Vic & Dup/Pta/dm

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA CASE NUMBER: 10415/00

DATE: 2000.05.10

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.

DATE 13-6-2000 SIGNATURE

In the matter between:

HENBASE 3392 (EIENDOMS) BEPERK Applicant

and

THE COMMISSIONER FOR
THE SOUTH AFRICAN REVENUE SERVICES Respondent

J U D G M E N T

VAN DER WESTHUIZEN J:

1. INTRODUCTION

This application came before me as a matter of urgency. The papers are voluminous, comprising of almost 600 pages, excluding the substantial bundles of case law and other authorities made available to me by counsel for both sides. It was argued for two days during a full

urgent /...

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10415/00 - 1 - JUDGMENT

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urgent motions week, broken up by several public holidays. The judgment was handed down orally, whereafter the typed version was edited.

The applicant was represented by Mr A Joubert SC, assisted by Mr Simon, and the respondents by Mr E Dunn SC, assisted by Mr Mabena.

The applicant seeks the following interim relief, according to from the prayers in the notice of motion: -

"1. Declaring this application urgent, and dispensing with the usual forms of service in terms of rule 6(12) of the Uniform Rules of Court.

2. Directing the first respondent to release the goods set out in Annexure "A1", pending the outcome of the application for a declaration of rights issued by the Line-Out Trading CC against the respondent under case number 31256/99; alternatively the outcome of an action or application to be instituted by the applicant against the respondents within 21 days hereafter to determine whether any duty is payable upon importation of the goods set out in Annexure "A1".

3. Costs of suit.

4. Further and/or alternative relief."

During argument counsel for the applicant indicated that their preference is for an order directing the first respondent to release the goods pending the outcome of an action or application to be instituted by the applicant to determine whether any duty is payable upon importation of the goods, in other words in terms of the alternative portion of

prayer 2 /...

prayer 2, rather than the main portion of prayer 2. He did not strongly advance argument in support of the part of prayer two related to the pending Line-Out case in the WLD (to which I refer again later).

2. THE FACTS

The facts, as they appear from the affidavits filed by an employee of the applicant, Mr Wong Wong Wu, and Ms Ilze Amanda Enslin, a senior legal administrative officer in the employ of the first respondent, are as follows, very briefly summarised: (10)

The applicant is a company carrying on business as an importer, supplier and distributor to retailers of new clothing. The applicant imports garments manufactured in Malawi to the RSA for sale to the Mr Price group of retailers. According to the applicant, the applicant on a regular basis procures that containers of garments are cleared through the Beit Bridge border post at Messina.

On behalf of the first respondent it is submitted that the applicant is in close association with a Closed Corporation called "Line-Out Trading," which is currently (20) engaged in litigation with the respondents (which will be mentioned again soon). According to Mrs Enslin of the first respondent, the applicant only commenced importing garments from Malawi to South Africa during December 1999. Before then, such garments were imported by Line-Out. According to the first respondent, the applicant replaced Line-Out as a strategic move after Line-Out had started to experience legal difficulties regarding importation duty.

The garments are manufactured in Malawi by a factory (30)

called /...

called "Chirimba". In terms of a trade agreement concluded between South Africa and Malawi on 19 June 1990, the importation of certain goods manufactured in Malawi, including garments, attracts no duty. In order for a full rebate of duty to avail the importer, at least 25% of the production costs of the goods so imported must be represented by materials produced and labour performed in Malawi.

According to the applicant, they attempted to clear a container of garments so manufactured in Malawi through the Beit Bridge border post on 19 April 2000. Officials of the first respondent stopped the container and detained the goods, requiring the applicant to bring duty as imposed by the first respondent on the importation of the goods to account by way of a provisional payment prior to the goods being released. The applicant refuses to make the payment. The goods are therefore still detained, hence this application.

According to the applicant, the goods comply with the abovementioned 25% requirement and the applicant is therefore entitled to a full rebate. The detention is thus unlawful.

