors listed in Rule 77H.03(7) are that:

(a) The amount demanded is substantial and its ability to continue trading.

(b) As a state-owned entity, its function is to generate income for the government. It has no intention of prejudice the fiscus in any way.

(c) It needs its assets to continue trading and has no intention to dissipate its assets.

(d) It intends to dispute the assessment and contends that it has good prospects of success.

(e) It provides employment to 1326 individuals who will be directly affected should it not survive.

(f) It has all the intention to contest the decisions of the Commissioner in the letter of demand and as such the application is not being used to delay or postpone payment .

(g) As a state owned pubic entity, the process of borrowing money to pay security is cumbersome and not practical for present purposes.

(h) Payment of the amount demanded will cause irreparable harm to the applicant because it will cease operations.

(i) There is no pending or anticipated liquidation proceedings against the applicant.

(j) The dispute between the parties centers on whether the applicant is entitled to claim set-off in respect of exports. There is no fraud involved.

[37] The request for suspension was refused on 30 March 2020. The decision was conveyed by telephone. The applicant's attorney was further informed that a formal notification and reasons would follow. Nothing has been provided to date.

[38] On 30 March 2020 the applicant's attorneys addressed a letter to SARS to request reasons for SARS persistence with the claim for under-declared diesel even after it had provided an explanation. Reasons were also requested with regard to the alleged additional deficiencies that were discovered in the documents submitted in response to the letter of intention to assess.

[39] SARS did not respond to the request for reasons.

Applicant's Submissions

[40] The Background facts are not in dispute. The manner in which the applicant conducts its business that is relevant to this application is the purchase and manufacture of fuel. The moment it leaves the warehouse, excise duty becomes payable

[41] On removal and delivery to a consignee in a BLNS country, an exporter of fuel is entitled to a refund of fuel levy and Road Accident Fund levy (Section 75(1)(d) of the Customs Act read with note 9 to Part 3 of Schedule 6 thereof)

[42] Refund is paid by a system of set-off on the applicant's excise account. This is consistent with the general principle in our law of Customs and Excise. (De Beers Marine v CSARS 2002(5) SA 136(SCA) at p.143).

[43] Summarized, the principle is that consumption of locally manufactured goods removed from the VM can take place either locally or abroad. What is used or consumed locally is taxed locally but conversely what is exported is not taxed locally and in essence the system of paying the duties and claiming refund upon exportation of fuel is consistent with this general principle.

[44] Further important undisputed facts are with regard to the transporting by pipeline to a storage facility owned and operated by Transnet at Tarlton and by road to Bloemfontein and pipeline to a depot in Alberton, and from there by road to the Tzaneen storage.

[45] It is also common cause that the Tarlton and Tzaneen storage facilities are not licensed in terms of the Customs Act. This fact has always been known to the Commissioner because before PetroSA consulted SARS before adopting the business module.

[46] Respondent's counsel in his heads of argument argues that there is insufficient evidence regarding the licensing arrangement. However, this is not disputed in the answering affidavit.

[47] The manner in which the applicant has conducted its business is consistent with Industry practice. This is not disputed in the answering affidavit. The practice of set-off was explained in the applicant's founding affidavit. It is the practice envisaged in Section 44(11A) of the Customs Act and it came

into existence in the manner in which set-offs are applied and accepted by SARS of acquittal and or export documents in respect of fuel exported from Tarlton.

[48] The Commissioner is precluded from claiming any of the amounts set out in Schedule A of the letter of demand because the exports and set-offs have been subjected to audits over many years by officials from various offices of SARS across the country. The audits were not only conducted on the applicant, but also other oil companies and until recently, SARS allowed the exports and set-offs to continue in the manner described above.

[49] The answering affidavit doesn't dispute the factual averments. The Commissioner only dispute the lawfulness of the practice but not the facts set out by the applicants. The counsel for the respondent argues (in the supplementary heads of argument) that there is n's insufficient evidence regarding the practice generally prevailing.

[50] There is no fraud in the origin of the dispute. The dispute raised by SARS centers around the question whether the applicant is entitled to claim set-off in respect of exports. There are no allegations that the applicant was party to any fraudulent activities. The answering affidavit and the letter of demand did not allege any fraud on the applicant's part.

[51] The answering affidavit failed to address issues regarding the application for suspension of payment. SARS undertook to provide a formal notification and reasons for its refusal to suspend the payment. It has still not supplied reasons for the decision.

[52] There is no explanation in the answering affidavit or justification for refusing the application for suspension, despite the fact that the applicant has explained in great detail why the suspension application should have succeeded.

[53] Applicant is confident that its financial position will improve. It gave information about its Turnaround Plan. The conversion of business model and a sale of PetroSA Ghana next year which will bring R4.5 in applicant's coffers in 2021.

[54] None of the averments in the application for suspension of payment are disputed in the answering affidavit.

[55] The respondent's answer in the answering affidavit is that there is no reasonable prospect that the Commissioner will be paid in due course. It does not engage any of the considerations that applicant has provided. The source of the bald allegation that the Commissioner will not be paid is interesting. The deponent is Mr. Hermanus, and it is clear that he is one of the SARS auditors in Cape Town who did the audit and drafted the letter of demand. There is no suggestion that he was part of the debt management committee that sat in the Tshwane and refused the suspension application. He does not have personal knowledge of the facts set out by the applicant. He is not privy to the refusal. He is in no position to deny the applicant's contentions with regard to its ability to pay the Commissioner should it be decided that the amount is due and payable.

[56] On requirements for an interim interdict;
The '*pay now argue later*' principle (MetCash Trading Ltd v Commissioner , South African Revenue Service, and Another 2001 (1) SA 1109 (CC) which is emphasized in the respondent's heads of argument is indeed a general rule.

