

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

DATE: 14/10/2005
CASE NO: A1796/04

REPORTABLE

IN THE MATTER BETWEEN:

THE COMMISSIONER FOR THE SOUTH
AFRICAN REVENUE SERVICE
THE COMMISSIONER FOR CUSTOMS
& EXCISE
AND
STERLING AUTO DISTRIBUTORS CC

FIRST APPELLANT

SECOND APPELLANT

RESPONDENT

IN RE:

BAYERISCHE MOTOREN WERKE

FIRST APPLICANT IN
INTERVENTION

DAIMLER CHRYSLER
AKTIENGESELLSCHAFT

SECOND APPLICANT IN
INTERVENTION

AND

STERLING AUTO DISTRIBUTORS CC

FIRST RESPONDENT IN
INTERVENTION

THE COMMISSIONER FOR THE SOUTH
AFRICAN REVENUE SERVICE

SECOND RESPONDENT IN
INTERVENTION

THE COMMISSIONER FOR CUSTOMS
AND EXCISE

THIRD RESPONDENT IN
INTERVENTION.

JUDGMENT

SMIT, J

This is, first of all, an application (“the application”) by Bayerische Motoren Werke Aktiengesellschaft (“BMW”) as first applicant in inter-vention, and Daimler Chrysler Aktiengesellschaft (“Mercedes”) as second applicant in intervention who seek leave to intervene as respectively third and fourth appellants in an appeal by the Commissioner for the South African Revenue Service (the first appellant and the second respondent in intervention), the Commissioner for Customs and Excise (the second appellant and third respondent in intervention) and Sterling Auto Distributors CC (“Sterling”) (the respondent on appeal and first respondent in intervention) and to introduce further evidence in the appeal allegedly relating to relevant facts that should have been placed before the court *a quo* by Sterling. Secondly, this is an appeal (“the appeal”) against the whole of the judgment and order granted by Patel J granting certain relief in favour of Sterling, leave to appeal having been granted by the Supreme Court of Appeal on petition to it, consequent upon a refusal of such leave from the court *a quo*. Before dealing with the issues to be decided in the application and the appeal, and in order to be able to do so, it is necessary, in my view, to set out the background to the litigation, more particularly the litigation between BMW and Mercedes on the one side and Sterling on the other side.

BMW is and has been the designer, developer, manufacturer and marketer of BMW motor vehicles and their components for many decades. These vehicles and their components, have been marketed and sold in South Africa for several decades. It also appears that BMW is the proprietor of various intellectual property rights that subsist in South Africa in relation to BMW vehicles and parts for them.

Mercedes and its predecessor-in-title are, and have been the designers, developers, manufacturers and marketers of ranges of Mercedes-Benz motor vehicles and their components for many decades and these vehicles and their components have been marketed and sold in South Africa for several decades. Mercedes, is likewise, the proprietor of various intellectual property rights that subsist in South Africa in relation to Mercedes Benz vehicles and parts for them.

Sterling is a close corporation which, *inter alia*, imports into South Africa motor vehicle components.

Prior to the present litigation BMW and Mercedes through their attorneys had extensive correspondence with Sterling regarding the infringement of the intellectual property rights of BMW and Mercedes in respect of motor vehicles parts. The correspondence dates back to as early as 22 January 1997 and a letter of demand dated 31 August 2001. In response to the letter; Sterling furnished during September 2001, BMW with a written undertaking in terms of which it undertook to cease its unauthorised use of the trade marks BMW, 3 series and 5 series or any confusingly or deceptively similar trade marks and not to use them in future. Similarly, a letter of demand by Mercedes, through its attorneys, was addressed to Sterling on 12 October 2001. On 16 October 2001, Sterling through its attorneys furnished an undertaking to Mercedes “not to utilise any numbering system which is utilised by your client, in the marketing of the replacement parts for Daimler Chrysler and Ford motor vehicles.”

On 28 May 2003 a container, belonging to Sterling, containing in excess of 3000 items of motor vehicle spares, arrived at Durban harbour from Taiwan. It was stopped by an official, one Ogle, from Customs and Excise for general customs purposes, as well as for counterfeit checking. Mr E Bharath, a customs officer in the employ of the South African Revenue Services (“SARS”) however handled the matter. After the container was stopped it was, at Sterling’s instance, stored at the Green Africa Container Depot, a private warehouse.

