IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED ✓
DATE 28/12/16 SIGNATURE

CASE NO: 33302/2014

DATE: 3/2/2017

IN THE MATTER BETWEEN

JM DA ENCARNAÇÄO N.O.	1ST APPLICANT
MZ DA ENCARNAÇÄO N.O.	2ND APPLICANT
AND	
THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES	RESPONDENT

JUDGMENT

PRINSLOO, J

[1] This is, essentially, an appeal in terms of the provisions of section 47(9)(e) of the Customs and Excise Act 91 of 1964 ("the Act") against a determination or determinations made by the respondent's duly authorised representative to the effect that 200 cases of Remington Gold cigarettes which were imported into the Republic

during June 2009 do not qualify for a full rebate of customs duty in terms of Rebate item 412.09 in Schedule 4 to the Act ("the Rebate item").

[2] In the notice of motion, there is also an alternative prayer, advanced only in the event of a finding that the decision(s) in question do not constitute determinations or a determination and a confirmation of the said determination, for a declaratory order in terms of section 21(1)(c) of the Superior Courts Act 10 of 2013 that the said cigarettes do qualify for the rebate of customs duty in terms of the Rebate item.

At the commencement of the proceedings, I was informed by counsel for the applicants, Mr Vorster SC, that this prayer for alternative relief was no longer proceeded with. I add that the question whether the decision or decisions made on behalf of the respondent amounted to a determination or determinations did not receive any attention before me. There was a bare denial in the opposing affidavit, that this was not pursued with any force.

In the result, I accept, for present purposes, that the decision or decisions taken on behalf of the respondent amount to a determination or determinations which may be challenged in an appeal to this court in terms of the statutory provision mentioned above.

[3] It also appears to be common cause that certain internal remedies which may have been available to the applicants were not exhausted because the prescribed time-limit had expired, but it was also not argued before me that this failure on the part of the applicants disqualified them from launching this appeal.

[4] Mr Van der Merwe SC appeared for the respondent.

[5] The applicants also claim a refund of an amount which the respondent, in terms of its wide powers provided for in the Act, unilaterally withdrew from the applicants' account as representing the amount of excise duty payable as calculated on behalf of the respondent.

The relief sought

[6] It is useful to quote the prayers as they appear in the notice of motion:

> "1. That the applicants' appeal against the respondent's determinations contained in the respondent's letters dated 18 March 2013 (annexure 'FA2' to the founding affidavit) and 11 September 2013 (annexure 'FA3' to the founding affidavit), alternatively against the determination dated 18 March 2013 which was confirmed by the respondent on 11 September 2013, be upheld.
>
> 2. That the said determinations, alternatively determination be set aside and substituted by a determination that the 200 cases of Remington Gold cigarettes imported into the Republic of South Africa on or about 17 June 2009 and 26 June 2009 as described in annexure 'FA8' and 'FA12' to the founding affidavit qualify for a full rebate of customs duty in terms of Rebate item 412.09 in Schedule 4 to the Customs and Excise Act 91 of 1964.

3. In the alternative to prayers 1 and 2 above, that it be declared, in terms of section 21(1)(c) of the Superior Courts Act 10 of 2013 ... (this is the relief that has been abandoned).

4. That the respondent be ordered to pay to the applicants the amount of R58 877,52 together with interest on the said amount calculated at the rate of 15,5% per annum from 30 October 2009 to date of payment.

5. That the respondent be ordered to pay the costs of this application."

[7] The *mora* date of 30 October 2009 is the date on which the respondent withdrew the amount from the applicants' account.

Brief synopsis

[8] The two applicants are the only trustees of the Da Encarnaçäo Trust ("the Trust"). The prescribed letters of authority as well as a copy of the Trust Deed form part of the founding papers.

An initial defence to the effect that the Trust Deed does not contain the necessary authority for the applicants to litigate this matter, was abandoned.

[9] The Trust trades under the trading name "Classic Tobacco" in Orkney, North West province and is a registered importer of goods (it appears, mainly cigarettes) in terms of section 59A of the Act. The Trust is also a licensee of a customs bonded warehouse in terms of section 18 of the Act. The warehouse is in Orkney.

[10] During May 2009 the Trust engaged All Trans Logistics CC ("All Trans") a close corporation which is licensed as a customs clearing agent in terms of section 64B of the Act, to act as the Trust's clearing agent to attend to the necessary entries in terms of the Act in respect of the importation of cigarettes by the Trust.

[11] It is not disputed that during or about the period May to August 2009 All Trans acted as the Trust's clearing agent in respect of a number of consignments of cigarettes imported by the Trust, without any incident.

[12] It is not disputed that on 17 June 2009 and again on 26 June 2009 All Trans made clearance, on behalf of the Trust, of two consignments of cigarettes which had been imported by air from Harare, Zimbabwe to OR Tambo International Airport. These consignments represent the 200 cases of Remington Gold cigarettes, forming the subject of this dispute.

[13] The relevant documentation, such as customs release notifications and certificates of origin form part of the founding papers.

[14] The consignments were landed under the purpose code of WH ("warehousing"). This purpose code indicates that the cigarettes were imported for storage in a bonded warehouse and that the payment of duty and VAT was deferred until the cigarettes were removed from the mentioned warehouse for home consumption.

