IN THE HIGH COURT OF SWAZILAND

Civil case No: 11/2013

In the matter between:

C.I.C. (PTY) Ltd **APPLICANT**

AND

SWAZILAND REVENUE AUTHORITY **FIRST RESPONDENT**

FIRST NATIONAL BANK **SECOND RESPONDENT**

Neutral citation: *C.I.C. (Pty) Ltd v. Swaziland Revenue Authority & Another (11/2013) [2013] SZHC87 (2013)*

Coram: **M.C.B. MAPHALALA, J**

For applicant Advocate Joubert SC instructed by Magagula Hlophe Attorneys

For First Respondent Attorney Nkosinathi Manzini

Summary

Value Added Tax – application to review the decision of the first respondent requiring it to pay 14% tax on its goods exported to Mozambique on the grounds that they are zero rated – applicant further sought an order reviewing the seizure of its assets from its bank and closure of its business without a Court Order – application dismissed on the basis that the Act provides for the levying of VAT on all goods not delivered outside Swaziland – the Act further authorises the seizure of assets and closure of businesses for non-payment of VAT.

JUDGMENT
17 APRIL 2013

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[1] An urgent application was instituted for an order in the following terms: Firstly, reviewing, correcting and/or setting aside the first respondent's decisions of the 12th November 2012 and 4th January 2012 requiring the applicant to pay 14% value Added Tax for goods exported by the applicant to Mozambique. Secondly, reviewing, correcting and/or setting aside as unconstitutional the respondents' decision and/or action of the 14th December 2012 in terms of which they took an amount of E996 422.90 (nine hundred and ninety six thousand four hundred and twenty two emalangeni ninety cents) from the applicant's bank account without a court order allegedly for VAT owing on export goods.

[2] Thirdly, reviewing, correcting and/or setting aside as irregular and /or unconstitutional the first respondent's decision of the 14th December 2012 in terms of which the first respondent shut down the business of the applicant for non-payment of V.A.T. allegedly owing on exported goods without due process or court order and/or without affording the applicant a hearing prior to making such decision.

[3] Fourthly, declaring that the provisions of the first respondent's value Added Tax guidelines regarding the payment of 14% V.A.T. on export goods are null and void insofar as they are inconsistent with and/or contrary to the provisions of the Value Added Tax Act of 2011 which

provides that export of goods are zero rated and are therefore not subject to 14% V.A.T.

[4] Fifthly, declaring that the applicant is not liable to pay 14% V.A.T. on export goods since same are zero rated in terms of the Value Added Tax Act of 2011. Sixthly, directing the respondents to return to the applicant forthwith the amount of E996 422.90 (nine hundred and ninety six thousand four hundred and twenty two emalangeni ninety cents) that was unlawfully seized by the first respondent from the applicant without a court order.

[5] Seventh, interdicting and restraining the first respondent from effecting any further seizure of the applicant's assets and/or sealing the applicant's business premises on the basis of V.A.T. allegedly owing on exported goods pending finalization of this application. The applicant further sought an order for costs including certified costs of counsel.

[6] The applicant alleges that the first respondent issued a directive to the second respondent bank to transfer an amount of E996 422.90 (nine hundred and ninety six thousand four hundred and twenty two emalangeni ninety cents) from the applicant's account held with the second respondent for V.A.T. allegedly owing. The applicant argued that this was done without a court order and without any due legal

process. In addition the applicant alleged that the seizure of its assets by the first respondent as well as the shutting down and sealing of its business premises was done without a court order, and without affording the applicant a hearing in accordance with section 33 of the Constitution.

[7] The applicant doesn't only seek the review of the first respondent's decisions aforesaid but it further seeks a declaratory order that the levying of 14% V.A.T. on its goods is unlawful since same are zero rated in terms of the Act, and not subject to V.A.T. The applicant alleges that on the 12th November 2012 and 4th January 2013, the first respondent levied 14% V.A.T. amounting to E2 925 011.61 (two million nine hundred and twenty five thousand and eleven emalangeni sixty one cents) as well as E633 935.50 (six hundred and thirty three thousand nine hundred and thirty five emalangeni fifty cents) respectively on goods that had been exported by the applicant to Mozambique.

[8] The applicant contends that it is involved in the business of importing liquor from the Republic of South Africa for export to Mozambique; and, that its sister company in Swaziland is Ocean Traders International Swaziland (PTY) Ltd. The applicant's sister companies import distilled liquor from overseas countries including but not limited to Scotland. The applicant argued that it had been operating business in this country

for a period of over ten years. It was further argued on behalf of the applicant that the first respondent had made a representation to the applicant that it was not liable for V.A.T.; and, that it was this representation which induced the applicant to maintain its investment in the country. The applicant argued that the first respondent was therefore precluded from alleging that it was now liable for V.A.T.

[9] The applicant explained that prior to the introduction of V.A.T., export goods were not subject to the payment of sales tax on the understanding that such goods were not for local consumption; and, that consequently all goods that were exported by applicant to Mozambique were not subject to the payment of sales tax. The applicant argued that the coming into effect of the Value Added Tax Act of 2011 did not change the position because V.A.T. by its very nature is a domestic tax levied on goods consumed locally; hence, the legislature provided that export goods are zero-rated and not subject to the payment of 14% V.A.T.

[10] The applicant argued that when V.A.T. came into effect the first respondent designed a new system of dealing with export goods; this system entails that the goods are inspected at the point of entry at Ngwenya Border Post by the first respondent. The inspection serves to ascertain that the consignment of goods tallies with the information in the documents submitted by the applicant. The documents are then

stamped approving entry of the goods into the country. The goods are further sealed by the first respondent on board the truck in order to ensure that nobody tempers with the goods until they reach the applicant's bonded warehouse in Matsapha; this is where the goods are kept pending exportation.

