IN THE HIGH COURT OF SWAZILAND

JUDGMENT

In the matter between:

Case No. 798/2014

C I C (PROPRIETARY) LTD **Applicant**

And

SWAZILAND REVENUE AUTHORITY **First Respondent**

M & S FREIGHT (PTY) LTD **Second Respondent**

SHARP FREIGHT (SWD) (PTY) LTD **Third Respondent**

G N S B HOLDINGS (PTY) LTD **Fourth Respondent**

Neutral citation: ***C I C (Proprietary) Ltd v Swaziland Revenue Authority And 4 Others (798/2014) [2016] SZHC 46 (14th March 2016)***

Coram: **M. Dlamini J.**

Heard: **2nd November 2015**

Delivered: **14th March, 2016**

- *That the first respondent is empowered by enactments to attach, for instance money belonging to a vendor in the hands of third parties without having first to resort to the court of law is without doubt, - As long as the Supreme Court judgment stands without challenge before it, its orders*

*ought to be respected and complied with in terms of the stare decisis and that the "**concrete decision is binding between the parties**.*

Summary: By means of motion proceedings, the applicant prayed for an order reviewing and setting aside first respondent's decision which called upon it to pay E18,964, 582-35 as duties under section 43 (*bis*) of the Customs and Excise Act, 1971 (the Act) and a declaratory order that applicant is not liable to pay the said amount. Applicant also claimed a refund of the sum of E996,422-98 held by first respondent as part of the duties due following an order in its favour by the Supreme Court of Appeal. The application is highly contested by first respondent, vouching that applicant is liable to pay the dues.

Applicant's case

[1] The applicant identifies itself as[1]:

> "*The applicant deals in the business of importing and exporting liquor to countries which include Mozambique. The applicant is a member of the C I C group of companies, which is a group of companies operating across Southern Africa and which is listed on the Johannesburg Stock Exchange under Imperial Holdings.*"

[2] The applicant asserts that it imports liquor from the Republic of South Africa and exports same to the Republic of Mozambique. Upon the goods entering Swaziland, they are declared for export to Mozambique. They are therefore not for consumption in Swaziland. For this reason, applicant contends that the goods are "*zero-rated*" and therefore do not attract any duties. Applicant keeps these goods in Matsapha at a bonded warehouse, *en route* Mozambique.

[1] See paragraph 4.2 at page 10 of the book of pleadings

[3] However, in December 2012, first respondent seized the sum of E996,422-98 which was in applicant's bank account. This sum was said to be VAT payment in respect of applicant's goods. Respondent further seized its goods worth E5 million and closed down its business. Applicant rushed to court and was granted an interim order interdicting first respondent's conduct. However, on 17th April, 2013 this court dismissed applicant's application and discharged the interim order. The applicant appealed this court's judgment and won. The first respondent's decision to levy VAT was reviewed and set aside.

[4] Further, a declaratory order was granted by the Supreme Court to the effect that applicant's goods were not liable to VAT. The applicant then sets out as follows:

> "*16. Once the judgment of the Supreme Court had been handed down, the First Respondent was obliged to refund to the Applicant the money taken from its bank account for VAT allegedly owing, being the amount of E996 422-98.*
>
> *17. However, the First Respondent failed to refund the amount to the Applicant, and the Applicant instructed its attorneys to demand a refund from the First Respondent. When the attorneys demanded the refund, the First Respondent reacted by filing a demand against the Applicant for an alleged amount owing in the sum of E1 546 324-47, for alleged taxes and duties owed to its Customs and Excise Division.*
>
> *18. Thereafter, and whenever the Applicant attempted to process any transaction for export, including the one for the return of stock bought on credit to the supplier in Johannesburg, the First Respondent refused to process these transactions, alleging that there was an ongoing investigations against the applicant.*
>
> *19. When the Applicant persisted in demanding a refund of the amount of E996,422-98 due to it, the First Respondent increased its demand to E18 964 582-35, alleging that documents submitted by the Applicant and / or its agents purporting to prove that the liquor had been exported to*

Mozambique, were forgeries. The First Respondent stated that similar letters of demand had been forwarded to-

> *"persons that imported and/or stored certain consignments of non-duty paid liquor in which you were beneficially interested who also failed to discharge their liability for duties and taxes for exactly the same reasons as outlined above."*

These other "persons" or entities are the following:

19.1 "M & S FREIGHT (PTY) LTD (Second Respondent) in respect of which an amount of E10 200 643-80 is claimed;

19.2 SHARP FREIGHT (PTY) LTD (Third Respondent) in respect of which an amount of E3 041 313-93 is claimed; and

19.3 GNSB HOLDINGS (PTY) LTD (Fourth Respondent) in respect of which an amount of E4 176 300-15 is claimed."

[5] Applicant contends that first respondent advised it that the amount of E996,422-98 previously held as VAT would not be refunded as per the Supreme Court's ruling as it would go towards reducing the customs duty debt of E18,964,598-35. The applicant then concludes:

> "*21. The position at present is therefore that the First Respondent refuses to refund an amount of approximately E1 million which is due to the Applicant, the Applicant is unable to trade and the First Respondent is demanding payment of approximately E19 million. It further appears that, as there is allegedly an investigation that is ongoing regarding transactions that date back to 2011, there is a possibility that the alleged amount owing may be increased by the First Respondent, if it so decides.*"

