THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 543/2017

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	**APPELLANT**

and

JM DA ENCARNAÇÂO N.O.	**FIRST RESPONDENT**
MZ DA ENCARNAÇÂO N.O.	**SECOND RESPONDENT**

Neutral citation: *SARS v Encarnacao N.O.* (543/2017) [2018] ZASCA 71 (29 May 2018)

Coram: Navsa, Willis and Mocumie JJA, Davis and Plasket AJJA

Heard: 16 May 2018

Delivered: 29 May 2018

Summary: Rebate item 412.09 in Schedule 4/Part 1 of the Customs and Excise Act 91 of 1964 – what occurrences fall within *vis major* – the meaning of 'such goods did not enter into consumption'.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Prinsloo J sitting as a court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Davis AJA (Navsa, Willis and Mocumie JJA and Plasket AJA concurring):

[1] This case concerns the requirements which are necessary to claim a rebate of customs duty in terms of Rebate item 412.09 in Schedule 4/Part 1 to the Customs and Excise Act 91 of 1964 (the Act). It follows upon an allegation that two consignments of Remington Gold cigarettes, which were imported into South Africa from Zimbabwe, were stolen on 15 August 2009 by unknown armed robbers during a robbery from a customs and excise warehouse as described in s 19(2) of the Act.

[2] On 26 August 2009, appellant notified respondents, the trustees of the DA Encarnacao Trust (the trust), that they were liable for outstanding customs duties and VAT in the amount of R910 171.42 in respect of these consignments of imported cigarettes. On 3 September 2009, appellant made a further demand for payment.

[3] The trust disputed this liability for payment of the outstanding amount on the basis that it qualified for a full rebate of the duty together with VAT in terms of Rebate item 412.09.

[4] Following a dispute concerning the applicability of Rebate item 412.09, the trust launched an application in the court *a quo* to compel appellant to repay an amount of R58 877.52, which appellant had obtained from the trust's bank account in

terms of s 114 A of the Act, together with a declaratory order that the trust qualified for the full rebate.

The decision of the court a quo

[5] The court *a quo* upheld the application bought by the trust. Its order was predicated on two essential findings. In the first place, it found that an armed robbery could amount to *vis major* as provided for in Rebate item 412.09. This would result in the importer of goods which are the subject of a robbery qualifying for the rebate.

[6] The court *a quo* was satisfied that the evidence provided by the trust, showed on the probabilities, that the two consignments of cigarettes were stolen as a result of an armed robbery. The consignments were never found; hence the trust was entitled to a rebate paid in terms of the provisions of Rebate item 412.09 for the customs duty which it had paid.

Appellant's case

[7] On appeal, with the leave of the court *a quo*, appellant contended that, on the facts of the case as accepted by the court a quo, the respondent was not entitled to a rebate. Appellant's counsel contended in their heads of argument that much of respondents' case had only been set out in its replying affidavit and that it was impermissible for respondent to so introduce new matter in reply. However, before this court the appellant's argument focused exclusively on the proper interpretation of Rebate item 412.09 and did not proceed with argument concerning the admissibility of parts of the replying affidavit. Thus, the appeal is concerned with one issue, namely the meaning and scope of Rebate item 412.09 within the context of a consignment of cigarettes being taken from a registered bonded warehouse by way of an armed robbery.

Rebate item 412.09 in Schedule 4

[8] Rebate item 412.09 deals with circumstances under which goods qualify for a rebate It provides as follows:

'Goods, excluding goods contemplated in Rebate Item 497.02, in respect of which the customs duty, together with the fuel levy (where applicable), amounts to not less than

R2 500.00, proved to have been lost, destroyed or damaged on any single occasion in circumstances of *vis major* or in such other circumstances as the Commissioner deems exceptional whilst such goods are:

(a) in any customs and excise warehouse or in any appointed transit shed or under the control of the Commissioner;
(b) being removed with deferment of payment of duty or under rebate of duty from a place in the Republic to any other place in terms of the provisions of this Act; or
(c) being stored in any rebate storeroom, provided-
    i) no compensation in respect of the customs duty or fuel levy on such goods has been paid or is due to the owner by any other person;
    ii) such loss, destruction or damage was not due to any negligence or fraud on the part of the person liable for the duty; and
    iii) such goods did not enter into consumption'.

[9] For the purposes of this case, the requirements contained in this rebate, which are cumulative, can be set out thus:

1. the goods involved are in the amount of not less than R2500;
2. they have been proved to have been lost, destroyed or damaged on any single occasion;
3. in circumstances of *vis major*, alternatively in such other circumstances as the Commissioner deems exceptional;
4. the *vis major* or the circumstances, which are deemed exceptional by the Commissioner took place while the goods were in a custom and excise warehouse;
5. no compensation in respect of the customs duty or fuel levy on the goods has been paid or is due to the owner by any other person;
6. the loss, destruction or damage was not due to any negligence or fraud on the part of the person liable for the duty ; and
7. the goods did not enter into consumption.

[10] Notwithstanding an initial dispute between the parties about the interpretation of these requirements, it was correctly conceded by respondents' counsel that all of these requirements had to be met before a rebate under this item could be claimed. The dispute then reduced to one central question: what was meant by 'such goods did not enter into consumption'?