The first respondent admits that the applicant sought to clear the goods in question on the mentioned date and that officials of the first respondent stopped the container. According to the first respondent, the goods were detained on 20 April 2000. The first respondent denies that the detention is unlawful, because the goods do not comply with the 25% requirement of the trade agreement in the opinion of the first respondent. Enslin

states in her affidavit that upon establishing that the goods in the container were manufactured by Chirimba, she immediately entertained a reasonable suspicion that they do not comply with the 25% requirement of the trade agreement, or with the relevant statutory provisions, to which I refer again later. She therefore instructed an official, Mr Erasmus, to stop the container.

The reason why the first respondent entertained the said suspicion arises from the contents of a report by Mr H E Wainer, a chartered accountant, who was specifically commissioned to conduct an investigation into Chirimba's manufacturing process. In this report, dated 3 April 2000, Wainer comes to the conclusion that the 25% requirement is not met as far as the goods manufactured by Chirimba are concerned. In fact, he is of the opinion that the production costs represented by materials produced and labour performed in Malawi over a period of January to June 1999 is much lower than the required 25%. In his report he mentions a percentage of 5,3%.

Enslin was also a member of a team which conducted an official investigation into, amongst others, Chirimba's manufacturing operation during the course of a visit to Malawi in October 1999, a report of which is attached, with some portions removed from it, presumably relating to other factories in Malawi.

On the basis of the Wainer report and the investigating team's report, the first respondent verily and reasonably believes that the applicant's goods do not conform with the 25% requirement. In terms of the relevant statutory provisions the first respondent is entitled to insist on

security. It is an established practice in international trade for states who are parties to trade agreements to require, in case of doubt, security for any duty or other charges which may be payable by an importer according to the deponent on behalf of the first respondent. According to Enslin the first respondent is willing to allow entry of the container into South Africa if the applicant is obligated to make urgent deliveries in South Africa, on condition that the applicant provisionally pays the stipulated duty for the goods. A number of other importers who are in a similar position to that of the applicant, in other words who have to conduct their business within the context of some uncertainty as to the duties payable, are all making provisional payments to ensure that the goods imported by them pass through customs. This arrangement is designed to assist importers.

The applicant attempts to place the detention in context by stating, *inter alia,* that pressure has been put onto the first respondent by South African clothing manufacturers, resulting in certain investigations and some Malawian clothing manufacturers and South African importers being put out of business.

According to the first respondent, Chirimba (like the other factories in Malawi) is involved in a cut, make and trim operation. The textiles are imported from the east and apparently some of it is also imported from South Africa.

The labour costs in Malawi are, in the words of the first respondent, shockingly low, amounting to a worker's wage

of R157,00 per month or 98 cents per hour. This makes the trade agreement with Malawi attractive to businesses like the one conducted by the applicant. In short, the materials are imported from the east or from elsewhere outside Malawi, to be made into garments by cheap labour in Malawi and the garments are then imported into South Africa while the full benefits of the trade agreement, namely a full rebate, are being claimed. This does not accord with the aims and spirit of the trade agreement and causes unhappiness amongst manufacturers and workers in South Africa.

The applicant points out that the respondents are already engaged in litigation with another importer, Line-Out CC, as to the interpretation of the trade agreement and in particular the 25% requirement. A dispute between Line-Out and the respondent as to whether garments imported from Malawi comply with the 25% requirement, or whether full import duty is to be paid, will by agreement between Line-Out CC and the respondent shortly be determined by the Witwatersrand Local Division of the High Court through declarator proceedings.

The applicant submits that Line-Out and the applicant import exactly the same kind of garments, and argues that it is inappropriate for the first respondent to act in the way they are acting, pending the proceedings regarding the declarative. Hence the applicant's second prayer, seeking interim relief pending the outcome of the application for a declaration of rights, in the alternative.

The /...

The first respondent's response is, as stated earlier, that the link between Line-Out and the applicant is so narrow that the sudden emergence of the applicant late in 1999, when Line-Out experienced certain problems, is no coincidence. The first respondent also submits that although the garments imported by Line-Out and the applicant are the same, the application for a declarator is a separate process with its own particular character and circumstances and that there is no need for the first respondent not to act as they did until finalisation of those proceedings, seeing that many millions of rands in duty may be lost.