[6] Turning to the first respondent's claim against it, applicant avers:

> "*The First Respondent alleges that SRA exit stamps purporting to be from the Lomahasha and Mhlumeni posts on the Customs and Export declaration forms are forgeries. The Applicant's attorneys have requested the First Respondent to provide details of the alleged forensic investigations carried out in this regard in*

> *order that the Applicant may be in a position to appoint its own experts to establish whether the stamps have been forged. The First Respondent has ignored the written requests made in this regard, and the Applicant finds itself in the untenable position of not being able to ascertain whether the stamps were in fact forged. The Applicant has carried out its own investigation and established that none of its employees are responsible for or implicated in the alleged forgery. It would appear that if in fact there were forgeries, the First Respondent's own employees were responsible.*"

[7] Expatiating on the reasons for asserting that it was first respondent's employees who were responsible for the forged stamps, applicant pointed out that first respondent never published an official print of its stamps. It was therefore difficult for applicant to differentiate between a genuine and a forged stamp. What compounded first respondent's position in relation to the forged stamp was that in a meeting between first respondent and itself, first respondent, divulged to it that it was not only applicant who was associated with the false stamps, but other traders as well. A number of correspondences exchanged hands between applicant and first respondent in regard to the false stamps and applicant's liability under the Act. Applicant demanded to be given all documents pertaining to the forged stamps in order to carry out its own investigations on the matter. The first respondent responded:

> *"In this instance please be advised that I am not prepared at this stage to provide you or your client the forensic investigation report. I am under no legal obligation to do so.*
>
> *In the spirit of courtesy, I can only provide you with the copies of all the documents that I believe to be forged as well as the impression of the correct stamps (attached hereto) so that you and your client may appreciate the prima facie evidence I have at my disposal in support of my claim. It is on the basis of this evidence that your client can either decide to own up or engage their own expert to dispute my allegations.*"

[8] The applicant adds as follows:

> "*72. It is significant that the First Respondent did not once during the VAT case, contend that the documentation in question had been forged. The Applicant seeks the opportunity to have the respondent's claim that the stamps and documents in question in question have been forged tested. I repeat my denial that the Applicant or any of its employees are in anyway responsible for or connected with the alleged forgeries.*
>
> *73. The First Respondent's stamps and SAD 500 documents are in their possession and that exports to Mozambique took place under their supervision. The goods in respect of which the respondent now purports to levy duties (in respect of the consignment handled by the applicant, as opposed to those handled by the applicant's agents) have been found by the Supreme Court of Appeal to have been exported. It is, with respect, not open to the respondent now to contend otherwise or for this Honourable Court to find otherwise.*"

[9] To fortify its assertion that it is not responsible for the false stamps, applicant states:

> *"The exportation of the goods takes place under the supervision of the First Respondent's representatives. The SAD 500 forms are provided by the First Respondent. When stock is removed from bond, that is to say from the applicant's duty warehouse, the First Respondent's representatives supervise the removal, check the quantities and, once they are satisfied with the removal, they seal the truck in which the stock is transported with a unique Custom seal. When the goods reach the border post they are still under the supervision and control of the First Respondent. The SAD 500 forms are stamped, not only by the First Respondent's representatives at the border when the goods are exported into Mozambique, but also by the Mozambican Customs officials."*

[10] The applicant further contends:

> *"84. It is further necessary to point out that the product exported to Mozambique differs in material respects from that which is available in Swaziland. It is therefore extremely unlikely that anyone would attempt to sell product destined for export in Swaziland.*

84.1 I annex hereto as annexure JT21 a photograph of two bottles of Jonnie Walker Red Label Whisky. The bottle on the right is a bottle of whisky destined for local consumption in Swaziland, and the bottle on the left of the photograph is a bottle of whisky destined for export to Mozambique. It is immediately apparent that the two bottles are different. For example the caps on the bottles are totally different.

84.2 I further annex hereto as annexure JT22 a further photograph of two bottles of Jonnie Walker Red Label Whisky, the one on the right being for local consumption in Swaziland, and the one on the left being export to Mozambique. As is clearly apparent from the photographs, the alcohol percentage in the bottle destined for domestic use in Swaziland is 43% whereas the alcohol percentage in the bottle destined for export to Mozambique is 40%."

[11] The applicant continued to point out that the top covers of the bottles are different. The bottles destined for Mozambique are written in Portuguese with different labels from the ones supplied within. Applicant states that first respondent declined to provide its forensic experts with all the necessary exhibits in order to carry out its own independent investigations of the matter.

First respondent *au contraire*:

[12] The case for the first respondent was very brief and was as follows:

"4.1 The First Respondent conducted investigations into the operations of the Applicant and discovered that the goods which the Applicant had imported into Swaziland for export to Mozambique had in fact not been exported into Mozambique because the documents, which would prove that the goods were actually exported had stamp imprints which were markedly different from those official stamps used by the 1st Respondent in the border gates through which the Applicant purportedly exported the goods to Mozambique.

4.2 The 1st Respondent then procured the services of an expert to determine whether the stamp imprints on the document submitted by the applicant, as proof that the goods were exported were actually authentic. The expert concluded that the stamp imprints were markedly different from those of the 1st respondent being used at the border posts. An excerpt of the report produced by the expert is annexed hereto marked "SRA1".

