IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: 13584/20

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHERS JUDGES: YES
(3) REVISED: YES

.....11/12/20..... .....
DATE SIGNATURE

In the matter between:

DRAGON FREIGHT (PTY) LTD	1st Applicant
TIAN LE TRADING ENTERPRISE CC	2nd Applicant
NEW FEELING FASHION DESIGN (PTY) LTD	3rd Applicant
TINGTING SECRET BEAUTY (PTY) LTD	4th Applicant
HIQ PACIFIC TRADING CC	5th Applicant
FFB IMPORT-EXPORT CC	6th Applicant
CALLA TRADING (PTY) LTD	7th Applicant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	1st Respondent
THE MINISTER OF TRADE AND INDUSTRY	2nd Respondent
THE SOUTH AFRICAN APPAREL ASSOCIATION	3rd Respondent
THE APPAREL AND TEXTILE ASSOCIATION OF SOUTH AFRICA	4th Respondent
SOUTH AFRICAN CLOTHING AND TEXTILE WORKERS UNION	Intervening Party

---

JUDGMENT

BAQWA J:

INTRODUCTION

1. On 13 August 2020 the Commissioner for the South African Revenue Services (SARS) took a decision to seize 19 containers ("the goods") which had been imported by the second to the seventh applicants in terms of Section 88 (1) (c) of *Customs and Excise Act* 91 of 1964 ("the Act").

2. The first applicant "Dragon Freight" is a clearing agent who acts in that capacity on behalf of the second to seventh applicants, who are importers.

3. There are five respondents, namely SARS, the Minister of Trade, Industry and Competition “the second respondent” or “the Minister”, the South African Apparel Association (“the third respondent” or “SAAA”), the Apparel and Textile Association of South Africa (“the fourth respondent” or “ATASA”) and the South African Clothing and Textile Workers Union (“the fifth respondent” or “SACTWU”).

4. The fifth respondent was an intervening party and its application to join was opposed by the applicants but the opposition to that application was abandoned during the hearing of this application. It has been joined as the fifth respondent.

5. This application was launched as a result of the detention by SARS of the 19 Containers of clothes imported by the applicants. SARS had detained the goods because it suspected that the value of the clothes had been under-declared in order to enable the applicants to pay less customs duty than they were lawfully required to pay.

6. The applicants applied for an order to review and set aside SARS’ decision not to release the goods. The applicants’ notice of motion included two prayers which sought the release of the goods from detention, alternatively, and in the event of SARS eventually seizing the goods as provided for in the Act, for an order reviewing and setting aside such decision.

PRECURSOR TO THE PRESENT APPLICATION

7. It is necessary to mention that the present application had been preceded by a similar application brought before Tuchten J in case no: 82686/19. I mention that case because in essence, it dealt with similar facts and it involved the same parties. In both matters the subject matter was containers of clothing imported by the same importers from China. The main difference between the present matter and the previous case was that the latter dealt with 11 containers whilst the present application concerns 19 containers.

URGENCY

8. Both applications were brought on an urgent basis in terms of Rule 6(12) of the *Uniform Rules of Court* and even though the issue of urgency has not been hotly contested in the present matter, I find the remarks in the matter of ***Dragon Freight and Others v Commissioner for the South African Revenue Service and Others*** **Case No: 82686/19 par 11 [unreported, delivered on 27 November 2019]**.before Tuchten J, dispositive of that particular issue even in the present application when he stated as follows at paragraph 11:

> *"[11] The first decision I have to make is whether the applicants' failure to comply with the rules as to time limits should be condoned: in short whether I should hear this case as a matter of urgency. It is not in dispute that what I called in Mogalakwena Municipality v Provincial executive Council, Limpopo and Others [2016 (4) SA 99 GP] the primary consideration, must be decided in the applicants' favour: the applicants will not receive substantial redress at a hearing in due course. This is because*

while the containers remain uncleared, the applicants must pay substantial fees for wharfage costs and the like…"

9. It is common cause that the fees currently payable by the applicants for wharfage are in the order of about R100,000.00 per day and that they currently amount to millions of rands. I have no hesitation in deciding that the current application should similarly be treated as urgent.

THE LAW

10. The applicable sections of the Act are as follows:

"10.1 ***Section 39 Importer and exporter to produce documents and pay duties:***

(1) (a) The person entering any imported goods for any purpose in terms of the provisions of this Act shall deliver, during the hours of any day prescribed by rule, to the Controller a bill of entry in the prescribed form, setting forth the full particulars as indicated on the form and as required by the Controller, and according to the purpose (to be specified on such bill of entry) for which the goods are being entered, and shall make and subscribe to a declaration in the prescribed form, as to the correctness of the particulars and purpose shown on such bill of entry.

10.2 ***Section 40 Validity of entries: -***

(1) No entry shall be valid unless-

(a) …

(b) …

(c) the true value of the goods on which duty is leviable or

which is required to be declared under the provisions of this Act and the true territory of origin, territory of export and means of carriage have been declared;

(d) in the case of goods purchased by or sold, consigned or disposed of to any person in the Republic, a correct and sufficient invoice thereof, as prescribed, has been produced to the Controller;

(e) the correct duty due has been paid: Provided that no bill of entry shall be invalid by reason of any deferment referred to in the proviso to section 39 (1) (b).”

11. The determination of the issues in this case revolves mainly around the provisions of Section 66 (1), Section 88 (1) (a) and (c) and Section 96 (1) which provide as follows:

11.1 ***“66 Transaction value***

(1) Subject to the provisions of this Act, the transaction value of any imported goods shall be the price actually paid or payable for the goods when sold for export to the Republic, adjusted in terms of section 67, provided-

(a) there are no restrictions as to the disposal or use of the goods by the buyer other than restrictions which-

(i) are imposed or required by law;

(ii) limit the geographical area in which the goods may be resold; or

(iii) do not substantially affect the value of the goods;

(b) the sale or such price of the goods is not subject to any term or condition for which a value cannot be determined;

(c) no part of the proceeds of any disposal, use or subsequent resale of

the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in terms of section 67;

(d) subject to subsection (3), the seller and the buyer are not related within the meaning of subsection (2) (a)."

11.2 **"<u>88 Seizure</u>**

(1) (a) Any 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.

(b) …

(bA) …

(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."

11.3 ***"<u>96 Notice of action and period for bringing action: -</u>***

(1)(a) No legal proceedings shall be instituted against the State, the Minister, the Commissioner or an officer for anything done in pursuance of this Act until one month after delivery of a notice in writing setting forth clearly and explicitly the cause of action, the name and place of abode of the person who is to institute such proceedings this section referred to as (in "litigant") and the name and address of his attorney or agent, if any.

