THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

CASE NO: 27/07

REPORTABLE

In the matter between :

MOHAMMED AMIN YUSUF SHAIKH

APPELLANT

and

STANDARD BANK OF SA LIMITED **FIRST RESPONDENT**

SOUTH AFRICAN REVENUE SERVICES **SECOND RESPONDENT**

BEFORE:	**NAVSA, NUGENT, JAFTA JJA HURT and MHLANTLA AJJA**
HEARD:	**12 NOVEMBER 2007**
DELIVERED:	**29 NOVEMBER 2007**
SUMMARY:	**The erroneous reference to a statutory provision or failure to refer to the applicable section does not render a notice for recovery of Vat by SARS invalid.**
NEUTRAL CITATION:	**This judgment may be referred to as *Shaikh v Standard Bank* [2007] SCA 168 (RSA)**

MHLANTLA AJA

MHLANTLA AJA:

[1] This is an appeal with the leave of the court below against a decision of Lopes AJ (sitting in the Durban High Court) in which he dismissed with costs two points *in limine* raised by the appellant, Mr Mohamed Amin Yusuf Shaikh ('Shaikh').

[2] The issue in this appeal is whether the South African Revenue Services ('SARS') was entitled to recover value added tax ('Vat') through an agent, as statutorily defined, on imported goods under a notice that referred only to s 114A of the Customs and Excise Act 91 of 1964 ('the Customs Act').There are related provisions of the Customs Act and the Value Added Tax Act 89 of 1991 ('the Vat Act') which will be examined in due course.

[3] It is necessary to commence by setting out the relevant legislation. The Customs Act empowers SARS to levy customs and excise duties on imported goods and s 114A provides a particular method of recovering such duties. It provides:

'The Commissioner may, if he thinks it necessary, declare any person to be the agent of any other person, and the person so declared an agent –

(a) shall for the purposes of this Act be the agent of such other person in respect of the payment of any amount of duty, interest, fine, penalty or forfeiture payable by such other person under this Act; and

(b) may be required to make payment of such amount from any moneys which may be held by him or her for or be due by him or her to the person whose agent he or she has been declared to be:

Provided that a person so declared an agent who, is unable to comply with a requirement of the notice of appointment as agent, must advise the Commissioner in writing of the reasons for not complying with that notice within the period specified in the notice.'

[4] Section 103 of the Customs Act imposes vicarious liability on managers of corporate entities for any liability incurred by such entities while under the management of the manager concerned. It provides:

'For the purposes of this Act any reference to a person shall be deemed to include a reference to a company, close corporation, co-operative society, firm, partnership, statutory body or club and in the event of a contravention of or non-compliance with this Act or the incurring of any liability under this Act by any company, close corporation, co-operative society, firm, partnership, statutory body or club any person having the management of any premises or business in or in connection with which the contravention or non-compliance took place, or the liability was incurred may be charged with the relevant offence and shall be liable to any penalties provided therefor and shall be liable in respect of any liability so incurred.'

[5] The VAT Act authorises SARS to collect Vat in general and in relation to goods imported into the Republic. Section 47 of this Act, like s 114A of the Customs Act, prescribes a particular procedure which may be followed by SARS in collecting Vat. It reads as follows:

'The Commissioner may, if he thinks it necessary, declare any person to be the agent of any other person, and the person so declared an agent shall for the purposes of this Act be the agent of such other person in respect of the payment of any amount of tax, additional tax, penalty or interest payable by such other person under this Act and may be required to make payment of such amount from any moneys which may be held by him for or be due by him to the person whose agent he has been declared to be . . . .'

[6] Section 13 of the VAT Act incorporates with the necessary changes the provisions of the Customs Act pertaining to the recovery of duty. Section 13(6) provides:

'(6) Subject to this Act, the provisions of the Customs and Excise Act relating to the importation, transit, coastwise carriage and clearance of goods and the payment and recovery

of duty shall *mutatis mutandis* apply as if enacted in this Act, whether or not the said provisions apply for the purposes of any duty levied in terms of the Customs and Excise Act.'