[15] It is common cause that the two consignments of cigarettes were stored in the All Trans warehouse in Dekama Road, Wadeville and not in the Orkney warehouse of the Trust. The All Trans warehouse is also a registered bonded warehouse.

In the founding papers, it is alleged on behalf of the Trust that the storage of the goods in the All Trans warehouse instead of in the Orkney warehouse was "contrary to the ordinary practice in respect of such importations" but nothing was made of this by the applicant. This allegation attracted some criticism in the opposing affidavit when the deponent on behalf of the respondent pointed out that the Trust only registered its bonded warehouse in Orkney on 1 February 2010, which is after the event, to which I will refer, which gave rise to this dispute. This oversight was conceded by the applicants in reply.

[16] I add that the applicants initially also adopted the stance that these particular cigarettes were not imported by them and that they knew nothing about these consignments so that they could not be held liable for excise duty. In correspondence which was exchanged between the attorneys representing the applicants and representatives of the respondent, the latter presented evidence to the effect that the relevant documentation suggests that the Trust was indeed the importer of these consignments of cigarettes. This was dealt with in the founding papers. On behalf of the Trust, it was conceded, in the founding affidavit, that, for purposes of this application, the Trust will accept that it was the importer. It appears that a dispute on this subject existed between the parties until shortly before the application was launched. It is alleged on behalf of the Trust that the applicants were advised to make the concession because of the factual dispute which, presumably, would be difficult to resolve on affidavit.

[17] The event which triggered this dispute, and subsequent litigation, is an alleged armed robbery, during the night of 15 and 16 August 2009, at the All Trans warehouse during the course of which the relevant consignment of cigarettes imported by the Trust was stolen by the robbers together with a consignment of cigarettes imported by another importer, Savanna Tobacco Company SA, and other items, such as quantities of liquor.

[18] It is the case of the Trust that this state of affairs, amounts to a situation of *vis major* which entitles the Trust to a full rebate of excise duty on the stolen cigarettes in terms of the Rebate item. This explains the nature of the relief sought as quoted from the wording of the notice of motion.

[19] The application is opposed on various grounds, which I will briefly refer to.

[20] I turn to the wording of the Rebate item, and a proposed interpretation thereof.

Rebate item 412.09 ("the Rebate item")

[21] In Schedule 4/Part 1 one finds Rebate item 412.09 under the tariff heading "Goods lost, destroyed or damaged".

[22] It is convenient to quote the wording of the Rebate item (there is an exclusion relating to goods contemplated in Rebate item 497.02 in respect of which customs duty, in certain circumstances amounts to less than R2 500.00, which does not apply for present purposes and which exclusion I omit from what is quoted:

"Goods, proved to have been lost, destroyed or damaged on any single occasion in circumstances of *VIS MAJOR* or in such other circumstances as the Commissioner deems exceptional while such goods are –

(a) in any customs and excise warehouse or in any appointed transit shed or under the control of the Commissioner;

(b) being removed with deferment of payment of duty or under rebate of duty from a place in the Republic to any other place in terms of the provisions of this Act; or

(c) being stored in any rebate store-room, provided -

(i) no compensation in respect of the customs duty or fuel levy on such goods has been paid or is due to the owner by any other person;

(ii) such loss, destruction or damage was not due to any negligence or fraud on the part of the person liable for the duty; and

(iii) such goods did not enter into consumption."

[23] It is stipulated that the extent of the rebate is "full duty".

[24] As to the interpretation of this Rebate item, it seems to me that the following requires consideration:

- It is clear that the circumstances described in (a), (b) and (c) are couched in the alternative.

  Initially, counsel for the respondent argued that, inasmuch as this Rebate item may be applicable, the situation under consideration resorted under (c), referring to goods "being stored in any rebate store-room" but later, and quite

properly, counsel conceded that the situation which is applicable for present purposes is that listed in (a) as it is common cause that the goods were stored in a customs and excise warehouse.

This concession did not detract from the general tenor of the arguments offered on behalf of the respondent.

- It is clear that the three provisos listed as (i), (ii) and (iii) are not prescribed in the alternative but that all three the provisos have to be satisfied in order to successfully claim a rebate. The word "and" between (ii) and (iii) is telling in this regard.

- It was argued by Mr Vorster on behalf of the Trust that provisos (i), (ii) and (iii) forms part of situation (c) given the "lay-out of the Rebate item" so that it does not apply to situations (a) and (b).

I cannot, with respect, accept this argument. In the first place, there is no conceivable reason why the provisos would only apply to goods being stored in a rebate store-room as opposed to goods being stored in a customs and excise warehouse or goods being removed with deferment of payment of duty. In the second place, it seems to me to be patently clear from the wording and lay-out and also of the general nature of the meaning of the Rebate item, that the provisos apply to (a), (b) or (c), and not only to the latter.

- It was argued on behalf of the Trust that the stipulations with regard to situations (a), (b) or (c) as well as provisos (i), (ii) and (iii) do not apply to circumstances of *vis major* but only to the alternative "other circumstances as the Commissioner deems exceptional".