[11] At the warehouse the goods are inspected again in order to ensure that the seals have not been tempered with; if satisfied, the first respondent officers then signs the relevant documents confirming that there has been no tempering with the goods. This is done before the goods are off-loaded from the truck.

[12] Similarly, when the goods have to be exported, officials from the first respondent supervise the loading of the goods from the warehouse to the trucks; the trucks used for export have to comply with certain specifications required by the first respondent and are further marked "sealable trucks/vehicles". The officials seal the trucks, complete and sign the necessary forms relating to the exportation of the consignment, and, further stamp the documents.

[13] When the trucks reach Lomahasha Border post, the export goods are inspected again and the quantities verified in order to ascertain that the seal has not been tempered with. In addition the officials will sign and

stamp the documents allowing the trucks to go through the border. On the Mozambique Border Post, the Customs officers will also sign and stamp the export documents as proof that the goods have been exported into Mozambique. The export documents showing the historical movement of the goods is then taken by the officers of the first respondent as proof that the particular consignment of goods has been exported to Mozambique.

[14] On the 7th November 2012 officials from the first respondent inspected the applicant's premises with a view to ascertain the nature of the applicant's business and to inspect the bonded warehouse facility. It was explained to them that customers from Mozambique fetch the goods from the warehouse in Matsapha in their own trucks; payment of the goods is done at the warehouse. The officials from the first respondent advised the applicant that it was liable to pay the 14% V.A.T. for the goods because their customers from Mozambique collect the goods from Matsapha and pay for them there.

[15] The first respondent wrote a letter dated 12th November 2012 informing the applicant formally that it was liable to pay 14% V.A.T. for its exports to Mozambique, and, that in terms of the first respondent's guidelines such a method is categorised as an indirect export and liable to V.A.T. The first respondent, in the letter, further demanded from the

applicant proof that the goods which had been allegedly exported from April 2012 to September 2012 had indeed been exported to Mozambique. The applicant argued that the Value Added Tax Act, however did not categorise exports as direct and indirect export as the guidelines of the first respondent.

[16] According to the applicant the requisite proof was forwarded to the first respondent showing the historical movement of the goods from South Africa to Matsapha warehouse as well as to Mozambique by means of a covering letter dated 30th November 2012; the proof was in the form of documents with the requisite official stamps from the Customs officials in South Africa, Swaziland and Mozambique.

[17] On the 30th November 2012 the first respondent demanded payment of the 14% V.A.T. on the goods that had been exported between April 2012 and September 2012 in the amount of E2 925 011.98 (two million nine hundred and twenty five thousand and eleven emalangeni ninety eight cents) within seven days. The applicant through its attorneys by letter dated 12th December 2012 requested a meeting with the first respondent with regard to the V.A.T. issue, the request was declined; and, the applicant demanded payment and threatened to invoke the provisions of the Value Added Tax to close down the company's operations. The applicant decried the fact that the first respondent had

denied them the opportunity to explain why it should not be liable to V.A.T. payment.

[18] On the 18th December 2012 the applicant was informed by its bankers, the second respondent, that the first respondent had issued a directive in terms of the Value Added Tax demanding payment of E2 925 011.98 (two million nine hundred and twenty five thousand and eleven emalangeni ninety eight cents). The applicant further alleged that on the same day five officials from the first respondent arrived at its premises in the company of eight heavily armed police officers stormed the reception office and demanded payment failing which they would close the business. An intervention by the applicant's attorney was not helpful. The applicant's attorney told the first respondent's officials that the legality of the seizure of applicant's assets as well as the closing down of the business was unlawful partly because the V.A.T. demanded was disputed and partly because they had no court order authorizing their actions. However, the first respondent's attorneys stated that they were not prepared to enter into any negotiations or discussions with the applicant.

[19] The first respondent's officers then demanded the stock inventory from the applicant's Public Officer; they took the inventory and verified the numbers by counting the actual stock in the bonded warehouses.

Thereafter, they sealed the warehouse ensuring that nothing could be taken out or brought into the warehouse. In addition they posted their own security personnel at the gate who would remain there for an indefinite period to monitor and ensure that no goods were removed from the premises. The applicant argued that the actions of the first respondent were unlawful in the absence of a court order or an opportunity afforded to them to be heard in terms of section 33 of the Constitution of 2005. The first respondent in doing this purported to act in terms of section 34 of the Value Added Tax Act.

[20] The applicant argued that pursuant to the seizure of its financial assets and the closure of its business, it had agreed with the first respondent that it would furnish a bank guarantee in respect of the balance of the V.A.T. owing in the amount of E1 928 588.63 (one million nine hundred and twenty eight thousand five hundred and eighty eight emalangeni sixty three cents) pending the determination of whether or not the applicant was liable to pay V.A.T. Subsequent meetings were held between the parties but no amicable solution was found.

[21] On the 4th January 2013, the applicant received a letter from the first respondent demanding a further payment of E633 935.50 (six hundred and thirty three thousand nine hundred and thirty five emalangeni fifty cents) in respect of V.A.T. allegedly owing in respect of goods sold

during October 2012 and exported to Mozambique. The first respondent further threatened to seize applicant's assets and close down the business without a court order if payment was not made in full within seven days.

[22] This review application is three-fold: firstly, to review the decision of the first respondent of the 12th November 2012 and 4th January 2013 to levy 14% V.A.T. on export goods. Secondly, to review the decision of the first and second respondents in effecting a seizure of applicant's funds kept with the second respondent bank without a court order. Thirdly, to review the first respondent's decision to close down applicant's business without a court order and purporting to act in terms of section 44 of the Value Added Tax Act.

[23] The applicant argued that the indirect export in terms of the first respondent's V.A.T. Guidelines are in conflict with the Act in so far as indirect exports are subjected to payment of 14% V.A.T. by the exporters; it was argued that in terms of the Act, there was a zero-rating of supplies. It was argued on behalf of the applicant that in terms of section 1 (a) of the Second Schedule of the Act read together with section 24 (4) of the Act, the supply of goods or services is zero rated for V.A.T. purposes if they are exported from Swaziland as part of the supply.