[57] The applicant submits that there are two sections in the Customs Act, which softens this general principle. The first is section 47(b)(1) which reads as follows:

> *" Whenever any determination is made under paragraph (a)or any determination is amended or withdrawn and a new determination is made under paragraph (d), any amount due in terms thereof shall, notwithstanding that such determination is being dealt with in terms of any*

*procedure contemplated in Chapter XA or any proceedings have been instituted in any court in connection therewith, remain payable as long as such determination or amended or new determination remains in force**:*** ***provided that the Commissioner may on good cause shown, suspend such payment until the date of any final judgment by the High Court or a judgment by the Supreme Court of Appeal*** *(applicant's emphasis)*

[58] There is a clear power of the Commissioner to soften the general principle of '*pay now argue later*'.

[59] The legislature has also provided something similar in section **77G** (obligation to pay amount demanded).

[60] There are Rules that have been published in terms of this section which have been addressed under factors to be considered when making an application for suspension of payment. This is a clear intention on the part of the legislature to ameliorate the harsh application of the '*pay now argue later*' principle.

Requirements of a Prima facie right

[61] Mr. Vorster referred to the well known test as espoused in the authoritative writings of Justice Harmse in LAWSA 2nd Edition, Vol. 11 para 404 which reads as follows:

"*The proper approach is to consider the facts set up by the applicant together with any facts set out by the respondent which the applicant cannot dispute and to decide whether with regard to the inherent probabilities and ultimate onus the applicant* ***should*** *on those facts obtain final relief at the trial and then one also look at the facts set out in contradiction*".

[62] Justice Harmse also referred to authorities that say in urgent applications, a lesser test may be applied, and the word should must read '***could'.***

[63] The Commissioner has not adduced any admissible evidence that the applicant cannot dispute.
The question is whether the applicant could succeed with the High court application.

[64] Addressing the findings that underline the demand:

[65] First finding: under-declared volumes removed

[66] The applicant conceded that in its founding affidavit it exaggerated the percentage of the amount of fuel that it alleges the Commissioner over-stated in its findings. it is not 99,6 % as indicated in the founding affidavit.

[67] I have already addressed the correct volumes in the initial findings , the reductions after representations were made and the amounts indicated in the letter of demand.

[68] The point made by the applicant in this regard is that the Commissioner arrived at a finding of 82 million litres (which was later found to be incorrect) after an audit that lasted more than 12 days. This shows a that the potential for errors is substantial.

[69] The applicant has given an explanation for the remaining 5 million litres that remain in dispute. This volume was pumped out only once only during 30 April to 1 May 2016. The creditor asked to be debited on 1 May 2016. The Commissioner was of the view that the volumes left twice and was not accounted for.

[70] It is noted that the Commissioner does not accept the applicant's explanation with regard to the remaining dispute in finding 1. The applicant has rebutted the Commissioner's answer in the replying affidavit. The dispute should be adjudicated on the version of the applicant.

[71] Second finding : Inadequate export documents

The applicant has provided the Commissioner with 6 arch lever files pertaining to its acquittal documents in respect of each transaction in its response to the Notice of Intention to Assess. These contained the relevant acquittal documents. The answering affidavit does not deal with this or say whether the Commissioner considered the content of the six arch lever files, or what his conclusions in that regard are.

[72] The Commissioner complained that the applicant did not seek approval to use affidavits. The applicant stated in the founding affidavit that there was no such requirement in the legislation to seek approval to submit an affidavit. The commissioner does not address this averment in the answering affidavit.

[73] There are new findings in the letter of demand but the *audi alterem partem* rule was not applied. The potential taxpayer (applicant in this case) is given notice of intention to assess and given a chance to respond. After the response, the Commissioner came up with new alleged findings in the letter of demand where he stated that he discovered further discrepancies when considering the applicant's response to the Notice of Intention to Assess.

[74] The Commissioner's answer to his failure to give the applicant a hearing with regard to the new findings is that he accepts the audi *alterem partem* rule was not applied, but contends that the applicant will deal with the findings in the contemplated appeal. This nullifies the purpose of the notice of intention to assess.

[75] The only response from the Commissioner on the information given by the applicant in the six arch lever files is that the applicant is said to have compounded its problems by not being an exporter.

[76] There is no dispute raised, hence the applicant submits that there is a strong prima facie right as long as the second finding is concerned..

[77] Third finding: unlicensed depots

The applicant relies on a legal argument that it believes will be upheld by the court hearing the appeal. The argument centers on the interpretation of the Act and the Rules and also the question of the practice generally prevailing.

[78] Rule 19A4.04(a)(ii) provides that the fuel levy goods may only be removed from a storage tank owned by or under the control of a licensee of a VM.

[79] The applicant contends that on a proper construction of this subrule, the storage does not have to be part of the licensed premises and it would have been expressly stated if that was the intention of the legislature. The applicant contends that the fuel can be stored in another warehouse owned by the applicant and then be exported from there. This is an argument that applicant submits could be accepted by the court dealing with the main application.

[80] Although the Tarlton storage facility is not licensed, the applicant contends that it is still in control, albeit indirectly because it is common cause there are controls to keep records of volumes going in and out and the documents of the transactions.

[81] The applicant referred to the judgment of Mojapelo J (as he then was) in the matter of Zulu v Minister of Defence 2005 (6) SA 446 (T) at paragraphs 37 and 41. It was also an application for an interim interdict. The question is how does one treat issues of law when adjudicating an application at the interim interdict stage. The essence of the relevant principle arising from the authorities cited is that the court at this stage should not concern itself with legal issues that arise in the main application. A prima facie right, even though open to doubt suffices. The question of whether the applicant should or could succeed in the main application refers to facts, not issues of law.
This principle is common cause between the parties.