I am unable to accept this argument, and find myself in respectful agreement with the submissions made by Mr Van der Merwe, when he adopted the opposite stance.

It seems to me that in both sets of **circumstances** (emphasis added) either situations (a), (b) or (c) must apply and the provisos (i), (ii) and (iii) must be met.

It seems to me to be clear, from a general reading of the Rebate item as a whole, that the requirement is that the goods must be proved to have been lost, destroyed or damaged on any single occasion (this applies to both sets of **circumstances**) in **circumstances** of *vis major* or in **such other circumstances** as the Commissioner deems exceptional while such goods are ... There is no pause or comma or any other interruption between the description of these two sets of **circumstances** and the phrase "while such goods are". In my view, the reference to "**circumstances**" is a specific link between the two situations namely *vis major* and what the Commissioner deems to be exceptional so that stipulations (a), (b) or (c) and the three provisos must apply to both sets of **circumstances**.

In any event, there appears to be no valid reason why only the one set of circumstances should be subjected to these rather strenuous additional provisions. After all, in the case of both sets of circumstances the goods must be proved to have been lost, destroyed or damaged on any single occasion. The whole sentence from "proved to have been lost" to "while such goods are" which leads to the additional stipulations, is a free flowing affair, free of interruption of any kind. In my view, this supports the conclusion that both sets of **circumstances** fall to be subjected to the same rules namely (a), (b) or (c) followed by (i), (ii) and (iii).

- Finally, on the issue of interpreting the Rebate item, I turn to submissions made by Mr Van der Merwe in his very comprehensive supplementary heads of argument from which I quote the following extract:

> "The only circumstances in which the obligation to pay the duties and taxes will fall away are when the goods are somehow completely destroyed or rendered useless or '*irrevocably lost*' such as when there was a fire or the goods have been rendered useless by flooding. It is clear that it is the intention of the legislature that once goods enter the market, '*enter into consumption*', whether lawful or unlawful, and whether as a result of theft, a hi-jack, a robbery or a burglary then the custom duties and taxes on those goods must be paid."

The first leg of this argument, if I understand it correctly, is that the goods have to be rendered useless by fire or flooding before they can be proved to have been "lost" as foreshadowed in the introductory wording of the Rebate

item. I cannot agree with this submission: in my view, goods can also be "lost" and even "irrevocably lost" to coin counsel's phrase, if they are removed during an armed robbery, never to be retrieved again. They do not have to be destroyed by fire or flooding in order to bring the situation inside the ambit of the Rebate item.

The second leg of the argument, if I understand it correctly, appears to be that in the event of an armed robbery, which is inevitably aimed at selling the stolen goods to the public or some identified collaborating recipients, the goods in any event "enter into consumption" so that proviso (iii) is not complied with. Again, I find myself in respectful disagreement with this argument: it seems to me that when the robbery takes place, the goods did not yet enter into consumption in the spirit of proviso (iii). The goods were still stored in the customs and excise warehouse. The operative and relevant time appears to me to be before the robbery and not thereafter. I add that the reference by counsel, when dealing with when consumption is entered into, to "theft, a hi-jack or a burglary" in the same breath as "a robbery", is, with respect, inaccurate for present purposes: As will appear from what I attempt to illustrate later, *vis major*, on which the case of the applicants is based, may exist in the case of a robbery, but not in the case of theft. I also suggest later that the same would apply to a burglary. As for hi-jacking, which is not a crime independently defined in our criminal law text-books, it is not before me for decision, and I do not pronounce thereupon, but if it, for example, happens in situation (b) mentioned in the Rebate item (I cannot see it happening in

situation (a) or (c)) under circumstances tantamount to robbery, it may well invite a debate around *vis major*, as happened in the present case.

[25] In conclusion, I mention, although it is stating the obvious, that the **second set of circumstances**, namely such as the Commissioner deems exceptional, do not enter the equation for present purposes, because the Trust relies on circumstances of *vis major* for purposes of establishing its case.

***Vis major* and how it may or may not apply to the present case**

[26] In Wille's *Principles of South African Law*, 9th ed, the following is said at p849:

> "*Vis major*, or superior force, is some force, power or agency which cannot be resisted or controlled by the ordinary individual. The term is now used as including not only the acts of nature, vis divina, or 'act of God', but also the acts of man."

[27] By way of example of the "acts of man" the learned author refers to *Peters, Flamman & Co v Kokstad Municipality* 1919 AD 427 at 435 where the following is said:

> "For the authorities are clear that if a person is prevented from performing his contract by *vis major* or *casus fortuitus*, under which would be included such an act of state as we are concerned with in this appeal, he is discharged from liability."

The "act of state" referred to was the compulsory winding-up by the treasury of a contracting party's business rendering it impossible for him to perform in terms of the contract.

[28] In heads of argument on behalf of the applicant, I was also referred to *Davis v Lockstone* 1921 AD 153. A hotel guest had his valuables stolen from his room while he was absent and he successfully claimed the loss representing the value of the stolen articles from the proprietor of the hotel.

It was common cause that the goods had been stolen but there was no evidence of a break-in or violence being used in the form of a robbery.

