

**IN THE HIGH COURT OF SOUTH AFRICA
(TRANSCAPE PROVINCIAL DIVISION)**

**CASE NO: 8642/2004
DATE: 12/02/2009**

REPORTABLE

In the matter between:

FAYNAZ IMPORT AND EXPORT ENTERPRISES CC

Plaintiff

and

**THE COMMISSIONER OF CUSTOMS
AND EXCISE**

First Defendant

**THE CONTROLLER OF CUSTOMS
AND EXCISE, JOHANNESBURG**

Second Defendant

THE MINISTER OF SAFETY AND SECURITY

Third Defendant

JUDGMENT

MURPHY J

1. The plaintiff, a close corporation involved in import and export, has instituted action against the defendant the Minister of Safety and Security, for the return of goods lodged in a customs bonded warehouse or alternatively for damages in the amount of the value of the goods, valued by agreement between the parties at R460 000.

2. The plaintiff originally issued summons on 1 April 2004 against the Commissioner of Customs and Excise, as first defendant, and the Controller of Customs and Excise, Johannesburg, as the second defendant, under case number 8642/04. In their plea, filed on 9 December 2004, the Commissioner and the Controller denied that they had ever detained the goods in question or sealed the bonded warehouse from which they had disappeared and consequently further denied that they were ever in possession of the goods or knowing of their whereabouts. Subsequent to receiving this plea the plaintiff issued summons against the Minister of Safety and Security under case number 32457/05 on 21 September 2005. On 31 August 2007 an order was granted for the consolidation of the two actions under the original case number 8642/04 with the Minister cited as the third defendant. Shortly before the matter was called the plaintiff withdrew the action against the first and second defendants with the result that it proceeds only against the Minister, to whom I shall refer as the defendant.
3. In the particulars of claim to the summons issued on 21 September 2005 it is alleged that on 14 December 2001 members of the South African Police Service (“SAPS”) under the command of Inspector Charles Bezuidenhout (“Bezuidenhout”) took control of the customs bonded warehouse of Tonnit Transport CC situated at 274 Main Reef Road, Denver, Johannesburg at

which the plaintiff had lodged the contents of five containers consisting of imported paper handkerchiefs, cleansing facial tissues and towels. No notices of detention or seizure (in terms of the relevant legislation) were served upon the plaintiff in respect of its goods at that time or subsequently. As will become clearer in due course, the relevant goods, along with everything else in the warehouse, were removed from the warehouse some time between 14 December 2001 and 8 January 2002. The whereabouts of the goods is presently unknown and it is alleged by the plaintiff that the SAPS has lost them. The plaintiff accordingly alleges that the defendant is liable to return the goods to the plaintiff or to compensate the plaintiff for the value thereof. Counsel for the plaintiff stated in his opening address that the claim was essentially a *reivindicatio*. In the alternative the plaintiff brings suit on the *actio ad exhibendum* for compensation. The claim is formulated in general terms sufficient to found also a claim on the *actio legis Aquiliae* in the event of the requirements of the *actio ad exhibendum* not being met, a matter to which I will return later.

4. The particulars further allege that Bezuidenhout and any other police officer involved were acting in the course and scope of their employment with the SAPS.

5. The defendant's plea is to the effect that at some unspecified time prior to 14 December 2001 Bezuidenhout received information from an informant that there was second-hand clothing stored at the bonded warehouse which had been illegally imported into the country. Bezuidenhout visited the warehouse and issued a detention notice in respect of the second-hand clothing, which he served upon Mr Trevor Naidoo, the owner of the warehouse business. Thereafter Bezuidenhout left the premises. He returned later on the same day and discovered that the second-hand clothing had been removed from the warehouse and had been stored in other storage facilities on the same premises. Members of the South African Revenue Services and Border Police present at the premises, then took over the matter. Bezuidenhout returned to the premises on 14 December 2001, and perused the registers, bond books and files kept at the premises. After that he issued a detention notice in terms of section 88(1)(a) read with section 87 of the Customs and Excise Act 91 of 1964, whereby he detained for investigation purposes all registers, bond books and files. The defendant accordingly denied that Bezuidenhout or any member of the SAPS detained or seized the plaintiff's goods. However, he admitted that Bezuidenhout acted in the course and scope of his employment in relation to the detention of the registers, bond books, files and second-hand clothing is concerned. The defendant further denied having knowledge of the whereabouts of the plaintiff's goods and denied that they were lost by the SAPS as claimed by the plaintiff. It is also

alleged that Bezuidenhout, after finalising his investigations, handed the bond books, registers and files to officials of the South African Revenue Service for the further handling of the matter. It was accordingly denied that the defendant was liable to return the goods or to compensate the plaintiff for their value.

6. The defendant has also raised a special plea. As originally formulated, the special plea alleged prescription as well as time barring under both section 96(1)(a) of the Customs and Excise Act 91 of 1964 and section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002. In argument before me, counsel for the defendant abandoned any reliance upon section 96(1)(a) of Act 91 of 1964 and limited the special plea to the time bar under section 3 of Act 40 of 2002. The section provides that no legal proceedings for the recovery of a debt may be instituted against an organ of state unless the creditor has given and served on the organ of state notice in writing of his or her intention to institute the legal proceedings within six months from the date on which the debt became due. The notice must briefly set out the facts giving rise to the debt and such particulars of the debt as are within the knowledge of the creditor. In terms of section 3(3)(a), a debt may not be regarded as having been due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he, she or it

could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him, her or it from acquiring such knowledge. In terms of section 3(4), if an organ of state relies on a creditor's failure to serve notice timeously the creditor may apply to court for condonation, which the court may grant if it is satisfied that (i) the debt has not been extinguished by prescription; (ii) good cause exists for the failure by the creditor; and (iii) the organ of state was not unreasonably prejudiced by the failure.

7. In his special plea the defendant avers, such being common cause, that the plaintiff's notification to institute legal proceedings was only given to the defendant on 1 February 2005 and that summons was served on the defendant on or about 27 September 2005. He further alleges that the plaintiff's cause of action arose on 14 December 2009 when the plaintiff's goods were allegedly detained by Bezuidenhout or members of the SAPS. It was therefore submitted that the plaintiff's cause of action arose more than three years before summons was issued; that the plaintiff's notice was not issued and served on the defendant within six months from the date the alleged debt became due within the meaning of section 3 of Act 40 of 2002; and the plaintiff failed to bring an application for condonation of such failure. Consequently, he contended that the plaintiff is barred from instituting the action. No plea was made that the debt had prescribed under the Prescription Act.

8. At the commencement of the trial the parties were *ad idem* that the special plea could only be decided at the end after hearing all the evidence and could not be disposed of *in limine*. For that reason I propose first to deal with the merits.
9. The plaintiff led evidence from four witnesses: Mr Nazir Talia (“Talia”), the sole member of the plaintiff; Mr Nassim Pahad (“Pahad”), the shipping agent responsible for the shipping and warehousing of the plaintiff’s goods who operated initially through NP Shipping Services (Pty) Ltd and later through Pahad Shipping CC (“NP Shipping”); Mr Trevor Naidoo, the principal member of Tonnit Transport Services CC (“Tonnit”), the company that operated the bonded warehouse; and Mr Johan Steyn a customs official employed in the post clearance inspectorate. The defendant led only the evidence of Bezuidenhout.
10. It is not disputed that the plaintiff imported five containers of paper products from Taiwan in August 2001 through Durban and that these were in turn cleared by NP Shipping, transported to Johannesburg, unpacked and warehoused in the Tonnit bonded warehouse. Tonnit operated the bonded warehouse in accordance with the required authorisation of the Commissioner of Customs and Excise (“the Commissioner”). The advantage to the plaintiff of storing the goods at a bonded warehouse is

that customs duty would be levied on the goods in terms of the Act only in the event of the goods being removed from the warehouse when sold to purchasers. Customs duty is deferred until the importer sells the goods within South Africa. The plaintiff had no direct dealings with Tonnit and was represented throughout the import, clearing and warehousing processes by NP Shipping. Talia was aware though that NP Shipping had housed the goods at the Tonnit bonded warehouse.

11. It must be emphasised at the outset that the plaintiff's imported goods were never the subject of any investigation by either the Commissioner or the SAPS. It is therefore common cause that they were imported legally in accordance with the provisions of the Act and were never directly the subject of any detention or seizure notice in terms of Section 88 of the Act. Although the particulars of claim are somewhat ambiguous, as I understand the plaintiff's case it is alleged that the SAPS on 14 December 2001 took control of the bonded warehouse and its contents, including the plaintiff's goods, without them being the subject of a detention notice and thereafter either unlawfully removed them or lost them while they were in possession of them. The uncontested evidence of Steyn is that the warehouse was empty when he visited it on 8 January 2002; and hence the only reasonable inference is that the plaintiff's goods were removed from the warehouse in the intervening three week period. Accordingly, the principal issue requiring determination is whether or not Bezuidenhout

took possession of the plaintiff's goods and then wrongfully removed or lost them and intentionally or negligently caused loss to the plaintiff. Bezuidenhout and the defendant deny that he did so.

