

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC Case nos.29/2022; 57/2022; and 58/2022
Gauteng Division: Case no. 28368/2021
32175/2021

Case no. 57/2022

In the matter between:

**COMMISSIONER FOR THE SOUTH
AFRICAN REVENUE SERVICE**

Applicant
(second respondent in the court *a quo*)

and

**AMBASSADOR DUTY FREE (PTY)
LTD**

First Respondent
(applicant *a quo* -28368/21)

**FLEMINGO DUTY FREE SHOPS
INTERNATIONAL SA (PTY) LTD**

Second Respondent
(first applicant *a quo*- 32175/21)

**INTERNATIONAL TRADE &
COMMODITIES 2055 CC
T/A ASSORTIM DUTY FREE**

Third Respondent
(second applicant *a quo* -32175/21)

**NU AFRICA DUTY FREE SHOPS
(PTY) LTD**

Fourth Respondent
(intervening party *a quo*)

MINISTER OF FINANCE

Fifth Respondent
(second respondent *a quo*)

**MINISTER OF INTERNATIONAL
RELATIONS AND COOPERATION**

Sixth Respondent
(third respondent *a quo*)

CC Case no. 58/2022

AND In the matter between:

MINISTER OF FINANCE

Applicant
(first respondent in the court *a quo*)

and

**AMBASSADOR DUTY FREE (PTY)
LTD**

First Respondent
(applicant *a quo* – 28368/21)

**FLEMINGO DUTY FREE SHOPS
INTERNATIONAL SA (PTY) LTD**

Second Respondent
(first applicant *a quo*- 32175/21)

**INTERNATIONAL TRADE &
COMMODITIES 2055 CC
T/A ASSORTIM DUTY FREE**

Third Respondent
(second applicant *a quo* 32175/21)

**NU AFRICA DUTY FREE SHOPS
(PTY) LTD**

Fourth Respondent
(intervening party *a quo*)

MINISTER OF FINANCE

Fifth Respondent
(second respondent *a quo*)

**MINISTER OF INTERNATIONAL
RELATIONS AND COOPERATION**

Sixth Respondent
(third respondent *a quo*)

**CONSOLIDATED PRACTICE NOTE FILED ON BEHALF OF THE
SECOND AND THIRD RESPONDENTS
UNDER CASE NUMBERS: 57/2022 AND 58/2022**

A. THE NAMES OF THE PARTIES AND THE CASE NUMBER

1. There are three applications before this court arising out of the judgment of the court *a quo*.
2. The first is the application of Nu-Africa Duty Free Shops SA (Pty) Ltd (“**Nu-Africa**”) under case number 29/2022. The second is the application brought by the Commissioner for the South African Revenue Service (“**SARS**”) under case number: 57/2022. Finally, the third is the application brought by the Minister of Finance (“**the Minister**”) under case number: 58/2022.
3. Approval was granted to consolidate all three applications in the directive of the Registrar of the Court dated 10 May 2022.

4. The remaining parties to the consolidated applications are all respondents in each of these applications. The abbreviations to be used for each of these respondents are set out below:

4.1. The Minister of International Relations and Co-Operation, will hereinafter be referred to as “**DIRCO**”;

4.2. Ambassador Duty Free (Pty) Ltd, will hereinafter be referred to as “**Ambassador**”;

4.3. Flemingo Duty Free Shops International SA (Pty) Ltd, will hereinafter be referred to as “**Flemingo**”;

4.4. International Trade & Commodities 2055 CC t/a Assortim Duty Free, will hereinafter be referred to as “**Assortim**”.

5. When referring collectively to Flemingo and Assortim, they will be referred to as “**the respondents**”.

B. THE NATURE OF THE PROCEEDINGS

6. **The Nu-Africa confirmation application:** Is an application for the confirmation of the declaration of invalidity in terms of section 172(1)(a) of the Constitution of the following provisions declared unconstitutional by the *court a quo*:

- 6.1. Section 75(15)(a)(i)(bb) of the Customs and Excise Act, 91 of 1964 (“**the Customs Act**”), only to the extent that it purports to confer on the Minister the power to amend Schedule 4 or Schedule 6 of the Customs Act;
 - 6.2. Section 74(3)(a) of the Value-Added Tax Act 89 of 1991 (“**the VAT Act**”), only to the extent that it purports to confer on the Minister the power to amend Schedule 1 of the VAT Act in consequence of an amendment to Schedule 4 or 6 to the Customs Act in terms of section 75(15)(a)(i)(bb) of the Customs Act;
 - 6.3. The amended Schedules to the Customs Act published by the Minister of Finance in terms of section 75 of the Customs Act in No. R.360 to R.368 in Government Gazette No. 44473 of 23 April 2021, further amended by No. R.523, R.524 and R.526 in Government Gazette No. 44705 of 14 June 2021; and
 - 6.4. The amended Schedule to the VAT Act published by the Minister in terms of section 74(3) of the VAT Act, in No. R.369 in Government Gazette No. 44473 of 23 April 2021, further amended by No. R.525 in Government Gazette No. 44705 of 14 June 2021.
7. **The applications by the Minister and SARS for leave to appeal:** Are applications for direct access brought in terms of section 167(6) of the