At 158, the following is said:

> "'The action', he says, 'is allowed against the inn keepers, etc ... to repair and make good all damage caused by theft, rotting, or otherwise in whatever manner, that alone excepted which is proved to have happened through *damnum fatale* or *vis major*, as for instance through shipwreck or damage done by pirates. To which is not dissimilar the case where the hotel or stable being broken into, the travellers' goods or horses have been stolen, provided that there has been no accompanying neglect or *culpa* on the part of the inn keeper or ostler."

At 159, the learned Judge of Appeal, quoted the following extract from an older authority:

> "In this civil action for the property's value shipowners, inn keepers and stable keepers were supposed to have implicitly contracted that the property should be kept safely: and this was held to make them liable absolutely, unless the loss was occasioned by something in the way of inevitable fate or *vis major*,

which would not include theft as distinguished from robbery with violence not to be resisted."

[29] The learned author H C Cronje, *Customs and Excise Service* at 10-34, says the following while dealing with the subject of Rebate item 412.09:

"Regarding *casus fortuitus damnum fatale* and *vis major* see Wille's *Principles of South African Law* ...; *Gibson* ... and the cases and authorities there cited (in respect of carriage of goods). Such forces or events which are inevitable, unforeseeable and quite irresistable include, so it seems, robbery but not theft. If goods were lost, destroyed or damaged by these forces or events the carrier would escape liability but not if he was negligent in exposing the goods to such risks." (Emphasis added.)

[30] It is worth noting that already on 11 November 2013, and well before this application was launched in May 2014, the applicants' attorney wrote a letter to the respondent dealing with the contentious issues and referring the latter to some of the authorities which I already quoted. The attorney also referred respondent to the SARS: External Standard Operating Procedure Removal of Goods which contains the following guideline on p13:

"Robbery by armed or dangerous attackers can be regarded as *force majeure*, but theft in the ordinary cause (*sic*, should be course) will seldom be regarded as *force majeure*.

Theft is *prima facie* considered the fault of the licenced remover or representative ie by observing normal care the incidence of theft can be

avoided. The theft of goods is definitely not 'destruction or loss by accident'. Therefore in the case of theft the duty remains payable."

[31] The respondent attempted to counter this reference to the External Operating Procedure by pointing out that there is also a Code of Instruction which was attached to the answering affidavit.

The relevant passages in this Code of Instruction relied upon by the respondent stipulate:

"(a) In the event of a customs storage warehouse being burgled, duty and VAT should immediately be called for on any pilfered goods. No provision exists whereby the duty and/or VAT can be waived in these circumstances. Such goods are regarded as being removed/entered into home consumption.

(b) In the event of goods being destroyed by fire, flood water etc and the duty amounts to R2 500,00 or more, the licensee may apply for a rebate of the duty in terms of Rebate item 412.09 of Schedule 4. No provision exists whereby any duties or VAT amounting to less than R2 500,00 can be waived."

In the first place, I am of the view that the situation of a "storage warehouse being **burgled**", is not tantamount to a "robbery by armed or dangerous attackers" which, in terms of the External Standing Operating Procedure, is recognised as amounting to *vis major* in a proper case. It is also not the same as the "robbery with violence" recognised in *Davis v Lockstone, supra.*

Although the phrase "burglary" is seldom used in our criminal law text-books, a "burglar" is described in the *Concise Oxford Dictionary*, p122, as "one who enters building illegally ... with intent to commit felony". In the more comprehensive *Shorter Oxford English Dictionary*, volume 1 p309 "burglary" is defined as "the crime of entering a building (in English law formerly by night only) with intent to commit an arrestable offence". All this is a far cry from an armed robbery which is the crime which is regarded as *vis major* by the authorities quoted, and the circumstances recognised in the Rebate item as qualifying the importer for a total rebate in a proper case.

The second portion of the passage quoted from the Code of Instruction is misleading because it is an incomplete summary of the terms of the Rebate item in the sense that the circumstances of *vis major* are not even mentioned. Indeed, the document relied upon by the respondent is in harmony with the External Standard Operating Procedure relied upon by the applicants in the sense that in the latter document ordinary theft is also recognised as not qualifying the importer for a rebate.

I add that Mr Vorster, in his supplementary heads of argument, reminded me that the effective date of the document relied upon by the applicants is 14 March 2012 and the effective date of the document relied upon by the respondent is 14 May 2012. The alleged robbery on which the applicants rely in support of their case took place in August 2009, some two years earlier. Counsel points out that as there is no indication that these documents were intended to have retrospective effect, it would be "unsafe to

have regard thereto". Neither party raised this point in their affidavits. Indeed, it was the applicants who initiated the debate around these two documents.

Whatever the position, it seems, that at least at present, the respondent recognises that an armed robbery can be regarded as *vis major* for purposes of the Rebate item.

[32] In conclusion, I add that the applicants, correctly in my view, find broad support for their case in the provisions of section 76(2)(d) of the Act which stipulates:

> "(2) The Commissioner shall, subject to the provisions of subsection (4), consider any application for a refund or payment from any applicant who contends that he has paid any duty or other charge for which he was not liable or that he is entitled to any payment under this Act by reason of –
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) the goods concerned having been damaged, destroyed or irrecoverably lost by circumstances beyond his control prior to the release thereof for home consumption."