An appointment was made with Sterling’s clearing agent and on 4 June 2003 the container was opened. Samples were extracted from the front of the container what purported to be a Mercedes Benz C-class headlamp and a BMW front grill. During the examination a representative of Sterling’s clearing agent, SA Mercantile (“SAM”), was present and was fully aware of the purpose for which the samples were extracted. A forensic specialist in counterfeit goods, one St John Pitt took the samples to verify whether they were counterfeit. The samples had been sent to Adams and Adams, a law firm that represented BMW and Mercedes.

Adams and Adams, on behalf of their clients BMW and Mercedes respectively, addressed letters of demand to Sterling on 11 June 2003, setting out their

intellectual property rights and why they believed the conduct of Sterling was unlawful. On 13 June 2003 attorneys Webber Wentzel Bowens, on behalf of Sterling, replied to the letters of demand denying that the motor vehicle parts were counterfeit and certain proposals were made. Various correspondence ensued between the attorneys representing their respective clients but no settlement could be reached. During the exchange of this correspondence one of the containers in issue was inadvertently released to Sterling who then disposed of the stock therein contained. As a result of Sterling's conduct a letter was addressed to Webber Wentzel Bowens on 22 July 2003 but, as no response was received, a reminder was again addressed on 20 August 2003. The response then was: "Our client is not obliged to litigate by way of correspondence."

On 13 June 2005 Bharath sent a memo to SAM informing them that they would be advised as soon as the samples were analyzed.

On 17 June 2003 Bharath was informed by Pitt that both samples received by him had been confirmed to be counterfeit and he received the necessary affidavits and indemnities from Adams and Adams on 18 June 2003. The affidavits were deposed to respectively by D.J. Richardson, the Brand Protection Manager of Mercedes, and C.H. Joy, the business Development Manager of BMW wherein they stated that in their opinion the relevant parts were counterfeit, both stating the grounds upon which they based their opinion.

A re-examination was booked with the knowledge of Sterling's agent, SAM, and was held on 19 June 2003. A representative of SAM was present at this re-examination. The manager of the container-depot, where the container was held, advised all those present at the re-examination, including Sterling's agent, that because the warehouse was not equipped and too full at the time to fully unpack a container of that size, and due to the fragility of some of the items a full unpack of the container could not be conducted. Photographs were taken and the container was re-sealed.

Bharath informed SAM to move the container to New Pier Warehouse, a State warehouse, where it could be unpacked under customs control. The container has, however, not been moved as requested so that it may be unpacked, an inventory made and samples sent to the relevant parties for confirmation as to whether they

are counterfeit or not.

Also on 19 June 2003 a messenger from SAM collected the affidavits of D.J. Richardson and C.H. Joy, referred to hereinbefore, as well as a memorandum confirming the re-examination of 19 June 2003, stating that a full unpack was required to separate the items confirmed to be counterfeit, confirming why a full unpack could not be conducted at the container depot and advising SAM to apply for the release of the container from the container depot and have it moved to a state warehouse where it could be unpacked under customs control.

Sterling's launched an urgent application ("urgent application") on 11 July 2003 for, *inter alia*, an order declaring that the container is not being lawfully or properly retained in terms of the provisions of the Customs and Excise Act no 91 of 1964 ("CEA"), and/or the Counterfeit Goods Act no 37 of 1997 ("CGA") and that the goods contained in the container be released to Sterling. It is noteworthy that, in view of the events as set out above, the relief was sought and obtained on an urgent bases without any notice to BMW and Mercedes and while certain undertakings as set out above had been given on behalf of Sterling to BMW and Mercedes. SARS, however, was oblivious of these facts until the application came to light.

The urgent application was served on the first and second respondents in that application (who is one and the same person and a senior official in SARS) on 14 July 2003 and was set down for 14:00 on Friday, 18 July 2003. SARS' opposing affidavit was only deposed to in Pretoria on 18 July 2003, thus leaving SARS with only a couple of court days to respond to the serious allegations in the founding affidavit of the urgent application.

The urgent application came before De Vos J on 18 July 2003 but the matter was postponed *sine die* due to a lack of urgency. The costs were reserved.