[82] The Customs Act: Section 44 (11A): <u>Practice Generally prevailing</u>

> "***Notwithstanding anything to the contrary contained in this Act*** *there shall be no liability for any underpayment on any goods if the duty which should have been paid was,* ***in accordance with the practice generally prevailing at the time*** *of entry for home consumption, not paid or the full amount of duty which should have been paid… unless the commissioner is satisfied that the amount was not paid…. due to fraud or misrepresentation or non disclosure of material facts or any false declaration for purposes of this Act'*(applicant's emphasis)

[83] The applicant contends that it did not pay duty in respect of fuel removed from its manufacturing warehouse because that duty was set off on the strength of its earlier export credits as it were. So the section clearly applies.

[84] The respondent's counsel argues that the practice is unlawful. As a starting point, looking at the first few words of section 11(A), there is a clear indication that the practice will not necessary be a lawful one, it would be something contrary or could be contrary to the Act.

[85] On whether even if the Commissioner was aware of it and permitted it to happen and now intends to stamp it out, Mr. Vorster argued that he entitled to stamp out practices that he no longer wishes to allow. The argument is that on the facts presented to this court, the practice has been prevailing since about 2012 and if the Commissioner wants to clean out the practice, he cannot do so retrospectively.

[86] There is no definition of practice generally prevailing in the Customs Act. The applicant referred to the interpretation by courts in other tax legislation, which it accepted might not be identical.
In Commissioner for Inland Revenue v SA Mutual Unit Trust Management CO. LTD 1990 (4) SA 529 (A) Corbett CJ said it is a practice that is applied generally in the offices , not in just one or two offices. As to the origin of the practice, he stated that "*the existence of such a practice could be established by showing that the commissioner or someone in the office with*

authority has issued a directive to that effect and that this directive was being followed generally in the assessment of taxpayers; ***or by showing*** *that in the general process of assessment dividend stripping losses* ***were consistently allowed in a sufficient number of cases to lead to the inference that such a practice was authorised and generally prevailed. These are factual matters*** *to be decided by the court; and they are matters in respect of which assistance may be derived from expert evidence as such….*" (applicant's emphasis)

[87] As there is no directive in the matter before this court, the applicant relies on the highlighted alternative, one of proving the practice by inference. This entails producing sufficient facts.

[88] Irreparable harm:
In terms of Section 47(9)(c) of the Customs Act, the Commissioner will not be liable to pay interest on the amount indicated in the letter of demand if he collects it now and is ordered to return it after the applicant has successfully challenged the assessment. This fact has an important bearing on the requirement of irreparable harm. The amount involved is R860 Million.

[89] Balance of convenience and alternative remedy
It is not disputed that the applicant is unlikely to recover if it complies with the demand of the Commissioner . It has no alternative remedy

[90] Costs
The applicant's counsel has considered what respondent's counsel said with regard to the court only making prima facie findings at this stage.
So, if if the court is only going to make interim orders, the cost order should possibly be amended. Otherwise, if the court does not grant an order in terms of the proposed draft, the applicant also pray for costs.

Respondent's submissions

[91] Although the submissions were very long, they were very helpful in that the court gained a broad overview of the interaction between the relevant sections of the Customs Act, the rules and the notes with regard to the control regime of a licensed warehouse.

[92] However, Mr. Peter spent a lot of time on the allegations of fraud committed by the applicant and other persons in the supply chain, which were not referred to in the various notices given to the applicant before this application was launched. As counsel for the applicant indicated in reply, fraud is a special defence and it must be pleaded. These allegations appeared (in general terms) for the first time in the answering affidavit.

[93] Other than the differing interpretation of the relevant sections of the Act and the Rules (which I will deal with later on), the high watermark of the respondent's case is the alleged fraudulent activities, which , it is submitted, disentitle the applicant from relying on the provisions that gives it some advantage, such as the 'practice generally prevailing'.

[94] In the answering affidavit the Commissioner has indicated that he is aware of two 'unlawful activities' that have given *'rise to a large scale fraudulent industry in which purchasers of the fuel which has been acquired at an export price, that is not inclusive of duties and levies and are able to sell the fuel locally making large margins at the expense of the Commissioner and the fiscus. Often when audited, the licensees of the VMs produce supporting documentation given to them by their purchasers which do not evidence valid exports and which are fraudulent. This happened in the present case where the refund claims for exports have been disallowed because the documentation did not exist or was deficient. The applicant disclaims any complicity in the fraud on the basis that it merely relied on the documents given to its by its purchaser*".

[95] The two 'unlawful activities are described as follows;

(a) a licensee selling fuel to a non-LDF purchaser at an export price for export. This is what has been referred to as lending a name to the export transaction above. The licensee then claims a refund as if it exported the fuel levy goods.

(b) *'.. sale of fuel levy goods which have entered home consumption at export prices, most often to a non-LDF, for export from a storage facility other than a VM. This applies particularly to sales by the applicant from storage facilities owned and maintained by Transnet at Tarlton and Bloemfontein from quantities of fuel in respect of which the applicant has a claim against Transnet. The licensee of the VM then claims the refund as if it exported the fuel levy goods from its licensed VM. for export from an unlicensed storage facility. This happen at Tarlton and Bloemfontein facilities owned and maintained by Transnet. The licensee of the VM then claims the refund as if it exported the fuel levy goods from its licensed VM'.*

[96] Mr. Peter raised two issues emanating from the common cause facts; The first is the admission by the applicant that what has been disallowed is exports that are not taking place from the licensed warehouse but from Tarlton and Tzaneen. They relate to finding 2 and 3 (finding 3 is a double finding of 2). He argues that the applicant should sell the fuel with the duty included but it deducts it and sell at discounted price because it gets a refund from the Commissioner. If sold to foreign country the price excludes tax. If it is a genuine export from a licensed warehouse, the price does not include export tax.