(Subsection (4) does not apply for present purposes.)

This sums up the case offered on behalf of the applicants. I have already expressed the view that "lost" in the spirit of the Rebate item, is not limited only to destruction by fire or flood, but can also be "lost" in that sense through a robbery, if the goods were never retrieved. The learned author *Cronje*, dealing with the same subject at

10-35, states that "irrecoverably lost" would require conclusive evidence that the goods cannot be recovered. My attention was not invited to any evidence to the effect that the goods lost during the robbery were ever recovered. Now, 9 years after the event, this is in any case not likely to happen.

[33] In the result, and for the reasons mentioned, I have come to the conclusion, and I find, that an armed robbery, in a proper case, can amount to circumstances of *vis major* as intended by the provisions of the Rebate item which could qualify the importer for a rebate.

[34] I turn to the evidence about the armed robbery relied upon.

Evidence about the armed robbery relied upon by the applicants in support of their case

[35] At the outset, it must be observed that the applicants, understandably, have no personal knowledge about the incident. They were not at the scene or even near the scene of the alleged crime.

[36] The best evidence available to the applicants, from the start, was the case docket obtained from the SAPS Elsburg with CAS number 214/08/2009 which contains affidavits of three security guards, which are annexed to the founding papers.

[37] The three security guards, Mr Wabeng, Mr Nyembenya and Mr Ramahlo were employed by Sabela Security (East branch).

The following evidence is attached to the founding papers:

- the full docket, including what is listed hereunder;
- the police statements of the three security guards;
- affidavits by staff members of the applicants' attorney describing efforts made to trace the security guards in order to obtain their supporting affidavits;
- the supporting affidavit by Mr Moshesh Wabeng which was handed up by agreement during the hearing before me in which Mr Wabeng confirms the correctness of his police statement;
- the report of Sabela security;
- importantly, the SARS Post Clearance Inspection Report dated 26 August 2009 and compiled by lead officer Ms Brenda Koekemoer as well as a colleague Mr Carel Jacobs. Ms Koekemoer is also the deponent to the respondent's opposing affidavit;
- a report by Chubb which was the armed response company involved.

[38] Although there was some suggestion in the opposing papers that the applicants rely on hearsay evidence, this issue was not pressed with any force before me. In any event, given the nature of the evidence, including the report by SARS itself, clearly recognising that the occurrence took place and that the relevant consignments of cigarettes were removed during the robbery, I have no hesitation in exercising my discretion, inasmuch as it may be necessary, to allow this evidence in the interest of justice by exercising my discretion in favour of the applicants in terms of the provisions of section 3(1) of the Law of Evidence Amendment Act 45 of 1988.

[39] Broadly speaking, it can be said that it appears from the evidence that on 15 August 2009, at about 21:00, while the security guards were stationed at or patrolling the

premises of All Trans in Dekama Road, Wadeville, they were approached by a number of African males armed with firearms. The robbers apprehended the security guards. The robbers then took the security guards' uniforms and tied them up in the guardroom. When the security supervisor came to check the occurrence book a firearm was also pointed at him and all the guards were then put in a toilet. Boxes of cigarettes from the warehouse were loaded by the robbers, assisted by at least one of the security guards under duress onto trucks together with certain boxes of alcohol.

[40] This is an extract of the affidavit made by security guard Kgotso Ramahlo to the police on 25 August 2009:

> "During the tour of my duties at approximately 21:00 I was seated alone in the guardroom. I saw two people coming to the guardroom. One was dressed in our uniform jacket. I presumed they were my two colleagues who were also on duty. The two people just entered the room and grabbed me. I then realised that the two were not my colleagues. They asked me how many were we on duty and after telling them that we were three they took me to where my two colleagues were. I found them lying down with their hands and legs tied with shoe-laces. One of the suspects took my uniform jacket and put it on. The three of us were taken to a toilet.
>
> Myself and Kenneth were taken to a store-room whereupon we were ordered to help load the liquor and cigarette boxes into the three trucks. The three trucks left the premises in the early morning and myself and Kenneth were left in the store-room. We came out and only found the police in the yard. Supervisor

Moses was in their company. The supervisor also told me that he too was tied up by the suspects ..."

[41] This is an extract from the police affidavit of Ntembeko Kenneth Nyembenya stating that he was on duty on Saturday 15 August 2009:

"On the same day at about 21:00 I saw two black males one with a Sabela security uniform. They went into the guardroom where I was sitting and it was dark. They came to me and told me to stand up and the one who was wearing the uniform had a gun pointing at me telling me that he will shoot me and the other guy had a knife and told me that he will stab me.

I complied with the instructions and they searched me and took my uniform that I was wearing and my black Nokia 600 cell phone with a value of R800,00. They took me with them to the other guys. When I got there I found out that one of our security guards was already been tied up on his hands. Then they took out my shoe-laces off my shoes and tied me up on my hands."