The applicant also refers to an earlier instance of a container being detained by the first respondent, namely on 11 April 2000. The first respondent then insisted on a provisional payment on goods imported from Malawi before the release of the goods. The applicant paid the amount of provisional duty demanded by the first respondent, because the applicant required release of the goods to fulfil its obligations to its customers but did so "under protest." In a letter by the applicant's attorneys of record, the first respondent was accordingly informed and warned that an urgent application would be launched if the conduct of the first respondent is repeated.

Before 11 April the applicant had imported 28 containers under full rebate of duty. However, the first respondent states that this was not because the applicant had always complied with the trade agreement. It was only since the receipt of the earlier-mentioned Wainer report of

3 April2000 that the first respondent has held a firm view that the goods manufactured by Chirimba do not meet the 25% requirement.

3. URGENCY

The parties agreed that a significant or a sufficient degree of urgency was involved to hear the matter on the urgent motions roll. Apparently several other containers are also soon to be imported into South Africa. I consequently came to the conclusion that although this matter is not one of the utmost urgency, there is a sufficient degree of urgency of a serious commercial nature for it to dispense with the usual forms of service and prescribed time periods in terms of rule 6(12) of the Uniform Rules of Court.

4. LEGAL AND FACTUAL DISPUTES IN A NUTSHELL

The issues in dispute between the parties (very briefly summarised) are more or less as follows:

It is the applicant's case that it is entitled to import the goods into South Africa from Malawi under full rebate of duty by virtue of the trade agreement concluded between South Africa and Malawi. Regarding the goods, namely the garments in question, materials provided and labour performed in Malawi compromise at least 25% of the production costs of the goods in conformity with the provisions of the trade agreement. The Commissioner's officials at the border post unlawfully detained the goods, resulting in the applicant's peaceful and undisturbed possession of the goods being violated. In addition the conduct by the Commissioner constitutes administrative action which is unfair, unjustifiable and

unreasonable under the provisions of section 33 of the Constitution, read together with other relevant provisions. Therefore the applicant seeks an order directing the first respondent to release the goods.

It is common cause that the goods have been detained. The first respondent furthermore does not deny that the applicant was not afforded a hearing prior to the detention of the goods. It also does not seem to be in dispute that the decision and conduct on the part of the respondent constitutes administrative action. (10)

The first respondent's case is that the goods do not comply with the relevant provisions of the trade agreement and/or section 46 of the Customs and Excise Act, Act 91 of 1964, read with rule 46, which relates to this particular section, alternatively that the first respondent has a reasonably-grounded suspicion that the goods do not comply. As a result of this non-conformity or reasonable suspicion thereof, the first respondent is entitled to detain the goods in terms of section 88(1)(a) of the Act and the first respondent is also entitled to (20) invoke the provisions contemplated in section 102 and/or 107(2)(a) of the Act. It is furthermore the case of the first respondent that it had reasonable grounds to invoke such provisions, because the requirement that at least 25% of the production cost of the goods is represented by materials produced and labour performed in Malawi, has not been met. Therefore the first respondent contends that its conduct in detaining the goods is based on its statutory authority to ensure proper compliance with the provisions of the Act and that the detention of the goods (30)

is therefore not unlawful as contended by the applicant, or at all.

5. THE RELEVANT STATUTORY AND OTHER PROVISIONS

I briefly refer to some of the relevant statutory and other provisions that are at stake here.

The trade agreement between South Africa and Malawi was concluded in terms of section 51 of the Act. In the preamble to the trade agreement the two governments recognised the desirability of expanding trade between their respective countries and the necessity of accelerating and diversifying their economies. The relevant provisions of the trade agreement are sections 2, 6(ii) and 7(3). I quote a portion of section 2:

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

Section 6(2) reads as follows -

"*Goods shall not be regarded as having been produced or manufactured -*

(i) ...; and

(ii) in Malawi, unless at least 25%, or such other lower percentage as may from time to time be agreed upon between the parties in respect of specified goods manufactured in Malawi, of the production costs of those goods shall be represented by materials produced and labour performed in Malawi and the last "process in the production or manufacture of such goods shall have taken place in Malawi."

The provisions of the abovementioned act which are directly relevant to the present dispute are section 2, which charges the Commissioner with the administration of the Act, and section 39 which enjoins a person entering any imported goods for any purposes in terms of the provisions of the Act to deliver and produce certain documents and to pay all duties due on the goods. If the goods are not entitled to be imported under full rebate of duty in terms of the provisions of the trade agreement, the provisions of this section are therefore applicable. Section 40(1)(e) is also relevant and sets out under which circumstances the entry of goods will not be valid.