[7] The facts of this case are common cause. In January 2004 Shaikh was a manager in the wholesale business of a close corporation called Nexor 188 CC, trading as Classic Distributing Company ('Classic') at 28 Linze Road, Durban. The sole member of Classic was Shaikh's former wife, Ms Marianne Ward. Classic traded in shoes which were imported into South Africa through Durban Harbour. As expected, SARS charged duty and Vat on shoes imported into the country by Classic. The value of goods is used as a basis for calculating the amount of customs duty due to SARS. Therefore it is incumbent upon the importer to declare the true value and this is usually done by submitting invoices to SARS.

[8] On 29 January 2004 customs officials including Mr Younus Mansoor ('Mansoor'), a post-clearance inspector specialist stationed at the Durban's customs office, called at Classic's business premises to conduct a search. During the search they discovered documents which proved that Classic had underdeclared the value of the shoes it had imported by submitting false invoices reflecting an amount less than the true value. Mansoor and his team noticed that there were duplicate invoices relating to the same consignment and that Classic had submitted ones reflecting the lesser value.

[9] On 16 February 2004 Mansoor, on behalf of SARS, demanded payment from Classic of the difference between the amount of duty and Vat it had already paid (the understated value) and the sum calculated on the basis of the actual value of imported shoes. Shaikh met Mansoor and raised minor queries but

accepted the correctness of Mansoor's calculations. Classic failed to pay the amount claimed and SARS turned to Shaikh for payment, invoking the provisions of s 103 of the Customs Act. When he too failed to pay SARS sought to recover the duties and Vat due from him by means of the procedure contemplated in s 114A of the Customs Act and s 47 of the VAT Act.

[10] Acting in terms of s 114A SARS appointed the Standard Bank of SA Limited ('the bank') at which Shaikh had an account as his agent and instructed the bank to pay the sum of R1 245 724.33 to it. This amount represented customs duty, Vat, forfeiture and interest charges. The first notice of appointment was issued on 28 March 2006 and reads as follows:

'APPOINTMENT AS AGENT: MR M.A.Y. SHAIKH : YOUNG AMERICAN

The abovementioned is indebted to this department for Customs Duty, Vat, Forfeiture and Interest of R1 245 724.33.

In terms of s 114A of the Customs and Excise Act 91 of 1964, as amended, the Commissioner for the South African Revenue Services is empowered to appoint an agent who may be in custody or control of income, money etc of the client, to hold such money or assets for the payment of Duty, VAT, Forfeiture, fine, penalty and interest upon the request of the department.

In terms of this section [the] Commissioner appoint[s] you as agent and requests that you hold and not dispose of any monies or assets, whether capital or interest to the client or to any other person. You are requested to pay such money referred to above to the Commissioner by close of business tomorrow 29 March 2006. If you are unable to comply with this notice you must advise me in writing by 30 March 2006, your reasons for not complying.'

The bank duly complied and paid the sum of R699 920 being the only funds available in Shaik's account to SARS.

[11] On 8 May 2006 SARS issued a second notice in almost identical terms for the payment of the sum of R539 993.29. The bank again complied.

[12] Shaikh thereafter launched an application in the court below challenging the validity of the notices on the basis that they were *ultra vires*. The bank did not oppose the application and gave notice that it would abide the decision of the court. It adopted the same attitude on appeal.

[13] At the hearing of the matter Lopes AJ was asked to decide points raised by Shaikh separately from the other issues which were deferred for later consideration. The first question was whether the provisions of the Customs Act authorised the Commissioner to appoint agents for the recovery of amounts relating to Vat. Allied to this was the question of whether s 13(6) of VAT Act bestowed such authority. The second was whether Shaikh had not incurred liability for Vat in terms of s 103 of the Customs Act. The claims can only arise, contended Shaikh, under the Vat Act. It was contended that a notice in terms of s 47 of the VAT Act ought to have been issued rather than the notice which relied on s 114A of the Customs Act. The court below decided these questions in favour of SARS and postponed the application *sine die*.