4.3 The 1st Respondent then came to the conclusion that the goods were not exported to Mozambique, and as such the Applicant was liable to pay duties in respect of those goods and, then demand payment of E18,964 582.35.

4.4 The 1st Respondent, still trying to obtain further evidence that the goods were not exported to Mozambique, approached the Swaziland Immigration Department under the Ministry of Home Affairs and submitted the registration numbers of the motor vehicles purportedly used to transport or export the goods into Mozambique, as shown in the documents, being SAD 500 forms.

4.4.1 The Immigration Department has since produced a report from its system which shows the movement of persons and motor vehicles in and out of the country via the two border posts shared with Mozambique being Lomahash and Mhlumeni.

4.4.2 The report from the Immigration Department confirmed that on the dates on which those motor vehicles exporting the goods were purported to have exited Swaziland into Mozambique, did not go through these border posts. This report therefore also proves that the goods were not exported to Mozambique as alleged.

4.5 The reasonable conclusion that the 1st Respondent could reach, given the information at its disposal is that the Applicant has failed to produce proof to the satisfaction of the 1st Respondent that the goods have indeed been duly taken out of the country or exported to the intended destination in this case Mozambique. This being the case, the Applicant is therefore liable to pay the duties in the sum of E16 099 406.07 (Sixteen Million Ninety Nine Thousand Four Hundred and Six Emalangeni Seven Cents). The reason this amount and not the amount of E18 964 582.35 is demanded is that one of the agents GNSB had its records mixed, i.e. the transaction where it is principal bond holder owing E2,865 176.18 (Two Million Eight Hundred and Sixty Five Thousand One Hundred and Seventy Six Emalangeni Eighteen Cents) was mixed with the transactions

where it is Applicant's agent, owing E1 311 123.97 (One Million Three Hudred and Eleven Thousand One Hundred and Twenty Three Emalangeni Ninety Seven Cents).

4.6 I also wish to submit that all the SAD 500 forms on which the claim for the E16 099 406.07 (Sixteen Million Ninety Nine Thousand Four Hundred and Six Emalangeni Seven Cents) is based on, were not returned to the 1st Respondent for acquittal as per procedure, but these forms were all obtained from the premises of the Applicant and its agents and the 1st Respondent had no border copies of the forms as per procedure.

4.7 I humbly submit that with all these issues raised in the above paragraphs it will be clear to the Court that this matter may not be resolved only based on the papers before Court, unless the Applicant produces cogent evidence which would disprove that which has been provided by the 1st Respondent herein."

[13] First respondent refutes that it did not supply sufficient documents for applicant to carry out its own investigations. It asserts that the stamp imprint was sufficient to enable applicant to compare the false stamp against its documents. First respondent attaches a document[2] reflecting a genuine imprint of its stamp and avers[3]:

"...it is even apparent to an ordinary person that the stamp on the SAD 500 form purporting to be 1st Respondent's stamp used at Mhlumeni is markedly different from that which is actually used at Mhlumeni as shown on the next page of "JT20". The Applicant has not even tried to proffer any explanation as to the differences to the stamps."

[14] The first respondent also highlights[4]:

"What worsens the Applicant's case is that all the SAD 500 forms with the questioned stamps were not with 1st Respondent but only Applicant and its agents, yet they were purportedly stamped at the border. Yet all Applicant's

[2] (JT 20)
[3] Page 229 paragraph 15.2 of book of pleadings
[4] Page 229 paragraph 15.4 of book of pleadings

SAD 500 forms returned to Matsapha by the border personnel had authentic stamps."

[15] First respondent concludes from applicant's action[5]:

"*It is denied that the 1st Respondent's employees forged the stamps because they would not benefit from such an act yet it would benefit the Applicant to forge the 1st Respondent's stamps as it would not have to actually submit its SAD 500 forms to the 1st Respondent for stamping when "exporting" its goods but it would just stamp the documents and purport that they were actually stamped at the border post yet the goods were not even taken to the border post for export."*

[16] First respondent denied the utterances purportedly made in the meeting. It further disputes that its employees are responsible for the forged stamps. First respondent deposes that it is not obliged to hand applicant its forensic report. Applicant ought to conduct its own investigations based on the imprint stamp given and the SAD 500 forms bearing forged stamps at its disposal. First respondent highlights another feature of its findings[6]:

"*The 1st Respondent raised a concern on the documents because one of those forms had been stamped at the warehouse as being released on the 20th August 2012 but were only stamped at the border post for export to Mozambique on the 28th August 2012 and no explanation was given as to why it took eight days for the goods to reach the border post, which was itself suspicious. Suspicion alone was not enough, at that time, to make such serious assertions as forgery.*"

[17] It further details[7]:

[5] Page 229 paragraph 15.3 of book of pleadings
[6] Page 237 paragraph 34.1 of book of pleadings
[7] Page 237paragraph 34.3 of book of pleadings

"*I further submit that the Applicant is responsible for the forged signatures, it has failed to give an explanation as to how such stamp imprints were found on the SAD 500 forms in its and its agents' possession, which forms had not been returned to the 1st Respondent for acquittal of those goods purported to have been exported to Mozambique and failed to explain how there are not border copies for the forms with questioned stamps, whereas all their other forms have copies at the border, which have authentic stamps.*"

[18] The first respondent continues to answer[8]:

"*I submit that it was not even necessary for the 1st Respondent to verify with the Mozambique customs department if the stamps on the forms were genuine, this is because the 1st Respondent had in its possession conclusive evidence, that the goods were not exported, in the form of the forged stamps and the Swaziland Immigration Department report which shows that the motor vehicles by which the goods were transported to Mozambique did not cross on those dates purported to be the dates on which the goods were exported to Mozambique.*"

[19] First respondent proceeds[9]:

"*The Applicant does not even suggest what kind of incentive would have made 1st Respondent's employees to forge stamps, and that who would have offered such an incentive and why. This allegation by applicant begs an answer as to how such forms having been forged by 1st Respondent's employees then get to it and its agents.*"

Adjudication

[20] As can be gleaned from the above stated parties' contentions, the applicant has pointed out a number of circumstances supporting its assertion that it is not liable to pay any customs and excise duties for its concerned goods. The first respondent on the other hand puts up a similar formidable case, insisting that the applicant is liable. That as it may, I do not think that at present this court should make a final determination on whether the

[8] Page 239 paragraph 39 of book of pleadings
[9] page 240 paragraph 42 of book of pleadings

applicant is liable under the Act to pay for the goods under issue. The case does not turn on the factual matrix of the nature or otherwise of the goods under issue. For reasons that will become apparent later in this judgment, the case rests within the question of procedural law.

Common cause

[21] From the pleadings and as appreciated by learned Counsel for all the parties herein, it is not in issue that the goods forming the subject matter of this case were the same goods which were the subject matter in the Supreme Court under Case No.20/2012. It is further not disputed that the Supreme Court found that the said goods were zero rated in so far as the VAT was concerned. It is further common cause that the reason for so finding by the Supreme Court was based on other factual circumstances and not as advanced by first respondent *viz*. that the stamps reflected in the SAD 500 forms were forged and that the motor vehicles said to have conveyed the said goods across to the Republic of Mozambique were not found to have done so from the Immigration department's records.

Related terms

[22] During submissions by both Counsel on behalf of the parties herein, a number of terms associated with revenue collection were at play. These were namely; VAT, excisable goods and the principle "*pay now and argue later.*" I wish to attend to them briefly:

VAT

[23] The Value Added Tax Act 2011 replaced the Sales Tax Act of 1983 as in South Africa. As to the meaning and circumstances under which VAT is applied, I need not re-invent the wheel. This subject is well canvassed by Justice **Kriegler J** in **Metcash Trading Limited v Commissioner for South African Revenue Services and Another**.[10] His Lordship **Kriegler J**[11] outlines[12]:

> ***"[12] VAT is, as its name signifies, a tax on added value. It is imposed at each step along the chain of manufacture and distribution of goods or services that are supplied in the country in the course of business; and it is calculated on the value at the time of each such step."***

[24] He continues:

> ***[13] The basic idea of VAT is that it is calculated on the value of each successive step as goods move from hand to hand along the commercial production and distribution chain from their original source to their ultimate user. For present purposes it can be accepted that the tax is calculated at the present rate of 14% on the price at which each successive act of handling on takes place. Furthermore, the tax is not only calculated on the value of each successive supply, but is to be paid at that time. As goods move along the distribution chain, everyone making up the sales chain is first a recipient, then a supplier."***
>
> ***[14] Being a tax on added value, VAT is not levied on the full price of a commodity at each transactional delivery step it takesalong the distribution chain. It is not cumulative but merely a tax on the added value the commodity gains during each interval since he previous supply. To arrive at this outcome a supplying vendor, when calculating the VAT payable on the particular supply, simply deducts the VAT that was paid when the particular goods were supplied to it in the first place. As a commodity is on-sold by a succession of vendors, each payment of VAT by each successful supplier must then represent***

[10] CCT 3/00 [2000] ZACC 21; 2002 (4) SA 317
[11] Page 4 of 24 *Supra*
[12] Page 4 of 24 *ibid* paragraphs 13,supra

14% of the selling price less 14% of the price which was payable when that commodity was acquired. According to the scheme at the Act the tax that is payable by a supplying vendor is called output tax and the tax that was payable on the supply to that vendor upon acquisition is called input tax.

[15] Of course it would be wholly impracticable to expect merchants to pay and the fiscus to receive individual payments of VAT on each and every separate supply. Therefore the Act provides a detailed mechanism for vendors to keep certain kinds of records and periodically to calculate, account for and pay VAT to the Commissioner. In broad outline the mechanism provides how the deduction of input tax from output tax is to be made and specifies the kinds of vouchers that have to be kept; and then when and how vendors are to make their payments and complete their supporting returns to the Commissioner. In the result vendors are entrusted with a number of important duties in relation to VAT. First there is the duty to calculate and levy VAT on each supply of goods; then to calculate the output tax and the input tax on that transaction correctly; also to keep proper records supported by the prescribed vouchers, periodically to add up the sum of output and input taxes attributed to that period and appropriately deducting the total of the input taxes from those of the output taxes; and ultimately and crucially, to make due and timeous return and payment of the VAT that is payable in accordance with the vendor's allocated tax period.

[16] It would be convenient to pause at this point to recapitulate and fill in some details before moving on to the next phase of the Act, which deals with assessments by the Commissioner and what they may set in train. The first significant point to not is that VAT, quite unlike income tax, does not give rise to a liability only once an assessment has been made. VAT, is a multi-stage tax, it rises continuously. Moreover VAT vendors/taxpayers bear the ongoing totals over and above deductible input totals (and any other permissible deductibles) and to pay such balances over to the fisc. It is therefore a multi-stage system with both continuous self-assessment and predetermined periodic reporting/paying.