Sterling, however, filed a replying affidavit and a notice of set-down on 5 August 2003 for 10:00 on 6 August 2003, i.e. less than 24 hours notice to SARS. Nevertheless, the court *a quo* decided that the matter was urgent and heard argument on the merits of the matter. On 26 September 2003 the court *a quo* delivered judgment wherein it was ordered:

“2. That it is declared that the consignment of motor vehicle parts contained in container number EMCU 9090150 was stopped and detained by M Ogle on 28 May 2003 in terms of the provisions of the Customs and Excise Act 91 of 1964 and/or Counterfeit Goods Act 37 of 1997; and subsequently seized and detained by Ebrahim Bharath on or about 4 June 2003 in terms of Act 37 of 1997 are unlawful. (sic.)

3. That the first and second respondents are directed to forthwith release the consignment of goods, referred to in paragraph 2 above, to the applicant.

4. That the first and second respondents are ordered to pay, jointly and severally, the costs of this application, including the costs of the postponement on 18 July 2003.”

On 28 August 2003, i.e. after the hearing of the urgent application but during the period when the parties to that application were still awaiting the decision of the court *a quo*, Webber Wentzel Bowens addressed a letter to the South African Police Service and copied it to the presiding judge in the court *a quo*. On 18 September 2003 Adams and Adams came into possession of a copy of the letter of 28 August 2003, and then, for the first time, became aware of the urgent application.

An associate of Adams and Adams at the time, attended the High Court and located the court file in the urgent application in the chambers of the presiding judge. The judge allowed the attorney to read through the file but refused her permission to make copies thereof and he intimated to her, according to her affidavit, “that it would not be necessary” for BMW and Mercedes to intervene in the urgent application. I interpose to mention that this and another allegation concerning the conduct of the learned judge stand unopposed as the judge obviously has not had an opportunity to answer the correctness of the allegations.

It appears, however, that during his oral judgment on 26 September 2003 the judge stated that “BMW and Daimler Chrysler had the temerity not to join in this application.” In his final written judgment the judge stated about BMW and Mercedes that “(n)either of them intervened in those proceedings to protect their

respective intellectual property rights in the face of the importation of the alleged counterfeit goods by the Applicant.”

Subsequent to the judgment being delivered by the court *a quo* in the urgent application, formal complaints were lodged by BMW and Mercedes against Sterling in respect of the goods in question. The goods were detained and removed to a counterfeit goods depot. Sterling, once more, launched an urgent application for the release of the goods without citing BMW and Mercedes as parties to the litigation. These facts, however, came to the knowledge of BMW and Mercedes and they brought an application for leave to intervene in the second urgent application. Bosielo J granted them leave to intervene and expressed his surprise at the fact that Sterling brought the second urgent application without citing BMW and Mercedes as parties to the litigation. That concludes the chronology of events leading up to the application.

I now turn to consider the relief claimed in the application. As indicated hereinbefore the relief is twofold, firstly leave is sought to intervene in the appeal and secondly, to introduce further evidence.

The right to intervene in proceedings is regulated by the provisions of Rule 12 of the Rules of this court. The Rule provides:

“Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a plaintiff or a defendant. The court may upon hearing such application make such order, including any order as to costs, and give such directions as to further procedure in the action as it may seem meet.”

To intervene, an applicant for intervention must have “a direct and substantial interest in the subject matter.” (See: *United Watch and Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (A) SA 409 (C) at 416B-C. *Middelburg Rugby Club v Suid-Oos Transvaalse Rugby Unie en ‘n Ander* 1978 (1) SA 484 (T) at 489D.)

Sterling’s attitude on intervention is that there was no reason to join BMW and Mercedes as they at most only had an indirect financial interest in the outcome. They did not have a legal interest in the subject matter which could be prejudicially

affected by a judgment as the application dealt exclusively with the question of whether there had been a lawful seizure, detention and removal of the goods imported by Sterling.

There is, in my view, no merit in this submission. There can be no seizure or detention of goods which are alleged to be counterfeit without such goods being, at least *prima facie*, counterfeit goods. As such the intellectual property rights of BMW and Mercedes strike at the very heart of the matter. It is noteworthy that in the founding affidavit Reddy, on behalf of Sterling, specifically states that the goods are “not counterfeit goods”. Furthermore the intellectual property rights of BMW and Mercedes formed an important part of the judgment of the court *a quo*. The undertakings given by Webber Wentzel Bowens to Adams and Adams would clearly have clothed BMW and Mercedes with the required legal interest. In terms of the provisions of section 10(1)(a) of the CGA goods that are counterfeit goods can be delivered up to the proprietors of the intellectual property, irrespective of the outcome of the legal proceedings. Equally telling, on this issue, is the criticism, albeit unwarranted, of BMW and Mercedes in not joining or intervening in the urgent application and the fact that Bosielo J. in the abovementioned subsequent application clearly recognised the legal interest that BMW and Mercedes had in the litigation.

