

IN THE HIGH COURT OF SOUTH AFRICA  
(TRANSVAAL PROVINCIAL DIVISION)

Case Number: 10030/01

In the matter between:

AM MOOLLA GROUP LIMITED	First Applicant
AM MOOLLA CLOTHING (PTY) LTD	Second Applicant
MAHOMED YACUB DHAI	Third Applicant
YUSUF AHMED SADEK VAHED	Fourth Applicant

and

THE COMMISSIONER FOR SARS	First Respondent
CONTROLLER OF CUSTOMS & EXCISE, DURBAN	Second Respondent
THE GOVERNMENT OF THE RSA	Third Respondent

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JUDGMENT

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ROUX, J

The parties have agreed that an issue, within the broader dispute between them, be decided. They formulated the issue in these terms:

*"Whether or not Section 46 of the Customs and Excise Act, No 91 of 1964, as read with Rule 46, made in terms of the Act, applies in relation to the goods imported by the Second Applicant and defined in paragraph 1(a) of the Notice of Motion."*

On the 19<sup>th</sup> of June 1990 the Governments of South Africa and Malawi concluded a Trade Agreement. The Applicants have imported goods into South Africa from Malawi

and rely on the provisions of the agreement to pay less or no duty thereon. They claim that the agreement must be regarded as a free standing agreement upon which the provisions of the Act have no application. The Respondents hold the opposite view.

The agreement was concluded in terms of Section 51 of the Act. I quote Section 51 (1)(a):

**"51 Agreements with African territories**

(1) *The National Executive may conclude an agreement with the government of any territory in Africa in which it is provided that, notwithstanding anything to the contrary in this Act contained-*

(a) *goods produced or manufactured in or imported into the Republic shall be admitted into that territory free of duty or at special rates of duty and goods produced or manufactured in or imported into that territory shall be admitted into the Republic free of duty or at special rates of duty;"*

Section 1 of the Act defines "*this Act*" to include any agreement concluded in terms of Section 51. This seems a clear indication that the agreement is not a free standing document.

Article 2 of the Agreement provides:

*"Subject to the provisions of this Agreement, the Government of the Republic of South Africa shall allow all goods grown, produced or manufactured in Malawi to be imported into South Africa free of custom duty."*

This is certainly not a blanket exemption. Relevant to the goods mentioned in the Notice of Motion is Article 6 of the Agreement. It is clear therefrom that goods which do not fall within its definition are not exempt.

Articles 3 & 6 of the Agreement describe what goods may be imported into South Africa free of duty. The question then arises who determines the duty on goods imported from Malawi to which the agreement does not apply. Clearly it is the First Respondent who is entrusted with this task by virtue of the provisions of the Act. Being a creature of Statute the First Respondent must perform his task as laid down in the Act and not by will. Section 46 and Rule 46 define the First Respondent's powers. There is no contrary provision in the Agreement.

The question formulated by the parties, quoted above, must be answered in favor of the Respondents. There is one proviso, namely one of fact. I am not called upon to find whether or not the goods fall within or without the provisions of Article 6 of the Agreement. My ruling can only apply to goods not covered by the Agreement.


Finally I refer to an unreported judgment of the Supreme Court of Appeal, namely *Henbase 3392 (Pty) Ltd v The Commissioner for South African Revenue Service and Another*, (Case No. 231/2000 delivered on the 31 May 2001.)

The judgment concerned the same Trade Agreement I am dealing with. The Supreme Court of Appeal could not have come to the decision it did without assuming and accepting that Section 46 of the Act and Rule 46 applied to the Agreement.

In the result I make the following rulings:

1. Section 46 of Act 91 of 1964 and Rule 46 made thereunder apply to goods imported from Malawi which are not in fact exempted by the Trade Agreement concluded between South African and Malawi dated the 19<sup>th</sup> of June 1990.
2. The Applicants are ordered to pay the Respondents costs relating to the dispute

placed before me. Such costs will include those consequent upon the employment of two counsel.



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JP ROUX

JUDGE OF THE HIGH COURT

Date Signed: 17/10/2001