[17] An even more important feature of VAT, particularly in contradistinction to income tax, is that vendors are in a sense involuntary tax-collectors. In principle VAT payable on each and every sale; the VAT percentage, the details for its calculation and the timetable for periodic payment are statutorily predetermined, and it is left to the vendor to ensure that the correct periodic balance is

calculated, appropriated and paid over in respect of each tax period. By like token the regularity of VAT payments on the one hand ensures a steady and generally more accurately predictable stream of revenue via a multi-staged taxation that is perceived as resting less heavily on the taxpayer, but on the other hand it does require a great deal of book-keeping by vendors and policing by the revenue authorities."

[25] The following excerpt is apposite in our jurisdiction:

> ***"21. It would now be convenient to revert to the summary of the relevant statutory provisions which it will be recalled, had reached the point where a vendor's obligation to make timeous periodic returns and payments of VAT to the Commissioner were outlined. The Act, having prescribed the VAT obligations of vendors, proceeds to cater for those vendors who do not voluntarily and faithfully fulfil those obligations. The first step to that end is section 31 of the Act[13], which empowers the Commissioner to make an independent assessment of both the VAT and the amount on which is payable, and makes the amount of the assessed tax payable, where there is a failure to make a VAT return, or where the Commissioner is not satisfied with a return or has reason to believe VAT is due but has not been paid. The Commissioner must give the vendor written notice of the assessment and in the notice inform the vendor that objection to the assessment may be lodged.***
>
> ***[22] Manifestly section 31(section 33) constitutes a valuable weapon in the hands of the Commissioner. The prospect of having the Commissioner independently assess both the underlying amount and the VAT that is to be paid thereon must in itself be a powerful disincentive for recalcitrant, dishonest or otherwise remiss vendors. But the compulsive force of this mechanism of the Act goes a good deal further. The dissatisfied vendor can, by lodging an objection under section 32 of the Act (section 35) and, that failing, by noting an appeal under section 33 or 33A (section 36), both compel the Commissioner to reconsider the assessment and have its correctness reconsidered afresh by an independent tribunal. But the burden of proving the Commissioner wrong then rests on the vendor under section 37 (section 38). Because VAT is inherently a system of self-assessment based on a vendor's own records, it is obvious that the incidence of this onus can have a decisive effect on the outcome of an object or appeal. Unlike income tax, where assessment can elicit genuine differences of opinion about accounting practice, legal interpretations or the like, in***

[13] See section 33 of the VAT Act of 2011

the case of a VAT assessment there must invariably have been an adverse credibility finding by the Commissioner; and by like token such a finding would usually have entailed a rejection of the truth of the vendor's records, returns and averments relating thereto. Consequently, the discharge of the onus is a most formidable hurdle facing a VAT vendor who is aggrieved by an assessment: unless the Commissioner's precipitating credibility finding can be shown to be wrong, the consequential assessment must stand." **(my own addition)**

Excisable goods

[26] The first respondent has deposed that it has levied duty on applicant's goods on the basis of section 43 (*bis*) of the Act which reads:

> "***43bis.*** ***Subject to the provisions of sections 35 (3) (b) (i) and 99(2) (b), whenever in terms of this Act liability for duty or any amount demanded under section 88(2)(a) devolves on two or more persons, each person shall, unless he satisfies the Commissioner that his relevant liability has ceased in terms of this Act, be jointly and severally liable for such duty or amount, any one paying, the other or others to be absolved pro tanto. (Added A.5/1991)***

[27] It is on the basis of the above that the first respondent joined the second, third and fourth respondents and claims duty. Excisable goods are defined by the Act as:

> ***"excisable goods" means any goods specified in Part 2 of Schedule No.1 which have been manufactured in Swaziland;***
>
> ***"goods" includes all wares, articles, merchandise, animals, currency, matters or things;***

[28] The first respondent relies on section 43 (*bis)* and section 114 (3). **Ota JA**[14] discussed the import of section 43 and more particularly the meaning extended to home consumption. She then concluded, "***This goes to establish that duty is not payable on all goods landed in the Kingdom. It is payable only on goods imported for use and consumption in Swaziland***."

"*Pay now and argue later*" principle

[29] It was contended on behalf of applicant that it was unlawful for the first respondent to hold on the applicant's money before the matter is adjudicated upon either before a tribunal or the courts. Counsel on behalf of first respondent submitted that in the collection of revenue matters, the principle "*pay now and argue later*" is applicable.

[30] It is our common law rule of practice that execution of judgment is automatically stayed once an appeal to that judgment is noted. This general rule of practice applies with equal force to decisions by tribunals or functionaries.

[31] **Cobertt JA**[15] stated:

> ***"The purpose of this rule as to the suspension of a judgment on the noting of an appeal is to prevent irreparable damage from being done to the intending appellant, either by levy under a writ of execution or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from."***

[14] See Swaziland Revenue Authority v Charles Mafika Ndzimandze Civil Appeal Case No.89/2012
[15] South Cape Corp. v Engineering Management Services 1977 (3) 534 at 545)

[32] As generally accepted, every general rule has an exception to it. An exception therefore to the rule of practice that execution of judgment is *mero motu* stayed upon filing of an appeal, applies in matters of revenue collection.