For these reasons I am satisfied that BMW and Mercedes had a direct and substantial interest in the subject matter.

In terms of section 22(a) of the Supreme Court Act no 59 of 1959 an Appeal Court is permitted to receive further evidence. The ambit of the section is wide and not subject to any limitations. (See: *S v Swanepoel* 1983 (1) SA 434 (A) AT 439 A-C; *Staatspresident en 'n Ander v Lefuo* [1990] ZASCA 6; 1990 (2) SA 679 (A) at 691C.)

The principles to be applied before receiving evidence on appeal would seem to be that there should be a reasonably sufficient explanation, based on allegations which may be true, why the new evidence sought to be led was not lead initially; there should be a *prima facie* likelihood of the truth of the evidence; and the evidence should be materially relevant to the outcome of the trial. (See: *S v de Jager* 1965 (2) SA 612 (A) at 613C-D; *Road Accident Fund v Le Roux* 2002 (1) SA 751 (W)

at 753H-J). In the present matter BMW and Mercedes were not parties to the urgent application and were, accordingly, not in a position to place any evidence before the court *a quo*. That, in my view, would not prevent them, once having been granted leave to intervene, to introduce further evidence before this court. In this regard I also keep in mind, that none of the facts which is sought to be introduced is disputed.

In the urgent application Sterling merely informed the court that the goods were seized and detained by Bharath on 28 May 2003; that Bharath transmitted a facsimile to SAM informing them of such seizure and detention and advising that the goods would be released when samples which had been extracted had been analysed; that despite repeated requests by Sterling and SAM, Bharath failed to provide written reasons for the seizure and detention and that thus they at all times remained in the dark regarding the reasons; that, despite its alleged lack of knowledge as to the reasons for the seizure, Bharath was acting unlawfully for failure to comply with the provisions of the CGA and not the CEA; and that the goods were not counterfeit.

It is significant, however, that Sterling failed to inform the court that a representative of Sterling, a person from SAM, was on both occasions present when the container was opened and was fully aware of the nature of the proceedings.

In my opinion, in view of these circumstances, the evidence sought to be introduced is materially relevant to the outcome of the appeal. I am consequently satisfied that BMW and Mercedes are entitled to the relief sought in prayers 1-4 of the application.

I now turn to consider the merits of the appeal.

The crux of BMW and Mercedes' basis for their appeal is the failure of the court *a quo* to appreciate and draw the crucial distinction between "detention" and "seizure and detention". It was their case throughout that the goods contained in the container were not seized but were only being detained. This distinction is, in my opinion, of great significance in that it vitally affects many of the other grounds of appeal.

Mr Salmon, on behalf of Sterling, however argued that the true crux of the matter is the failure of all the appellants to have appreciated the import and impact of the Constitution of the Republic of South Africa Act 106 of 1996, upon SARS' actions, including the purported enforcement of the provisions of the CGA. It is significant, however, that Mr. Salmon in his argument before us and in his heads of argument did not deal with what the appellants alleged to be the crux of their case.

What Mr. Salmon did argue was that the appellants overlooked the provisions of sections 39, 25 and 36 of the Constitution. The starting point, so the argument went, was the interpretation of the Bill of Rights as provided for in section 39 of the Constitution. Relying on the provisions of section 25 of the Constitution it was further argued that the appellants' primary contention in the appeal – that the goods were detained whilst they were deciding what to do – brings the deprivation of Sterling's property fairly and squarely within the concept of arbitrariness. If a deprivation was without good reason, follows unfair procedures or was irrational it is "arbitrary" and therefore unlawful.

But, so the argument concluded, if it is found that the seizure and or detention was not arbitrary, still in terms of law of general application, in casu more particularly the CGA, the seizure and or detention must be consonant with the entrenched right and such statute must be read in the light of the provision of section 36 of the Constitution. Thus the limitation on the right not to be deprived of his property must be "(r)easonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant facts, including a) the nature of the rights; b) the importance of the purpose of the limitations; c) the nature and extent of the limitation; d) the relation between the limitation and its purpose; and e) less restrictive means to achieve the purpose."