Constitution for leave to appeal the order of the court *a quo* that held that the following amendments made respectively by the Minister and SARS are reviewed and set aside:

7.1. The amendments made by the Minister:

7.1.1. to rebate item 406 of schedule 4 part 1 of the Customs Act, being the notes to rebate item 406.00, rebate item 406.02, rebate item 406.03, rebate item 406.05, and rebate item 406.07 as published in notice R368 on 23 April 2021;

7.1.2. the consequential amendments resulting from the aforesaid amendments to schedule 4 to the Customs Act, being the amendments to schedule 6 of the Customs Act as published in notices R.360 to R.367 on 23 April 2021;

7.1.3. the amendment to paragraph 8 of schedule 1 to the VAT Act, as published in notice R.369 on 23 April 2021; and

7.1.4. the amendments to notices R.360 to R.369 as published in notices R.523, R.524, R.526 on 14 June 2021.

(hereinafter referred to as “**the amendments to the schedules**”)

7.2. The amendments made by SARS to Rules 21.05.07(a)(ii), 21.05.07(b) and 21.05.08(b)(iii) made by SARS in notice R.525 on 14 June 2021.(hereinafter referred to as “**the amendments to the Rules**”)

8. These amendments will hereinafter be collectively referred to as the “**impugned amendments**”.

C. ISSUES TO BE ARGUED

9. Whether the court *a quo*'s declarations of invalidity should be confirmed and, if so, the extent of which and on what terms these declarations should be implemented – (Although, as will be explained below, this is the dispute in the Nu-Africa application and the respondents are not engaged in this dispute);

10. Whether the Minister and SARS should be granted direct access to apply for leave to appeal the order of the court *a quo* in respect of the review applications launched by Assortim and the Respondents;

11. Whether Ambassador, Flemingo, Assortim and Nu-Africa (“**the duty-free shops**”) had the necessary *locus standi* to bring the applications in the court *a quo*;

12. Whether there is any merit in SARS and the Minister's appeal and whether it has any prospects of success. In deciding this issue, the following aspects will have to be considered:

12.1. Whether the impugned amendments are unreasonable and irrational;

12.2. Whether the impugned amendments are unlawful and invalid since they are inconsistent with the provisions of the Diplomatic Immunities Act and the Vienna Conventions;

12.3. Whether the amendments to the Schedules constitute an impermissible delegation of power to adjust quantities imposed in the amended schedules by the Minister to DIRCO;

12.4. Whether the promulgation of some of the impugned amendments was procedurally unfair since those regulations were not published for public comment prior to promulgation.

D. THE RECORD

13. The record consists of three consolidated applications that served before the court *a quo*, being: (1) Ambassador's review application; (2) the respondents' review application; and (3) Nu-Africa's intervention application.

14. Although the respondents support the Nu Africa application, it is not engaged in the dispute. The respondents involvement is limited to the applications for leave to appeal instituted by the Minister and SARS under case numbers 57/2022 and 58/2022.
15. In order to determine this dispute, it is submitted that the following portions of the record are relevant:
 - 15.1. **Volume 1:** Ambassador's founding affidavit (pp. 10-76);
 - 15.2. **Volume 2:** Ambassador's supplementary founding affidavit (pp.150-223); Ambassador's amended notice of motion: (pp. 224-228);
 - 15.3. **Volume 3:** SARS's answering affidavit to Ambassador's application: (pp. 278 -377);
 - 15.4. **Volume 4:** "AA11" and "AA12" (pp. 430 -453), "AA15", (pp. 475);
 - 15.5. **Volume 5:** "AA16" (pp.500); "AA18" (pp. 512-523); "AA20" (DIRCO's affidavit) (pp. 525-527); Minister's answering affidavit to Ambassador application, (pp. 528-573);

- 15.6. **Volume 6:** Ambassador’s reply to SARS’s answer (pp. 589 to 660); Ambassador’s reply to the Minister’s answer (pp. 661-698);
- 15.7. **Volume 7:** Flamingo and Assortim’s notice of motion and founding affidavit (pp. 699 - 751); “**FA2.1**” to “**FA5.1**” (pre and post-amended version to the impugned amendments) (pp. 773 – 818)
- 15.8. **Volume 8:** “**FA5.2**” (post amended Rules) (pp. 819 – 829);
- 15.9. **Volume 9:** Minister’s answer to Flemingo and Assortim’s application (pp. 928 to 968); SARS’s answer to Flemingo and Assortim’s application (pp. 970 – 1028);
- 15.10. **Volume 10:** SARS’s answer (cont.) (pp. 1029 – 1118); “**2RAA11**”, pp. 1116 – 1118); “**2RAA12**” (pp. 1120-129)
- 15.11. **Volume 11:** Flemingo and Assortim’s reply to SARS and the Minister’s answer (pp. 1130 – 1194); Flemingo and Assortim’s answer to Nu-Africa’s application (pp. 1219 – 1222);
- 15.12. **Volume 12:** Minister’s application for leave to appeal before the court *a quo* (pp. 1287-1295);