[33] In South Africa, this exception was first introduced by enactment, Section 85 of the Income Tax (Consolidated) Act 41 of 1917. It found its way through similar enactments. In the present time, it is still provided by legislation (VAT Act). It provides that unless the Commissioner directs otherwise, no noting of appeal shall suspend execution of judgment, *viz* inclusive of special court orders.[16]

[34] The above exception was later to be referred to as "*pay now and argue later'* provision"[17] . **Krieger J** sums up this legislative provision with much clarity as he propounds[18]:

> ***"[36] The common-law rule of judicial practice relating to automatic suspension of execution by the noting of an appeal, does not apply to the appellate procedure created by sections 33 and 34 of the Act. Neither the noting of the statutory "appeal" to the Special Court (or the board) nor the noting of any subsequent appeal in itself suspends the vendor's obligation to pay according to the tenor of the assessment and accompanying imposts. That means that, unlike a common-law obligation to pay by the noting of an appeal to the Special Court (or board), and from the Special Court to an ordinary court of law."***

[35] The learned judge emphatically points out[19] following the contention that this principle violates a litigant's right to fair hearing and access to court:

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[16] See Cir v NCR Corporation of South Africa (Pty) Ltd 1988 (2) SA 765 at 774-775
[17] See Metcash *supra*
[18] Paragraph [36] *supra*
[19] Paragraph [37] *supra*

> ***"[37] More importantly, section 36 (1) is not concerned with access to a court of law and says nothing that can be construed as a prohibition against resort to such a court. It also has nothing to do with judgment on the tax debt; and even less does it have any bearing on execution of such a judgment. It does not afford any authority to circumvent the courts, nor any right to levy execution. The first part of the section is simply not concerned with anything other than the non-suspension – notwithstanding demure – of the obligation to pay the assessed VAT and consequential imports chargeable under the Act."***

[36] The honourable Judge sums as follows:

> ***"Even if this very benevolent interpretation is accepted, the rest of the provisions cannot be clearer in their meaning and effect, namely that no court of law, irrespective of the nature of the dispute which serves before it, has the power to suspend the obligation to pay"***

Could this exception explicitly provided for by legislation in South Africa also apply in Swaziland?

[37] **Krieger J**[20] concentrating only on VAT having postulated that *"**it is a multi-stage tax, it arises continuously ..... It is therefore a multi-stage system with both continuous self-assessment and predetermined reporting / paying"***, also notes:

> ***"[18] A special feature of VAT relates to export. VAT is payable only on consumption in South Africa and as a result output tax is not payable on goods sold and exported. In the arcane language of the Act, they are zero-rated. Therefore a merchant who buys and sells goods in South Africa and also sells some goods that are exported does the periodic calculation by adding up all input taxes for deduction from the sum of output taxes but, in calculating the latter, includes no output tax on the value of the exports. No output tax is payable on the***

[20] *n[10]*

> ***exported goods but a full credit is given for the input tax. This exemption, which aims at promoting exports and enhancing their competitiveness in the world market, holds self-evident evident benefits for export-orientated vendors. Unfortunately those benefits not only attract honest exporters but are a notorious magnet for crooks who devise all manner of schemes to exploit the system to their advantage.***" (my emphasis)

[38] Following that there are a number of taxes to be collected on behalf of the Government and VAT is just one of them, it is clear that the work of the first respondent and its officials is onerous. It is for this reason that the legislative enactment arms the first respondent with a number of weapons in order to carry its work effectively. One that quickly comes to mind is section 45 of the VAT Act 2011. It empowers the first respondent by notice in writing to require any person owing money or holding money on behalf of the tax payer or an agent as it were to pay such amount to the first respondent. It appears that the respondent invoked section 45 (1) (b) in withholding the money under dispute herein. **Brett AJ**[21] pointed out on a similar section:

> ***"The Notice enjoins the agent to pay the applicant's alleged VAT liability from funds in the latter's bank account irrespective of the will of the first applicant (tax payer)***. (my emphasis and addition)

[39] The effect of this sections translates into the "*pay now argue and later*" principle. In brief, this principle is applicable in the Kingdom and the first respondent's power to invoke it lies within the enabling legislations. The observation by **Ebersohn J** that "*the law in Swaziland is the same as that in South Africa,*"[22] therefore cannot be faulted in this regard as well.

[21] In Contract Support Services (Pty) Ltd v Commissioner, SARS 1999 (3) S.A. 1133 at 1144
[22] See Shell Oil Swaziland (Pty) Ltd v Motor World (Pty) Ltd t/a Sir Motors Appeal case No. 23/2006 at page 18 para 32

[40] Litigants need not fear this principle[23] as some exponents of *audi alterum partem* do. The principle is based on well grounded reasons eloquently articulated by **Brett AJ**[24] as follows:

> "***I also agree with Mr. Du Toit that to require a prior hearing would defeat the very purpose of the notice. It would alert the defaulting VAT payer or (taxpayer) to the intention to require payment from the latter's debtor and so enable the defaulting tax payer to receive payment of the funds due and to enable the taxpayer to spirit such funds away. Where prior notice and a hearing would render the proposed act migatory, no such prior notice or hearing is required***." (my emphasis and my own addition)

[41] At any rate the first respondent's power to apply this principle has been defined as administrative.[25] Such administrative powers are subject to review on the common law grounds. In other words, the *audi alteram partem* principle is afforded to a litigant in due course, as *in casu*.[26]