12. Naidoo testified that he obtained a licence to operate a bonded warehouse in February 2001. He was thus a relative newcomer to the business. The warehouse consisted of a simple storage facility located on premises with other similar units. The warehouse could be accessed through a pedestrian steel door and two roller shutter doors locked internally by padlocks. Internally it consisted of the packing and storage area, as well as an office area where the files, registers and computer were kept. The floor area was demarcated for the purpose of storing goods unpacked from containers.

13. Tonnit's difficulties appear to have begun in August 2001 (six months after the licence was issued) when it was subjected to an investigation by the SA Revenue Service ("SARS"). There are several documents that point to Bezuidenhout having been involved in investigations pertaining to activities at Tonnit from this time onwards. Exhibit A102 comprises a brief inspection report by a SARS inspector, Mr. PP Makoatsane, dated 13 August 2001. In the report, under the heading: "Reasons for the Inspection or Investigation", it is stated:

“Suspicious activity report was received from Durban Customs that the abovementioned containers are to be warehoused in JHB at Tonit Transport T/A Tonit Services. It was suspected that the goods were going to be diverted and not reach their final destination.”

Under the heading: “Discrepancies found or comments”, the following is recorded:

“The four(4) containers were detained and removed by Inspector Bezuidenhout of SAPS Organised Crime Unit in Pretoria: Truck number CHY 371 GP. See attached SAP21.”

14. Exhibit A90 is a SAP21 pro forma document or form which bears the fax transmission date of 24 July 2001, as well as the fax number of Tonit. The document purports to originate from Inspector Bezuidenhout and records his force number to be 483972. It refers to four containers, numbered EMCA 2453214, SEAU 187355, TEXU 4719809 and MAEU 6357543, and states:

“Please note that the above goods have been detained and will be forwarded to your address, Tonit Transport Services, 247 Main Rd, Denver for holding until further notice.”

A second SAP 21 form, Exhibit A91, dated 7 August 2001 addressed to Naidoo makes reference to two of the containers, namely, MAEU 6357543 and TEXU 4719809 and states:

"Please release the above containers into Police Custody."

There is a handwritten inscription on Exhibit A91, which Naidoo identified as his handwriting which reads:

"Contrs released to Premium Transport under police supervision: Registration CHY 371 GP."

The reference numbers of the containers in Exhibit A90 and Exhibit A91 correspond with those in the Inspection Report (Exhibit A102). Both SAP 21's are addressed to Naidoo by Inspector Bezuidenhout and both direct any queries to Bezuidenhout on the Pretoria landline telephone number 012-401 3458 and fax number 012-401 3409.

15. It was Naidoo's testimony that the two containers mentioned in Exhibit A91 were removed under the supervision of Bezuidenhout in August 2001 (four months before the plaintiff's goods were removed) and were loaded onto the vehicle with the registration number CHY 371 GP. As for the other two containers mentioned in Exhibit A90, he explained that he never received them. One assumes they must have been directed elsewhere en route from Durban.

16. None of these containers contained goods belonging to the plaintiff. The purpose of this testimony, as I understand it, was merely to provide background showing that Bezuidenhout had on an earlier occasion been involved in the detention and removal of suspicious goods from the Tonnit bonded warehouse.

17. These documents were faxed to Tonnit. Naidoo testified that the originals were handed to him personally by Bezuidenhout at the time the goods were removed. During cross-examination, counsel for the defendant put it to Naidoo that Bezuidenhout would testify that Exhibit A90 and A91 were not his documents, that he was not the author of them, that he has never seen them, and that he would deny handing them to Naidoo personally. In support thereof Naidoo was referred to Exhibit A36, the detention notice of 14 December 2001, where Bezuidenhout's signature appears differently to those in Exhibit A90 and A91 and his police force number is recorded as 04061507. Although the matter was not taken up by counsel for the plaintiff in re-examination, it strikes me that there are two signatures on Exhibit A36, both recording the name "Bezuidenhout", the first bearing, superficially at least, some resemblance to those on Exhibit A90 and A91. What is notable on all three documents is that the fax number for enquiries to be directed to Bezuidenhout is the same: 012-4013409. As it transpired, Bezuidenhout did not during his examination in chief deal with these issues and in cross-examination initially maintained he had never

visited the Tonnit bonded warehouse prior to 14 December 2001, despite the content of the SARS inspection report and the testimony of Naidoo to the contrary. I will deal with this issue more fully later when analysing the evidence of Bezuidenhout.

18. With regard to the more directly relevant events of 14 December 2001, Naidoo testified that Bezuidenhout came to him at the warehouse on that day and detained his books, registers, the bond files and the keys to the warehouse. The detention notice dated 14 December 2001, Exhibit A36, records in its typed pro forma part that the goods mentioned are “hereby detained in terms of section 88(1)(a) read with section 87 of the Customs and Excise Act 91 of 1964”. The goods mentioned are recorded in handwriting (by Bezuidenhout) to be:

“All Registers, Bond Books and Files for investigation purposes.”

19. It is immediately noticeable that there is no mention in the notice of the keys to the warehouse. Naidoo testified that he gave the keys to Bezuidenhout after the detention notice was served on him. He said Bezuidenhout requested the keys and the alarm code on learning that Naidoo proposed to leave on holiday the next day (15 December 2001) to Thailand. It is not disputed that Naidoo was in Thailand with his wife between 15 and 25 December 2001. Bezuidenhout denied taking the keys. According to Naidoo, Bezuidenhout told him that he needed access

to the warehouse for the purposes of his ongoing investigation. Naidoo then handed him his only set of keys. Naidoo's evidence is that he next returned to the warehouse on 8 January 2002. For the first week of January 2002 he was on holiday with his family in Bela-Bela (Warmbaths). While there he received a call from Steyn who informed him that there were additional goods destined for the bonded warehouse which the Commissioner proposed to detain. Naidoo met with Steyn at the warehouse on 8 January 2002, but was unable to give him access because he did not have the keys. He gave Steyn a copy of the detention notice, Exhibit A36. Steyn in turn served upon Naidoo Exhibit A39, a further detention notice under a SARS letterhead, dated 7 January 2002, detaining in terms of section 88(1)(a) of Act 91 of 1964 the following:

"Footwear of TH 6402.99 for Bills of Entry no 30179 dd 2001/12/03 and 30180 dd 2001/12/03 (Total cartons 2120,00 No)."

20. These goods do not seem to have reached the warehouse either. Steyn was acting however in response to an instruction from Mr E Kellerman of the Controller of Customs and Excise in Durban who requested Steyn to detain 550 cartons of shoes which had been dealt with suspiciously. Once again these goods and their detention bear no relation to the plaintiff's goods or his claim. The events of 8 January 2002 are relevant only to the extent that Naidoo was unable to give Steyn access to the warehouse

because he did not have the keys, and Steyn by looking through the window noted that the warehouse was empty.

21. Steyn confirmed in his testimony that Naidoo gave him the detention notice of 14 December 2001 as well as Bezuidenhout's telephone number.
22. Naidoo's involvement after this was limited. He maintained that Bezuidenhout instructed him not to return to the warehouse until all investigations had been finalised. He believed the warehouse had been put out of business pending the completion of the investigations relating to the various suspicious importations in which he may have had some involvement. He only became aware of all the goods having been removed some months later when he eventually established contact with Bezuidenhout. Both he and Steyn experienced some difficulty in getting hold of Bezuidenhout. He explained his somewhat passive approach as being due to his assumption, on the basis of what Bezuidenhout told him, that Bezuidenhout would inform all the clearing agents that the goods had been detained, and because without his files he could not contact his clients directly.
23. A few months later, Naidoo, on the prompting of Pahad, eventually got hold of Bezuidenhout, whom, he said, he took to a meeting with Pahad. The meeting was confirmed by Pahad but denied by Bezuidenhout.

Naidoo testified that it was on this occasion that Bezuidenhout first informed him that the goods had been removed by the SAPS. He went back to the warehouse at some unspecified point and established that everything had disappeared from which he concluded that the investigation had been completed.

24. When asked in cross-examination if he had asked Bezuidenhout why he needed the keys, Naidoo replied that he understood Bezuidenhout intended to do a reconciliation between the goods reflected in the bond register and those on the warehouse floor.