[97] A taxpayer who wants to claim a refund must show that the goods have been exported and this does not only mean that they left the licensed warehouse, but that they arrived at a foreign destination. This is the gravamen of the respondent's case. The submission is that there is a difference between 'export and 'exporter'. The latter has been given a statutory meaning.(De Beers Marine v CSARS)

[98] PetroSA sell to people who are not licensed fuel distributors who then sell it to the foreign purchasers. In the export transaction, the local person uses the applicant's name as exporter on the document. The applicant justifies this by saying it is the exporter on the extended meaning of the word 'export'. The question is whether do they sufficiently export, and the answer is NO.
In order to claim a refund, the applicant has to export. What is not common cause is that it must be an exporter in terms of the definition of the Act. This is a legal argument.

[99] The second legal issue is whether the applicant has to export from the licensed warehouse. If the answer is yes, then that is the end of the matter on findings 2 and 3.

[100] Mr. Peter's submission is that if the court is with the respondent on the law (on having to export from a licensed warehouse), it disposes the whole case, except for Finding 1 which is inconsequential because it only involves R24 Million of the capital claim and should not determine the outcome of this matter.

[101] It is common cause that some of the fuel comes from other warehouses like Shell and BP and it is pumped straight to Tarlton and does not go anywhere near the applicant's warehouse. From Tarlton it is either exported or sold locally. The fuel at Tarlton has lost its identify because it gets mixed with every other refineries' fuel, like money in a bank account. It has lost its identity of where it comes from. *(I must mention that the applicant has objected to this submission, which arises from Mr. Peter's supplementary heads of argument, on the basis that the facts are not common cause, particularly in as far as it pertains to their relevance to the disputed claims.)*

[102] The regime of control starts with a licence or permit issued by the Commissioner. In this case a manufacturing warehouse for fuel levy goods.
They have to keep account of what is in the warehouse, what comes in and out and where it is going and must pay duty. That is what duty at source is. There are procedures of taking goods out and details of how to claim refunds

from the commissioner. When the fuel is pumped from Bloemfontein, there must be an entry that it is going to Tarlton and the applicant must pay duty. Even if it is for export, when it leaves the warehouse, for whatever reason, duty must be paid.

[103] The respondent does not agree with the applicant's proposition that if they then decide that some of its fuel will be exported from Tarlton , they can somehow bring it in to the excise account and then can set-it off. The respondent's contention is that if the fuel is going for export, it must leave the licensed warehouse as such and accounted as such. The Commissioner has no control on the unlicensed warehouses.

[104] The Commissioner's principal (legal) contentions. The submission is that this case turns on these contentions. They are as follows;

(a) A licensee of a VM , may only export fuel levy goods removed from a storage tank owned or under its control. The refunds are confined to goods within the licensed control regime.

(b) A licensed distributor (LDF) may only claim a refund for exported fuel levy goods obtained from stock of a licensed VM and not from some unlicensed facility.

[105] In its replying affidavit, the applicant disagrees with these contentions and the correctness of the commissioner's interpretation.

[106] The applicant admitted that the practice has developed with the knowledge of the commissioner but deny that it is unlawful.

[107] Mr. Peter explained what he referred to as the modus operandi of this practice as follows; Fuel is either pumped from Durban to Tarlton and they sell it to somebody who has a buyer in Zimbabwe or Botswana. They justify themselves as exporter because they have a beneficial interest or some other reason such as arranging transport. The applicant in this scenario does not export and this arrangement is not allowed.

[108] He further explained that they get around this 'little legal problem' by telling the Commissioner that they are exporter whereas a third unlicensed party did the export. Fuel levy goods entered for local consumption is sold to an unlicensed person (non-LDF)

[109] The applicant is alleged to be;

(a) exporting from an unlicensed warehouse.
(b) They are not exporting but sell to someone that exports.
(c) They don't have the documents relating to export.
(d) Two types of fraud: declaring as exporter and second is when goods are not exported but sold in the local market at black market prices and fake export documents are produced to show they crossed the border and received on that side. They lend their name to the export of goods. It is a bad practice that the Commissioner is trying to stamp out in this audit. They are knowingly lending their name that they are the exporter when they are not. Although the commissioner cant make case that they are party to the fraud. They are guilty of that fraud.

[110] To claim the credit, you have to actually export. The applicant relies on section 75(1)(d) read with rebate item 671.05 and note 9 to Part 3 of Schedule 6 to the Act, to advance an argument that it is entitled as an exporter to a refund of the fuel levy and Road Accident Fund levy once such fuel has been removed and delivered to a consignee in a BLNS country and that in practice the refund is received by applying set-off in its monthly excise account.

[111] The respondent contends that there are two problems with the applicant's submission. The section that the applicant relies on does not entitle an 'exporter.' The item doesn't talk about exporter but talks about fuel removed and delivered. Here they are using a passive voice. In terms of item 671.05, the licensee must pay first before claiming a rebate. The removal is by a by licensee of *such* warehouse. Schedule 6 of the Act require removal of consignment to BLNS and then the licensee can claim a rebate.

It is the licensee of a specific warehouse and from De Beers case export means also deliver. These two items authorize the refund, and if one does not satisfy them, there cannot be a claim for a refund. In terms of Section 75(1)(d), the refund is for the goods entered and exported in accordance with such entry.
There is no mention of exporter but licensee of such warehouse. Not licensee of warehouse removing something from a depot.

[112] Only a Licensee and an LDF can claim refund (See section 64F(2)(a) which prohibits removal to any country or refund unless by licensed distributor or licensee).
The persons that the applicant is selling to from Tarlton Tzaneen or Bloemfontein depots must be licensed distributors to claim refund. Because they are non-LDF, the applicant lends its name as exporter.
This is repeated in the rules .

[113] The Act is carefully worded not to bring in the statutory definition of export. It says export. The applicant does not export. They claim to be because the Act has an extended meaning of the definition of exporter. It is the licensee that is supposed to remove and deliver to qualify as an exporter. The applicant sells to somebody who sell to a foreign buyer. They lend their name to the transaction. They say they have a beneficial interest because they are entitled to a refund. The argument is circular. The exporter definition must be seen in the context of the items and not the extended meaning.