[24] It was further argued on behalf of the applicant that in terms of section 2 (a) of the Second Schedule, documentary proof is to be furnished to the Commissioner General to show that goods have been delivered to an address outside Swaziland. The applicant argued that this has always been done in respect of their exports from Swaziland to Mozambique. It was further argued on behalf of the applicant that the V.A.T. Act of 2011 does not categorise export goods between direct and indirect exports; hence, the first respondent's V.A.T. Guidelines were to that extent inconsistent with the Statute.

[25] The applicant argued that the first respondent levied V.A.T. on the basis of its Guidelines that the export was indirect. It was argued that in so doing the first respondent took into account irrelevant considerations and acted ultra vires the V.A.T. Act; and, that consequently, it committed a gross irregularity that has resulted in a miscarriage of justice.

[26] It was further argued on behalf of the applicant that the first respondent in making its decision which was adverse to the applicant did not afford the applicant a hearing. In addition it was argued on applicant's behalf that the first respondent's decision was arrived at arbitrarily on the ground that the first respondent did not take into account evidence provided that the goods were actually exported and there were no

discrepancies found in the documentation. It was argued further that the collection of the goods from the Matsapha Warehouse by the Mozambican customers is not evidence that the goods are delivered at the warehouse and not in Mozambique.

[27] The applicant also argued that section 19 (2) of the Constitution provides that a person shall not be compulsorily deprived of property or any interest in or right over property except where the taking of possession or the acquisition is made under a court order. It was argued on applicant's behalf that the seizure of applicant's monies from its bank accounts was done without a court order; hence, payments to suppliers by the applicant could not be honoured by the bank.

[28] It was further argued on applicant's behalf that in closing down the business the first respondent acted in the manner that was unreasonable and grossly unfair contrary to section 33 of the Constitution. The applicant decried the fact that it was not afforded a hearing in circumstances where it disputed the levying of V.A.T. on its exported goods. Similarly, it argued that there was no court order authorising the closing down of the business but that the first respondent paraded heavily armed police officers to effect its unlawful actions. They also argued that pursuant to the first respondent's unlawful actions, its

business has been greatly prejudiced to the extent of adversely affecting its listing in the Johannesburg Stock Exchange.

[29] The applicant also seeks a declaratory order that it is not liable to pay V.A.T. on its goods exported to Mozambique or other places on the basis that export goods are zero rated in terms of section 24 (4) read together with section 1 (a) of the Second Schedule of the Act. It was argued that in terms of section 2 (9) of the Second Schedule, goods are exported from Swaziland if they are delivered to or made available at an address outside Swaziland. To that extent it was argued that delivery takes place when the goods reach Mozambique and not when they are collected by Mozambican customers at the Matsapha Warehouse.

[30] The applicant argued that the matter was urgent because it was unable to trade because it doesn't know where it stands with regard to the V.A.T. In addition, the applicant sought an interim order for a stay on the payment of V.A.T. on exported goods pending the determination of the proceedings for review on the legality of levying V.A.T. on its export goods. It was argued that the applicant stands to suffer irreparable harm if the interim order was not issued because the first respondent may continue to seize the applicant's assets and close down its business. It was further argued that the applicant did not have an alternative relief in the circumstances.

[31] The applicant's Manageress Dumsile Ndzimandze deposed to a confirmatory affidavit in which she stated that the first respondent seized an amount of E996 422.98 (nine hundred and ninety six thousand four hundred and twenty two emalangeni ninety eight cents) from the applicant's bank account held with the second respondent, and, further closed down the applicant's business. She argued that this was done without a court order. Similarly, the applicant's attorney deposed to a confirmatory affidavit confirming what was being said about him in the founding affidavit by the Managing Director of the applicant Hendrik Albertus Johannes Theart.

[32] The application is opposed by the first respondent. In *limine* it argued as follows: Firstly, that Hendrik Albertus Johannes Theart who deposed to the founding affidavit has no *locus standi* to depose to the affidavit on behalf of the applicant. Secondly, that the application is not urgent. It was alleged by the applicant that the reason for urgency is that it is unable to trade because it doesn't know its status with regard to the payment of V.A.T. The first respondent disputes this on the basis that after the applicant had provided the guarantee as security for the V.A.T. due, the business premises were opened and that the applicant is currently in occupation of its premises and continuing with its trade. The first respondent further argued that from the 12th November 2012

the applicant knew the position which the first respondent had taken and that this was duly communicated to the applicant.

[33] As a further basis for the urgency the applicant has alleged that it was further made to pay an additional E600 000.00 (six hundred thousand emalangeni) for V.A.T. for October 2012, and, that its business will incur huge losses and might close down notwithstanding that it was not liable to pay the said amount. In response the first respondent argued that the security is a statutory requirement, and, that the applicant cannot raise urgency to avoid a statutory obligation.

[34] Thirdly, that the applicant failed to exhaust all the available remedies as provided by the V.A.T. Act. It was argued on behalf of the first respondent that the applicant was obliged to invoke the provisions of section 35 of the Act and lodge an objection with the Commissioner-General for a decision. However, this point of law overlooks the fact that soon after the Acting Commissioner for Domestic Affairs had made the decision on the 12th November 2012, the Commissioner-General confirmed the decision on the 14th December 2012 and 4th January 2013; in addition, the Commissioner-General issued a notice to the second respondent bank to pay E2 925 011.61 (two million nine hundred and twenty five thousand and eleven emalangeni sixty one cents) from the applicant's bank account. This point is bound to fail.