25. Steyn testified that in response to the instructions from Kellerman he made contact with Naidoo some time after 30 December 2001, the day he received the instruction, and that Naidoo was en route to Warmbaths. He recorded this on the back page of the instruction from Kellerman, (Exhibit A37 and A38), along with a note stating "this bond store is closed until Mon the 7th of Jan 2002". He arranged to meet Naidoo on 8 January 2002. He arrived at the warehouse on that day before Naidoo and took a walk around. He looked through the windows and saw nothing inside. The warehouse was completely empty.

26. The plaintiff has discovered various file notes made by Steyn during the course of his meeting with Naidoo. Exhibit A43 contains the following note initialed by Steyn at 12h25 on 8 January 2002:

“Mr Naidoo said that James Brown from Border Control visited the warehouse after following a container. James Brown asked for paperwork. It was shown to him. (Date unknown, ...: Aug/Sept 2001). The next day Inspector Charles Bezuidenhout from Com/Crime PTA visited and took away all books and left nothing behind. No Customs officer was with them, but this fact not 100% certain. Some containers were supposed to have been placed in warehouse. Insp Bezuidenhout informed Mr Naidoo that it was not possible as the Bond Store is closed. No further arrangement was made to accommodate further shipment into Bond Store.”

It is further recorded on the same page that Naidoo was unaware of the whereabouts of the goods forming the subject of Steyn’s investigation. Be that as it may, it is evident that Steyn was left under the impression that the bonded warehouse was empty, no longer receiving consignments and had been locked by the SAPS. A further file note recorded on Exhibit A41 (a transmission verification report) states:

‘Bond store locked by SAPS. See SAPS detention notice.’

On the same page there is another note:

“Another SAPS member name was given to me by Mr Naidoo, Charles Bezuidenhout, allegedly from Commercial Crimes 083 954 9507. Phoned him @ 14:25 08 Jan 2002 and left messages to phone me back on voice mail.”

27. Later that day Steyn addressed a letter to Kellerman which reads:

“With regard to Etienne Kellerman’s request to have consignments detained for DBN Bills of Entry 30179 and 30180 dd 2001/12/03, the following transpired:

The consignments are not in warehouse as the warehouse has been closed by the SAPS for investigation. It is possible that the 2 containers are still in Durban. If so, please detain. (2X 40’ FCL’s: CCLU 6009183 AND TGHU 7766968).

The following containers may also be in Durban. As warehouse is inoperative, please detain if still in your area of control.

TEXU 5259483

MSCU 8935790

SEAU 8186180

MAEU 6017219

SCZU 7719873

TTNU 9013183

Any other info re above will be appreciated, i.e. transporter particulars if containers are picked up at terminal, place where goods are now kept, etc. if such details are available.

DATE • 18 JANUARY 2002

REFERENCE • YOUR REF: 17/9/2001 DATED 2001-12-14 ISSUED BY INSP.
C. BEZUIDENHOUT

SUBJECT • **DETENTION OF GOODS / VEHICLE(S) ITO SECT. 88 OF
CUSTOMS ACT**

EXTREMELY URGENT!

COULD YOU KINDLY CONTACT ME WITH REGARD TO THE DETENTION OF
REGISTERS, BOND BOOKS AND FILES DETAINED UNDER SECTION 88(1)(a)
THE CUSTOMS AND EXCISE ACT NO 91 OF 1964.

THE COMPANY IN QUESTION IS TONIT TRANSPORT T/A TONIT SERVICE, 247
MAIN REEF RD, DEVER, JOHANNESBURG.

GOODS ARE STILL BEING DIRECTED TO THIS BOND STORE ON
DECLARATIONS, YET THE STORE WAS CLOSED BY YOUR UNIT. CUSTOMS,
JOHANNESBURG NEED TO DO AN URGENT POST CLEARANCE INSPECTION
ON TONIT AND THE DETAINED DOCUMENTATION ARE REQUIRED.

OTHER OFFENCES ARE ALSO SUSPECTED, WHICH YOUR UNIT COULD AD TO
THE EXISTING ONE, WHICH I BELIEVE IS ON 2ND HAND CLOTHING."

30. Steyn received no response to this memorandum. He kept on trying to
contact Bezuidenhout because he was keen to review the bond register.
When he spoke to Bezuidenhout in February 2002, Bezuidenhout

undertook to meet him and to hand over the books and files when they met. Steyn needed the books in order to close the warehouse down. Because of Bezuidenhout's inability or unwillingness to co-operate, as Steyn put it, it was difficult to get any closure on this particular bond store. The core of the business lies in the bond register owing to it being the record of goods moved in and out of the bonded warehouse. The removal of the register effectively sterilizes the business and cancels out the control of customs. Nevertheless, despite many attempts, Steyn could not get a meeting with Bezuidenhout nor has he ever received the bond register since. When asked to comment on the defendant's version that the bond register and files were delivered to his offices by Bezuidenhout in late January 2002, and left at reception with an African male (as recorded by the defendant in paragraph 14 of its answer to the plaintiff's notice in terms of rule 37(4)), Steyn stated that he had no knowledge of these documents reaching his office in Johannesburg. Had they been delivered by Bezuidenhout at that time there presumably would have been no need for the meeting of 13 February 2002 arranged telephonically on 8 February 2002 by Steyn for that purpose. I will return to this when discussing Bezuidenhout's evidence. Suffice it at this stage to state that the bond register and other documents taken from Tonnit's bonded warehouse have disappeared. Steyn has never seen them with result that he has been unable to effect closure of the warehouse on the system, or to determine the amount of customs duty owing, despite the warehouse

- having been inoperative for the past seven years. However, from the evidence of Pahad it is clear that already in August 2002 an entry on the system prevented the consignment of goods into the warehouse. This may have been as a consequence of Naidoo not renewing his licence or a functionary of either SARS or SAPS restricting the operation of the warehouse on account of the various investigations.
31. Steyn also made the point that Bezuidenhout would have been able to contact him by phone to inform him of the intended delivery of the register and files. Steyn's evidence is to the effect that at no stage did Bezuidenhout phone him to tell him that he intended to deliver the books and files or that he had in fact done so.

 32. Under cross-examination Steyn conceded that he had no recollection of whether Naidoo told him in his first telephone call to him that the SAPS had closed the bonded warehouse. Naidoo was never asked what he had told Steyn on the phone. As a consequence, Steyn's file note (Exhibit A38) that "the bond store is closed until Monday the 7th of January 2002" remains ambiguous and ultimately inconsequential. Without Naidoo having had an opportunity to explain what he told Steyn on the phone prior to the meeting, and why he did so, it is difficult to draw the inference counsel for the defendant sought to draw; namely that Naidoo regarded the warehouse as still being operative. An explanation that he did not want to discuss the events of 14 December 2001 with Steyn over the

- phone and preferred to do so in person, for example, would be equally plausible.
33. Steyn conceded that he ought to have recorded in his notes (but did not) that the bond store was empty on 8 January 2002. He remained adamant though that such was in fact the case. He confirmed that he relied exclusively on what Naidoo had told him in relation to the SAPS having locked the warehouse. He added during re-examination that where a bond store is suspected of illegal business, from a customs point of view it would not be unusual to close it down and remove any goods in it to the state warehouse.
34. Pahad's evidence is relevant to the issues of the handling of the plaintiff's goods but also the question of prescription. Besides confirming that he had arranged for the shipping and warehousing, he testified that he had arranged for 255 cartons of the plaintiff's goods to be released and delivered in October 2001. Talia confirmed that these were the only goods he received from the shipment. When Pahad gathered there was some difficulty with the warehouse, he attempted in late July 2002 to obtain the release of a further 950 cartons. The relevant bill of entry was returned to him by Customs with a note stating the warehouse had no depot code. He then contacted Naidoo. Some time in September 2002 Naidoo visited him at his office in the company of Bezuidenhout, who

Pahad had not met before. Bezuidenhout informed him that the warehouse had been closed pending an investigation. Pahad did not discuss the status of the goods in the warehouse with Bezuidenhout because he took it for granted that SARS (the Commissioner) had the authority to seal the warehouse. He assumed Bezuidenhout was acting on behalf of the Commissioner. He limited his discussion with Bezuidenhout to confirming the closure of the warehouse, and to taking his phone number for passing on to his client, the plaintiff, which he later did.

35. On 30 September 2002 Pahad received a letter from the plaintiff (Exhibit A35) which reads as follows:

“Please note that we are still having major difficulties with regard to the delivery of our containers from the bonded warehouse. We have been in constant contact with Inspector Bezuidenhout but all promises do not seem to materialise. To date we have only received 201 cases of our goods.

We strongly suggest that legal action is now required.”

36. The relationship between the plaintiff and NP Shipping was a new one. The consignment of the missing goods was the first job NP Shipping had undertaken on behalf of the plaintiff.