- 15.13. **Volume 13:** Court *a quo* judgment on the merits (pp. 1349 – 1413);
- 15.14. **Volume 14:** Court *a quo* order (pp. 1414-1419); SARS’ application for leave to appeal to the Constitutional Court (pp. 1457 – 1490) “**KT3**” (SARS’ application for leave to appeal before the court *a quo*) (pp. 1493-1504);
- 15.15. **Volume 15:** Minister’s application for leave to appeal to the Constitutional Court (pp. 1507-1536); Flemingo and Assortim’s ground of opposition (pp. 1564-1583); “**JC2**”- “**JC6**” (pp. 1587-1599); Ambassador’s grounds of opposition (pp. 1603 – 1618).

E. AN ESTIMATE OF THE DURATION OF ORAL ARGUMENT

16. One court day.

F. SUMMARY OF THE RESPONDENTS’ ARGUMENT

17. The respondents do not oppose the applications for direct access to this Court by the Minister and SARS. The respondents contend that it would be appropriate if this Court dealt simultaneously with all the disputes between the parties. This is so, not only because the issues raised therein

are of significant importance, but it will also bring a swift resolution to all disputes between all the parties, which is urgently required.

18. The respondents, however, oppose the applications for leave to appeal. This is on the basis that both applications lack prospects of success and it would therefore not be in the interest of justice for leave to be granted. Furthermore, an order to this effect will bind any other Court and put an end to any further meritless attempts to have the order of the court *a quo* appealed.

19. The basis on which the respondents contend that the applications lack prospects of success in so far as the findings of the court *a quo* are concerned are, in summary, that:

19.1. The court *a quo* correctly found that the process that resulted in the impugned amendments being promulgated was not rational. The Minister, as the decision maker, presented no evidence to illustrate that he had any involvement in the determination of the quota. Even in his application for leave to appeal¹ it is made clear that this process was solely administered by SARS and DIRCO.

¹ Record: Vol. 15 – Minister’s application for leave to appeal, para. 28 to 30, pp. 1521 to 1522

- 19.2. Even if regard is had to the benchmarking done by SARS and DIRCO, same does not assist to illustrate a rational basis for the calculation of the quotas. The table presented is meaningless.² It does not indicate what the numbers refer to – litres or bottles? If bottles, what size? There is simply no indication. Towards the bottom of the table is a series of entirely unhelpful figures of averages – “spirits/liquors: 143”. No indication is given of what the 143 relates to. The table, simply put, is entirely meaningless.
20. In addition, the respondents contend that apart from the findings in favour of the respondents, the applicants face further insurmountable challenges in so far as other grounds of review raised by the respondents (which were not considered and dealt with in the judgment of the court *a quo*). These included that:
- 20.1. The impugned amendments offend the rule of law since they are not sufficiently clear and amount to an impermissible delegation of authority as DIRCO has an unfettered discretion to adjust the limits of the quantities imposed;
- 20.2. The process to adopted to promulgate the amendments to schedule 6 was procedurally unfair. It is common cause that the proposed

² Record: Vol. 10, p. 1044;

amendments were not published for comment prior to the publication thereof. If it had been, the respondents would have advised SARS and the Minister that the schedule, dealing with local goods, do not impose the quotas referred to in schedule 4, which is applicable to imported goods.

21. Finally, in so far as a finding was made by the court *a quo* that the impugned amendments are not inconsistent with the Vienna Conventions, the respondents submit that such a finding was incorrect. The court *a quo* relied on a business-like interpretation of the Vienna Convention, which is not an appropriate test when dealing with matters of international relations. In the event that the matter should be considered on appeal, this finding should be overturned and create a further independent basis for the setting aside of the impugned amendments.

G. A LIST OF AUTHORITIES ON WHICH PARTICULAR RELIANCE WILL BE PLACED DURING ORAL ARGUMENT

22. Dawood v Minister of Home Affairs 2000 (3) SA 936 (CC);
23. Giant Concerts CC v Rinaldo Investments (Pty) Ltd [2013] 3 BCLR 251 (CC);

24. Law Society of South Africa v President of the Republic of South Africa
2019 (3) SA (CC)

25. Minister of Health v New Clicks South Africa (Pty) Ltd 2006 (2) SA 311
(CC);

N Komar
Circle Chambers, Pretoria

22 June 2022