(ii) such notice shall be in such form and shall be delivered in such a manner and at such places as may be prescribed by rule.

(iii) no such notice shall be valid unless it complies with the requirements prescribed in this section and such rules

(b) Subject to the provisions…

12. Other relevant provisions are to be found in Section 84 (1) and 2 (b):

*12.1 "**84 False documents and declarations***

(1) Any person who makes a false statement in connection with any matter dealt with in this Act, or who makes use for the purposes of this Act of a declaration or document containing any such statement shall, unless he proves that he was ignorant of the falsity of such statement and that such ignorance was not due to negligence on his part, be guilty of an offence and liable on conviction to a fine not exceeding R40 000 or treble the value of the goods to which such statement, declaration or document relates, whichever is the greater, or to imprisonment for a period not exceeding ten years, or to both such fine and such imprisonment, and the goods in respect of which such false statement was made or such false declaration or document was used shall be liable to forfeiture.

(2) For the purposes of subsection (1), any invoice or other document relating to any denomination, description, class, grade or quantity of goods shall be deemed to contain a false statement if the price charged by the exporter or any value, price, commission, discount, cost, charge, expense, royalty, freight, duty, tax, drawback, refund, rebate, remission or other information whatever declared therein which has a bearing on value for the purposes of payment of any duty or on classification in terms of any Schedule to this Act or on anti - dumping duty, countervailing duty or safeguard duty or on extent of rebate, refund or drawback of duty –

(a) …;

(b) is influenced, adjusted or amended as a result of any separate transaction, arrangement, agreement or other consideration of any nature whatever particulars of which are not specified in such invoice or document;

12.2 "**102 (4) Sellers of goods to produce proof of payment of duty: -**

(4) If in any prosecution under this Act or in any dispute in which the State the Minister or the Commissioner or any officer is a party, the question arises whether the proper duty has been paid or whether any goods or plant have been lawfully used, imported, exported, manufactured, removed or otherwise dealt with or in, or whether any books, accounts, documents, forms or invoices required by rule to be completed and kept, exist or have been duly completed and kept or have been furnished to any officer, it shall be presumed that such duty has not been paid or that such goods or plant have not been lawfully used, imported, exported, manufactured, removed or otherwise dealt with or in, or that such books, accounts, documents, forms or invoices do not exist or have not been duly completed and kept or have not been so furnished, as the case may be, unless the contrary is proved."

13. The applicable sections of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) are the following:

*13.1 "**5 Reasons for administrative action: -***

(1) Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.

(2) The administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action."

*13.2 "**6 Judicial review of administrative action: -***

(1) …

(2) A court or tribunal has the power to judicially review an administrative action if –

(a) the administrator who took it –

(i) was not authorised to do so by the empowering provision;

(ii) acted under a delegation of power which was not authorised by the empowering provision; or

(iii) was biased or reasonably suspected of bias;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair;

(d) the action was materially influenced by an error of law;

(e) the action was taken –

(i) for a reason not authorised by the empowering provision;

(ii) for an ulterior purpose or motive;

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(iv) because of the unauthorised or unwarranted dictates of another person or body;

(v) in bad faith; or

(vi) arbitrarily or capriciously;

(f) the action itself –

(i) contravenes a law or is not authorised by the empowering provision; or

(ii) is not rationally connected to –

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator;

(g) the action concerned consists of a failure to take a decision;

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful."

14. In review proceedings, PAJA constitutes the prism through which a Court can determine whether an administrative decision was rational, reasonable or procedurally correct. This is the essence of the Court's review function. The Court is not called upon to decide the correctness or otherwise of the decision.

15. The role of the Courts in review proceedings was succinctly stated in ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Another* 2004 (4) SA 490** at [45] to [46] where the following was said:

"[45] Although the review functions of the court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The court should take care not to usurp the

functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.

[46] In the SCA, Schutz JA held that this was a case which calls for judicial deference. In explaining deference, he cited with approval Professor Hoexter's account as follows:

> *"[A] judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinize administration action, but by a careful weighing up of the need for and the consequences of judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal." (footnote omitted)*

Schutz JA continues to say that "[j]udicial deference does not imply judicial timidity or an unreadiness to perform the judicial function". I agree. The use of the word "deference" may give rise to misunderstanding as to the true function of a review court. This can be avoided if it is realised that the need for courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself."

APPLICATION TO STRIKE OUT

16. The applicants have applied for the striking out of the Chinese Declarations, SARS translations thereof and all references thereto in the affidavits by SARS

and the Minister on the grounds that they constitute “inadmissible hearsay” as “no-one speaks to the veracity of the contents of the documents”.

17. According to SARS the Chinese Export Declarations are export declarations presented to the General Administration of Customs of the People's Republic of China ("GACC") by the exporters in respect of 8 of the 11 containers that formed part of the earlier application under Case No.82686/19 GP.

18. In terms of Section 3 (4) of the *Law of Evidence Amendment Act* 45 of 1988 ("the Evidence Act"):

> *"[H]earsay evidence", is "evidence whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence"*.

19. The respondents oppose the application to strike out and underline the fact that the present application is an application for review and not a re-hearing of the seizure decisions made. They submit that the Export Declarations are being tendered in evidence as part of the documents on which SARS relied when it made the seizure decisions.

20. They further contend that where an administrator relies on a document in the course of making a decision, the purpose of a review is to assess whether or not that reliance was reasonable and rational. In that context, so they argue, the administrator's decision cannot be properly assessed without reference to a document on which the administrator relied.

21. It is common cause that the Export Declarations formed part of the decision making process which led SARS to making the seizure decision. Whether or not SARS decision was rational or reasonable by relying, *inter alia*, on the Export Declarations is a matter for consideration later in the judgment.

22. All things considered, it would not make any sense to mutilate the body of evidence presented by an administrator as part of its decision-making process by striking it out and thereafter attempting to make an assessment of the reasonableness or rationality of the decision because in essence, there would no longer be any decision to assess. To grant the application to strike out would defeat the very purpose of the review application.

23. In that context therefore, the application to strike out cannot succeed and falls to be dismissed.

REVIEW GROUNDS

24. Applicant's grounds of review appear from applicants' supplementary affidavit (p3659 – para 146 – 174) as follows:

> *"[146] SARS' decision to seize the 19 containers and the goods therein is reviewable on any or all the grounds contained in section 6(2) of the Promotion of Administrative Justice Act, 2000 ("PAJA"), in particular the following sub-sections to section 6(2): The "administrator" who took the decision was biased or is reasonably suspected of bias. The administrative action was procedurally unfair and materially influenced by an error of law. The administrative action was taken for an ulterior purpose or motive, irrelevant considerations were taken into account and relevant considerations were not considered, and the action was taken in bad faith or arbitrarily or capriciously. The administrative action itself was unlawful, not rationally connected to either the purpose for which it was taken, the purpose of the empowering provision, the information before the administrator or, such as they are, the "reasons" given for it by the administrator. The administrative action is so unreasonable that no reasonable person could have so exercised the power or perform the*

function in the manner in which it was done. The administrative action is also, otherwise, unconstitutional and unlawful.