In the present matter, Mr. Salmon submitted, it is clear from the facts that no consideration was given at all to the entrenched right and no facts were at the disposal of appellants that could have allowed such consideration. Consequently, the conduct was without good reason, was irrational and therefore arbitrary and was also in conflict with the correct constitutional application of the general law.

Considerable reliance was placed on two Constitutional court judgments, the first

being the judgment in the case of *Janse van Rensburg NO and Another v Minister of Trade and Industry and Another NNO* [2000] ZACC 18; 2001 (1) SCA 29 (CC), and the second, the unreported, as at present, decision in *Laugh It Off Promotions CC v South African Breweries International (Finance) B.V t/a Sabmark International, and Another*, case no CCT 42/04 dated 27 May 2005.

At the outset I must say that the factual background in these two matters, in fact all the cases referred to by Mr Salmon, are so different from the facts in the present matter that a clear distinction should be drawn on the facts. I do not intend analysing all the differences – the facts speak for themselves – but if the ten features set out in the *Janse van Rensburg* – case are taken into consideration it clearly appears that completely different circumstances are applicable in the present matter. To my mind the main distinguishing feature in the present case is that Sterling was the author of its own wrong. Furthermore, I am not persuaded that the conduct of Ogle and or Bharath was arbitrary and in conflict with constitutional application of the general law. I will hereinafter more fully consider and weight up the conduct of the parties.

I should indicate that Mr. Salmon during his argument requested an order of constitutional invalidity of section 113 A(1) of the CEA. Apart from the fact that there is no merit in the request, this issue was never raised in the papers and the responsible Minister has not been joined as an interested party.

It was also argued that because Bharath exercised his powers in terms of the provisions of the CGA and not the CEA, while he did not comply with the procedures prescribed by the CGA, his actions were without good reason, follow unfair procedure, were irrational and arbitrary and therefore unlawful. As I will indicate hereinafter Bharath stated that the detention was executed according to certain provisions of the CEA. He went on to declare:

“26. I refer to what has been stated above and submit that full legal argument will be presented in this regard at the hearing. I was at all times acting in terms of section 88(1)(a), section 106, section 197 and section 113A(1) of the Customs & Excise Act, as well as section 4(1) of the Act.”

In his replying affidavit in the urgent application Reddy does not challenge the

correctness of Bharath's statement but merely indicates "it is remarkable that he did not say so when pressed for the reason for detention or seizure of the applicant's goods. I deny he was entitled to use the provisions of the Customs and Excise Act as a means of delivering to Adams and Adams the remedies of the counterfeit goods Act without compliance with its terms. I am advised that, in as much as Mr Bharath purports to act in terms of section 4(1) of the Act he is acting unlawfully ..."

Mr Bharath, in my view, acted in terms of the provisions of the CEA and detained the goods to ascertain whether such goods were counterfeit goods as contemplated in the CGA as provided for in section 113A(1) of CEA.

In a further attempt to overcome his, in my view insurmountable, difficulties Mr. Salmon argued that the detention of the goods was unlawful for a want of compliance with the provisions of section 113A(2)(a) of the CEA. It was submitted that the goods of Sterling were detained while the commissioner was not indemnified against claims as provided for in section 113A(2)(a). The fallacy of Mr. Salmon's whole argument is clearly demonstrated in this submission. This sub-section also illustrates the necessity to distinguish between the separate procedures of detention and seizure. The words "seize or detain" in this sub-section must refer to the procedure of seizure after the first step of detention has been completed. If this sub-section was intended to provide that indemnity should be provided before the original detention could be carried out it would render the whole procedure ineffective. Who would be responsible for providing the indemnity and how would an officer ever be able to detain goods for purposes of establishing whether such goods are counterfeit goods?

Mr Bharath, the deponent to the opposing affidavit filed in the urgent application stated:

"8.1 The container was stopped by one M Ogle, an import assessment officer for Customs and Excise. This detention is sanctioned by the relevant provisions of the Customs and Excise Act, namely section 88(1)(a) and section 113A(1) read together with section 4(1) of the Act .."

Section 88(1) of the CEA provides:

“(a) An officer, magistrate or member of the police force may detain any ship, vehicle, plant, material or goods at any place for the purpose of establishing whether that ship, vehicle, plant, material or goods are liable to forfeiture under this Act.

...