37. In his evidence Talia confirmed that he wrote the letter but stated that the reference to the 201 cases was in fact meant to be 255, being the cartons he received in September 2001. The documentation reveals that an additional 2850 cartons would have remained at the warehouse. Talia further testified that he called Bezuidenhout several times regarding the whereabouts of the goods. He got hold of him for the first time in September 2002 after Pahad gave him the number. Bezuidenhout told him that his goods were in the warehouse and that they would be delivered to him in due course. Talia spoke to Bezuidenhout on a number of occasions and, as he put it, many promises were made to him. On one occasion in December 2002, Bezuidenhout told him that the goods would be delivered within a week or two. In response Talia hired a warehouse from Investec to receive the goods. Bezuidenhout informed him that the goods would be delivered from a warehouse in Pretoria to Germiston and from there to the premises hired by Talia. This never came to pass. Talia kept on pestering Bezuidenhout until eventually they met at the plaintiff's premises during February or March 2003. This was the first and only occasion on which Talia met Bezuidenhout. There is a dispute of fact about what Bezuidenhout told Talia. According to Talia, Bezuidenhout admitted that the SAPS had removed the goods from the warehouse and that it was the fault of the SAPS that they had disappeared. Somewhat inconsistently, according to Talia, Bezuidenhout gave an undertaking that he would make sure Tonnit reimbursed the plaintiff for the loss. After this

meeting, Talia phoned Pahad who advised him to seek a legal opinion and take legal action. As I have just indicated, there is a dispute of fact about what was said at this meeting, there is also a dispute about when the meeting took place. I will return to Bezuidenhout's version on that issue in due course.

38. Pahad recommended to Talia that they consult with Mr Brian Moss, an attorney, with a view to taking legal action. Moss tried unsuccessfully to make contact with Steyn who at that time was on sick leave. Pahad and Moss then met with Mr Mohamed Ali and Mr Patrick Ngoepe of Customs and Excise, Johannesburg on 9 April 2003. According to Pahad, they were told at the meeting that the warehouse had been sealed and they were unable to remove any goods. Ali and Ngoepe were not sure of what the problem was. Pahad raised with them the fact that SARS had not communicated with him informing him, as the clearing agent, of the closure of the bonded warehouse. Ali and Ngoepe then acceded to the request of Moss to furnish them with copies of the relevant documents in the file. Moss was at that stage not only acting for the plaintiff but also other importers whose goods had been in the warehouse. On 14 April 2003, Moss addressed a letter (Exhibit A53) to Ali which reads:

**“BONDED WAREHOUSE - TONIT TRANSPORT, 247 MAIN REEF ROAD,
DENVER, JOHANNESBURG**

I refer to my recent meeting with your Mr Mohammed Ali and Patrick Ngoepe on Wednesday, 9 April 2003.

I confirm having advised you that I act for Faynaz Enterprises CC of 137 Purse Road, Westdene, 2092, Al Mass Apperels and Kinjal Garments of Mumbai, India.

Letters of authority from my clients authorising me to act on their behalf in this matter will be sent to you shortly.

In regard to Kinjal Garments, I attach for your information copies of bills of entry reflecting that two containers numbered -

INBU4715613

ZCSU2216278

were lodged at the bonded warehouse of Tonit Transport, warehouse number JHB0S04575. I am given to understand that this warehouse was sealed by Customs for investigation purposes in or about November or December 2001.

Likewise, and in respect of my client, Al Mass Apperels, I attach for your information a copy of bill of entry reflecting that one container numbered -

CGTU4103387

was similarly lodged at the bonded warehouse of Tonit Transport.

In addition my client, Faynaz Enterprises CC, brought into the country four containers being -

GSTU8274364

MSCU4158705

MSCU4018724

MSCU4172771

all of which were lodged in the bonded warehouse of Tonit Transport at 274 Main Reef Road, Denver on or about 11 September 2001.

I annex for your information copies of the relevant documentation in support thereof.

I understand that the bonded warehouse of Tonit Transport was sealed by Customs and Excise in late November early December 2001. Faynaz Enterprises CC have attempted to obtain release of their goods as no seizure or detention notice was served in respect thereof. My clients' attempt to obtain release of their goods met with no success.

My clients have recently attended at the premises of the bonded warehouse only to find that there are now new occupants of the premises and they are unable to obtain any information regarded the bonded warehouse.

Would you please advise me as a matter of some urgency what has transpired in relation to the warehouse and in particular the content thereof."

39. Pahad elaborated that because the warehouse was bonded in terms of the Customs and Excise Act and with the detention notice (Exhibit A36) being issued in terms of section 88(1)(a), he assumed that the warehouse

had been closed by Customs and Excise in terms of the Act. He and Moss first received a copy of the detention notice at the meeting on 9 April 2003. He was consequently of the view that the Commissioner would be liable for the loss of the goods.

40. There is no evidence of any reply to the letter addressed by Moss to Ali on 14 April 2003. On 14 November 2003, Moss addressed a letter (Exhibit A59) to the Commissioner in Pretoria which reads:

**"BONDED WAREHOUSE - TONIT TRANSPORT, 247 MAIN REEF ROAD,
DENVER, JOHANNESBURG**

YOUR REFERENCE: JHBOS4575(2/3//T11(P))

We address you at the instance of Faynaz Import and Export Enterprises CC, Registration No. CK98/052325/23 with its principal place of business at 137 Perth Road, Westdene, 2092 and its registered address at 137 Perth Road, Westdene.

We are instructed by our client that -

1. On or about 17 September 2001 our client imported quantities of paper handkerchiefs, cleansing or facial tissues and towels under Bill of Entry No. 31111 in four containers numbered GSTU8274364, MSCU4158705, MSCRU4018274 and MSCU4172771.
2. The goods were valued for Customs purposes in the amount of R171 565.00 and at a total value CIF&C of R261 565.00

3. The goods were cleared into a bonded warehouse operated by Tonit Transport under JBOSO4575 at 247 Main Reef Road, Denver, Johannesburg.
4. During December 2001 and pursuant to a detention notice issued by South African Police Services at the instance of South African Revenue Services the premises of Tonit Transport were sealed pursuant to an investigation being conducted by your offices and South African Police Services on your instructions.
5. No detention notices in respect of our client's goods were ever served upon our client or its agent, NP Shipping Services (Pty) Limited.
6. Our client has on various occasions approached the Department of Customs and Excise, Johannesburg, for release of their goods but to no avail. During or about April 2003 and at a meeting with representatives of Customs and Excise, Johannesburg, it was ascertained that the licence of Tonit Transport to operate a bond store had been revoked. Our client further ascertained that the premises of Tonit Transport had been vacated.
7. Insofar as the licence of Tonit Transport to operate a bond store has been revoked and bearing in mind that our client had not yet paid the duty in respect of the imported goods, our clients goods should have been removed from the premises to States Warehouse and our client duly notified thereof. We have not been able to ascertain when the goods were moved to the States warehouse.
8. Under the circumstances we have been instructed to call upon you, as we hereby do, to advise us of the whereabouts of our client's goods so that our client may pay the duty thereon and take delivery of the goods out of bond. Should you not be able to tender delivery of the goods to our client against payment of duties,

our client reserves the right to recover from you such damages as it may have sustained being the CIF&C value of the goods namely R261 565.00 and to which purpose this serves as notice in terms of Section 96(1)(a) of the Customs and Excise Act 1964.

Kindly note that should you not comply with our client's demands as set out in the body of this letter within one month of delivery hereof our client will institute proceedings against you for return of its goods, alternatively payment of the CIF value thereof without further notice or delay."

41. There is no evidence to support the claim that Tonnit's licence had been revoked. It is undisputed though that the warehouse ceased operating after 14 December 2001 and in all likelihood the licence lapsed because Naidoo did not renew it. Steyn indicated that he could not effect a final closure without his obtaining access to the bond register which has disappeared.

42. After the Commissioner filed his plea on 9 December 2004, and as a result of consultations between Pahad and the legal representatives, on 28 January 2005 Moss addressed the following letter (Exhibit A62) to the defendant, which was received by the defendant on 1 February 2005:

**"FAYNAZ IMPORT AND EXPORT ENTERPRISES CC
COMMISSIONER FOR CUSTOMS AND EXCISE AND ANOTHER**

1. We act for Faynaz Import and Export Enterprises CC. On behalf of our client we hereby give notice in terms of Section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act No. 41 of 2002 (the "Act"), of our client's intention to institute legal proceedings against you for the recovery of a debt.

2. A brief summary of the facts giving rise to the debt and particulars of the debt are set out as follows:
 - 2.1 In or about November or December 2001 the South African Police Services detained and seized all registers, bond books and files together with the keys in respect of the bonded warehouse of Tonit Transport which bore warehouse number JHB0804575, purportedly in terms of Section 88(1)(a) read with Section 87 of the Customs and Excise Act No. 91 of 1964;

 - 2.2 .A copy of SAP 21 dated 14 December 2001 relating to such detention and seizure is attached to this letter.