[35] On the merits the first respondent argued that the seizure of applicant's assets was lawful and duly authorised by sections 44 and 45 of the Act which empowers the first respondent to close down businesses liable for VAT in the event they failed to remit the amount payable and to further recover tax from third parties. It was argued on behalf of the first respondent that these are statutory powers that do not require the sanction of a Court Order.

[36] The first respondent denied that the applicant exported the goods to Mozambique as alleged. It was argued that this was apparent from the applicant's documents under a filing notice dated 10th January 2013 that the export documents were made by another company called Ocean Traders International and not the applicant.

[37] The first respondent argued that in order for export goods to be zero-rated, they must comply with the provisions of section 24 (4) of the Act as read together with sections 1 (a) and 2 (1) of the Second Schedule and Regulation 15 of the V.A.T. Regulations, which provide that zero-rating can only be applied where goods are delivered or made available at an address outside Swaziland; it was argued that in the present case the goods were not delivered or made available at an address outside Swaziland. The first respondent further argued that since the applicant's goods were sold by the applicant in Matsapha and collection done by its

customers in Matsapha, the zero rating provision does not apply to the applicant. It was further contended that the applicant also failed to produce the Customs Entry (SAD document) from the Mozambique Customs which is a standard form used in the SADC region for exports and imports; the said document would prove that the goods were exported and declared to the Mozambique Revenue Authority.

[38] The first respondent contended that in terms of the Act, it was not obliged to give the applicant a hearing or seek a court order prior to levying the 14% V.A.T. It further argued that the applicant failed to prove that the goods were exported to Mozambique. Notwithstanding this, the first respondent argued that it advised the applicant by letter dated 19th December 2012 that in terms of section 77 of the Act it was willing to discuss the applicant's tax issues with its "Nominated Person".

[39] The first respondent denied as alleged by the applicant that the first respondent has designed a new procedure for monitoring the loading of goods, and argued that it only monitors the loading of goods for Customs purposes and not V.A.T. It was further argued that the first respondent is concerned with ensuring that the goods are bonded, sealed and on transit in the manner required by the Customs and Excise Act and not the V.A.T. Act.

[40] The first respondent denied that the furnishing of the bank guarantee was an agreement pending determination of whether V.A.T was payable. It argued that this was a provision of security for V.A.T. owing, and, that it was in terms of the Act. The first respondent contended that it had all along maintained that the applicant was liable to pay V.A.T. and had advised it in writing.

[41] The first respondent explained that as from the 1st April 2012 the procedure for the export of goods is the same in other jurisdictions; and, that the seller should issue an invoice and charge V.A.T. at the zero rate on goods properly exported and levy a V.A.T. of 14% on those goods not exported in terms of the Act. Customs procedures for removal of goods from bonded warehouses were not affected by the introduction of V.A.T. A Customs SAD500 Form (Declaration) must be submitted to the first respondent whose officers will ensure that the goods are loaded into the transport and then sealed.

[42] Thereafter, the goods are transported to the border where the sealed transport and documentation is presented to the first respondent and Customs officers. If everything is in order, the goods are permitted to cross the border; and, another SAD500 declaration is made to the Customs Administration of the importing country for them to issue their certificate. The documents are then returned to the bonded warehouse to

acquit its bond; however, if the required documentation is not made available to the first respondent, the duties and taxes guaranteed become payable. To that extent the first respondent denied that it introduced and designed a new system that relates to V.A.T. as alleged. It was argued that the applicant failed to furnish all the requisite documents to prove export in terms of the V.A.T. Act.

[43] The first respondent argued that the applicant is not entitled to an interdict since it does not have a clear right on the basis that the actions of the first respondent are authorised by the V.A.T. Act. To that extent it was argued that the VAT Guide is not in conflict with the V.A.T. Act; and, that "direct export" in the V.A.T. Guide is in line with section 2 (a) of the Second Schedule of the Act which provides that V.A.T. at zero rate for export can only be applied where the goods are delivered or made available at an address outside Swaziland. It was further argued that where goods are supplied domestically in Swaziland but intended for export, the wording "indirect export" is used.

[44] The first respondent argued that "delivery" has to be afforded a legal meaning, and, that under the V.A.T. Act, "delivery takes place when the goods are handed over or possession and control thereof is given to the customer". It was argued that in this matter "delivery" took place in

Matsapha; the customers arranged their own transport to collect the goods.

[45] The first respondent further argued that the applicant is not entitled to the declaratory order sought on the basis that the VAT Guide is not inconsistent with the Act. It was explained that the applicant can comply with the Act by delivering or making the goods available to its customers at an address outside Swaziland; in this way, it will not be liable to VAT.

[46] The applicant filed a replying affidavit in which the deponent clarified that he is the Managing Director of the applicant, and, that he was duly authorised to depose to the affidavit for and on behalf of the applicant. A resolution from the applicant's directors authorising the applicant to institute the proceedings was annexed. In addition the resolution authorised Hendrick Theart in his capacity as Managing Director of the applicant to act on behalf of the company. It was further argued that the applicant is a member of the OTI Group of companies as reflected by annexure "OTI2"; hence, the point of law relating to *Locus Standi* is misconceived. The applicant argued that VAT is a tax for local consumption; and, that exports are not subject to VAT. Exports are dealt with in terms of the Customs and Excise Act; and that the

applicant's objection to payment of VAT is based on the premise that the goods constitute exports.

[47] The applicant reiterated that in terms of section 19 of the Constitution, the first respondent was not entitled to take the applicant's money from the applicant's bank account without due process of law.

[48] The applicant argued that in light of the correspondence signed by the Commissioner-General, it was not in the circumstances, obliged to comply with section 35 of the Act and exhaust internal remedies. It argued that it was entitled to approach the court in the manner it has done to review the decision of the first respondent and to seek a declaratory order.