[147] SARS' decision to seize the containers and the goods therein should, in consequence, be set aside on review."

25. The Commissioner's reasons for the seizure decisions appear from paragraphs 76 to 77.2 which are quoted hereunder:

*"**[G5] THE COMMISSIONER'S REASONS FOR THE SEIZURE DECISIONS***

[76] The decisions of the Commissioner to seize the goods and the containers were taken by having regard to all the evidence dealt with in these papers, and with regard to the failure to respond to requests for information. On a conspectus of the evidence it was found that the written agreements cannot be relied on as constituting proof that the prices actually paid or payable for the clothing were as reflected therein. The evidence, on the contrary, demonstrates that the agreements were false and that the values of the of the clothing were under declared. As such:

the following provisions of the Act have been breached or not complied with: sections 38(1), 39(1), 40(1) and (2), 41(1) and (4) read with sections 65(1) and 66; the conduct also constitutes an offence in terms of section 84 of the Act.

[76.1] the clothing as well as the containers in which it was imported were dealt with irregularly and became liable to forfeiture as provided for in sections 87(1) and (2) of the Act.

[77] The evidence relied on when coming to the aforesaid conclusions and taking the decisions in issue can be summarised as follows:

[77.1] Although they assert that they are not related and operate completely independently, everything about the importers is the same: the modus operandi employed by them to source the clothing; the Chinese suppliers from which the clothing was purchased; the terms of their agreements with the

Chinese suppliers; the values of the clothing imported by them; the responses to the decisions and actions taken by the Commissioner.

[77.2] *The initial explanation proffered by the applicants for the low values of the clothing was that an employee of the importers attended "various markets" in China, each with thousands of traders selling clothing at very low prices.*

[77.3] *If that explanation were correct, at least one employee of each importer would have had to be present in China for at least a period of time shortly prior to the export of the consignments in order to attend the various markets. Notwithstanding being specifically requested to do so the importers did not provide adequate information, including the identity of the employees who purportedly travelled to China and copies of the passports to prove that they did so, to support their original explanation.*

[77.4] *The 19 consignments in issue were bought from only three Chinese suppliers, equated by the applicants to "multinational listed companies". Save for New Feeling who, on the face of it, concluded contracts with two of the suppliers, all the other importers bought all the consignments from only one of the three suppliers. This effectively gainsays the applicants' original explanation.*

[77.5] *No credible explanation was provided for the incredibly low prices charged by the three suppliers. Further, an explanation was also not provided for the fact that the prices charged by the three companies were effectively identical.*

[77.6] *In response to paragraph 7 of the request for further particulars, which deals with the relationships between the importers, it was confirmed that importers are not related in any way. The following facts fly in the face of this assertion:*

[77.6.1] *they used the same clearing agent;*

[77.6.2] they used the same modus operandi to source and buy their clothing;

[77.6.3] they obtained their stock from the same Chinese suppliers;

[77.6.4] the written contracts purportedly entered into by them with the different Chinese suppliers are identical;

[77.6.5] the declared values of the clothing in issue are in the same price bracket, i.e. within a range of a few US cents;

[77.6.6] they used the same agents in China;

[77.6.7] when called upon to explain their (identical) conduct one collective (identical) explanation was provided.

[77.7] The aforesaid facts do not only cast serious doubt on the relationship between the importers but, more importantly, also on the credibility of the evidence regarding the prices actually paid or payable for the clothing.

[77.8] In response to paragraph 8 of the request for particulars, which deals with the identical nature of the sale agreements, the importers responded that "many multinational listed companies have standard form contracts". This is no explanation. The ineluctable inference to be drawn from the ostensible use of the same agreement is that they are not the agreements entered into with the suppliers. Put differently, the agreements were created by the importers to support the entries.

[77.9] In response to paragraph 10 of the request for particulars, which seeks detail in respect of the representative who signed the sale agreements, the date of signing, and the location of signing, the applicants responded that SARS was not entitled to this

information as it did not have any bearing on the issues set out in the letters of intent. Yet, when confronted with the document reports, the importers made an about turn and explained that the purchaser's signature on the agreements were electronically effected by Chinese agents who represent them "from time to time". No mention had been made before of any Chinese agent acting on behalf of the importers. If the agreements could be concluded electronically by the Chinese suppliers and the importer's Chinese agent then, in principle, they could have been concluded directly between the suppliers and the importers. No explanation was provided why all the importers had to make use of a Chinese representative and how it came about that they use the same agents.

[77.10] *The fact that the use of Chinese agents, and the reasons therefore, were not explained initially in response to paragraph 10 causes the response to be questionable. Further, notwithstanding the fact that their aforesaid response to the document reports evidently caused the information sought in paragraph 10 to be of paramount importance they still refrained from providing SARS with the same. The ineluctable inference to be drawn is that both their original explanation of how the product were sourced and bought and their explanation regarding the signatures are false.*

[77.11] *In the applicants' response to the letters of intent, the values reflected in the Chinese export declarations were fobbed off as being fraudulent. In their affidavits that form part of the response, all three Chinese suppliers record the following:*

"The Chinese export agent industry often 'inflate' the actual price of the commercial invoices for the purposes of applying for loans from banks as well as receiving export tax rebates from our Chinese government."

[77.12] The applicants adduced no evidence in substantiation of their assertion that the prices reflected in the Chinese Export Declarations were inflated.

[77.13] The best proof that the export declarations had been tampered with by the export agents involved would have been to provide SARS with the documentation and instructions initially prepared by the Chinese suppliers. The mere fact that the documentation that must be available and which would conclusively prove what the true position is, was not provided to substantiate the allegation that fraud was committed by export agents, causes the explanation to be questionable.

[77.14] In any event, the export tax rebates referred to are afforded to Chinese suppliers, not their agents. On the face of it, the agents referred to appear to be the agents of the Chinese suppliers. Chinese export agents would therefore not benefit from inflated export prices, either to obtain bank loans based thereon or otherwise. The only entities who could benefit from false export declarations were the three Chinese suppliers.

[77.15] In this context, the importers were requested in paragraph 13.3 of the request for particulars to:

> *"13.3.1 identify the Chinese export agency which in each instance prepared and submitted the declarations to the Chinese customs authority;*
>
> *13.3.2 provide SARS with the instructions given by the supplier to the agent;*
>
> *13.3.3 provide SARS with the export documentation furnished by the suppliers to the export agent."*

In their response the applicants simply referred to their earlier criticism of the export declarations and refused to provide any of the called for information,

i.e. information that would provide objective vindication of their assertion that the Chinese documents were false.