(c) If such ship, vehicle, plant, material or goods are liable to forfeiture under this Act the Commissioner may seize that ship, vehicle, plant, material or goods.”

Section 113A(1) of the CEA reads:

“An officer may-

(a) detain any goods to ascertain whether such goods are Counterfeit goods as contemplated in the Counterfeit Goods Act, 1997 (Act no 37 of 1997).

(b)

Notwithstanding anything to the contrary contained in the said Act, while acting as an inspector as defined in that Act -

(i)

seize and detain any goods when requested to do so in accordance with the provisions of section 15 of the said Act whether or not such goods are under customs control;

(ii)

seize and detain any goods in accordance with the provisions of the said Act where such officer has reasonable cause to believe that such goods are *prima facie* counterfeit goods as defined in that Act while such goods are under customs control; or

(iii)

seize and detain any goods while such goods are in transit through the Republic or transit goods found in the area of control of any Controller where such officer has reasonable cause to believe that such goods are *prima facie* counterfeit goods as defined in the said Act.”

From these provisions of the CEA it is clear, in my view, that provisions is made for a “detention” of goods prior to actual “seizure”, for the purpose of determining or ascertaining whether the goods in question ought properly to be “seized”, whether by the customs authorities or another authority administering the legislation in question. This distinction applies to customs officers whether for the purposes of the CEA or any other law.

Support for this view that detention and seizure are two distinct and separate procedures that fulfil two different purposes was confirmed by the Supreme Court of Appeal in the matter of *Henbase 3392 (Pty) Ltd v Commissioner, South African Revenue Service, and Another* 2002 (3) SA 26 (SCA), **in upholding the judgment of the court of first instance in *Henbase 3392 (Pty) Ltd v Commissioner South African Revenue Service, and Another* 2002 (2) SA 180 (T)**. In the latter judgment at p 191C-F it was held:

“However, *Deacan’s* case is distinguishable from this particular matter. Not only do the facts differ, *inter alia*, because the applicant in Deacon was an ‘innocent’ individual who purchased an already imported motor vehicle, but also because Deacon’s case dealt with seizure in terms of section 88(1)(c) of the Act, whereas the applicants in this particular case seem to rely on section 88(1)(a), as well as other provisions of the Act. In this matter it is therefore detention in terms of section 88(1)(a) which is relevant, at least as far as the first respondent’s reliance on that clause is concerned. Detention and seizure or forfeiture, for example in terms of section 87 of the Act, are very different steps as far as the conduct of the respondent is concerned. Whereas it can easily be understood that for example the *audi alteram partem* principle may or has to be applicable to seizure and forfeiture, the same is not necessarily true regarding mere detention. In terms of sections 87 and 88, detention is the very first step which takes place in order to set in motion a process of establishing whether forfeiture should follow. To require a prior hearing before detention can take place would make little sense, also from a practical perspective. In many situations customs officials would be unable to do anything if they could not first detain certain goods without affording a prior hearing.”

At page 192A-D the learned judge continued as follows:

“The Constitutional right to administrative action is, like all other rights, subject to

limitation provided the limitation is by law of general application and is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom (in terms of section 36 of the Constitution.) To require a prior hearing with regard to detention – as opposed to, for example, forfeiture or even seizure in terms of this Act – would impose on customs officials a procedure so cumbersome that it would be wholly impractical and could render the clause that authorises detention meaningless.”

Even though the court was in that case dealing with detention and seizure under section 88(1) of the CEA to my mind the identical legal principles are applicable to “detention” and “seizure and detention” in respect of suspected counterfeit goods, such distinction having been clearly drawn by the legislature in the wording of section 113A(1)(a) and (b) of the CEA respectively.

Consequently, in my view, a customs officer is entitled, in terms of the CEA to detain any goods as provided for in section 113A(1)(a) in order to ascertain whether they are counterfeit, as contemplated in the CGA. Only after this investigation is completed is the officer bound to either release the goods or seize them on the basis that the investigation has provided him or her with reasonable cause to believe that the goods are at least *prima facie* counterfeit as provided for in section 113A(1)(b).

Section 107(2)(a) of the CEA places a duty on the Commissioner and/or his employees, after goods have been detained, not to allow the goods to pass from customs’ control until satisfied that the relevant provisions of CEA or any other law have been complied with.