 - 2.3 The South African Police Services was at all times represented by one Inspector, Charles Bezuidenhout and/or other Police Officers who at all material times was/were acting in the course and scope of his/their employment with the South African Police Services.

 - 2.4 At the time our client had lodged in the said bonded warehouse four containers bearing registration numbers GSTU8274364, MSCU4158705, MSCU4018724 and MSCU4172771, which contained goods belonging to our client;

 - 2.5 The value of our client's said goods was R261, 565.00;

2.6 By effecting the detention and seizure referred to in paragraph 2.1 above, the South African Police Services took the goods belonging to our client into its possession;

2.7 Attempts by our client and its representatives to secure release of its goods have been to no avail. We have established that the goods were in fact never transferred to the Department of Customs and Excise and are still in your possession;

2.8 In the premises you are liable to return the said goods to our client, alternatively to compensate it by paying compensation to our client in the sum of R261,565.00.

3. You are therefore called upon to return the said goods to our client, alternatively to pay to us the sum of R261,565.00 within 30 days after the service of this notice, failing which legal action will be instituted."

43. Pahad under cross-examination reiterated that he only grasped the fact that the SAPS had acted alone without the involvement of Customs and Excise after the delivery of the plea. Talia appears not to have conveyed to Pahad that Bezuidenhout admitted liability on the part of SAPS during their meeting in February 2003, though it was never asked of Talia if he had conveyed such to Pahad. Even had Talia conveyed Bezuidenhout's admission, it is evident from the subsequent correspondence and course of events that Moss and Pahad were manifestly of the impression that Bezuidenhout had acted on behalf of Customs and Excise.

44. Pahad readily conceded that he had no personal knowledge of whether or not Bezuidenhout had detained and seized the keys of the warehouse along with the books, files and registers as was alleged for the first time in correspondence in paragraph 2.1 of the letter dated 28 January 2005 addressed by Moss on behalf of the plaintiff to the defendant (Exhibit A62). Pahad stated in his testimony that he was informed by the attorneys that Bezuidenhout had explained that he had delivered the documents and keys to Customs and left them at reception. The double hearsay nature of that evidence in relation to the keys gives it little weight or value.
45. Pahad was adamant that he had met with Bezuidenhout and obtained his phone number for the purpose of passing it on to Talia. He dismissed as untruth the assertion put to him in cross-examination that Bezuidenhout never visited him at his office or discussed this matter with him. He was one hundred per cent certain that he had met Bezuidenhout with Naidoo at his office, but said he had limited the discussion because as clearing agent he had a restricted role, and the issues of liability he felt would be better handled by the plaintiff dealing directly with Bezuidenhout. For that reason he took Bezuidenhout's number and passed it on to Talia.
46. Bezuidenhout admitted that he had issued the detention notice of 14 December 2001 (Exhibit A36), testifying that he had done so as part of his

- investigation into the illegal importation of second-hand clothing. He denied that he detained any of the goods in the warehouse or that he had taken control of the warehouse by dispossessing Naidoo of the keys. He insisted that he had only taken possession of the register, bond books and files. When he visited the warehouse he saw bundles of second-hand clothes and several cardboard boxes, which one may reasonably surmise included the plaintiff's goods.
47. He states that he kept the books with him for about three months until early March when he returned them to Customs in Johannesburg. He said that he could not find Steyn on the day he went to Johannesburg and therefore simply left a cardboard box with the files inside and an envelope including his report taped to the top of the box, which he left with a person at reception who signed an acknowledgment of receipt. He offered no plausible explanation for not having made an appointment with Steyn to hand over the documents. Nor was the acknowledgment of receipt discovered or produced in evidence. He simply arrived at Steyn's place of work in the hope of encountering him.
48. Bezuidenhout denied that Naidoo took him to Pahad and that a meeting took place. He qualified this by saying that he had been to Pahad's office previously, on his own, in relation to another matter. While it was put to Pahad that Bezuidenhout would deny coming to his office with Naidoo, it

was not put to him that Bezuidenhout had met him alone on a previous occasion. Pahad testified that the first time he met Bezuidenhout was with Naidoo for the purpose of discussing this matter. Pahad's version is corroborated by Naidoo and the fact that Talia obtained Bezuidenhout's number from Pahad immediately after the meeting.

49. Bezuidenhout admitted to communicating with Talia by phone and eventually meeting with him at the plaintiff's offices. His version though is that the meeting took place at the end of 2002 and not in March 2003. He denied making any admission to Talia that the SAPS had taken possession of the goods or that it was at fault in any way in relation to them. He said he informed Talia that the police had never closed the warehouse, and Talia in turn informed him that Naidoo had returned 201 boxes of the goods and showed him documentary proof of that fact. Talia denied that. The purpose of this evidence was an attempt to bolster his assertion that he had not removed the goods and that they were still under Naidoo's control. The figure of 201 boxes corresponds with the mistaken figures in Talia's letter to Pahad. For reasons that will become apparent, I doubt Bezuidenhout's account of the conversation.

50. In elaborating upon his denial of ever taking possession of the keys, Bezuidenhout created the impression that such would normally be the function of Customs who normally would not move the goods to a state

- warehouse but would leave them within the sealed bonded warehouse. He was not asked to respond specifically to Talia's evidence that Bezuidenhout told him the goods were in a warehouse in Pretoria and that he had undertaken to move them first to Germiston and then to the premises Talia hired from Investec. Talia's evidence that he hired premises from Investec in late 2002 to receive the goods is accordingly uncontested.
51. Bezuidenhout took sick leave at the beginning of 2003 and was later discharged from the SAPS on medical grounds as a result of suffering post-traumatic stress. He was unable to comment definitively on the outcome of any investigation into the disappearance of the goods.
 52. Under cross-examination Bezuidenhout explained that his reason for visiting the warehouse on 14 December 2001 was to look for illegally imported second-hand clothing, which he in fact found and detained. However, despite his issuing a SAP21 detention notice for the clothing that day, such notice has not been discovered or produced by the defendant in evidence. That notice would have particular relevance in that it most likely would describe precisely the goods in the warehouse which Bezuidenhout detained and would indicate whether the plaintiff's goods were included. Bezuidenhout described how he issued a detention notice in respect of the second-hand clothes and gave the original to Naidoo who

filed it in the bond register which Bezuidenhout seized when immediately thereafter he detained the books and registers in terms of the second detention notice, Exhibit A36. The detention notice detaining the goods thus, according to Bezuidenhout, was together with all the documents he left at the reception at Johannesburg Customs when he went there to meet Steyn without an appointment in March 2002. It was never put to Naidoo that Bezuidenhout would testify to having given him two detention notices. The tenor of Naidoo's testimony is that he received only one, Exhibit A36, the original of which he gave to Steyn. Bezuidenhout and the defendant were not able to produce a copy of the detention notice in respect of the goods detained on 14 December 2001 on account of Bezuidenhout's investigation file also having disappeared. At a later stage in his evidence, Bezuidenhout conceded that Customs and the border police were involved in moving the second-hand clothing from the warehouse to other units on the premises in his presence and presumably under his supervision. I will return to this aspect presently.

53. Bezuidenhout was cross-examined in some detail about what he did with the books and documents he detained in terms of Exhibit A36. The cross-examination established that Bezuidenhout kept the documentation for between two to three months even though he had copied them and despite Steyn demanding access to them in mid-January 2002. There are contradictions between the version Bezuidenhout testified to in court and

that pleaded. The pleaded version is that Bezuidenhout delivered the register, bond books and documents to an African male person at the fourth floor of the SARS building in Johannesburg at the end of January 2002. His version in court is that in March 2002 he visited SARS, without having made an appointment with Steyn, went to Steyn's office on the 2nd or 4th floor, and when he could not find him left the documents at reception on the ground floor. Steyn's undisputed evidence is that his office was on the 5th and 6th floors of the building. The pleaded version was stated twice in different pre-trial minutes, firstly about a year before the trial and secondly shortly before the trial commenced.

54. Counsel asked Bezuidenhout to explain why he had not simply returned the books and register to Naidoo after he had made copies of them. Bezuidenhout was fully aware that without the bond registers Tonnit's business activities had been effectively sterilised. Bezuidenhout replied that he could not get hold of Naidoo. The following revealing exchange between counsel and Bezuidenhout then took place:

Counsel: Hoekom ry u nie net na die perseel toe en gaan lewer dit by die pakhuis af nie?