[114] Rule 19A4.04 prescribes the *'procedures relating to goods removed from a customs and excise warehouse'*
Subrule(a)(iii) reads as follows:

> *" Only a licensee of such manufacturing warehouse or the special customs and excise storage warehouse contemplated in rule 19A4.01(b)(ii) or a licensed distributor as contemplated in section 64F may export fuel levy goods.*

[115] Subrule (iv) reads as follows:

> *" Only a licensee of such manufacturing warehouse or a licensed distributor as contemplated in section 64F or a licensed distributor as contemplated in section 64F may remove fuel levy goods to any BLNS country"*

[116] The applicant is alleged to be concealing the identity of the person that does the export, and this constitutes fraud.

[117] Factually the applicant does do not fall within the definition of exporter and they are not the person that export. They must do the export to claim a refund.

[118] Customs and excise warehouses are licensed in terms of section 19(1) of the Customs Act. It is a 'place appointed' , that is, physical premises for manufacture of dutiable goods, and not a person or entity that is licensed. PetroSA has a number of activities but the licence does not apply to any other activities but one for which the premises were licensed.

[119] The licensee accounts for what is in the licensed warehouse, and not what is in unlicensed storage facilities because they falls outside the control regime. Duty is payable the moment goods are removed from a licensed warehouse

[120] When dutiable goods are exported, be it by road, rail, sheep or air, Export by road, rail, ship, air Form SD500 must be filled and processed before loading. These requirements are in respect of licensed premises, as such, the Commissioner cannot enforce this requirement on unlicensed storage facilities such as the applicant's Tzaneen depot.

[121] When dutiable goods are removed to BNLS countries, there must be compliance with Rule 19A4.04(f) which provides as follows:

> *"Whenever any fuel levy goods are removed to BLNS countries or exported by the licensee of a customs and excise warehouse, the said*

licensee must include with the excise account required to be submitted in terms of these rules, a statement to the effect that-

(i) the goods removed to BLNS countries or exported as reflected in the said account were duly removed to the consignee in the BLNS countries or duly exported, as the case may be;

(ii) record of the proof of such removal or export is available at the licensed premises and will be kept in accordance with the requirements of rule 19A.05"

[122] Therefore, it was submitted on behalf of the Commissioner that looking at all these provisions the applicant has not made a prima facie case.

[123] On the practice generally prevailing argument, the respondent contends that section 44(11A) of the Customs Act does not apply, factually there is no evidence of such a practice and that even if there is such a practice, the applicant is disqualified because of the misrepresentation that they are the exporter whereas someone else is.

[124] Section 44(11A) provides that there is no liability for underpayment if the duty payable has not been paid in accordance with *practice generally prevailing*, provided that the Commissioner is satisfied that it was not paid due to fraud, non-disclosure of material facts or misrepresentation. The submission here is that this section is a 'lifeline' or 'get out of jail free' but there must not be fraud or non-disclosure, for example, that the export was done by the licensee whereas done by a non-LDF. What they are doing is claiming a credit and then a set-off.

[125] The actual interpretation of section 44(11A) does not apply to a refund wrongly claimed. The alternative argument is that the applicant has committed fraud by making a misrepresentation that it is the exporter whereas it is not. The facts do not meet the test for practice generally prevailing.

[126] The criticism by applicant's counsel on the deponent of the respondent's answering affidavit is not justified because as the person that conducted the audit , he is the one with primary information regarding the findings of the audit. Knowledge may be acquired either directly or by hearsay. (Nugent JA in President of the Republic of South Africa and Others v M& G Media Ltd 2011 (2) SA 1 (SCA) at 12. This was confirmed by the Constitutional court (2012 (2) SA 50 (CC) per Cameroon at p.467 para 107)

[127] The evidence of the applicant on the practice generally prevailing is insufficient. The deponent's capacity is head legal counsel of the applicant, says he has access to document (not actually read). No one knows know if she was there in 2012. It is the same for the confirmatory affidavit. There is no indication as to who consulted SARS, whether it verbally or in writing, who at SARS and the nature of the business model.

[128] To draw an inference that SARS condoned the practice, we must know what it was consulted about. Names of person consulted would enable SARS to file an affidavit of that person . There is no evidence of the previous audits where the practice was allowed. There is a complete dearth of evidence. They just make statements and suppositions.
The court cannot safely conclude that there was a consultation without evidence. The fact that SARS does not actually tell them that they do not qualify does not mean they qualify.

[129] The practice generally prevailing is not that of the taxpayer, but the Commissioner. They must identify a single office or person where that is happening. They must provide the facts.
They don't get in to section 44(11A). If they do, the exception applies because there has been fraud, misrepresentation and non-disclosure.

[130] Finding 1: Is a factual and not legal argument. The amount involved is only R24M involved. They have several versions, as such they should not complain about not getting audi alteram because the version in the founding affidavit is different from the one in their representations. He referred to an

Invoice dated 05-03-2020 dated at Cape Town. They are selling diesel at 4,87 per cubic litres. SARS has a problem with the amount because they are selling it locally. They must pay the duty on the fuel and must not include it on local sale. This is a local sale to Astron. The amount they are selling for is equal to the duty they must pay SARS, it is like they are giving it away. The invoices are not genuine.

[131] The applicant has not replied to these criticisms in its replying affidavit. Faced with this criticism, one would explanation, but it is a bare denial. They deny te price of sale of diesel,

[132] It is correct, as the applicant has submitted that for interim relief the court must look at the version of the applicant. However, there is a factual dispute between their versions, not even on respondent's version. Applicant should be referring this matter for evidence.

[133] Finding 1: factually, their explanation does not make sense.
Findings 2 and 3: inadequate documentation, court need not deal with it because they come from unlicensed warehouses.