The witness goes on to say that the robbers went to fetch another security guard, brought him to the rest of them and locked them all up in the toilet. After midnight, he was instructed by the robbers to report on the radio that all was well. When he resisted, the robber that was wearing his uniform threatened him with a firearm and slapped him. When he fell down he was kicked and taken back to the toilet. The attack on this security official, Kenneth, was confirmed in the Sabela report which states that Kenneth was later rushed to hospital.

[42] The police affidavit which the witness Moshesh Wabeng made on 16 August 2009, the day after the robbery, and the correctness of which he confirmed in his supporting affidavit handed up during the hearing which he signed after his whereabouts were traced, reads that he was employed by Sabela Security East and it contains his telephone numbers and other particulars. Here is an extract:

> "On 15 August 2009 at around 21:00 in the evening while I was patrolling at All Trans as a security guard I went around the building while I was busy moving around I was approached by four African males who pointed me with four firearms. They were possessing four 9mm pistols. I was then instructed to take off my uniform. After I took off my uniform they asked me how many we are. I then relayed that we are three. They went on to the guardroom where my other colleague was. After some few minutes they came back with my colleague Kenneth who was tied with shoe-laces. We were then kept in the corner, since they were wearing our uniforms. The supervisor came to check the Occurrence book, but he could not notice them. The suspects then pointed the supervisor with the firearm and took all of us and kept us in a toilet. The suspects and my two colleagues went inside the warehouse and three 1 tonner trucks came inside the warehouse. Boxes of cigarettes were loaded inside the trucks as well as boxes of alcohol Richards ..."

[43] It is clear that the security guards corroborate each other in all material respects. At least on the overwhelming probabilities, they were the victims of an armed robbery. They were outnumbered by well organised armed robbers. They were tied up and assaulted. I add that according to affidavits by staff members of the applicants' attorney, Mr Wabeng was ultimately traced and he signed the supporting affidavit

referred to. Mr Nyembenya was traced to Katlehong. He refused to sign an affidavit, not because of the contents of his police affidavit, but because his services were terminated by his employer. Mr Ramahlo could not be traced.

In my view, the circumstances that prevailed were those of *vis major* as described and recognised by the relevant authorities referred to. There is no evidence whatsoever that they were able to prevent this robbery or that there was any negligence on their part, let alone on the part of the employer or the applicants. It is also clear, on the overwhelming evidence, that the stolen cigarettes had not yet entered into consumption when it was removed from the warehouse by the robbers.

[44] I turn to the all important SARS Post Clearance Inspection Report. This is part of the founding papers. As I mentioned, it was signed by lead officer Ms Brenda Koekemoer and team leader Mr Carel Jacobs on 26 August 2009. These officials consulted with Ms Doris Wagner, the All Trans warehouse manageress on 19 August 2009 and with Mr Keith Mordaunt, the managing member, on the same date. They also consulted Messrs Bruwer and Du Preez of Marwalo Warehousing and confirmed that the stolen goods had been removed from the All Trans bonded warehouse during the week-end of 15 and 16 August 2009. A "break-in" at the bonded warehouse was recorded.

In the report it is confirmed that 614 master cases of cigarettes were looted, 414 belonging to Savanna Tobacco Company of South Africa and 200 master cases belonging to the Da Encarnaçäo Family Trust t/a Classic Tobacco Wholesalers. Details of the various containers, the brand names and so on describing the cigarettes appear from the report. It is common cause that the 200 cases of cigarettes forming

the subject of this disputes were those stolen during the robbery. The duties and VAT on the stolen cigarettes was assessed, in terms of the SARS report, in the amount of R1 018 006,07 and a letter of demand was addressed to the applicants for payment of this amount on 26 August 2009. The amount was later reduced to R910 171,42. According to the report, the incident which occurred is described as a "break-in". It was not explained to me what the difference is between this amount and the R58 000,00 refund claimed, or whether this amount was ever paid. Nothing turns on this for present purposes.

[45] The Sabela report, by and large, confirms details of the incident. It is also stated that the alarm system was disconnected and the camera surveilance equipment was removed. The remark was made that "the intruders were methodical in their approach which means that they have had inside information as they knew exactly where to go and what to go for". On behalf of the respondents, this information was submitted as representing a clear sign that this was, after all, not a robbery but no more than a theft as it happened with the co-operation of insiders. There is no evidence to this effect as far as the security guards and their version is concerned. This is no more than speculation. Even if the robbers had some inside information it does not detract from the fact that there was a clear description of an armed robbery, something which was not controverted by the respondent. In fact, the whole incident is not disputed. The evidence of the security guards is not disputed. There is no basis to reject the clear evidence that an armed robbery took place.

[46] The report by Chubb, dated 18 August 2009 indicates that a phone call was received at 05:45 on 16 August. This presumably happened because the alarm system had been

disconnected. At 05:48 armed response was dispatched and it was discovered that an unknown number of suspects gained entry by breaking open the front door. Mr Wagner reported that an undisclosed amount of cigarettes and liquor had been stolen.

[47] Against this background, and for all reasons mentioned, I have come to the conclusion, and I find, that the cigarettes were stolen, and never retrieved, during an armed robbery under circumstances of *vis major*.

[48] I turn to the final subject for consideration, namely whether evidence pleaded by the applicants only in the replying affidavit and not in the founding affidavit ought to be allowed or whether it ought to be disregarded.