[49] The applicant argued that the word "export" has two essential elements; Firstly, the physical removal of the goods; secondly, the goods must be used or consumed outside Swaziland. The applicant argued that the method of transporting the goods out of the country is not material. It further argued that it is also not necessary for the exporter to prove that the goods were declared to the Mozambique Revenue Authority. These submissions are incorrect as will appear during the course of this judgment.

[50] It is common cause that the applicant is seeking the review of the first respondent's decisions of the 12th December 2012 and 4th January 2013 in terms of which the applicant was required to pay 14% VAT on goods that have been exported to Mozambique on the ground that they are zero rated in terms of the Act. It further sought an order reviewing and setting aside the decision of the first respondent made on the 14th December 2012 in terms of which it took E966 422.98 (nine hundred and sixty six thousand four hundred and twenty two emalangeni ninety eight cents) from the applicant's bank account held with the second respondent in respect of VAT allegedly owing without a court order. The applicants also seek an order reviewing and setting aside the first respondent's decision made on the 14th December 2012 in terms of which the first respondent shut down the business of the applicant for non-payment of VAT allegedly owing on exported goods without a court order and/or affording a hearing to the applicant.

[51] The applicant further seeks two declaratory orders. Firstly, that the provisions of the first respondent's value Added Tax Guidelines regarding the payment of 14% VAT exports are null and void in so far as they are inconsistent with and/or contrary to the provisions of the Value Added Tax Act which provides that export goods are zero rated and therefore not subject to VAT. Secondly, declaring that applicant is

not liable to pay 14% VAT on export goods on the basis that they are zero rated in terms of the Act.

[52] The applicant also seek an interim order interdicting any further seizure of the applicant's assets and/or sealing the applicant's business premises on the basis of VAT allegedly owing on exported goods pending the finalisation of this application. It is common cause that when this matter appeared in court, an interim order was issued on the basis of a *prima facie* right established as opposed to a clear legal right. In order to obtain a temporary interdict, the applicant has to establish a *prima facie* right, which is a right though open to some doubt suffices on condition that failure to grant an interdict will cause irreparable injury to the applicant while the respondent will not suffer any irreparable injury. The court will exercise its discretion to grant or refuse the interdict once a *prima facie* right has been established. See the Law of Things, C.G. Van der Merwe, published by Butterworths Durban in 1987 at pages 84-85; *Setlogelo v. Setlogelo* 1914 AD 221 at 227.

[53] The points in *limine* were argued simultaneously with the merits. The applicant has alleged that the matter is urgent on the basis that it is unable to trade because it does not know where it stands regarding the issue of V.A.T. It is apparent from the evidence that the alleged basis of urgency is misconceived for two reasons: firstly, after the applicant had

provided a guarantee as security for the balance of the V.A.T. allegedly owing the first respondent allowed the applicant to resume its trading operations. Secondly, the first respondent advised the applicant on the 12th November 2012 that it was liable to payment of V.A.T. on all its goods exported to Mozambique; hence, it is not true that the applicant was not aware of its status with regard to the payment of V.A.T.

[54] Furthermore, the court issued an interim order interdicting and restraining the first respondent from effecting any further seizure of the applicant's assets and/or sealing of applicant's business premises on the basis of V.A.T allegedly owing on exported goods pending finalization of this application.

[55] The first respondent further argued in *limine* that the applicant has rushed to court without exhausting all the available remedies in terms of section 35 of the Act. It was argued on behalf of the first respondent that the applicant was obliged to exhaust the said remedies after being notified of the decision of the Acting Commissioner of Domestic Taxes that it was liable for payment of V.A.T.

[56] Section 35 of the Value Added Tax of 2011 provides the following:

"35. (1) A person who is dissatisfied with a decision of an officer

may submit an objection to the decision to the Commissioner-General within thirty days after the service of the notice of decision.

(2) Where the Commissioner-General is satisfied that owing to

absence from Swaziland, sickness or other reasonable cause, the person who is dissatisfied was prevented from submitting an objection within the time specified on subsection (1) and there has been no unreasonable delay by the person in lodging the objection, the Commissioner-General may accept an objection submitted after the time specified in subsection (1).

(3) The objection shall be in writing and shall specify in detail the grounds upon which it is made."

[57] I have already mentioned in the preceding paragraphs why the applicant could not invoke the provisions of section 35 in the present case. Suffice to say that the Commissioner-General has been actively involved in the decisions of the officers to levy V.A.T. upon the applicant. This is evident by his correspondence to the second respondent of the 14th December 2012 demanding payment of E2 925 011.61 (two million nine hundred and twenty five thousand and eleven emalangeni sixty one cents) from the applicant's bank account held with the second respondent bank. Again on the 4th January 2013, he reminded the applicant to pay the balance of E1 928 588.63 (one million nine hundred and twenty eight thousand five hundred and eighty eight emalangeni

sixty three cents) in respect of V.A.T. for the months of 1st April to 30th September 2012. He further advised the applicant to pay an amount of E633 935.50 (six hundred and thirty three thousand nine hundred and thirty five emalangeni fifty cents) in respect of V.A.T. for the month of October 2012, failing which further recovery action would be instituted.

[58] Having said this, it becomes unnecessary for me to deal with the provisions of section 36 of the Act which deal with appeals to the Tax Tribunal from a decision of the Commissioner-General. In the circumstances, the applicant was entitled to approach the High Court for redress and not invoke the provisions of sections 35, 36 and 37 of the Act which deal with appeals from the Tax Tribunal to the High Court on questions of law only; hence, the present proceedings are properly before this court on the basis that the applicant seeks to review the decisions of the first respondent and further seek declaratory orders.

[59] The first respondent also seek an order, in *limine*, for a dismissal of the application on the basis that Hendrik Albertus Johannes Theart has no *locus standi* to institute the present application on behalf of the applicant and that he has no authority to depose to the Founding Affidavit. The basis for the preliminary objection is that he had described himself in the founding affidavit as "a businessman" of South Africa and the Managing Director of OTI Group of Companies, and, that he is

authorised to institute these proceedings and depose to the founding affidavit. The first respondent argued that such a description has no relationship to the applicant who is a company duly registered and incorporated in terms of the laws of Swaziland.