[77.16] *In paragraph 14 of the request for particulars it was pointed out that although some of the called for information may have to be obtained from the Chinese suppliers, their affidavits attached to the applicants' response to the letters of intent made it clear that they would be prepared to assist the applicants. This proposition was not challenged by the applicants, yet no evidence from the Chinese suppliers to verify their assertions was provided.*

[77.17] *In their response to the request for further particulars the applicants refused to furnish a response to paragraph 13.3 of and did not respond at all to paragraph 14. This left unchallenged the prima facie inference that, if fraud was committed in respect of the Chinese export declarations, then the Chinese suppliers benefitted therefrom. The applicants' reliance on the Chinese suppliers' corroborating affidavits needed to be viewed in this context: they relied on the evidence of suppliers who, on their version, are prepared to be dishonest when it suits them.*

[77.18] *Although some of the criticism expressed and inconsistencies pointed out by the applicants in respect of the export declarations have some merit they, in the Commissioner's view, were not sufficient to negate or even diminish the probative value thereof when evaluated with all the other evidence.*

[77.19] *All the sale agreements record the payment terms as 90 days after receipt of the goods. According to the applicants this is to be interpreted as meaning 90 days after the importer physical receives the goods. Bearing in mind the customs process involved, this interpretation is patently absurd. No seller of goods to a buyer in another country would make payment subject conditions over which it does not control, e.g., the whims of the customs authority in the country of import.*

[77.20] The evidence of different experts (Dr Irkhede and the witnesses of the 3rd and 4th Respondents), who assessed the alleged prices from different perspectives, is clear: the claimed prices were not realistic and "simply not possible" to attain. The valuations of Dr Irkhede accord with the values as reflected in the Chinese Export Declarations.

[77.21] In the letter under cover of which the Document Reports were communicated to the applicants they were expressly advised that, based on the said reports, the Commissioner was prima facie of the opinion that the agreements were false. The applicants were invited to respond to, among others, the aforesaid. In their response the applicants merely denied the correctness of the conclusion drawn by the Commissioner and referred to the explanations provided by them in earlier documents and affidavits. What they conspicuously did not do, was to address the evidence and finding of Mr Bester that the agreements were "cut and paste" copies of an earlier document. Absent an explanation as to why the three Chinese suppliers were using the same "cut-and-paste" document, there no room for any conclusion other than that the agreements were false.

[77.22] The containers were used to transport the clothing from China to South Africa."

THE EXPORT DECLARATIONS

26. It is common cause that the Export Declarations formed a significant portion of the process that was followed by SARS and which ultimately led to the seizure decisions. It is also common cause that the Export Declarations related to 8 of the 11 containers referred to in the Tuchten decision and that they had nothing to do with the 19 containers in the present application.

27. SARS' reliance on the Export Declarations is evident from the reasons quoted above. SARS also passed the Export Declarations to Dr Irhede whose report also assisted SARS to reach the decisions. It is in this context that it becomes necessary to examine the nature and relevance (or otherwise) of the export declaration to seizure decisions.

28. The reliance by SARS on the Export Declarations was to establish that "the prices in the export declarations are realistic and market related" and that "the prices allegedly paid by the importers are absurd" as it stated in its supplementary answering affidavit.

29. Another factor which had to be considered regarding the Export Declarations is that they were of poor quality and illegible even though the numbers were Arabic and legible, SARS confirmed the illegibility in its supplementary affidavit when it said:

> *"Although some of the criticism expressed and inconsistencies pointed out by the applicants in respect of the Export Declarations have some merit they, in the Commissioner's view, were not sufficient to negate or even diminish the probative value thereof when evaluated with all the other evidence."*

30. Another weakness in any value that could be derived from the Export Declarations is that the quantities therein did not accord with the quantities that were as a fact imported in the earlier containers.

31. Whilst it is common cause that SARS had received the Export Declarations from the GACC, there is no evidence that SARS had received any affidavit from the declaration company as to what the Export Declarations were and

why they were required by the Chinese authorities. It does not appear that SARS had information what role the Declaration Company played regarding the consignments and how they verified the information contained in the declarations.

32. It is common cause that SARS had been presented with the requisite documents by the applicants in terms of the Act such as the contracts which applicants had entered into, the waybills, the invoices and proof of payment. The applicants had also furnished SARS with explanations as to how they had achieved the low prices reflected in their documents.

33. SARS had the capacity when in doubt about the information presented to it to physically examine, destuff and count the goods in the containers. SARS had demonstrated such capacity when it performed such an examination process for a period of 34 days in regard to the earlier containers.

34. Yet in regard to the 19 containers SARS chose to trust the information in the Chinese Export Declarations over its own processes. In SARS' reasons for seizure there is no reference to such an examination process in order to verify the contents of the of the containers against the applicants' documentation.

35. SARS as an administrator has a duty to establish the probative value of the documents on which it relies in order to avoid a charge of arbitrariness or capriciousness.

36. The probative value of the Export Declarations had to be established prior to making the seizure decisions. It cannot and ought not be sought via the

reverse onus provided for in the Act. The persons upon whose credibility the probative value of the Chinese Export Declarations could have been established were, firstly, the Declaration Company responsible for the production of those documents. Only two Companies were involved in the production of the Chinese Export declarations, namely, Shenshen Junga International Freight Forwarding Co. Ltd and Shenzhen Xinglifei Customs Clearance Co. Ltd. Representatives of the said companies could have provided affidavits regarding the contents and accuracy of the Chinese Declarations or how they ascertained the information contained therein. This was not done. Secondly, the GACC had similarly not provided any affidavit to confirm that these documents were provided to it by the declaration companies who had confirmed the content and accuracy of the Export Declarations.

37. All things considered SARS was wrong in its decision to rely on the Export Declarations in order to reach the seizure decisions given the common cause fact that the said documents only related to 8 of the earlier containers. The Export Declarations had nothing to do with the 19 containers.

REQUEST FOR FURTHER PARTICULARS

38. What is evident from a reading of SARS reasons is that the Commissioner relied on what SARS called the non-responsiveness of the applicants yet the applicants submit that the information requested had been provided to SARS before the request was made and that it seemed as if SARS had not read that information.