Should certain evidence pleaded only in the replying affidavit be accepted as part of the record?

[49] The main thrust of the respondent's argument that the evidence pleaded in the replying affidavit should be disregarded is the following: it has been the case of the applicants throughout that the duty to comply with provisos (i), (ii) and (iii) mentioned in the Rebate item does not apply when the goods were lost, destroyed or damaged in circumstances of *vis major*. It only applies, and has to be established, when the goods were lost, destroyed or damaged "in such other circumstances as the Commissioner deems exceptional". Indeed, as I already pointed out, counsel for the applicants persisted with this argument throughout. I have already rejected this argument. It is a relatively complex legal argument.

Because of the stance adopted by the applicants, they did not establish a case in the founding affidavit that there was compliance with the requirements of the three provisos.

When the respondent raised the issue in the opposing affidavit, contending that the provisos had not been complied with, the applicants, in the replying affidavit, persisted with their attitude that the provisos do not apply on a proper interpretation of the Rebate item, but pleaded compliance in any event, "to the extent that this may be relevant".

The issue was pleaded as follows in the replying affidavit:

"6.2 Legal argument will be addressed to the Honourable Court with regard to the proper interpretation of the Rebate item. However, to the extent that this may be relevant, I state the following:

6.2.1 The cigarettes were present in the customs and excise warehouse of All Trans in Wadeville when the robbery took place. No compensation in respect of the customs duty has been paid or is due to the Trust by any other person. In this regard, the Trust had no insurance cover in respect of the customs duty in question.

6.2.2 The loss of the cigarettes was not due to any negligence or fraud on the part of the Trust or its trustees as the robbery took place from the warehouse of the Trust's clearing agent, All Trans which is geographically far removed from the Trust's place of business and customs and excise warehouse in Orkney.

6.2.3 The cigarettes had not been entered for home consumption when the robbery occurred.

6.2.4 Should respondent be of the view that a further affidavit should be filed by the respondent to deal with any of the aforegoing averments, the respondent is invited to file such affidavit within a reasonable time of receipt of this affidavit. The applicants will not object to the filing of such affidavit.

6.2.5 In this regard I respectfully point out that, as far as the applicability of the Rebate item is concerned, SARS' stance as communicated in the last paragraph of the 2nd page of annexure 'FA2' to the founding affidavit was simply that the circumstances in issue did not constitute *vis major*.

6.2.6 The correspondence between the applicants' attorneys and the respondent dealt with the proviso in paragraph (c) of the Rebate item as dealing, not with *vis major*, but with such other circumstances which the Commissioner deems exceptional (in this regard I refer to paragraph 20 on p4 of annexure 'FA21' and also paragraphs 18 and 19 on p5 of 'FA25' to the founding affidavit)."

[50] The invitation to the respondent to file a further affidavit on the issue was not accepted. The invitation was extended in the replying affidavit dated August 2014 and the case was only heard in May 2016.

[51] Turning to the correspondence on the issue which was exchanged between the applicants' attorney and the respondent, and referred to in paragraph 6.2.6 of the replying affidavit, it is useful to record that, already on 11 November 2013, in letter "FA25", the applicants' attorney says the following in paragraph 27 of that letter:

> "27. Although we are of the view that item (c)(i) to (iii) is only applicable in the event of '*such other circumstances as the Commissioner deems exceptional*', it is in any event confirmed that:
>
> 27.1 our client has not received any compensation from any party in relation to the duties thereon;
>
> 27.2 the loss was not a result of negligence or fraudulent activities of our client; and
>
> 27.3 our client cannot comment regarding whether the cargo has entered into home consumption."

Where this letter forms part of the founding papers, it can be said that the stance of the applicants relating to compliance with the provisos if it were to be found that the compliance therewith was applicable to this case, was already disclosed in the founding papers in November 2013, some 7 months before the application was launched in May 2014.

Against this background I am of the view that it cannot properly be argued that the applicants are seeking to introduce a new case in the replying affidavit: they are simply repeating evidence already disclosed before the launch of the application to support an argument that the provisos were in any event complied with if their legal

argument about the proper interpretation of the Rebate item (that the provisos do not apply) were to be rejected.

[52] In support of his argument that the evidence introduced in the replying affidavit about compliance with the provisos fall to be disregarded, the respondent relied on the well-known case of *Titty's Bar and Bottle Store v A.B.C. Garage and Others* 1974 4 SA 362 (TPD) where the following was said at 368H-369C:

> "It has always been the practice of the Courts in South Africa to strike out matter in replying affidavits which should have appeared in petitions or founding affidavits, including facts to establish *locus standi* or the jurisdiction of the Court ... In my view this practice still prevails ... It lies, of course, in the discretion of the Court in each particular case to decide whether the applicant's founding affidavit contains sufficient allegations for the establishment of his case. Courts do not normally countenance a mere skeleton of a case in the founding affidavit, which skeleton is then sought to be covered in flesh in the replying affidavit. In the present case, the applicant has not made out even a skeleton of a case in so far as his *locus standi* rests on a *stipulatio alteri* ..."