[60] However, the applicant has annexed to its replying affidavit a resolution of the applicant which states that the applicant trades as Ocean Traders International OTI. The resolution further authorises Hendrik Theart in his capacity as the Managing Director of the Company to act on behalf of the applicant in the present matter. Hendrik further appears in the Form J annexed to the replying affidavit as one of the Directors of the applicant company. In the circumstances the applicant has discharged the onus of proof not only that he is a director of the applicant company but that he has the necessary authority to represent the applicant in these proceedings. It is trite law that when an objection is raised that the deponent is not a director of the company in litigation, Form J provides *prima facie* evidence in that regard; however, an objection to his authority can be proved by a resolution of the company to that effect. The onus to prove this on a balance of probabilities lies with the applicant. See *Herbstein & Van Winsen*, the Civil Practice of the Supreme Court of South Africa 4th edition at pages 363-364.

[61] The learned authors in *Herbstein & Van Winsen*, (supra) at page 363 state:

> **"As was pointed in Mall (Cape) (PTY) Ltd v. Merino Co-operative Ltd 1957 (2)SA 347 (C) at 531 E-G, since an artificial person, unlike an individual, can function only through its agents, and can take decisions only by the passing of resolutions in the manner prescribed by its Constitution, less reason exists to assume, from the mere fact that proceedings have been brought in its name, that those proceedings have in fact been authorised by the artificial person concerned. See *Pretoria City Council v. Meerlust Investments (PTY) Ltd* 1962 (1) SA 321 (A) at 325 C-E."**

[62] *Watermeyer J* delivering the unanimous decision of the full bench in *Mall (Cape) (PTY) Ltd v. Merino* (supra) at pages 351H – 352C stated the following:

> **"In such cases some evidence should be placed before the court to show that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance. Unlike cases of an individual, the mere signature of the notice of motion by an attorney and the fact that the proceedings purport to be brought in the name of the applicant are in my view insufficient. The best evidence that the proceedings have been properly authorised would be provided by an affidavit made by an official of the company annexing a copy of the resolution but I do not consider that the form of proof is necessary in every case. Each case must be considered on its own merits and the court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some**

unauthorised person on its behalf. Where, as in the present case, the respondent has offered no evidence at all to suggest that the applicant is not properly before the court then I consider that a minimum of evidence will be required from the applicant."

[63] The issue before this court is whether the applicant is liable to pay V.A.T. in terms of the Value Added Tax Act of 2011. It is common cause that the applicant imports liquor from South Africa and keep it in its bonded warehouse in Matsapha, which is its place of business. The applicant then sells the liquor to its Mozambique customers from the warehouse. The customers come to Swaziland to purchase the liquor, pay the purchase price and then take it away in their own transport which they provide. The applicant does not levy or charge V.A.T. on the sale of the liquor to its customers.

[64] The applicant argued that since its business is to export liquor to Mozambique, it is not liable to payment of V.A.T. because the Act provides that export goods are zero rated. The applicant further argued that it provided all relevant documentation to the first respondent to prove that the liquor was exported to Mozambique. The applicant argued that the documents include declaration forms bearing the stamps from the Matsapha depot where the first respondent's officers released the goods from the bonded warehouse for export to Mozambique; and that the same documents were stamped at the Lomahasha Border gate by

the officers of the first respondent as well as a stamp from the Customs Officials in Mozambique.

[65] The first respondent argued that the applicant does not export the liquor to Mozambique on the basis that the applicant sells the liquor to its customers in Matsapha; the customers pay for the goods in Matsapha and further collect the liquor from the warehouse using their own transport. The first respondent argued that this fact renders the applicant's business subject to the payment of V.A.T. at 14% as required by the Act.

[66] The applicant argued that the term "export" is defined in *De Beers Marine (PTY) Ltd v. Commissioner SARS* 2002 (S) SA 136 SC at pp 142-143 as signifying the physical removal from the country. According to the applicant the goods were delivered in Mozambique and therefore zero rated for purposes of V.A.T.

[67] However, this argument overlooks the provisions of the Value Added Tax Act. Section 3 (a) provides that tax to be known as Value Added Tax shall be charged in accordance with the provisions of this Act on every taxable supply in Swaziland made by a taxable person. Section 4 of the Act provides that the tax payable in the case of a taxable supply is to be collected and paid by the taxable person making the supply.

[68] Section 10 (1) of the Act provides the following:

> **"10. (1) Except as otherwise provided under this Act, a supply of goods means any arrangement under which the owner of the goods parts or will part, with possession of the goods, including an agreement of sales and purchases."**

[69] Section 14 (1) explains when a supply of goods occurs and provides as follows:

> **"14. (1) Except as otherwise provided under this Act, a supply of goods or services occurs:**
>
> **....**
>
> **(c) In any other case, on the earlier of the date on which;**
>
> **(i) the goods are delivered or made available, or the performance of the service is complete;**
>
> **(ii) payment for the goods or services is made; or**
>
> **(iii) a tax invoice is issued."**

[70] It is not in dispute that the applicant parted with possession of its goods at the Matsapha warehouse where the goods were sold to its customers from Mozambique and further paid the purchase price. This means that the goods were delivered and made available to the customers at the Matsapha warehouse; this is where the customers paid for the goods and further took possession of the goods and transported them to Mozambique. This conclusion is supported by section 15 (1) of the Act

which provides that a supply of goods takes place where the goods are delivered or made available by the supplier.