One of the sections or sub-sections which are crucially important for the purposes of this application, is section 88(1)(a) which authorises a customs officer to detain goods at any place for the purpose of establishing whether they are liable to forfeiture under the Act. I quote this section:

"*SEIZURE*

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

Note must also be taken of section 88(1)(c) which mentions **seizure** as a step which presumably follows on the **detention** referred to in section 88(1)(a) and preceding the **forfeiture** dealt with in section 87 of the Act.

Section 102(4) casts an onus on the applicant wherever there is a dispute in which the state, the minister or the commissioner or any officer is a party, to show that the goods have lawfully been imported to manufactured or otherwise dealt with. I quote section 102(4):

"If in any prosecution under this Act or in any dispute in which the State, the Minister of the Commissioner or any officer is 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."

Section 107(2)(a) of the Act is also relevant. It obligates the Commissioner not to allow goods to pass from his control until the provisions of the Act or any law relating to the importation thereof have been complied with and authorises him to impose certain conditions, including conditions relating to security in respect of such goods. I quote section 107(2)(a):

"107 EXPENSES OF LANDING, EXAMINATION, WEIGHING, ADJUSTING ETCETERA. -

(2)(a) Subject to the provisions of this Act, the Commissioner shall not, except on such conditions, including conditions relating to security, as may be determined by him, allow goods to pass from his control until the provisions of this Act or any law relating to the importation of exportation or transit carriage through the Republic of goods, have been complied with in respect of such goods, and the State of the Commissioner or any officer shall in no case be liable in respect of any claim arising out of the detention of goods pending the decision of the Commissioner or for the cost of such detention.

(b) Whenever the Commissioner considers it necessary for the purposes of paragraph (a) of this subsection of section 106(1) that any goods should be analysed he may direct that such goods be analysed by a person designated by him and that the analysis be done in accordance with a method determined by him."

Section 46 of the Act (and rule 46) is relevant in the sense that it describes which items of expense and cost may or may not be included in determining the production costs of the goods in order to determine whether they comply with the 25% requirement already referred to. I briefly refer to rule 46, or to a portion of that rule:

"ORIGIN OF GOODS

46.01 In the calculation, for the purposes of section 46, of the costs of material produced and labour performed in respect of the manufacture of any goods in any territory, only the following items may be included -

(a) The cost to the manufacturer of materials wholly produced or manufactured in the territory in question and used directly in the manufacture of such goods; and

(b) the cost of labour directly employed in the manufacture of such goods."

6. REQUIREMENTS FOR AN INTERIM INTERDICT

The relief sought is an interim interdict and the matter has to be decided on the basis of the requirements for such relief. These are trite, but for the purpose of clarity I repeat them. An interim interdict will be granted if the applicant establishes -

(1) a clear right or, alternatively, at least a *prima facie* right;

(2) a well-grounded apprehension of irreparable harm if the interim interdict is not granted and the ultimate relief is eventually granted;

(3) that the balance of convenience favours the granting of the interim relief; and

(4) that the applicant has no other satisfactory remedy.

Where the applicant cannot show a clear right, and more particularly where there are disputes of fact relevant to a determination of the issue as to whether the applicant's right is *prima facie* established, though open to some doubt, a court's approach is to take the facts

set /...

set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial of the main action. The facts set out in contradiction by the respondent should then be considered and if serious doubt is thrown upon the case of the applicant, it cannot succeed. The authorities for these submissions are well known and I refer only to a few, such as *LAWSA Volume 11 paragraph 317* on page 292 and further; *Webster v Mitchell 1948 1 SA 1186 (W) 1189 - 1190; Gool v Minister of Justice and Another 1995 2 SA 682 (C) 687 - 688C-E; Fourie v Olivier en 'n Ander 1971 3 SA 274 (T) 285F-H; and Tony Rahme Marketing Agencies (SA) (PTY) LTD and Another v Greater Johannesburg Transitional Metropolitan Council 1997 4 SA 213 (WLD) 215J-216D.*

As to the difference of opinion in the authorities as to whether, as far as the *prima facie* requirement is concerned, only factual issues could be determined or also legal issues, I regard myself bound and am inclined to follow the approach of Goldstein J in the above-mentioned *Rahme* case.