[14] Before us the parties were agreed that the sole issue for determination which is dispositive of the appeal, was whether SARS was entitled to rely on the notices citing s 114A to recover Vat.

[15] Counsel for the appellant conceded, correctly in my view, that Shaikh was liable for Classic's debts within the parameters of s 103 of the Customs Act. Whilst conceding that Shaikh was liable for Vat and that SARS was entitled to claim it, he argued that SARS could not invoke s 114A for the recovery of Vat because that section (114A) was introduced in 2003, long after the VAT Act was

promulgated. It will be recalled that s 47 contains provisions identical to s 114A of the Customs Act. It was contended therefore that when s 114A was introduced the Legislature could not, so it was argued, have intended to incorporate s 114A into the VAT Act. Accordingly SARS could not, so it was submitted in conclusion, claim Vat under a notice issued in terms of s 114A. SARS could only do so under a notice issued in terms of s 47 of the VAT Act.

[16] The real issue here is not whether s 13(6) incorporates s 114A into the VAT Act but whether SARS is entitled to claim Vat under a notice which refers only to s 114A. Put differently, does the reference to that section render the recovery of Vat invalid where SARS is empowered to recover Vat albeit by a section in another statute?

[17] This question was answered by this court in *Howick District Landowners Association v Umngeni Municipality*[1] where Cameron JA stated:

'[W]here an empowering statute does not require that the provision in terms of which a power is exercised be expressly specified, the decision-maker need not mention it. Provided moreover that the enabling statute grants the power sought to be exercised, the fact that the decision-maker mentions the wrong provision does not invalidate the legislative or administrative act.

The landowners argued that there is "considerable doubt" about the validity of [*Latib v The Adminsistrator, Transvaal* 1969 (3) SA 186 (T)] in the light of the constitutional dispensation and, in particular, its emphasis on the principle of legality. As authority, they referred to the decision of the CC in [*Minister of Education v Harris* 2001 (4) SA 1297 (CC)]. But this seems to me to misinterpret both the doctrine and the decision. *Latib* does not license unauthorised legislative or administrative acts. It licenses acts when authority for them exists, and when the

[1] 2007 (1) SA 206 (SCA) paras 19 and 20. See also *Administrateur, Transvaal v Quid Pro Quo Eiendoms Maatskappy (Edms) Bpk* 1977 (4) SA 829 (A).

failure expressly or accurately to invoke their source is immaterial to their due exercise. As Baxter puts it:

> "If the authority is stated incorrectly, the action is not thereby invalidated so long as authority for the action does exist and the conditions for its exercise have been observed."'

[18] In my view the principle in *Howick* applies equally to the present case. When issuing the impugned notices, SARS erroneously referred only to s 114A and omitted to refer to s 47 of the VAT Act. The reference to s 114A was in order because SARS also sought to collect duty which arose under the Customs Act. To this extent Shaikh does not challenge the validity of the notices. Instead his complaint is that the notices do not also refer to s 47. Consequently, he contends, Vat could not be recovered in terms of those notices. The question that arises is whether it was mandatory for them to refer to s 47. The VAT Act does not prescribe that reference to the section be made in a notice issued under authority of s 47. The omission therefore did not affect the validity of the notices insofar as they related to the collection of Vat. SARS unquestionably had authority to issue the notices for that purpose. To conclude otherwise would be to elevate form above substance.

[19] It is worth noting that Counsel for the appellant conceded that there would have been no problem if the Commissioner had not mentioned any provisions in the notices and that under those circumstances the agent would have been obliged to pay. It follows that the appeal must fail.

[20] In the result the appeal is dismissed with costs.

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N Z MHLANTLA

ACTING JUDGE OF APPEAL

CONCUR:

NAVSA JA)

NUGENT JA)

JAFTA JA)

HURT AJA)