[134] Balance of convenience / irreparable harm.
The question is whether the Commissioner is likely to be paid. These are uncontested facts because they are from the founding affidavit. The facts have already been addressed and there is no need to repeat them here, save to state that they relate to the financial position of the applicant, its intended turnaround strategy and the likelihood of never recovering if the Commissioner insists on the payment.

[135] The applicant contends that If the court grants the interim interdict, the CSARS will not get the money owed. If the court refuses the interdict, they do not have money to operate beyond end of 2020 in any event. In every probability, the CSAR will not get his money. If they are able to come around with the Ghana plan, must still find other billions to continue.

[136] Costs: if court grants interim , costs must reserve costs for determination later.

Applicant's reply

[137] Mr. Vorster raised a concern that when the parties estimated a 3 hour hearing they did not anticipate an argument on the merits , which Mr. Peter has argued.

[138] On the fraud allegations, if the applicant says it did not commit fraud, that is a fact. If the Commissioner disagrees, he should have said so, unequivocally. Initially it was said it was a suspicion, but in argument Mr. Peter said it is fraud.

[139] He referred to the basic principles of pleading and submitted that . the affidavit of CSAR fulfills two functions, first to define issues and also to place evidence before the court. (See Die Dros 2003(4)207 at para 28)

[140] Fraud must be clearly alleged and proved clearly and distinctly. (see: AMLERS 9th edition p.204 where Justice Harms emphasized that fraud is not easily inferred.) The basic requirements and evidence that must appear in the CSARS's affidavit must show that the Applicant must have made a representation of fact knowingly.

[141] The letter of demand as recently as February 2020 did not allege fraud. It was co-written and co-signed by the deponent. The case was not fraud, otherwise it would have said so. The question is what has changed between February and May. The deponent does not say whether he conduct any further investigations, but a bald statement is made in the answering affidavit in this regard. The Commissioner even today does not have evidence of fraud.

[142] The fraud defence is not to be found in the answering affidavit.

Two '*unlawful practices'* are mentioned, but the Commissioner should have alleged fraud if it knows that the applicant has committed fraud. The submission by respondent's counsel that the applicant committed fraud is mischievous at best and ought to be rejected.

[143] Applicant admitted knowing about the practices . Mr. Peter argued ,in reliance of the paragraph of admission of the practice that the fuel was sold to a non-LDF, and in so doing, he ignored the difference in the two scenarios he was referring to. One is where applicant contracts for transporting over the border. The rules acknowledge this arrangement and the applicant said so in the replying affidavit. Applicant contracts licensed removals. In those cases clearly the applicant is the exporter.

[144] It is only with regard to the other scenario where the applicant relies on the extended meaning of exporter (Standard General Insurance v CSARS 2005 (2) SA 166 (SCA). Section 18A refers to items being removed from licensed warehouses. So the definition of importer has being widened to include export. There is nothing strange about the court applying the extended meaning. The semantic difference between noun and verb of word "exporter", the question is who exports, It can only be the exporter.

[145] The applicant accepted that the letter of demand contained a full exposition of the basis of demand. The Commissioner in the demand had to go further if there was more.

[146] Practice generally accepted applies because the applicant did not pay duty on removal from warehouse because it has been set-off. Mr. Peter says it does not apply. One must consider what the Commissioner is claiming from the applicant. He is claiming duties. The applicant relies on this section.

[147] Whether there is evidence relating to the practice. The counsel for the respondent ignored the Commissioner's affidavit where he says this practice has been known. Maybe by a slip of tongue, Mr. Peter also referred to audits

of BP and Shell which are not in the papers, so it is clear that it exists and SARS knows it.

[148] The test of interim relief is prima facie.

[149] The finding 1: It is correct that the application should not turn on it.

[150] The argument on failure to apply the *audi alterem* rule relates to findings 2 and 3.

[151] The negative financial factors listed by the applicant relating to its dire position show that there has been a full disclosure of facts.
The Technical insolvency must be contextualized. The 9 billions required will only become due in 2024 and it should not be overemphasized . The technical insolvency is artificial. If it continues trading, the applicant will be able to pay its debts .

[152] The Ghana sale. The planned sale is expected to realize R4.5 billion. This is not disputed in anyway in the answering affidavit. Mr. Peter refers to the application for suspension . Mr. Peter focused on the paragraphs that deal with drop of oil price. We all know it happened as a result of Covid -19 pandemic.

[153] The applicant has also indicated that it owns sufficient assets that exceed its liabilities. The respondent did not address this at all. This must be taken into account when considering balance of convenience.

Legal Principles and application on the facts

[154] The Constitutional Court in the matter of **National Gambling Board v Premier, Kwazulu Natal and Others**[1], stated the following

" [49] *An interim interdict is by definition 'a court order preserving or*

[1] 2002(2) SA 715 CC
[2] 1996 (4) SA 348 (A)

> *restoring the status quo pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination.' The dispute in an application for an interim interdict is therefore not the same as that in the main application to which the interim interdict relates. In an application for an interim interdict the dispute is whether, applying the relevant legal requirements, the status quo should be preserved or restored pending the decision of the main dispute. At common law, a court's jurisdiction to entertain an application for an interim interdict depends on whether it has jurisdiction to preserve or restore the status quo.*"

[155] The requirements for the granting of an interim interdict are well known and there is a wealth of authorities in this regard. The requirements were stated as follows in the matter of **Setlogelo v Setlogelo 1924 AD 221 at 227,**

They are; a prima *facie* right, a well granted apprehension of irreparable harm, if interim relief is not granted and the ultimate relief is eventually granted, the balance of convenience in favour of the granting of the interim relief and the absence of any other adequate ordinary remedy.

[156] The following passage in the matter of **Knox D'arcy Ltd & Others v Jamieson & Others**[2] illustrates the discretion of the court when dealing with an application for interim interdict pending determination of the parties' rights.