39. Further, the applicants rely on the Tuchten judgment which had dealt with similar requests from SARS and in which he decided that the information requested was irrelevant at paragraph [24] to [26] in which he said:

> *"[24] SARS explanation for its failure to investigate was based in large measure in the papers as initially framed around a questionnaire which it issued to the applicants. This questionnaire was a form document not tailored to the specific facts of the present case. I invited counsel for SARS to tell me which of the questions might be relevant to the present case. Counsel referred to questions 5, 8-10 and 20-24.*
>
> *[25] I find no relevance at all in these questions, particularly because the applicants had committed themselves to the applicants' version, backed up by all appropriate documents. I should add that the second and fifth applicants did indeed provide a written response to the questionnaire. The other applicants did not respond to the questionnaire. I need not delve into the reasons why the other applicants did not respond to the questionnaire. It is in my view obvious that SARS may ask a prospective importer for information and may draw appropriate inferences from a failure to supply the information requested.*
>
> *[26] But because of the lack of relevance of the questions and the fact that SARS has the explanatory versions of the applicants, I see no merit in SARS' contention, made repeatedly in its answering affidavit, that it was not obliged to come to investigate further of its own accord to enable it to come to conclusions for the purposes of s 88."*

40. It is not in dispute that the applicants had provided SARS with documentation regarding the transaction value of goods but SARS has chosen to entertain doubts regarding the veracity thereof.

41. In that regard Tuchten J had this to say:

"[30] On the footing that the applicants' explanatory version has been established, I find that SARS' suspicion that the goods were being brought in at transaction costs that were lower than the true transaction costs was unreasonable."

Tuchten continued to say:

> *"[32] SARS made the three seizure decisions because of its suspicion that the transaction values had been misstated. On any basis, the seizure decisions were irrational or made on improper considerations or on failing to take into account proper considerations."*

42. It is in the circumstances difficult to imagine how, after a proper assessment of the facts, a different conclusion can be reached, considering that in the present application we are dealing with 19 containers as opposed to the 11 containers dealt with by Tuchten J and that it is common cause that the factual matrix of the two applications is similar.

THE TRADER QUESTIONNARE

43. SARS requested the applicants to complete a Trader Questionnaire after the consignments were flagged on the SARS' customs electronic system by reason of the declared customs value being lower than the SARS risk price. For the questions in the trader questionnaire to be relevant to the under-declaration issue, they had to provide SARS with information that would establish whether the price actually paid or payable for the goods when sold for export to the Republic was appropriate. Tuchten J found that the questionnaire was irrelevant for that purpose as he dealt with the SARS Traders Questionnaire at paragraphs 24 – 26 *(supra)*.

44. SARS decided to seize the 19 containers, *inter alia*, on the basis that the applicants failed to answer SARS' request for further particulars. The evidence shows that not only did the applicants provide the relevant information prior to

the said requests but also that they responded copiously to SARS' request for information but SARS chose to ignore the said responses as inadequate.

What compounds issues is that the tools or forms which SARS utilised to seek the further particulars were irrelevant in that they were not fit for purpose. The table which forms part of the applicants supplementary replying affidavit demonstrates that the applicants answered the questions that might have been relevant. In the circumstances, the use of tools (forms) that are irrelevant and not fit for purpose by SARS leads to an inference that SARS was motivated by a desire to seize the goods which in itself suggests arbitrariness or capriciousness. An extract of the applicants' responses to SARS questionnaire is reproduced below:

The Questions Posed by SARS in its Request for Further Particulars, dated 29 May 2020. **[Column 1]**		**First Date on which the Information was First Provided by the Applicant to SARS.** **[Column 2]**	**Applicants' Answer to SARS' particular Question in the Request. Where that Answer referred SARS to a Previous Affidavit or Document, the Contents thereof are Specified.** **[Column 3]**
6.	Is the relationship between Dragon Freight and the different importers purely commercial?	**30 March 2020** when Response to LOI's Delivered	The relationship between the Importers and Dragon Freight is a commercial and business relationship in terms of which the importers appointed Dragon Freight as the clearing and forwarding agent and Dragon Freight acts as the clearing and forwarding agent
6.1	If it is, then the following documentation is to be provided:		

6.1.1	A copy of any written agreement between Dragon Freight and each importer.		Copies of the Trading Terms and Conditions concluded between Dragon Freight and each of the importers are attached, marked **"H"** [pp 3964 – 3970 comprising 7 pages].
6.1.2	Particulars of all imports by the importer where Dragon Freight was the appointed clearing agent.		Particulars of the imports where Dragon Freight was the appointed clearing agent by the importers are attached, marked **"I"** [p 3971 comprising 1 page]. The particularity is only provided in respect of those imports that form the subject matter of the letters of intent.
6.1.3	Proof of payment by the importer to Dragon Freight of all fees, charges etc. in respect of the imports where Dragon Freight acted as the clearing agent. This is to include all imports since entering into the agreement including the consignment/s in issue. The documents to be provided to prove payment are to include the relevant extract from the bank statements of both Dragon Freight and the importer.		A schedule of the payments received by Dragon Freight in the interim and which relate to the 8 consignments forming the subject of SARS' letter of intent dated 5 March 2020 is attached, marked **"J"** [p 3972 comprising of 1 page]. Dragon Freight has as yet not been remunerated for its services in respect of the other 19 containers as these containers have yet to be released by SARS. Save as stated the further particularity requested by SARS is irrelevant. SARS is not entitled thereto and it is refused.
6.2	If not, the full particulars of each relationship between Dragon Freight and the		N/A

	importers are to be provided.		
7	Are the importers related in any manner, formally or informally? If so, full particulars of the relationship between then are to be provided.	**8 May 2020** when Replying Affidavit filed	The importers are not related to one another. We refer SARS to paragraphs 161 to 163 and paragraphs 200 to 205 of the applicants' replying affidavit filed under case number 13584/2020 (GP). [161] In addition, I deny that the importers are empty shells and exist only in name. In this regard, I refer the Honourable Court to the description of each of the importers in the founding affidavit: each importer is either a registered close corporation or company. [162] SARS makes these types of statements in order to create the impression that the importers are guilty of suspicious conduct or that the Honourable Court should be wary of the importers. To support this, I refer the Honourable Court to the First Application, where SARS made the allegation that the reason for detaining the containers was because the addresses provided by the importers were not real and there was no business premises situated at the addresses provided. To counter this allegation, I visited each of the addresses provided by the importers and took photos of what I found there. In each case I found the importers' shops and warehouses. In support of this, I attach hereto marked **"CV34"** [pp 2697 – 2706 comprising 10 pages], the photographs of the importers' business premises which were attached to the replying affidavit in the First Application, marked **"CJV25"** [pp 2697 – 2706 comprising 9 pages]**.** [163] These photographs further indicate that the importers are not empty shells. [200] Feeling Fashion Design (Pty) Ltd is a company registered in South Africa and is the 3rd Applicant in this