[11] Appellant's counsel contended that, once the goods in question entered the relevant market which led to the consumption thereof, the duty must be paid. It did not matter in which way the goods entered the market, that is by the importer selling the consignments or by robbers illegally inserting the stolen consignments into the market. In this connection, he referred to the provisions of s 45(1) of the Act:

'(1) (a) Notwithstanding anything to the contrary in this Act contained, all goods consigned to or imported into the Republic or stored or manufactured in a customs and excise warehouse or removed in bond shall upon being entered for home consumption be liable to such duties (including anti-dumping duties, countervailing duties and safeguard duties specified in Schedule 2 and new or increased duties referred to in section 58 (1) and duties imposed under the provisions of section 53) as may at the time of such entry be leviable upon such goods.

(b) Notwithstanding the provisions of paragraph (a) but subject to the provisions of section 40, any dutiable goods imported into or manufactured in the Republic and which were removed, taken or delivered without due entry for home consumption having been made in respect of such goods, shall be liable to such duties as may be leviable upon such goods at the time of such removal, taking or delivery or at the time of assessment by an officer, whichever yields the greater amount of duty.'

[12] Appellant's counsel submitted that s 45(1)*(b)* of the Act envisaged the exact situation that occurred in the present case. Dutiable goods which were imported into South Africa were removed, taken or delivered without due entry for home consumption having been made. Nonetheless, the goods attracted the applicable duty at the time of their removal. Hence, s 45(1)*(b)* covered the case of goods entering consumption by way of the action of robbers who had seized the goods.

[13] This provision has to be read together with the balance of the Act, including s 76(2)*(d)* of the Act. This provides:

'The Commissioner shall, subject to the provisions of subsection (4), consider any application for a refund or payment from any applicant who contends that he has paid any duty or other charge for which he was not liable and that he is entitled to any payment under this Act by reason of –

…

(d) The goods concerned having been damaged, destroyed or irrevocably lost by circumstances beyond his control prior to the release thereof for home consumption.'

While this provision caters for refunds, it does so in circumstances where the goods for which duty has been paid have been damaged, destroyed or irrevocably lost in circumstances beyond the control of the importer prior to the release thereof for home consumption. Appellant contended that this section provides exclusively for refunds of duty already paid and did not concern rebates.

[14] It is difficult to see why an importer, who has prematurely paid duty while the goods are in a customs and excise warehouse, can obtain a refund if the goods are irrevocably lost due to a robbery while the same person cannot claim a rebate if the goods are lost as a result of an armed robbery prior to payment of the duty.

[15] The interpretation contended for by appellant contains an added difficulty. The duty is payable as set out in Schedule 4 which contains Rebate item 412.09. On appellant's interpretation of the Act and the Schedule read together, it is extremely difficult to see how an armed robbery could ever trigger a rebate of duty to be paid. Appellant did not argue that an armed robbery cannot fall under the category of *vis major*. That is understandable, given SARS Procedure Step of 14 March 2012 at para 2.9(e): 'Robbery by armed or dangerous attackers can be regarded as *force majeure*, but theft in the ordinary cause (*sic*, should be course) will seldom be regarded as *force majeure.'*
This guideline accords with South African law which recognizes that *vis major* includes human acts in addition to acts of nature or acts of God. *Wille's Principles of South African Law* (9ed) at 850.

[16] From this, it must follow that an armed robbery falls within the scope of *vis major*. After the robbery, the goods were out of the control of both appellant and respondent. Once respondent provided evidence, which was accepted on the probabilities, that a robbery had occurred, pursuant to which the dutiable goods had been lost to both parties, there is no evidence by which the respondent could show to which use the goods had been put. The facts of this case support this conclusion. The application before the court *a quo* was launched years after the robbery. There is

no evidence that the consignments were ever found. It is difficult to see what more is required of a party, in the position of respondent in order to claim a rebate.

[17] There are a number of significant problems with the approach of appellant in basing its case on the provisions of s 45 (1)*(b)* which refer to goods 'removed, taken or delivered without due entry for home consumption having been made.' The conditions contained in this provision are far wider than the phrase 'damaged destroyed or irrecoverably lost by circumstances beyond his control' as it set out in s 76(2)*(d)* of the Act or 'lost, destroyed or damaged on any single occasion in circumstance of *vis major'*, as provided for in Rebate item 412.09.

[18] These three separate provisions need to be read together to give coherence to the Act and the Schedule as a whole. An interpretation that accepts that an armed robbery can fall within the scope of *vis major* and that goods that are lost as a result of an armed robbery fall within the meaning of Rebate item 412.09 does not subvert the meaning of any of the provisions cited by appellant. In addition, it allows for a situation whereby a rebate can be claimed where goods are lost to both appellant and respondent as a result of an armed robbery.

[19] In the result, the appeal is dismissed with costs.

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D Davis

Acting Judge of Appeal

APPEARANCES

For the Appellant:	C Puckrin SC with M P Van der Merwe SC
Instructed by:	MacRobert Attorneys, Pretoria
	Lovius Block, Bloemfontein
For the respondent:	J G Cilliers SC
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