Case *in casu*

[42] It appears from the deduction of the entire pleadings before me that sometime in January 2013 first respondent embarked on investigations upon applicant's goods. First respondent then discovered that SAD 500 forms were not genuine. SAD 500 forms were described as documents presented by the exporter to first respondent's officials at the point of departure indicating that specific goods are on transit to the next country. These forms are then stamped by first respondent's officials confirming that the goods have departed. Once stamped, they are returned to the

[23] "Pay not and argue later"
[24] At page 1144
[25] See Metcash and Contract Support *supra*
[26] (and also in Pestana v Nedbank Ltd 2008 (3) SA 466.

exporter who will later file the same for purposes of acquisition before the next consignment is removed from the bonded warehouse.

[43] The applicant disputes that its goods are liable to tax. Firstly applicant advances a number of factors pointing out that its goods cannot be liable. For instance, that neither it nor its employees are responsible for the alleged forged stamps reflected in the SAD 500 forms; that even the attestation by first respondent that the stamps were forged lacks veracity for the reason that first respondent frustrated attempts by it to verify the allegations by failure to produce the actual physical genuine stamps for forensic comparison by its own expert despite requests. It further points out that it turned out in a meeting that it was not only applicant's forms that were said to have borne the false stamps. Other forms belonging to other traders were found to have had the said forged stamps. The inference therefore, is that it is not applicant or its employees who is responsible for the forged stamps, if the allegations by the first respondent are anything to go by.

[44] On the practicality of the averments by first respondent that the goods were as per Customs and Excise Act consumed locally, applicant argues that it is impracticable that its goods could find their way into the local markets for a number of reasons. Applicant points out that firstly the caps of its goods destined to Mozambique are different in colour from those consumed locally and that the alcohol content for local market goods is higher than those accepted by Mozambique laws.

[45] *In casu*, first respondent avers that it discovered that the SAD 500 forms at the hands or filed by applicant bore forged customs official stamps. First respondent highlighted that it did embark on investigations firstly of its own employees in this regard. The results were negative. It then launched

investigations against applicant. It was first respondent's conclusion that the applicant was responsible for the false stamps. This deduction was fortified by the evidence that on following the motor vehicles reflected on the forms which were said to have conveyed the goods across to Mozambique, such motor vehicles' registration and descriptions were not reflected in the corresponding immigration records.

[46] On the basis of the above, the first respondent submitted that it was entitled to withhold the sum of E996,422-98 which was previously held under case No. 20/2012. The basis is that as there were no records of the goods ever crossing over to Mozambique, the only plausible inference is that the goods were consumed locally and therefore subject to tax under the Custom and Excise Act.

[47] Secondly, applicant argues that in terms of the judgment as per Levinson JA, the said goods were declared zero-rated. This was so based on the finding that the goods had been exported to Mozambique.

Determination

[48] In the totality of the matrix of the case at hand, it is my considered view that I need not venture into the expedition of whether the applicant's goods are liable to tax under the Act or not.

[49] I must hasten to point out that I have already canvassed on the wide range of powers by the first respondent in carrying out its mandate in terms of the relevant legislations. That the first respondent is empowered by enactments to attach, for instance money belonging to a vendor in the hands of third parties without having first to resort to the court of law is

without doubt, as demonstrated above. However, this power as expected in our modern and constitutional dispensation where the rule of law enjoys predominance, is not without checks and balances.

[50] Owing to our infancy in litigation on the subject of revenue collection, I turn to South Africa whose legislation on such matters do not differ much but enjoys comparatively a wealth of decided cases in such area.

[51] I draw a correlation from the full bench case of **Pestana v Nedbank Ltd.**[27] In that case, the South African Revenue Services (SARS) in terms of its section 99 of the Income Tax Act 58 of 1962, by telefax, sent a notice ordering the respondent to attach and transfer to its account the sum of E496 546 40 held by **Joseph Michael Pestana**. This notice was received at 08:33 hours on 4th February 2004 by respondent's head office. **Pestana** who held the account at Carltonville branch, on the same day instructed the respondent to transfer the sum of E480 000 to appellant. At 11:33 hours on the 4th February 2004 respondent's branch at Carltonville complied with the instruction by **Pestana**.

[52] It appears that by the time the instruction by SARS received by respondent's head office was dispatched by respondent to its Carltonville branch, the sum to be attached had already been transferred to appellant. Respondent's Carltonville branch, upon receiving the instruction from its head office, reversed the transfer from appellant back to **Pestana's** account for purposes of complying with the SARS instructions.

[53] The appellant challenged the respondent in the High Court, Witwatersrand Local Division. The High Court dismissed the appellant's application

[27] [2008] 1 All S.A. 603 (W).

paying much regard to the powers vested in the Commissioner of SARS and upon finding that there was no prejudice suffered.

[54] However, the full bench of the same division, on appeal granted appellant's application and set aside the High Court decision. The full bench held that one must look behind the reason for the mistake. For the reason that the mistake could not be attributed to the appellant, the respondent was not entitled to effect the reversal.