Bezuidenhout: Aan wie oorhandig ek dit by die pakhuis. Die pakhuis is toegesluit. Daar is niemand by die pakhuis wat

ontvangs kan neem daarvoor nie. Ek kan dit nie vir enige persoon gee op die perseel nie.

Counsel: Wel, hoe weet u die pakhuis is toegesluit?

Bezuidenhout: Die deure was toe en die staaldeur was afgerol gewees.

Counsel: Maar u was nie weer daar gewees nie, dit is u getuienis?

Bezuidenhout: Ek kon nie weer soontoe gaan nie.

Counsel: Ja, met ander woorde die laaste keer wat u daar was, was 14 Desember?

Bezuidenhout: Was 14 Desember. Dit is korrek.

55. Although the intention of the line of questioning was to reveal the improbabilities of Bezuidenhout's claim to have taken the books to Customs at Johannesburg, the exchange discloses that Bezuidenhout knew on 14 December 2001, such being the last time he ever visited the warehouse, that the warehouse was "toegesluit" on that day.

56. Aside from that, the cross-examination established further that Bezuidenhout was aware that Naidoo and Tonnit could not carry on business without the registers and that Naidoo would have needed the register to deal with the goods other than the detained second-hand clothing, such as the plaintiff's goods, which remained (so he said) in the warehouse. The point being, as I understand it, that Bezuidenhout's conduct in holding the books for three months (when his only stated purpose was to make copies of them) before taking them to customs (if he did that) was consistent with knowledge on his part that the warehouse had ceased operating on 14 December 2001. His assertion that he (a policeman) could not locate Naidoo is so implausible that it redounds negatively on his credibility.
57. Another question mark over Bezuidenhout's credibility arises from his assertion that when he met Talia in 2003 he did not know whether or not the plaintiff's goods were in the warehouse, and despite undertaking to try trace them, he did not return to the warehouse at any point after 14 December 2001 to check if they were there. Again his behaviour and statements are consistent with knowledge on his part that the warehouse had ceased operating and was in fact empty. Had he genuinely intended to trace the goods he would have returned to the warehouse and located Naidoo. He did say he telephoned Naidoo and that Naidoo was evasive,

but he took no further steps. His failure to do so points to his knowing when he met Talia that the goods had already disappeared. Talia's version that he admitted to knowing of the disappearance of the goods thus seems more credible and probable.

58. With regard to the detention and removal of the goods in August 2001 in terms of the detention notices, Exhibit A90 and A91, Bezuidenhout originally denied having ever been at Tonnit prior to 14 December 2001, despite the detention notices containing his fax number being under his letterhead, and being included in the SARS investigation report. As he remembered it, 14 December 2001 was the first time he went to Tonnit. If that were true, given his evidence that he had never returned there after that day, it would have been the one and only time he went there. Counsel then confronted him with paragraphs 3.1-3.4 of the defendant's plea, which read as follows:

"3.1 Prior to 14 December 2001 Inspector Charles Bezuidenhout ("Bezuidenhout") who was attached to the commercial branch of the SAPS in Pretoria at the time, received information from an informant that there was second-hand clothing material stored at Tonic Transport Warehouse at Main Reef Road, Denver, Johannesburg, which clothing material has been illegally imported into the country;

3.2 Still prior to 14 December 2001, on arriving at the premises, Tonic Transport Warehouse, Bezuidenhout issued a detention notice on the second-hand clothing

material. The detention notice was issued to the manager/owner of the warehouse, a certain Mr Trevor Naidoo. After issuing the detention notice referred to herein, Bezuidenhout left the premises;

3.3 On Bezuidenhout returning to the premises, on the same day, before 14 December 2001, Bezuidenhout discovered that the second-hand clothing he had detained had been removed from the warehouse. He discovered that the second-hand clothing was just stored in the other storage facilities in the same premises. At the time members of the South African Revenue Services and Border Police were also at the premises, being Main Reef Road, Denver, Johannesburg. The members of the South African Revenue Services took over the matter.

3.4 On 14 December 2001, Bezuidenhout again returned to the premises, perused the registers, bond books and files kept at the premises. In terms of the detention notice served on the warehouse manager, Mr Trevor Naidoo at Tonic Transport, 247 Main Reef Road, Denver, Johannesburg, he detainee for investigation purposes all registers, bond books and files in terms of section 88(1)(a) read with section 87 of Act 91 of 1964;"

59. Quite evidently embarrassed and confused he then remembered that he had visited Tonnit a few days before 14 December 2001 and had detained second-hand clothes then as well. These were removed to another warehouse on the same premises which was sealed and that case was taken over by Customs. He then also later said that he met Naidoo for the first time in November 2001, contradicting again his statement that 14 December 2001 (or a few days before that) was the first and only time he

visited the warehouse. When confronted with that contradiction he backed away from it and re-asserted that he had only met him a few days before 14 December 2001. This then begs the question, which counsel neglected to ask, how it came to be that the SARS Inspector recorded his presence on the premises in his report of 13 August 2001.

60. Despite the breadth of the evidence just discussed, it will be recalled that on the merits there is essentially one factual question in need of determination: Did Bezuidenhout take control or possession of the warehouse on 14 December 2001 by taking Naidoo's keys? Naidoo said he did. Bezuidenhout denies it. Possession of property is usually acquired by some form of delivery (*traditio*). In the case of immovable property the transfer of possession can occur through symbolic delivery in which the transferor supplies the transferee with the means which will enable the latter to exercise control over the property. The undisputed evidence of Naidoo is that there was only one set of keys to the warehouse. Thus the handing over of the sole set of keys to a warehouse would be symbolical delivery of the property and an effective transfer of possession - *Harrington v Shalkolsky* 1914 CPD 478.
61. The versions of Bezuidenhout and Naidoo are mutually destructive. I am accordingly compelled to decide which version is the most probable with

reference to the credibility and reliability of their testimony, as well as the inherent probabilities.

62. Bezuidenhout, as appears from what has gone before, was a poor witness who contradicted himself on material aspects. Whether he was deliberately misleading or merely confused on account of his illness at the time is hard to say. He admitted that the post-traumatic stress he suffered, which led to his discharge, was characterised by depression, alcohol abuse and inappropriate conduct. However, having visited Tonit more than once, I doubt that he would have initially been as adamant as he was that he went there on one occasion only, namely 14 December 2001, had he not been deliberately trying to distance himself from having been there earlier. His motives remain opaque. Whatever they may be, his credibility is nonetheless suspect and his version as a result less reliable.
63. To accept Bezuidenhout's version as true, I would have to find that Pahad and Naidoo conspired to lie that Bezuidenhout had visited Pahad's office; that Pahad lied about this being the first time he met Bezuidenhout; that Talia lied about Pahad conveying the events of the meeting and Bezuidenhout's telephone number to him; that Talia lied about the purpose of his meeting with Bezuidenhout and the content of their discussion; that Naidoo lied about giving him the keys; that all the relevant documentation pertaining to his visits to the warehouse have been lost

through no fault of his own; and that the reception official at Customs, Johannesburg neglected to deliver critical documents to Steyn, or did so and Steyn lied about receiving them.

64. Steyn in particular was a good, patently honest and independent witness. The calibre and cogency of his performance, the absence of any inherent bias or interest in the matter, and the conscientious manner in which he attended to the matter at the early stages render his testimony both credible and reliable. Talia and Pahad too made a good impression, both testifying consistently and without any material contradictions, though both obviously having a clear interest in a particular outcome. Naidoo's evidence was coherent and consistent, though as will appear presently, not entirely trouble free. Nevertheless, Naidoo's evidence falls to be assessed against the totality of the evidence and in particular the probability or otherwise of his version.
65. It is common cause that Naidoo was overseas from the day after the detention of the books, 15 December 2001 until 25 December 2001, and was in Warmbaths between 30 December 2001 and 8 January 2002. It is further common cause that the warehouse was empty on 8 January 2002, meaning that the goods were removed some time during that period.

66. I am satisfied that Bezuidenhout indeed visited the warehouse in August 2001 and removed certain goods on that occasion. To hold otherwise would be to find that Naidoo or someone else had falsified the two SAP21 forms (Exhibit A90 and A91), had falsely recorded the registration number of the vehicle used by the SAPS to remove them, and then falsely misled the SARS Inspector. There is no basis for coming to that conclusion, particularly in the light of Bezuidenhout's contact details, his name and rank being correctly recorded in the notices. If Bezuidenhout only met Naidoo in November or December 2001, as he claims, then Naidoo perpetrated a fraud of elaborate dimensions using the details of a police officer he had never met, who either by remarkable coincidence or design turned out to be the same police officer responsible for the detention of 14 December 2001. One merely has to state the scenario to appreciate that the probabilities are overwhelmingly against it. That being so, one must ask why Bezuidenhout denied his involvement in the detentions and inspections of July-August 2001. Either he had something to hide or he was confused. Both render his testimony entirely unreliable. The contention, put by his counsel in cross-examination, that his signatures on Exhibit A90 and A91 were forged was not pursued by him with any vigour or much conviction when he testified. Nor did the defendant call an expert to establish a forgery. The probabilities point rather to Bezuidenhout denying his prior involvement because such is incontrovertible evidence that he had previously removed goods from the warehouse. Being of a

similar fact nature such alone does not establish that he removed the plaintiff's goods. Yet, still, his unsustainable denial, taken together with his equivocation about when he first met Naidoo and visited Tonit, impacts unfavourably upon the credibility and reliability of his version.