In the present matter I am satisfied, on all the evidence, that Sterling’s goods were not seized, but merely detained, and that this detention was lawful. This is particularly so since the detention had a dual purpose, namely general customs requirements and counterfeit checking. In my view, Ogle and Bharath had the necessary statutory authority to invoke both bases for the detention.

The detention on the ground of counterfeit checking was based on a suspicion that arose due to the facts that parts purporting to be for vehicles such as BMW’s and Mercedes’ were arriving from the east. It seems to me this ground is not

unreasonable. Furthermore Bharath was empowered, in terms of the provisions of section 113A(1)(a) to detain any goods in order to ascertain whether they were counterfeit or not.

Neither investigation was however completed as the container remained unopened until such time as it could be unpacked. Bharath could not be blamed for the fact that the container remained unopened and unpacked as it was not due to his fault. It was due to the fact that Sterling's agent initially requested that the container was to be stored at Green Africa Container Depot, that it was impossible to open and unpack the container at this depot and that Sterling failed to remove or agree to the removal of the container to a suitable depot, despite being requested to do so. Despite this failure Bharath did not act in a high-handed fashion by moving or opening the container without Sterling's consent or co-operation.

Bharath is also, in my view, not guilty of allowing an unreasonable amount of time to pass between the detention and the request and/or the launching of the urgent application. Bharath went so far as to enquire about the progress of the confirmatory affidavits from Pitt and informed SAM in writing that they would be advised as soon as the affidavits arrived.

In view of the fact that the investigation had not been completed, Bharath did not have any lawful grounds to release or seize the container. He was only in a position to seize the two samples extracted, but in my view it was not unlawful for him not to deal with the container in such a piece-meal fashion.

It is also important to keep in mind that Bharath had ensured, on both occasions that the container was opened, that Sterling's representative (SAM) was present and that he was aware of the reasons for the action taken.

I could find no evidence, and Mr Salmon did not refer me to any, that Bharath acted *mala fide* in relation to Sterling and the detention is also not unlawful for failure to provide a hearing to Sterling prior to the detention.

Sterling's agents were at all times aware of the reason for the detention. It is significant that the court *a quo*, despite having found the goods to have been initially lawfully detained by Ogle, does not identify the event or the point in time

that signified the metamorphosis that changed the lawful detention by Ogle to an unlawful seizure of the goods by Bharath. I am satisfied and convinced that the court *a quo* erred in finding that Bharath had seized and detained the goods and that his conduct in doing so was unlawful.

The court *a quo* found that there is no or insufficient proof that Bharath is indeed an inspector as contemplated in the provisions of the CGA. This finding is, with respect, clearly wrong in view of the provisions of paragraph b of the definition of “inspector” in that act, which defined a customs official as an inspector in addition to inspector appointed or designated in terms of section 22, by the use of the words “as well as”. Consequently Bharath’s actions were not unlawful for his failure to provide proof that he was an inspector. The court *a quo* also found that Bharath was not an inspector as contemplated in the CGA due to there being no proof that an application by the trade mark proprietor had been made and granted, or a complaint laid entitling him to act in terms of section 15(4) of the CGA and that his actions thus were unlawful. In my view the court *a quo* erred in coming to this conclusion. Sections 15(1)-(4) of the CGA clearly contemplates the situation where an owner of an intellectual property right makes an application to the commissioner which, if granted, entitles customs authorities to seize and detain counterfeit and suspected counterfeit goods. The distinction between the procedures of detaining and seize and detain, to which I have already referred to hereinbefore, is significant in this regard. Bharath never contended that he had exercised his powers in terms of the provisions of subsection 15(4) of the CGA and had thus seized and detained the goods. The wording of section 113A(1)(a) clearly contemplates that an officer may detain goods in order to enable him to ascertain whether the goods are counterfeit before an application has been made and granted in terms of section 15 of the CGA. A comparison of the provisions of sections 113(8) and 113A(1)(a) clearly contemplates that an officer may detain goods in order to enable him to ascertain whether the goods are counterfeit before an application has been made and granted in terms of section 15 of the CGA. A comparison of the provisions of sections 113(8) and 113A(1)(a) of the CGA indicates that no similar requirement of a “request” as appears in section 113(8) is needed for a detention for the purpose of ascertaining whether goods are counterfeit as provided for in section 113A(1)(a). Consequently, in my view, it is only for the purpose of seizing and detaining that a request in terms of section 15

of the CGA is necessary.