[71] The word "delivery" has a legal meaning, and, it is defined as the transfer of the thing sold in accordance with the terms of the contract into the control and possession of the purchaser. In the present case, actual delivery as opposed to constructive delivery, took place; and, actual delivery occurs when the seller places the purchaser in actual possession of the thing or placing the thing within the custody of the purchaser. See Norman's Law of Purchase and Sale in South Africa, 3rd edition, by CI. Belcher, at pages 182-184.

[72] Section 24 (4) of the Act provides that a supply of goods or services is zero-rated if it is specified in the Second Schedule. Clause 1 (a) of the schedule provides that the following supplies are specified for the purpose of section 24 (4), namely, the supply of goods or services where the goods or services are exported from Swaziland as part of the supply.

[73] The Second Schedule dealing with zero-rated supplies under section 24 (4) of the Act provides the following:

> **"1. The following supplies are specified for the purposes of section 24 (4) –**

(a) the supply of goods or service where the goods or services are treated as exported from Swaziland as part of the supply;

....

(2) For the purposes of clause 1 (a) goods or services are treated as exported from Swaziland if-

(a) In the case of goods, the goods are delivered to, or made available at, an address outside Swaziland as evidence by documentary proof acceptable to the Commissioner General; or,"

[74] As stated in the preceding paragraphs, the goods in the present matter were delivered or made available at an address in Swaziland at the bonded warehouse of applicant; hence, the applicant's goods are not zero-rated for the purpose of the payment of V.A.T. because they were delivered and made available to the Mozambique customers in Swaziland.

[75] The applicant argued that it was not given an opportunity to be heard in terms of section 33 of the Constitution before the seizure of its assets as well as the closure of its business by the first respondent. From the evidence, it is apparent that the applicant was given an opportunity to be heard. It is not in dispute that officers from the first respondent visited the applicant at its place of business on the 7th November 2012. The purpose of the visit was to examine the V.A.T. treatment of goods sold

to customers from Mozambique. After investigations, the first respondent established that the goods are sold to customers from the applicant's warehouse. The customers pay for the goods purchased, and, then take possession of the goods using their own transport which they have arranged. The invoices and delivery notes were apparent that delivery to the customers takes places at Matsapha.

[76] By a letter dated 12th November 2012, the applicant was advised of the findings of the inspection conducted on the 7th November 2012. The applicant was advised that it was liable to charge its customers V.A.T. at 14 % and further pay V.A.T. at 14% to the first respondent. The first respondent further noted during the visit that the public officer of the applicant had attended V.A.T. Seminars and had a copy of a V.A.T. Guide. The applicant was given up to 30th November 2012 to produce proof that the goods were exported to Mozambique as required by the Act in respect of shipment made between 1st April 2012 and 9th November 2012. The applicant was further advised that after the 9th November 2012, it should charge V.A.T. on all sales where delivery is effected in Swaziland. The letter was signed by the Acting Commissioner Domestic Taxes.

[77] The applicant responded to this letter on the 30th November 2012 and stated that it was not liable for paying V.A.T. because the goods were

consumed in Mozambique. It further argued that the goods were imported into the country and stored in its bonded warehouse for export to Mozambique; and, that it had obtained legal advice that in the circumstances, it was not liable to pay V.A.T. Certain documents were furnished as evidence that the goods were being exported and that they were not for local consumption. The letter was signed by its public officer.

[78] The first respondent replied to the applicant in writing in terms of a letter dated 6th December 2012. It was explained in detail the provisions of the Act and that its goods are not delivered or made available at an address outside Swaziland as required by the Act; and that the invoices and delivery notes issued on the supplies show that the goods have been delivered at Matsapha. It was explained to the applicant that the fact that the goods are stored in a warehouse to be exported to Mozambique and not consumed in Swaziland but delivered at Matsapha constitutes indirect export which attracts V.A.T. at 14%.

[79] The applicant was reminded that it had failed to supply the first respondent with a copy of the bill of entry or customs certified by the Customs Authorities which an exporter must produce as evidence that the goods have been exported from Swaziland and were imported into Mozambique.

[80] The applicant was further advised of the consequences of a failure to comply with the Act as outlined in sections 43, 44, 45, 58, 59 and 72 which provide for the seizure of assets of the person in default, locking and sealing the business premises, demand money from a person in possession of the defaulter's money as well as the criminal prosecution for non-compliance at the instance of the first respondent.

[81] In response the applicant in a letter dated 12th December 2011 acknowledged receipt of the first respondent's letter dated 6th December 2012, and, further requested a meeting between the parties. The letter reads in part:

> **"3. We note the contents of the letter under reply and request a meeting with you and our client as soon as it is convenient to you. Our client would urgently want to have clarity on the tax system to make a decision whether to continue operations in the coming year as its business model had all along been based on a certain understanding of the tax payable in respect of the goods exported to Mozambique."**

[82] It is not clear what clarity the applicant required in light of the detailed explanation provided by the first respondent in its letters to the applicant dated 12th November 2012 and 6th December 2012. It is common cause, however, that by letter dated 14th December 2012, notice was given to the second respondent to pay E2 925 011.61 (two million nine hundred

and twenty five thousand and eleven emalangeni sixty one cents) to the first respondent from the applicant's bank account held with the bank; in addition, a notice for the seizure of applicant's goods was issued. Negotiations between the parties were held at the instance of the applicant on the 24th December 2012 in which the applicant secured a bank guarantee issued by Nedbank in the amount of E1 928 588.63 (one million nine hundred and twenty eight thousand five hundred and eighty eight emalangeni sixty three cents) in respect of the balance of VAT outstanding.

[83] In addition there was correspondence made by the applicant to the first respondent on the 18th and 28th December 2012 in respect of the balance of the V.A.T. as well as the request for further meetings between the parties to clarify certain queries. The first respondent acknowledged receipt of applicant's letters. The first respondent further acknowledged receipt of the bank guarantee which it had accepted; and, it further proposed a meeting between the parties on the 31st December 2012 or the 2nd January 2013.