			application. Guangzhou Nixiya Garment Co. Ltd is a company registered in China with a clothing and fashion branch or subsidiary. I do not know the company structure of Guangzhou Nixiya Garment Co. Ltd, but same is not relevant to this application. [201] The website of Guangzhou Nixiya Garment Co. Ltd, **http://www.newfeeling.net.cn/**, states that Guangzhou Nixiya Garment Co. Ltd owns a well-known apparel brand called New Feeling. [202] SARS' assumption is that the brand, New Feeling, is the same as the limited liability company registered in accordance with the company laws of South Africa, New Feeling Fashion Design (Pty) Ltd. This assumption is wrong. [203] The easiest and most obvious way to determine the true identity of a company registered in South Africa, is to undertake a search on the Companies and Intellectual Property Commission ("CIPC") database. It is surprising that SARS, instead of performing a professional company search, elected to conduct a search akin to a witch hunt to find information to make the Applicants appear to be dishonest. [204] From the report on New Feeling Fashion Design (Pty) Ltd obtained from CIPC on 10 April 2020 by the Applicants' attorneys of record, it is clear that New Feeling Fashion Design (Pty) Ltd is a company and not a brand and was registered in South Africa in 2015, whereas Guangzhou

			Nixiya Garment Co. Ltd, which owns the brand, New Feeling, was established in 1995. New Feeling Fashion Design (Pty) Ltd also has only one director, Mr Kaisong Lu, whereas Mr Fan Li Juan is the Managing Director of Guangzhou Nixiya Garment Co. Ltd as can be seen from his affidavit referred to below. The CIPC report is attached hereto marked **"CV37"** and a confirmatory affidavit of Mr John Dean Du Plessis is attached hereto, marked **"CV38"** [pp 2721 – 2723 and pp 2724 – 2725 respectively].

Whilst the above table is an excerpt from SARS' questionnaire and the applicants' responses thereto, it demonstrates that to characterise applicants as having been "non-responsive" cannot be correct and that it is aimed at giving the impression that they were not co-operative during the SARS' investigative process. This does not appear to have been the case.

INTERNAL ADMINISTRATIVE APPEAL

45. It is SARS' contention that *"the applicants have furthermore failed to utilize their internal remedy of an internal appeal in contravention of Section 7(2) (a) of PAJA (Act 3 of 2000) without motivating an exemption in terms of Section 7(2)(a)".*

46. Notably, without resorting to PAJA, Section 77B of the *Customs and Excise Act*, 1964 provides a remedy of an internal administrative appeal. The section provides:

> *"77B. (1) Any person who may institute judicial proceedings in respect of any decision by an officer may, before or as an alternative to instituting such*

proceedings, lodge an appeal..."

47. Section 77F provides:

"77F. (1) The Commissioner may-

(a) refer the matter back to the committee for further consideration;

(b) reject or accept and vary the recommendation of the committee;

(c confirm or amend the decision or withdraw it and make a new decision."

48. As can be noted from Section 77B, its provisions are permissive and leave the discretion to pursue the internal appeal option to the affected party.

49. An internal remedy in terms of PAJA is an appeal on the merits to an appellate body that is usually more senior than the initial decision maker or may be an appellate body possessing more expertise. The appellate body is then given the power to confirm, substitute or vary the decision of the initial decision maker. See ***DDP Values (Pty) Ltd v Madibeng Local Municipality* 2015 JDR 2093 SCA** at para [10] and [13].

50. A Section 77H appeal on the other hand is not an appeal to an administrative body more senior than the initial decision-maker. It is an appeal to the original decision maker which has the power to confirm, substitute or vary its own decision.

51. The Court may exempt a person from the obligation to exhaust an internal remedy in the interests of justice.

52. The applicants submit that they qualify for such an exemption on the following grounds:

52.1 The present application has been pending before this Court since 24 February 2020 and to abandon the application would violate the interests of justice not only because of expenses already incurred in bringing the matter to Court but also due to the principle of bringing litigation to finality on its real merits and not on technical points.

52.2 The applicants would not obtain satisfactory relief because SARS would sit as a respondent and Judge in the same matter in violation of the '*maxim nemo iudex in sua causa'*.

52.3 Given SARS' conduct in the matter and the responses to communications with the applicants, the proposal of an internal appeal succeeding in an internal administrative appeal can be discounted.

52.4 SARS would suffer no prejudice if the matter was disposed of by way of judicial proceedings as it had had sufficient notice of the relief being sought by the applicants.

53. I have considered all the above reasons and come to the conclusion that delaying this application due to a technicality of an internal remedy would not be in the interests of justice. I find that special circumstances as contemplated in Section 7(2) (c) of PAJA to exempt the applicants from exhausting the internal remedy provided for in the Act do exist

SECTION 96 NOTICE

55. In this application the applicants anticipated that SARS might seize the containers and included the review and setting aside of any decision by the Commissioner to seize and this was incorporated in the applicant's Section 96 notice and in their notice of motion as follows:

55.1 "The relief sought in the application to the High Court will include the following:

(iv) in the event of any of the detained containers having been seized by SARS at any stage hereafter, the applicants claim that such seizures be reviewed and set aside and that it be ordered that the goods so seized be released immediately by the respondent."

55.2 The notice of motions reads as follows:

"[4] That the Commissioner's decision to seize any of the containers referred to herein, where applicable, be reviewed and set aside, subject to paragraph [5] below, and that the Respondent is ordered immediately to release the 19 containers and the goods contained therein."

56. It is trite that Section 96 ensures that SARS does not suffer prejudice which would arise from not being provided with an opportunity to set out its defence against whatever relief the applicants may seek. The section is therefore aimed at giving the Commissioner notice of judicial proceedings contemplated against SARS to enable SARS to prepare and plead its defence.

57. The respondents contend that the relief sought by the applicants is incompetent because the applicants did not comply with Section 96 of the Act.

The respondents admit that a Section 96 notice was delivered to SARS on 10 February 2020 but argue that it is not permissible for the applicants to serve a Section 96(1) notice and bring an application in anticipation of conduct by SARS that has not yet been performed. It is common cause that the seizure decisions were taken in August 2020.