> *"The granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the Court. Where the right which it is sought to protect is not clear, the Court's approach in the matter of an interim interdict was lucidly laid down by INNES, J.A., in Setlogelo v Setlogelo, 1914 AD 221 at p. 227. In general the requisites are –*

[2] 1996 (4) SA 348 (A)

(a) a right which, 'though prima facie established, is open to some doubt';

(b) a well grounded apprehension of irreparable injury;

(c) the absence of ordinary remedy.

In exercising its discretion the Court weighs, inter alia, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience.

The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of 'some doubt', the greater the need for the other factors to favour him. The Court considers the affidavits as a whole, and the interrelation of the foregoing considerations, according to the facts and probabilities; see Olympic Passenger Service (Pty.) Ltd. v Ramlagan, 1957 (2) SA 382 (D) at p. 383D - G. Viewed in that light, the reference to a right which, 'though prima facie established, is open to some doubt' is apt, flexible and practical, and needs no further elaboration."

[157] The correct approach when considering whether there is a prima facie right in applications for interim interdict was explained as follows In the matter of **Simon NO. v Air Operations of Europe AB & Others** 1999 (1) SA 217 (SCA) at 228; "*The accepted test for a prima facie right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, he cannot succeed.*

The importance of giving reason

[158] I do not need to repeat the chronology of events leading to the application, but it is clear that many there were developments, negative or positive that would have been better addressed by providing reasons. For example, on the issue of new deficiencies that were allegedly discovered when considering the response to the notice of demand and this ties with the complaint as to whether the Commissioner considered the six arch lever files.

[159] Although the chastisement was directed at a Judge who did not give reasons for in an award for general damages, the principles can apply in any situation where a party approaches court for relief without the benefit of reasons.

[160] It is the judgment of Navsa JA in the matter of **Road Accident Fund v Marunga** (144/2002) [2003] ZASCA 19; [2003] 2 All SA 148 (SCA) (26 March 2003)

*[31] Before considering whether the amount awarded by the trial court should be upset on appeal I return to an aspect touched on briefly earlier in this judgment, namely, the lack of a reasoned basis for the determination of general damages. As a general rule a court which delivers a final judgment is obliged to give reasons for its decisions. In an article in the The South African Law Journal (vol 115 — 1998 pp 116-128) entitled Writing a Judgment the former Chief Justice, MM Corbett, pointed out that this general rule applies to both civil and criminal cases. In civil cases this is not a statutory rule but one of practice. The learned author referred to Botes & another v Nedbank Ltd **1983 (3) SA 27** (A) where this Court held that in an opposed matter where the issues have been argued litigants are entitled to be informed of the reasons for the judge's decision. It was pointed out that a reasoned judgment may well discourage an appeal by the loser and that the failure to supply reasons may have the opposite effect, that is, to encourage an ill-founded appeal. The learned author stated the following at 117:*

> *'In addition, should the matter be taken on appeal, the court of appeal has a similar interest in knowing why the judge who heard the matter made the order which he did. But there are broader considerations as well. In my view, it is in the interests of the open and proper administration of justice that the courts state publicly the reasons for their decisions. Whether or not members of the general public are interested in a particular case — and quite often they are — a statement of reasons gives some assurance that the court gave due consideration to the matter and did not act arbitrarily. This is important in the maintenance of public confidence in the administration of justice.'*

[32] Writing on the same subject in The Australian Law Journal (vol 67 A 1993) pp 494-502 the former Chief Justice of the High Court of Australia The Rt Hon Sir Harry Gibbs, considering the same rule of practice in common law countries, stated the following at 494:

'The citizens of a modern democracy — at any rate in Australia — are not prepared to accept a decision simply because it has been pronounced, but rather are inclined to question and criticise any exercise of authority, judicial or otherwise. In such a society it is of particular importance that the parties to litigation — and the public — should be convinced that justice has been done, or at least that an honest, careful and conscientious effort has been made to do justice, in any particular case, and the delivery of reasons is part of the process which has that end in view.'

[33] This is of course not a case in which no attempt has been made to provide reasons for judgment. It is a case in which the attempt has been inadequate. Even though courts have a wide discretion to determine general damages and even though it cannot be described as an exercise in exactitude, or be arrived at according to known formulae, a trial court should at the very least state the factors and circumstances it considers important in the assessment of damages. It should provide a reasoned basis for arriving at its conclusions. Regrettably, although the Court below stated the main injury

sustained by the respondent and set out the envisaged corrective and further surgery it did not set out adequate motivation for the amount determined as damages.

Interdicting performance of statutory powers

[161] It is common cause that the Commissioner has been clothed with statutory powers to make rules that regulate the activities of licensed warehouses. In addition, as it has been accepted, his powers to demand payment fact and argue later, though draconian, have been held not to be unconstitutional.

[162] I am of the view that the blessings conferred on the draconian powers by the highest court should not be taken lightly because it shows the confidence that the public has on the Commissioner. Furthermore, that confidence is based on the fact that it is known that the Commissioner has all the resources not only to give guidance to taxpayers, but also to monitor and to enforce non-compliance with the legal prescripts.

[163] Allowing margins of human error, hence the notice of intention to the taxpayer since the dawn of our democratic dispensation is given in terms of the provisions of PAJA as indicated in the notice that was addressed to the applicant in this matter.

[164] What has been observed from the chronology of events is that indeed there were errors, hence the reduction of volumes fuel from the original intended assessment, the acceptance of explanations given, the discovery of further discrepancies at the stage of consideration of the response to the notice to assess and ultimately, the defining of what the Commissioner perceives to be the final liability of the taxpayer.

[165] It is for these reasons that I am of the view that there is nothing to prevent a court from issuing an interim interdict against the Commissioner if there are exceptional circumstances permitting the temporary curtailment of the draconian powers.

[166] In the matter of ***The Director-General, Department of Home Affairs and another v Islam and others*** (459/2017) [2018] ZASCA 48 (28 March 2018),

presence of fraud was one of the factors that Maya P found to be a consideration that the judge in the court a quo should have considered when making an order to interdict a functionary from performing his statutory functions. The relevant paragraphs also restate the principles in this regard.