67. Likewise, the contradictions and improbabilities attending his account of returning the registers to Customs, Johannesburg cast further doubt. In the first place it is improbable that a relatively senior and experienced police officer would deliver critical evidence disclosing the possible commission of an offence into the hands of an unknown receptionist without having made an appointment with the relevant customs official for whom they were destined and without letting that official know he had done so. Equally improbable is the fact that they, as well as Bezuidenhout's file, simply disappeared. The improbabilities are reinforced by the contradictions in the pleadings and evidence about when and where they were delivered and the precise location of Steyn's office, which together point to the likelihood that Bezuidenhout in fact did not deliver the registers and documents to Steyn. By contrast, the conscientious manner in which Steyn originally pursued the matter appears from his letter to Bezuidenhout's superior dated 18 February 2002. Steyn needed to do a post clearance inspection urgently. He got no joy or co-operation from Bezuidenhout or his superior. What is noteworthy about this letter also is that the SAPS did not counter Steyn's

statement in it that: “goods are still being directed to this bond store on declarations, yet the store was *closed* by your unit”. I accordingly accept Steyn’s evidence that he never received the registers. In the light of Bezuidenhout’s contradictory evidence and his loss of all other relevant documents, I do not believe that he delivered them and accordingly reject his evidence on this aspect as untruthful.

68. The difficulty outlined by Steyn, Naidoo and Talia in making contact with Bezuidenhout intimates that the latter was acting evasively. Both Steyn and Bezuidenhout were investigating possible criminal misconduct by illegal importers associated with Tonnit. One may reasonably infer from Steyn’s evidence that despite his best efforts Bezuidenhout avoided meeting with him. Given that they had a duty to share information, Bezuidenhout’s evasive behaviour, and the dubious manner in which he supposedly delivered the register, add further doubt to his version.
69. Moreover, I am inclined to accept the evidence of Pahad that he met Bezuidenhout (as corroborated by Naidoo) and that the latter told him the warehouse had been closed pending an investigation. Pahad’s version that such was the one and only time he met Bezuidenhout was not challenged in cross-examination. The meeting was denied but it was never put to Pahad that Bezuidenhout had met him on a prior occasion at his office. Bezuidenhout was able to describe the location of Pahad’s

- office but omitted the details of the prior visit. That the meeting occurred is corroborated further by Talia's conduct immediately after it took place. He began phoning Bezuidenhout (also without much luck) as soon as he got the telephone number from Pahad.
70. Likewise, I accept Talia's evidence that Bezuidenhout admitted that the police had removed the goods and through their fault lost them. No attempt was made by the defendant to challenge Talia's evidence that before the meeting, but after talking to Bezuidenhout on the phone and obtaining an assurance of delivery of the goods from him, he hired premises from Investec to receive them. Talia would not have hired the premises had Bezuidenhout not told him that the SAPS were in possession and control of the goods. Moreover, Bezuidenhout did not deny in his evidence that he had made promises to Talia that he would deliver the goods via Germiston to the Investec warehouse.
71. Perhaps the strongest indication that Bezuidenhout knew that Naidoo and Tonnit had been dispossessed of control of the goods is that evidenced in the slip he made when explaining why he had not returned the books and registers to Naidoo. He knew the warehouse was "toegesluit" and the probable reason for his knowledge is that he had locked it himself as Naidoo said he did. Naidoo's explanation for Bezuidenhout taking the keys in order to continue with the investigation while he was in Thailand is

plausible; and Naidoo's willingness to hand them over is understandable in view of Bezuidenhout having on a previous occasion in August 2001 removed illegally imported goods. Naidoo obviously thought it best to cooperate. Naidoo's version is further corroborated by what Steyn recorded in his file notes and the stance Steyn took, namely that the SAPS had closed the bonded warehouse, which was never contradicted until the plaintiff proceeded against the defendant in 2005. Had Bezuidenhout not taken control of the warehouse and closed it, as Steyn said he did in his letter to the Unit Commander of the Commercial Crime Unit in January 2002, one would have expected Bezuidenhout or his superiors to have corrected him. The thrust and tenor of Steyn's evidence is that he was initially of the view, and has been ever since, that the SAPS closed the bond store.

72. Besides Steyn's contemporaneous notes, there is also the letter of Talia to Pahad dated 31 September 2002 (Exhibit 35) recommending legal action. In it Talia state that he had been in constant contact with Bezuidenhout "but all promises do not seem to materialise". This too is consistent with the idea that Bezuidenhout was difficult to pin down, but also corroborates Talia's evidence that Bezuidenhout had promised to return the goods to him to the extent that Talia hired premises to receive them.

73. Naidoo's evidence admittedly is not entirely free from difficulty. I have already mentioned his apparent failure to inform Steyn on the telephone that the SAPS had closed the warehouse. The file note made by Steyn creates the impression that Naidoo told him the warehouse would re-open on 7 January 2002. Naidoo was never questioned on what he said to Steyn on the phone in this regard. As I have said, he might have preferred to wait until meeting Steyn before giving a fuller picture of the situation or alternatively Steyn's note might not be an accurate reflection of what Naidoo told him. I accordingly do not consider that much can be made of the content of the file note other than to say that it confirmed that the warehouse was closed and Naidoo was unavailable.
76. Another difficulty is that Naidoo in his examination in chief left the impression that immediately upon his return from Thailand he went to Warmbaths. Steyn's evidence was that when he spoke to him after 30 December 2001, Naidoo was en route to Warmbaths. Unfortunately this aspect was not canvassed with Naidoo either. Naidoo was not specific about when exactly he went to Warmbaths. Moreover, Steyn seemed to conclude Naidoo was en route to Warmbaths because he could hear Naidoo was in his vehicle when he spoke to him. Given that Naidoo never had an opportunity to clarify his movements after returning from Thailand the evidence is inconclusive and certainly insufficient to draw an adverse inference regarding his credibility or to conclude that Naidoo intended to

conceal that he himself had the opportunity to remove the goods between 25 and 30 December 2001.

77. Counsel made much of Naidoo's apparent passivity. After being dispossessed of his business he took no steps to challenge the authorities or to contact his clients. He simply accepted the situation by allowing his licence to lapse and the lease of the premises to terminate. His conduct is certainly questionable. However, in my assessment, he was new in the business and had obviously been subject to ongoing investigations. He struck me as a man who lacked the wherewithal to challenge the authorities. It is conceivable that he simply accepted the fate of the business, or as he said, gave up hope, and expected the SAPS to deal with the clearing agents and clients. I do not think that his passivity, especially in the light of the other evidence, leads to a strong or reasonable suspicion that he unlawfully dealt with the plaintiff's goods.
78. The fact that the keys were not mentioned in the detention notice (Exhibit A36), counsel submitted, supports the contention that Naidoo fabricated. Although the removal of the keys was alleged by the plaintiff in its letter to the defendant for the first time only in January 2005, Steyn's evidence that Naidoo told him Bezuidenhout had taken the keys and locked the warehouse is supported by his contemporaneous file note to that effect. Such is also consistent with Steyn's unanswered assertion in his letter of

18 January 2002 to the Commander of the Commercial Crime Unit that the Unit had closed the warehouse. Moreover, Bezuidenhout himself confirmed that Talia mentioned that he believed Bezuidenhout had taken the keys. And, importantly, Bezuidenhout gave as his reason for not returning to the warehouse after 14 December 2002 the fact that he knew the warehouse was “toegesluit”. This is consistent also with Steyn’s file note of 8 January 2002 in which he records (on the basis of information supplied by Naidoo):

“bond store *locked* by SAPS.”

78. Taking account then of the evidence and in particular the unsatisfactory aspects attending Bezuidenhout’s evidence, ultimately reflecting adversely on his credibility and reliability, I am of the opinion that the probabilities favour the plaintiff’s version that Bezuidenhout took the keys, locked the warehouse and effectively took control of the warehouse and possession of its contents including the plaintiff’s goods. His true motive for doing so cannot be gleaned from the evidence, but one may assume at the very least that he acted in furtherance of his investigation into the illegal importation of second-hand clothing.