58. The respondents rely on what they refer to as the peremptory provisions of the section and seek support in that regard in the matter ***of CSARS v Prudence Forwarding (Pty) Ltd and Grovemaster Trading Enterprises*** **(Gauteng Full Court Appeal) A4606/14** par [28] (delivered by Murphy J on 13 November 2015) paragraph 28 reads as follows:

> *"[28] The respondents gave written notice of their intention to seek interim relief in the form of an order to release the container against payment of a provisional payment. They gave no similar notice in respect of the new cause of action introduced by the amendment in which they sought to review and set aside the seizure of the goods. The interim relief they sought had in effect become moot. It was therefore incumbent upon them to serve the relevant notice and to obtain the agreement of the Commissioner or the sanction of the court to reduce the one-month period in respect of the new cause of action involving a review of the seizure decision. This was not done. The respondents could not rely on the notice they served to obtain the release of the goods from detention. Section 96(1)(a)(i) of the Act makes it plain that the notice must relate to a specific cause of action, which is required to be set forth "clearly and explicitly" in the written notice. And section 96(1)(a)(iii) provides that no notice shall be valid unless it complies with the requirements prescribed in the section. Thus, since no notice was delivered in respect of the review, and neither the Commissioner or the court agreed to a reduced period, the jurisdictional conditions precedent were not fulfilled, and the court accordingly lacked*

> *jurisdiction to grant the final relief it granted, in the form of an order setting aside the seizure of the goods. For that reason alone, the appeal must succeed."*

59. The applicants submit, correctly in my view, that the Prudence case is distinguishable from the present application in that the respondent (in the appeal) had not included a prayer in its notice of motion requesting that the period specified in Section 96 of the Act be reduced and that the respondent only made reference to this in its founding affidavit. (See para 16). Further, the Court found that the respondent's amendment which introduced a prayer to review and set aside SARS decision to seize the containers constituted a new cause of action, not previously provided for in the notice of motion and as a result, Section 96 had not been complied with.

60. On the contrary, in the present case both Section 96 notice and the notice of motion provide for the review and setting aside of the decision to detain and the decision to seize the containers. In the circumstances, so they contend, SARS had had notice of the contemplated action for several months, between February and August 2020, regarding the seizure notices. The distinguishing feature according to the applicants between the present case and the Prudence case is that the seizure of the containers in August 2020 had already been anticipated in the notice delivered in February 2020.

61. The applicants submit that SARS cannot claim to be prejudiced not only on the basis of the February 2020 notice but also because it had filed its supplementary answering affidavit specifically dealing with the seizure issue.

62. In ***Mabaso v National Commissioner of Police and Another* 2020 (3) SA 375 (SCA)** at para [14] the Court made reference to a unanimous decision of the Constitutional Court [14] In ***Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC)**, Didcott J writing for the Court in which the Court considered notices of the land required by the Defence Act 44 of 1957. In para [14] of the Mabaso, the judgment in Mohlomi is quoted as follows:

> *"[14] In Mohlomi, para 9, Didcott J explained the general purpose of clauses such as s 3(1):*
>
> > *'The conventional explanation for demanding prior notification of any intention to sue an organ of government is that, with its extensive activities and large staff which tends to shift, it needs the opportunity to investigate claims laid against it to consider them responsibly and to decide, before getting embroiled in litigation at public expense, whether it ought to accept, reject or endeavour to settle them.'"*

63. The need to interpret Section 96 in a manner which mitigates adverse effects on claimants is emphasised by the Constitutional Court in the Mohlomi decision when it said:

> "[9] *Over the years some Judges have drawn attention, even so, to the adverse effect on claimants of requirements like those. Innes JA described them in Benning v Union Government (Minister of Finance) as (c)onditions which clog the ordinary right of an aggrieved person to seek the assistance of a court of law. One was thought by Watermeyer J in Gibbons v Cape Divisional Council to be 'a very dramatic provision' and 'a very serious infringement of the rights of individuals'. In Avex Ait (Pty) Ltd v Borough of Vryheid Botha JA spoke in the selfsame vein of another (h)ampering as it does the ordinary rights of an aggrieved person to seek the*

> *assistance of the courts. And Corbett CJ echoed that comment in Administrator, Transvaal, and Others v Traub and Others when he observed that the provision then in question undoubtedly hampers the ordinary rights of an aggrieved person to seek the assistance of the courts*."

64. The Supreme Court of Appeal has been critical of the state and organs of state raising technical hurdles instead of facilitating the expeditious finalisation of cases. In ***Safcor Forwarding (Pty) Ltd v NTC* 1982 930 SA (A)** at 672H to 673A (judgment of Corbett JA as he then was) the Court relying on the judgment of Shreiner JA in ***Trans – African Insurance Co.Ltd v Maluleka* 1956 (2) SA 273** at 278 F –G held as follows:

> "there is no indication that the Commissioner was in anyway prejudiced by the alleged non-joinder of its Chairman. In the circumstances it is to me, a matter of some surprise that a public body like the Commission should raise such a technical procedural hurdle to the expeditious despatch of what appears to have been an urgent review application."

Although the Court found that the appellant should have cited the Chairman, the point was dismissed, for *"technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits."*

65. Despite the strenuous submissions by Counsel for the respondents for the applicants to be compelled to re-issue a Section 96 notice in respect of the seizure decisions, there is more than ample authority that in the present application, it would be inappropriate to do so. SARS had been fully alerted, for months that the release of the containers would be sought by the applicants. Seizures had been specifically and explicitly referred to as required in Section

96. SARS had therefore been enabled to collect and collate whatever information it needed in order to prepare its defence. Absent any prejudice as contemplated by the legislature in providing forward cover for SARS in Section 96 there is no necessity to frustrate the applicants in their quest to dispatch the merits of the matter in an expeditious manner. In the circumstances, I find that from a factual and legal basis the objection raised by the respondents in terms of Section 96 has no merit.

OTHER APPLICATIONS

66. The application to join as third fourth and fifth respondents had not been formerly granted. Even though the applicants had initially opposed the fifth respondents' application, the opposition was abandoned during the hearing.

67. On 16 November 2020 the fifth respondent filed an application to introduce further evidence. This evidence concerned proof that one Dasong Cao had been enrolled as a sworn translator by this Court from English into Chinese and from Chinese into English languages on 19 January 2005. Even though the application was opposed by the applicants due to the late filing despite having been requested timeously to do so, I do not consider that applicants will suffer any prejudice by the admission of such evidence. Despite the opposition there will be no costs order against the applicants in this regard.

68. The second, third, fourth and fifth respondent made common cause with the first respondent. In considering their evidence, I had to bear in mind that this application is not an appeal but a review application. This Court's duty is to

consider whether the first respondent's seizure decisions fall foul of the provisions of Section 6 (2) of PAJA. In that context, and after considering their evidence, I was not persuaded that the evidence they presented assisted the first respondent regarding the process the first respondent followed and the evidence it relied on in order to reach the seizure decisions.

CONCLUSION

69. Just to recapitulate:

69.1 The Chinese Export Declarations which SARS relied upon were illegible or partly illegible. Common sense dictates that one cannot rely on a document because some parts of it are legible.

69.2 It is common cause that the Export Declarations had no bearing on the 19 containers which are the subject of this application. In the premises, the Export Declarations are irrelevant and unreliable for their contents could not assist in the determination of the transaction value of the imported goods. They could not be relied upon to establish that the prices declared by the applicant importers were fabricated as contended for by SARS.