[84] Following the furnishing of the bank guarantee by the applicant to the fist respondent, the premises of the first respondent were re-opened and the goods released on the 28th December 2012. This was confirmed in writing by the first respondent in a letter dated 4th January 2013. in

addition the applicant was advised of a further outstanding V.A.T. in respect of incorrectly zero-rated supplies for the period after 30th September 2012 including an amount of E633 935.50 (six hundred and thirty three thousand nine hundred and thirty five emalangeni fifty cents) in respect of the V.A.T. returns for the month of October 2012 which was now due and payable within seven days. This letter was written by the Commissioner-General.

[85] A meeting was held on the 4th January 2013 between the parties in which the applicant made further submissions in an attempt to evade liability for the payment of VAT, the first respondent subsequently wrote a letter to the applicant dated 4th January 2013 in which it reiterated its position that the applicant was liable to pay V.A.T.

[86] From a reading of the Value Added Tax Act, it is apparent that the first respondent is given wide and extraordinary powers in its mandate to collect VAT on behalf of the government of Swaziland. Section 42 of the Act provides that from the date on which tax is due and payable, the Commissioner-General has a preferential claim against other claimants upon the assets of the person liable to pay tax until it is paid. Section 40 (1) of the Act confirms that Value Added Tax due and payable under the Act is a debt due to the government of Swaziland and is payable to the

Commissioner-General by the person liable for the tax as determined under the Act.

[87] Section 43 of the Act authorises the Commissioner-General to seize any goods in respect of which there are reasonable grounds to believe that tax is due and payable in respect of the supply or import of those goods has not been paid or will not be paid. Similarly, the Commissioner-General may authorise the release of goods seized where the person has paid or given security for the payment of the V.A.T. due and payable. In addition the Commissioner-General is authorised to sell the goods by auction where no payment has been made or security given; however, a reasonable time must have lapsed since fit the seizure was effected in respect of perishable goods, and, in any other case, a period of twenty days after the seizure of the goods or twenty days after the due date for payment of the tax.

[88] Similarly, the Commissioner General is entitled to proceed by way of section 40 if the proceeds of the auction sale are not sufficient to meet the costs of disposal and the V.A.T. due. Section 40 of the Act provides:

> **"40 (3) If a person fails to pay value added tax when it is due and payable, the Commissioner-General may institute an action in a court of competent jurisdiction for the recovery of the**

value added tax and where the Commissioner-General institutes an action under this section, judgment shall be delivered within sixty days from the date of institution of the action."

[89] The first respondent is also given the power to close down a business. Section 44 of the Act authorises the Commissioner-General to lock up and seal the business premises of a person liable for tax but has failed to remit the amount payable within the time prescribed. Such goods shall be deemed to be attached and at the disposal of the Commissioner-General. During the attachment the police could be present. Where payment is not made within a reasonable period in the case of perishables and twenty days in any other case, the property may be sold by public auction. All costs incurred are bone by the defaulter. If the proceeds are insufficient to meet the V.A.T. owing after payment of the costs of the auction sale, the Commissioner-General may proceed to recover the balance in terms of sections 39 and 40 of the Act.

[90] I have dealt with the provisions of section 40 of the Act in the preceding paragraphs. Section 39 provides, inter alia, that where the Commissioner-General has reasonable grounds to believe that a person may leave Swaziland permanently without paying all tax due under the Act, he may issue a notice to the Chief Immigration Officer requesting him to prevent that person from leaving the country until that person

makes payment in full or has made a satisfactory arrangement with the Commissioner-General for the payment of the tax.

[91] The Act further authorises the Commissioner-General to demand payment from any person owing or who may owe money to the person liable. Section 45 provides, *inter alia*, that where a person liable fails to pay tax on the due date, the Commissioner-General may by notice in writing require any person owing or who may owe money to the person liable, holding or who may subsequently hold money for or on account of the person liable to pay the money to the Commissioner-General. Criminal sanctions follow non-compliance with the provisions of the Act in Part XII.

[92] It is apparent from the evidence that the first respondent acted in accordance with the provisions of the Act. It did not misdirect itself or commit any irregularity as alleged or at all. The argument by the applicant that it took into account irrelevant considerations and ignored relevant considerations is not only misconceived but it is not supported by the evidence.

[93] The Supreme Court of Swaziland in *Takhona Dlamini v. The President of the Industrial Court and Another* Appeal case No. 23/1997 quoted with approval the South African Supreme Court case of *Johannesburg*

Stock Exchange v. Witwatersrand Nigel Ltd 1988 (3) SA 132 and at 152 where Corbett JA stated the following:

> **"Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the behest of the Statute and the tenets of natural justice.... Such failure may be shown by proof, inter alia, that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further ulterior or improper purpose; or that the president misconceived the nature of the discretion confined upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated...."**

[94] *His Lordship Tebbutt* in the *Takhona Dlamini* case (supra) concluded at page 11 of the judgment that the Common law grounds set out in the *Johannesburg Stock Exchange* case (supra) are not exhaustive, and, that an error of law may also give rise to a good ground of review.

[95] In the present case there is no basis in law and in light of the decision of *Takhona Dlamini* or the Johannesburg Stock Exchange to review the decisions of the first respondent or to make the declaratory orders as sought by the applicant.

[96] It is open to the applicant to challenge the Constitutionality of the provisions of the Value Added Tax and the Schedules thereto. However, that is a matter for another day which would have to be argued before a full bench of this court.

[97] This is a proper case in which the application should be dismissed. However, with regard to costs, I have taken into account the fact that the applicant did not charge V.A.T. on its customers; hence, the V.A.T. collected from the second respondent was from income received by the applicant without the requisite 14% V.A.T.

[98] Accordingly, the application is dismissed. Each party to pay its own costs.

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M.C.B. MAPHALALA

JUDGE OF THE HIGH COURT