79. The plaintiff’s main claim is a vindicatory action based on its ownership of the goods and the defendant’s alleged unlawful possession of them. To succeed on the *reivindicatio* the plaintiff is required to prove that it is the owner of the goods and that they were in possession of the defendant at

the commencement of the action - *Leon Bekaert Southern African (Pty) Ltd v Rauties Transport (Pty) Ltd* 1984 (1) SA 814 (W) at 816H. Summons was issued against the defendant on 27 September 2005. I agree with counsel for the defendant that there is no evidence that the defendant was in possession of the goods at that date. Had the SAPS been able to locate the goods, it would probably have handed them over to the plaintiff, being as they were unrelated to the commission of any criminal offence. The goods have most likely disappeared. This disposes of any vindicatory action.

80. The allegations in the particulars of claim founding an alternative claim are sparsely pleaded. In paragraph 9 it is alleged in the alternative that the goods have been lost by the SAPS and in paragraph 12 it is alleged that the SAPS is liable to compensate the plaintiff for the value of the goods. The *actio ad exhibendum* is available to the owner of a stolen thing against any *mala fide* possessor, who has consumed or alienated the thing. The owner is entitled to claim damages to the extent of the value of the stolen thing. The action is also available against any person who has parted with possession of the thing after receiving notice of the owner's rights or claims to it. In other words, in order to succeed on the *actio ad exhibendum* the plaintiff was required to allege and prove that the defendant or one of his servants disposed of, consumed or culpably destroyed the goods of the plaintiff with knowledge of the plaintiff's right or

claim. That knowledge must be actual knowledge. However, the defendant “cannot disavow knowledge if red or amber lights flash and you deliberately ignore or refrain from heeding them” - *Frankel Pollak Vinderene Inc v Stanton N.O.* [1996] 2 All SA 582 (W) at 601H. Nevertheless, the requisite fault element is one of *dolus*. The *actio ad exhibendum* is available against a defendant *qui dolo desiit possidere*. I doubt whether the allegations in the summons sustain such a claim in the present matter. Even if they did, there is no evidence that the goods were disposed of by any servant of the defendant with knowledge of the plaintiff’s rights and claims to them. Nor is it in my view sufficient to allege that the defendant could reasonably have acquired knowledge of the plaintiff’s claim to the goods. I concur with the sentiment expressed by Coetzee J in *Leon Bekaert Southern Africa (Pty) Ltd v Rauties Transport (Pty) Ltd (supra)* at 817B where he said:-

“Plaintiff’s counsel however pressed an argument that *mala fides* can be equated to negligence and, seeing that some form of negligence was proved, the *actio ad exhibendum* could be available to the plaintiff. This contention however, rests on a clear misconception of this remedy, as there is no way in which *mala fides* can be equated with negligence.”

It follows then, in my view, that the plaintiff cannot succeed on the *actio ad exhibendum*.

81. This finding however does not dispose of the claim. Our law also grants a remedy against persons who negligently cause economic loss to another by wrongfully dealing with that other's property - *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A). In determining whether the defendant acted wrongfully through its servants one should ask whether the defendant owed a duty to the plaintiff. This involves implicit policy considerations given the necessity always of imposing theoretical and practical limitations in order to keep liability for pure economic loss within reasonable bounds. When the police act under legislation, be it the Customs and Excises Act or the Criminal Procedure Act, to seize property with a view to possible forfeiture or for evidentiary purposes, good order and the constitutional right to property require them to act with the interests of all foreseeable parties in mind. Thus, when detaining or seizing the contents of a bonded warehouse there will always be the reasonably foreseeable possibility that the property of innocent persons will be stored there. The risk of adversely harming those interests should be avoided. The ease with which the SAPS might foresee the possibility of such loss and the availability of measures (including bond registers and source documents) to identify distinct goods and thereby avert any loss to foreseeable plaintiffs are important considerations in assessing the wrongfulness of the defendant's conduct. Little effort was required on behalf of the SAPS to take steps to protect the plaintiff's goods. The failure to take steps to do so rendered the SAPS in breach of

its duty towards the plaintiff and his conduct wrongful. Bezuidenhout had the bond register at his disposal. He could then have contacted NP Shipping immediately and made appropriate arrangements for the protection of the goods.

82. The allegation of negligence in the particulars and the evidence in support of it, as I have said, is sparse. However, the fact of the matter is that the defendant took control and possession of the plaintiff's goods and they have since disappeared - *res ipsa loquitur*, the matter speaks for itself, the defendant has negligently lost the plaintiff's goods. In accordance with the duty of care owed to foreseeable innocent property owners, the defendant is required to have in place arrangements to protect their property when it is seized together with suspicious property. There is no evidence before me of any protective arrangements or measures deployed by the defendant. Dealing with similar events Coetzee J in *Leon Bekaert Southern Africa (Pty) Ltd v Rauties Transport (Pty) Ltd (supra)* at 817G-818A wryly observed:-

"Res ipsa loquitur is no doctrine, but a convenient label to describe a result. The simple fact is that the defendant received the goods and these goods disappeared whilst in its possession. As it has also lost all the documentation which it received at the time of their delivery, the defendant is not able to explain this mystery at all and the most reasonable inference, namely that through its negligence, in some or other way in dealing with the goods, they cannot be accounted for and that they were probably stolen, remains undisplaced..... For the defendant to say that it is

generally careful is almost irrelevant. It is like a motorist who collides with the rear of a stationary motor car parked on the side of the road, trying to explain away the clear *prima facie* inference of negligence by merely proving that he is normally a good and careful driver without offering any explanation or evidence of or relating to the incident itself. This is not what is meant by saying that where *res ipsa loquitur* the facts which point to negligence required to be explained to avoid the normal inference of negligence becoming proof on a balance of probabilities. Nay, it is the very loss itself, *in casu*, which has to be explained, and that the defendant has failed to do.”

83. Likewise, in the present matter the loss of the plaintiff’s goods has not been explained. In the result, the defendant wrongfully and negligently lost the plaintiff’s goods after taking possession of them and is accordingly liable to it for damages in the agreed amount of R460 000.

84. This brings me to the special plea of prescription or time barring. The time bar in section 3 of Act 40 of 2002 provides that no legal proceedings may be instituted unless notice is given within 6 months from the date the debt is due. In terms of section 3(3)(a) of Act 40 of 2002 a debt may not be regarded as having been due until the creditor has knowledge of the identity of the organ of state and the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care. The time bar in section 3 of Act 40 of 2002, to be operative, requires the defendant to show that the plaintiff did not give notice in writing of its

intention to institute legal proceedings within 6 months of it requiring knowledge of the identity of the organ of state and the facts giving rise to the debt. It is common cause that the plaintiff gave the defendant notice on 1 February 2005. The defendant initially contended that the debt became due on 14 December 2001. Counsel did not persist with this contention arguing rather that Talia, on behalf of the plaintiff, acquired knowledge of the facts, on his version, when he met Bezuidenhout in February or March 2003. The plaintiff counters that it gained knowledge of the true facts only on 9 December 2004 when the Commissioner filed his plea and hence its notice of 1 February 2005 was within the six month period.

85. I accept the evidence of Pahad and Talia that they were under the mistaken impression, given the use of the power under section 88 of the Customs and Excise Act, that Bezuidenhout was acting as an agent for the Commissioner until they received the plea in which it was denied for the first time that the Commissioner had issued any instructions to members of the SAPS. The conversation between Talia and Bezuidenhout did not change that as is evident from the fact that notice was given against the Commissioner in November 2003, after the meeting with Bezuidenhout. Considering also that the matter was for all intents and purposes a customs and excise matter by nature, as well as the apparent failure by Ali and Ngoepe to disavow the plaintiff in April 2003

that the Commissioner was the relevant organ of state, I find that the debt can only be regarded as having been due on 9 December 2004. The notice of 1 February 2005 was thus within the six month period. Hence the time bar is not applicable.

86. The defendant has not raised a special plea under the Prescription Act and as stated at the outset has abandoned its reliance upon the time bar in section 96 of the Customs and Excise Act. In the premises, the special plea falls to be dismissed.

87. For those reasons the following orders are issued:

1. The defendant is ordered to pay the plaintiff R460 000 together with interest at 15,5% per annum from the date of judgment to the date of payment.
2. The defendant is ordered to pay the plaintiff's costs.

JR MURPHY
JUDGE OF THE HIGH COURT

Date Heard: 10, 11 and 12 November 2008
For the Applicant: Adv J Strydom, Pretoria
Instructed By: Moss Marsh & Gorgiev c/o Savage, Jooste & Adams Inc., Pta
For the 3rd Defendant: Adv N Jansen v. Niewenhuizen
Instructed By: Bopape MC Inc. Pretoria (tel: 012 321 5057)