69.3 Various inferences had been drawn by SARS and the second respondent and they had reached conclusions based on the Chinese Export Declarations. The conclusions and inferences were irrelevant as they were based documents which were irrelevant and whose origin and veracity had not been proven. In the result, the inferences drawn

and the conclusions reached could not be rationally connected to the seizure decisions.

69.4 Even in the reasons presented by the Commissioner with reference to the expert employed to evaluate the applicants' documents, Mr Bester, the expert found that *"the similarity in the aforementioned bullet points indicate to similarity in the source documents"*. Nowhere in Mr Bester's report does he refer to the agreements as "cut – and – paste" copies of the same documents. Yet in the reasons presented by SARS for the seizure decisions the Commissioner refers to "cut – and – paste" documents presented by the applicants. This is a further demonstration of the disconnect and lack of rationality in SARS' decision making process by SARS. The reasons differ even from the report of SARS' own expert witness.

69.5 Regarding the questionnaire given to the applicants to respond to, Tuchten J's remarks in paragraphs 26 and 30 of his judgment bear repeating where he says:

> *"[26] But because of the lack of relevance of the questions and the fact that SARS has the explanatory versions of the applicants, I see no merit in SARS' contention, made repeatedly in its answering affidavit, that it was not obliged to come to investigate further of its own accord to enable it to come to conclusions for the purposes of s 88.*
>
> *[30] On the footing that the applicants' explanatory version has been established, I find that SARS' suspicion that the goods were being brought in at transaction costs that were lower*

> *than the true transaction costs was unreasonable. SARS applied a certain economic model to the transactions to come to its conclusion that the transactions were suspicious. But given the correctness of the applicants' explanatory version, the economic model used by SARS was outdated and wrong."*

70. In the circumstances, I find that the administrative action taken by SARS to seize the 19 containers was:

70.1 Procedurally unfair in that SARS ignored the information presented to it by the applicants and that SARS instead continued to interrogate them utilising questionnaires that were irrelevant to the case at hand.

70.2 Materially influenced by an error of law in that SARS relied on hearsay evidence in the form of Export Declarations without verifying the veracity of the contents thereof, who had authored the said documents, where and when they had been produced.

70.3 Taken for an ulterior purpose or motive in that irrelevant considerations were taken into account and relevant considerations were not considered rendering the decisions arbitrary and capricious.

70.4 Not rationally connected to the purpose of the empowering provision (Prof) *Cora Hoexter Administrative of Law of South Africa (2011) 340* states that rationality means that a decision must be supported by the evidence and information before it. It must also objectively be capable of furthering the purpose for which the power was given and for which the decision was taken. In ***Democratic Alliance v President of the***

Republic of South **[2012] ZACC 24; 2013 91) SA 248 (CC); 2012 (12) BCLR 1 297 (CC)** the Court held that:

> *"The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitute means towards the attainment of the purpose for which the power was conferred."*

70.5 So unreasonable that no reasonable person could have so exercised the power or performed the function in the manner it was done.

COSTS

71. The applicants seek a costs order against the first respondent and those respondents opposing the application on a scale as between attorney and client including the costs consequent upon the employment of two Counsel, one being Senior Counsel.

72. The first respondent is a public body performing a duty in the public interest and this Court should consider that factor in a costs award. I accept that it followed the investigation path it took in a quest to establish what it considered to be truth. I am therefore not persuaded that a punitive cost order is justifiable. Costs must follow the result including the costs of two Counsel one of whom is Senior Counsel.

ORDER

73. In the result, I make the following order:

73.1 That the requirements as to form and service provided for in the Uniform Rules of this Honourable Court be dispensed with and the matter be heard as one of urgency in terms of Rule 6(12).

73.2 That the period of one month specified in section 96(1)(a)(i) of the Customs and Excise Act, 91 of 1964 ("the Act") be reduced to such an extent that this application is then construed as being compliant with section 96 of the Act; alternatively, that non-compliance with the time period specified in section 96(1)(a)(i) of the Act be condoned.

73.3 That the Commissioner's decision not to release the 19 containers IMTU9101868, TCNU3362797, MSKU0238397, MSKU1587325, IMTU9031415, TCNU6629336, TCNU6765456, EITU1461227, EITU1237330, TEMU6261619, TCNU2129749, EITU1617639, FCIU7048813, FCIU7287778, CAIU7558573, TGBU6569113, HASU4885520, MRSU4057438 and BEAU4384637, be reviewed and set aside, subject to paragraph 75.5 below, and that the Respondent is ordered immediately to release the 19 containers and the goods contained therein.

73.4 That the Commissioner's decision to seize any of the containers referred to herein, be reviewed and set aside, subject to paragraph

75.5 below, and that the Respondent is ordered immediately to release the 19 containers and the goods contained therein.

73.5 That the release of the 19 containers referred to herein and the goods contained therein is dependent upon the Applicants paying the customs duty, calculated on the transaction value of the goods as assessed in accordance with the documents submitted to the Respondent, VAT and all fees lawfully due to the Respondent, calculated at 100% of the transaction value of the goods as assessed in accordance with the documents submitted to the Respondent.

73.6 The application to strike out is dismissed with costs.

73.7 The third, fourth and fifth intervening parties are joined as third, fourth and fifth respondents.

73.8 The application to introduce further evidence is granted and first respondent to pay the costs thereof.

73.9 The respondents are ordered to pay the costs of the first to seventh applicants, jointly and severally, the one paying the other to be absolved, such costs to include the costs of two Counsel, one being Senior Counsel.

SELBY BAQWA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Matter Heard On	:	23 To 25 November 2020
Judgment Reserved On	:	25 November 2020
Judgment Delivered On	:	11 December 2020

APPEARANCES:

Counsel for the Applicants	:	Adv A.P Joubert (S.C)
	:	Adv L.F Laughland
Attorneys for the Applicants	:	Richard Meaden & Associates Inc
Counsel for the 1st Respondents	:	Adv B Swart (S.C)
	:	Adv A Meyer (S.C)
Attorneys for the 1st Respondents	:	Klagsbruin Edelstein Bosman De Vries
Counsel for the 2nd Respondents	:	Adv A Cockrell (S.C)
	:	Adv M Stubbs
Attorneys for the 2nd Respondents	:	Webber Wentzel Attorneys
Counsel for the 3rd & 4th Respondents	:	Adv E Webber
Attorneys for the 3rd & 4th Respondents	:	Norton Rose Fulbright Attorneys
Counsel for the Intervention Application	:	Adv A Friedman
Attorneys for the Intervention Application	:	Haffergee Roskam Savage Attorneys