> *[19] In sum, Mr. Islam's possession of a fraudulent visa could not vest him with a prima facie right to the interim interdict he was granted. This finding dispenses with the need to consider the other requirements for the grant of an interim interdict and the appeal should succeed on this basis alone. But I think it is important to reiterate the warning sounded in National Treasury v Opposition to Urban Tolling Alliance,*[18] *even though it relates to the balance of convenience enquiry (which the high court did not conduct at all). There, the Constitutional Court did not merely endorse the common law position which constrains courts to grant temporary interdicts against the exercise of statutory power only in exceptional cases, where a strong case is made out for the relief sought. The Court took the principle further and said:*
>
> > *'Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the Constitution requires courts to ensure that all branches of Government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the Executive and the Legislative branches of Government unless the intrusion is mandated by the Constitution itself ... [W]hen a court weighs up where the balance of convenience rests, it may not fail to consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought. The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of Government. The enquiry must, alongside other relevant harm, have proper regard to what may be "*

The balance of convenience

[167] Patel AJA explained the fulfillment of this requirement as follows in the matter **Maccsand CC v Macassar Land Claims Committee and Others** (594/2003) [2004] ZASCA 114; [2005] 2 All SA 469 (SCA) (30 November 2004)

> *[18] It is the fulfillment of the requirement of the balance of convenience that the learned judge misdirected himself. The balance of convenience is often the decisive factor in an application for an interim interdict. The exercise of the discretion vested in the court, where the other requirements for an interdict are fulfilled, must turn on the balance of convenience. Moloto J's finding on the papers that some of the owners of Lots 35 to 63 had a registered right of commonage is legally and factually untenable. If indeed*

> *their rights were so registered a restitution claim would be unnecessary. The answering affidavit filed on behalf of Maccsand places in doubt the rights of the claimants represented by the Committee. This doubt appears to be in no small measure. The nature of the balance of convenience required in such a case was well summed up by Holmes J in Olympic Passenger Service (Pty) Ltd v Ramlagan* ***1957 (2) SA 382*** *(N) at 383F:*
>
> > *'In such cases, upon proof of a well grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the Court may grant an interdict - it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience - the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted.'*

[168] At paragraphs [13] and [14] the learned Judge also reiterated the principles with regard to the issue of costs of interim relief proceedings and referred to amongst other authorities the judgment of EMS Belting that Mr. Peter has directed my attention to.

> *[13] I turn now to the costs order made by the learned judge. Costs orders are, in the absence of exceptional circumstances, not generally made in interlocutory interdict proceedings since the court finally hearing the matter is in a better position, after hearing all the evidence, to determine whether or not the application is well founded (see EMS Belting Co of SA (Pty) Ltd and Others v Lloyd and Another* ***1983 (1) SA 641*** *(E) 644H, confirmed in Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban, and Others* ***[1986] ZASCA 6****;* ***1986 (2) SA 663*** *(A) at 683A).*
>
> ***[14]*** *Moloto J has not placed any exceptional circumstances on record to deviate from the established approach. In my view a costs order would be unjust and without warrant since it may subsequently be shown that the claimants represented by the Committee do not show any entitlement to Erf 1197. The costs order should have been properly reserved for determination at the hearing of the claim.*

[169] The respondent's attitude that the applicant is in anyway close to a point of collapse (even if it was true) goes against the mandate and objectives of the Commissioner. The office does not exist to kill off business entities. This is clear from the many provisions in both the Customs Act and the rules which give him a discretion, under certain circumstances to waive strict compliance with the certain requirements. From the facts before me it is clear that the Commissioner only concentrated on allegations of the unlawful

activities and failed to engage with the requirements of an interim interdict. The applicant disclosed its source of income which has been known for some time that it was going to be depleted . T

[170] There fear that the Commissioner will not be paid if he is successful in the intended court applications has no basis. As stated above, the applicant has assets of its own. In the papers there is even mention of the fact that the difficulty with paying security arises from the fact that as a state owned public entity the processes of borrowing money are cumbersome and time consuming.

Conclusion and order

[171] Having considered the undisputed facts, particularly with regard to the ' the relevant provisions of the Customs Act, read with the rules and notes as well as the legal principles, I am satisfied that save for a cost order against the respondent, the applicant has made out a case for the relief sought in the proposed draft order.

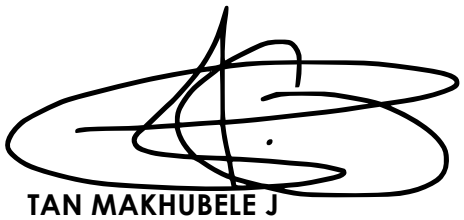
[172] Consequently I make the following order:

1. The application is heard as an urgent application and that the normal rules pertaining to forms and service be dispensed with.
2. To the extent necessary, the period of 1 (one) month referred to in Section 96(1)(a)(i) of the Customs and Excise Act 91 of 1964, be reduced in terms of the provisions of Section 96(1)(c)(ii) of the said Act.
3. Pending the finalization of the High Court proceedings (an appeal in terms of section 47)(9)(e) of the Act and for declaratory relief) in terms of which the decisions embodied in the letter of demand will be disputed, payment of all amounts due under the respondent's letter of demand dated 18 February 2020 is suspended and the Commissioner is interdicted and prohibited from taking any enforcement and/or collection

steps to enforce and collect the amounts demanded as set out in the letter of demand dated 18 February 2020.

4. The proceedings in paragraph 3 shall be instituted within twenty (20) days of this order, failing which the interim relief shall lapse".

5. Costs are reserved for adjudication by the court that will hear the application in paragraph 3".



TAN MAKHUBELE J
Judge of the High Court

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Heard on 20 & 21 May 2020
Judgment delivered at the time and date of uploading on ***Caselines***