7. UNFAIR ADMINISTRATIVE ACTION

On behalf of the applicant it was argued that the conduct of the first respondent, namely the detention, constituted administrative action which is unfair, *inter alia* in terms of section 33 of the Constitution of 1996. The *audi alteram partem* principle was not adhered to.

The applicant was not called on or given the

opportunity /...

opportunity to present their side of the case, prior to the detention. No reasons were also given. Therefore the conduct of the first respondent as an administrative act is clearly invalid and a nullity and must be declared as such and set aside, according to the applicant.

Heavy reliance was placed on the judgment of Horn AJ in *Deacon v Controller of Customs and Excise 1992 SA 905 SECLD*. In this case the issue to be decided was whether the decision to seize an imported motor vehicle in terms of section 88(1)(C) of the Act, failing to follow substantive and procedural fairness and to comply with the rules of natural justice, would result in the decision being invalid. In *Deacon's* case the court held that there were situations where an act of parliament or conduct in terms of an act of parliament would by reason of the nature of the act not be subject to the rules of natural justice, because in some circumstances public policy and public interest could hold sway over the rights of individuals in order to ensure effective governance. The court further held that in order to ascertain whether the rules of natural justice were applicable to a decision taken by an organ or official of governments in terms of a statute regard had to be had to the objects of the statute, the nature of the discretionary powers conferred on the authority, the conduct controlled by the statute, the potential prejudice for the individual concerned and the prejudice to the organ of state concerned. It was further held in *Deacon's* case that neither section 87 nor section 88 of the Act (which is of course also at the centre of

this dispute) expressly or impliedly excluded the right to be heard or the applicability of the rules of natural justice. It was held that where a functionary exercises a discretionary power of an administrative nature in terms of an act of parliament, as the respondent does when he acts in terms of section 87 and section 88, he could not do so without having regard to the spirit and objects contemplated by section 33 of the Constitution, which should at all times be uppermost in the mind of an official, who could no longer act in disregard for the rights of the individual. It was also found that the exercise of this discretion by the respondent or his officials in terms of sections 87 and 88 of the Act was administrative in nature and for that reason fell within the ambit of the provisions of section 33 of the Constitution, and further that the applicant's situation was such that it called for a proper investigation by the respondent and a full ventilation by the parties of all the relevant facts before the respondent took the decision to seize the motor vehicle. The respondent had taken the view that once it had been confirmed that duty was payable in terms of the Act, he was entitled to invoke the provisions of sections 87 and 88 without the need to have regard to the provisions of section 33 of the Constitution, thereby ignoring the fact that section 33 had broaden the basis upon which a court would interfere with the decision of a functionary in matters of this nature. This last part is specifically dealt with on pages 918F to G and H of the report regarding the *Deacon* case.

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I respectfully agree with the approach of Horn AJ in the *Deacon's* case, in principle, namely that the conduct of the Commissioner in terms of sections 87 and 88 of the Act is in general not exempt from the constitutional requirements of just administrative action and the common law principles of natural justice.

However, *Deacon's* case is distinguishable from this particular matter. Not only do the facts differ, *inter alia*, because the applicant in *Deacon* was an "innocent" individual who purchased an already imported motor vehicle, but also because *Deacon's* case dealt with **seizure** in terms of section 88(1)**(c)** of the Act, whereas the applicants in this particular case seem to rely on section 88(1)**(a)**, as well as other provisions of the Act. In this matter it is therefore **detention** in terms of 88(1)(a) which is relevant, at least as far as the first respondent's reliance on that clause is concerned. **Detention** and **seizure** or then **forfeiture**, for example in terms of section 87 of the Act, are very different steps as far as the conduct of the respondent is concerned. Whereas it can easily be understood that for example the *audi alteram partem* principle may or has to be applicable to seizure and forfeiture, the same is not necessarily true regarding mere detention. In terms of sections 87 and 88, detention is the very first step which takes place in order to set in motion a process of establishing whether forfeiture should follow. To require a prior hearing before detention can take place would make little sense, also from a practical perspective. In many situations customs officials would not be able to do

anything /...

anything if they cannot first detain certain goods, without affording a prior hearing. At the stage when they may wish or have to detain the goods, the relevant parties to whom notice and the opportunity of a hearing will have to be given may not even be present or available. The only way to notify them of the possibility of seizure of forfeiture, would have to be to first detain the goods. If no detention without a prior hearing is allowed, imported goods will mostly have to pass by customs control, and the rest of the steps could hardly be expected to follow.