[53] I turn to a few other authorities on the subject:

- In *Juta and Company Ltd and Others v De Koker and Others* 1994 3 SA 499 (TPD) the learned Judge quotes the following extract from *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger* 1976 2 SA 701 (D) at 510G-H of the *Juta* judgment:

"In consideration of the question whether to permit or to strike out additional facts or grounds for relief raised in the replying affidavit, a distinction must, necessarily, be drawn between a case in which the new material is first brought to light by the applicant who knew of it at the time when his founding affidavit was prepared and a case in which facts alleged in the respondent's answering affidavit reveal the existence or possible existence of a further ground for relief sought by the applicant. In the latter type of case the Court would obviously more readily allow an applicant in his replying affidavit to utilise and enlarge upon what has been revealed by the respondent and to set up such additional ground for relief as might arise therefrom."

- In *Shephard v Tuckers Land and Development Corporation (1)* 1978 1 SA 173 (W) at 177H-178A the learned Judge comments as follows on the principle laid down in *Titty's Bar* to which I have referred:

  "This is not however an absolute rule. It is not a law of the Medes and Persians. The Court has a discretion to allow new matter to remain in a replying affidavit, giving the respondent the opportunity to deal with it in a second set of answering affidavits. This indulgence, however, will only be allowed in special or exceptional circumstances ..."

- In *Triomf Kunsmis (Edms) Bpk v AE & CI Bpk en Andere* 1984 2 SA 261 (W) the learned Judge, after referring to what was said in *Shephard*, said the following at 269E-G:

> "My indruk is dat hierdie reëls soos aldus geformuleer hoofsaaklik van toepassing is op wat gewoonlik beskou word as 'new matter', wat nie sinoniem is met 'n nuwe oorsaak van aksie nie. In die geval van 'n nuwe oorsaak van aksie wat die bestaande een vervang kan ek my kwalik omstandighede indink wat nie die onvermydelike gevolg het dat die proses, soos op daardie stadium, afgewys word nie. Dit is een ding om slegs ekstra feite ter ondersteuning van 'n bepaalde oorsaak van aksie, óf te onderstreep óf vir die eerste keer aan te haal in 'n repliserende verklaring. Dit is 'n ander ding om geheel en al bollemakiesie te slaan ten opsigte van gedingsoorsaak wat die gedingvoering in 'n totaal verskillende rigting stuur."

[54] It seems to me, that the following remarks are appropriate for present purposes against the background of the aforesaid authorities:

- There is no question of the applicants seeking to introduce a new cause of action, as I already pointed out, let alone performing a "bollemakiesie" in the celebrated words of the learned Judge in *Triomf*.

- It is a question of the applicants, as I pointed out, repeating evidence already disclosed before the application was launched and appearing from annexures to the founding affidavit. This was done in response to what was said in the opposing affidavit reflecting the attitude of the respondent on the proper interpretation of the Rebate item, a stance evidently not earlier adopted by the respondent who only attacked the question of whether or not there were circumstances of *vis major*.

- It is a question of maintaining the applicants' stance on the proper interpretation of the Rebate item but dealing with the evidence that may be required in the event of the somewhat complex legal argument not being upheld.

- I have already rejected the legal argument but found that the three provisos were complied with.

[55] Inasmuch as "special or exceptional circumstances" may have been required as suggested by the learned Judge in *Shephard*, I am of the view that these are present, for the reasons mentioned, particularly where the respondent was invited to file further affidavits.

[56] In the circumstances, I am of the view that the evidence on this particular subject pleaded in the replying affidavit ought to be taken into account.

Conclusion

[57] In all the circumstances, I have come to the conclusion, and I find, that the application should succeed and the costs should follow the result.

The order

[58] I make the following order:

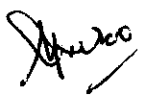
1. The applicants' appeal against the respondent's determinations dated 18 March 2013 (annexure "**FA2**" to the founding affidavit) and 11 September 2013

(annexure "**FA3**" to the founding affidavit), alternatively against the respondent's determination dated 18 March 2013 which was confirmed by the respondent on 11 September 2013, is upheld.

2. The said determinations, alternatively determination are set aside and substituted by a determination that the 200 cases of Remington Gold cigarettes imported into the Republic of South Africa on or about 17 June 2009 and 26 June 2009, as described in annexures "**FA8**" and "**FA12**" to the founding affidavit, qualify for a full rebate of customs duty in terms of Rebate item 412.09 in Schedule 4 to the Customs and Excise Act 91 of 1964.

3. The respondent is ordered to pay to the applicants the amount of R58 877,52 together with interest on the said amount calculated at the rate of 15,5% per annum (alternatively the applicable *mora* rate of interest from time to time) from 30 October 2009 to date of payment.

4. The respondent is ordered to pay the applicants' costs of this application, including the costs flowing from the employment of senior counsel.



W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

33302-2014

HEARD ON: 6 MAY 2016
FOR THE APPLICANTS: J P VORSTER SC
INSTRUCTED BY: SHEPSTONE & WYLIE ATTORNEYS
FOR THE RESPONDENT: M P VAN DER MERWE SC
INSTRUCTED BY: THE STATE ATTORNEY