The court *a quo* also found that there can be no counterfeiting in terms of the CGA due to the fact that there is no underlying intellectual property right and moreover the onus of proving same rested on appellant and such onus was not discharged. The definition of “intellectual property right” in the CGA provides “(a) means the rights in respect of a trade mark conferred by the Trade Marks Act, 1993 (Act no 194 of 1993) and includes rights in respect of a trade mark contemplated in section 35 of that Act” (My underlining). In my view, clearly this will include more especially, well-known marks such as BMW and Mercedes Benz. Apart from this construction of the definition Bharath’s uncontested statement was that on 18 July 2003 he received affidavits from Adams and Adams, confirming the subsistence of the intellectual property rights of their clients. I am consequently of the view that the court *a quo* erred in finding that there can be no counterfeiting in terms of the CGA. It is in any way, precipitous and premature for the court *a quo* to make such a finding as the question whether the goods are counterfeit or not is the subject-matter of litigation between the intellectual property right owner and the importer and not for the court *a quo* to decide.

Similarly, it is not the role of customs authorities to make a finding on whether the goods are counterfeit or not, the only question being whether it was reasonable for Bharath to rely on the confirmatory affidavits to detain the container pending further investigation. It appears that the affidavits in question were deposed to by persons in the employ of the relevant intellectual property right owners, who state their positions in the companies, their knowledge and experience and the grounds on which they base their respective opinions that the goods are counterfeit. On this information it was, in my view, not unreasonable for Bharath to base his suspicion on these grounds and his conduct constitutes “reasonable cause” as required by the provisions of section 113A(1)(b) of the CEA. To the extent that the court *a quo* required from Bharath to go further and undertake an enquiry into the complicated field of intellectual property law and the authorities in relation to the “range of statutory and common law defences”, it clearly, with respect, was wrong. No such duty is placed on a customs inspector in terms of the CGA, nor to customs officers in particular as the framework of the CGA is based on the premise that the true debate as to whether goods are counterfeit or not must be determined by a court of

law at a later stage.

Finally, in considering the court *a quo*'s judgment in coming to the conclusion that Bharath acted unlawfully, it was found that the affidavits of both Richardson and Joy are substantially hearsay and "that Bharath in opposing the application on behalf of the respondents, relies on pure hearsay." The learned judge makes no mention of the fact, and it seems he did not consider the provisions of section 3 of the Law of Evidence Amendment Act no. 45 of 1988. Having regard to all the factors enumerated in section 3(1)(c) of the said Act I am satisfied that the affidavits are admissible, especially in view of the fact that the application was heard by the court *a quo* on an urgent basis after another court had already almost three weeks before, decided the matter not to be urgent.

For all the reasons set out hereinbefore I come to the conclusion that the court *a quo* was wrong in holding that Bharath acted unlawful and in granting Sterling the relief it did.

I make the following order:

1.1 The first and second applicants in intervention are granted leave to intervene in the appeal as third and fourth appellants, respectively.

1.2 The first and second applicants in intervention are granted leave to introduce further evidence in the appeal as set out in and annexed to the accompanying affidavits of Jurgen Philipp Fegbeutel, David John Richardson, Ilse Lock and Christopher Karl Job.

1.3 The first respondent in intervention to pay the costs of the application, such costs to include the costs consequent upon the employment of two counsel.

2.1

The appeal is upheld.

2.2 The order of the court *a quo* is set aside and substituted with an order dismissing the application with costs.

2.3 The respondent to pay the costs, such costs to include the costs consequent on the employment of two counsel.

J M C SMIT
JUDGE OF THE HIGH COURT

I agree,

M F LEGODI
JUDGE OF THE HIGH COURT

I agree,

A P LEDWABA
JUDGE OF THE HIGH COURT

FOR THE 1st and 2nd APPLICANTS

IN INTERVENTION: ADV C E PUCKRIN SC and R MICHAU

INSTRUCTED BY: ADAMS & ADAMS PRETORIA

FOR THE 1st, 2nd, 3rd and

4th APPELLANTS: ADV C E PUCKRIN SC & T KHATRI

INSTRUCTED BY: STATE ATTORNEY, PRETORIA

FOR THE 1ST RESPONDENT

IN INTERVENTION: ADV O SALMON AND K HOPKINS

INSTRUCTED BY: WEBBER WENTZEL & BOWENS

DATE OF JUDGMENT: 14/10/2005

HEARD ON: 19/09/2005