[55] Turning to the case *in casu*, it is my considered view that applicant stands on much solid grounds than **Pestana** (*supra*) for the common cause reason that a judgment of a higher court exist which considered the question as to whether the goods were liable to tax (VAT) at the time. The court made a firm finding that the goods ought to be zero-rated as it stated as follows[28]:

> *"In my view the goods in question were neither delivered nor made available to the Mozambique customer in Swaziland. In so far as there was a suggestion by the First Respondent that the transaction herein can be classed as "indirect export", that suggestion in my view has no legal foundation in either of the relevant acts. The facts show that the goods were at all times under his supervision of the Swaziland customs officials. The consignment was placed in an approved sealed vehicle and upon arrival at the border post its contents were checked against the documentation. Delivery within the meaning of the VAT act connotes a transfer of possession and ownership and more particularly the notion of control, that is to say, that one is free to deal with ones own property.*
>
> *Moreover, the term "making available" carries the connotation of placing the goods at the purchaser's disposal. None of these things occurred in my view. Form the time the goods were taken out of the bonded warehouse under supervision until the time they arrived at the border post they were, in a supervised, secure and quarantined environment. It can hardly be suggested that the purchaser had any form of control until such time as customs clearance had taken place."*

[28] Pages 138 to 139 of the Book of Pleadings

[56] The court then concluded[29]:

> "*In the result I find that the first respondent misdirected itself as matter of law in concluding that the respective transaction between April 2012 and September 2012 attracted the payment of VAT. The subsequent assessment in respect of October 2012 falls into the same category*."

[57] I appreciate that the first respondent deposed that the evidence presented *in casu* was different from the one serving before the Supreme Court. Before the Supreme Court the first respondent had tendered that the goods were liable under VAT Act by reason that applicant's customers from Mozambique had actually entered into Swaziland and purchased the goods from the applicant. The Mozambique customers had then conveyed the goods themselves to Mozambique. As demonstrated from the above excerpt of the judgment, the Supreme Court rejected first respondent's arguments and accepted that of applicant.

[58] I further consider that the submission on behalf of first respondent that a court of law faced with the new facts discovered, would be inclined to find in favour of the first respondent. However, the difficulty with accepting first respondent's submission in this regard is that, even if the court were for a moment, to consider such issue and supposedly find in favour of first respondent, this court would be directly overturning the Supreme Court's findings on the tenure of the goods. Such would, with due respect, be tantamount to a review through the back door. This is a procedure highly undesirable by reason that, *"...if allowed, would produce endless uncertainty and confusion."*[30] based on the principle of *stare decisis* (stand by the decision).

[29] Page 139 N17

[30] See Strateford JA in Bloemfontein Town Council v Ricliter 1938 AD 195 at 232 also cited in Commissioner for Insland Revenue v Estate Crème and Another 1943 AD 656 at 680.

[59] I appreciate the view that the doctrine of *stare decisis* is to the effect that "*the court is bound by a previous decision* (*stare decisis*) *has reference only to the ratio decidendi and not to the concrete result of that decision*" as per **Greenberg JA.**[31]

[60] However, the learned judge also wisely pinpointed:

> *"..the concrete decision is binding between the parties to it but it is the abstract ratio decidendi which alone has the force of law*."[32]" (my emphasis)

[61] This notion that the court cannot embark on the enquiry on the status of the goods must have been appreciated by the first respondent as it was attested on its behalf:

> "*I wish to bring to the court's attention that, with the evidence now at our disposal, the first respondent has instructed its attorneys to review the Supreme Court's judgment ...*"

[62] Well and good as Rule 18 of the Court of Appeal Rules 1955 as amended reads:

> *"Taking of additional evidence*
> *18. Additional evidence ordered by the Court of Appeal to be taken shall be either by affidavit or by oral examination before the Court of Appeal or before the High Court or before an examiner or commissioner."*

[63] In other words, the Rules do provide upon application, for the Supreme Court to admit fresh evidence or grant leave to have the matter referred to the High Court for fresh adjudication. However, what was of note and

[31] Feller v Minister of the Interior 1954 (4) S.A. 523 at 537.
[32] N[31]

conceded by Counsel for first respondent before court was that there was no review application serving before the Supreme Court up to the date of arguments which was November 2015. As long as the Supreme Court judgment stands without challenge before it, its orders ought to be respected and complied with in terms of the *stare decisis* and that the "***concrete decision is binding between the parties***.[33]" I may add that the doctrine of *stare decisis* does not only apply to decisions made horizontally. It applies with greater force on decisions taken by higher courts or vertically as it were.

[64] It would be ominous for this court to decline to grant the orders prayed for in the light of the finding of the Supreme Court and the non pending review application. To do otherwise would strike at the very foundation of the rule of law.

[65] I must however, hasten to point out that because I have not made any findings on the merits and demerits of the goods having been consumed locally, I am unable to decide on applicant's prayers 1 and 3. In law, I am duty bound not to do so for reasons advanced above.

[66] For the above reasons, I enter the following orders:

1. First respondent's decision contained in a letter dated 7th October 2013 refusing to refund applicant the sum of E996 422-98 is hereby reviewed and set aside;

2. First respondent is hereby ordered to refund applicant the amount of E996 422-98;

[33] See *n*[32]

3. First respondent is ordered to pay costs of suit including certified costs of counsel;

4. No orders are entered in respect of prayers 1 and 3 of applicant's application.

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M. DLAMINI
JUDGE

For Applicant: **F. Joubert assisted by Z. Shabangu of Magagula Hlophe Attorneys**

For Respondents: **N. Manzini of C. J. Littler and Company**