Counsel on behalf of the first respondent referred me quite extensively to Canadian and American authority in support of the submission that sovereign states have always exercised the necessary political function of controlling who and what enters its boundaries. (See for example *Simmons v The Queen 45 CCC (3D) 296*, W H G Heinrich *"A Review of the Administrative and Appeal Provisions of the Customs Act"* in *Canadian Tax Journal September/October 1998, Industrial Acceptance Corporation Limited v The Queen (1953) 2 SCR 273 at 277* in the United States and L Tribe, *American Constitutional Law (2nd Edition 1988)* on pages 714 to 732.

The situations with which some of these authorities dealt may be factually different from the present one, but it is clear that governments may validly resort to "summary procedures" in order to ensure the effective collection of taxes in the wider sense of this word. (Also see *Hindry v Nedcor Bank Limited and Another 1997 2 SA 757 at 781E-H.*)

The constitutional right to administrative action is, like all other rights, subject to limitation provided the limitation is by law of general application and is reasonable and justifiable in an open democratic society based on human dignity, equality and freedom (in terms of section 36 of the Constitution). To require a prior hearing with regard to detention - as opposed to for example forfeiture or even seizure in terms of this Act - would impose onto customs officials a procedure so cumbersome that it could be wholly impractical and could render the clause which authorises the possibility of detention meaningless. I am therefore not in agreement with the applicant that the first respondent's decision to detain is invalid and a nullity on the basis alleged and argued by the applicant.

7. THE 25% REQUIREMENT AND DUTY PAYABLE

The most crucial dispute between the parties is whether duty is payable on the importation of the goods in this case and whether the earlier mentioned 25% requirement has been met, which would entitle the applicant to a full rebate. As to the calculations or computation of the relevant percentage of the production costs, the applicant relies heavily on the report and opinion of its expert, Mr Rabson, who comes to the conclusion based on books and records of Chirimba, that the cost of the material acquired in Malawi together with the cost of labour performed in Malawi is well in excess of the 25% of the total costs of production. This view is supported by, for example, Mr SA Kalembera, an official for the Department of Customs and Excise in Blantyre who presents

evidence as to how it is ensured from the Malawian side that only manufacturers who comply with the requirements of the trade agreement remain active, and also to some extent the opinion of Mr D Solomon, a prominent and leading person in the textile industry in South Africa, repeatedly referred to by counsel for the applicant as the "Mr Garment of South Africa", who supports aspects of the affidavit by the earlier-mentioned Wong Wong Wu.

From the side of the first respondent, the deponent Enslin explains why she believes or has reason to believe that the goods manufactured by Chirimba do not comply with the 25% requirement. As stated earlier, the most important basis for her conviction is the report by the respondent's expert, Wainer, dated 3 April 2000, who is of the opinion that for the purposes of section 46 the production costs of the goods imported by Line-Out as represented by materials produced and labour performed in Malawi between January and June 1999, is much lower than 25%. Enslin also relies on observations of the joint investigation team, of which she was a member, who visited Malawi in October 1999, as well as the views expressed by E G Jere, an investigating officer in the office of the controller for Customs and Excise, Malawi and Benita Kaplan, a chartered accountant who was also involved in the fieldwork regarding the investigations during March 2000.

The applicant's main criticism against Wainer's report and opinion, very briefly summarised, is that Wainer admits that his investigation and report were subject to certain limitations, that Wainer was not physically

present /...

present in Malawi where the investigation was done (unlike the applicant's expert Rabson), that Wainer's report to some extent relies on and amounts to legal interpretations of the relevant statutory clauses which is not proper for Wainer seeing that he is not a legal expert, and that Wainer's report is based on old and outdated information, namely a period over a few months in 1999. The applicant submits that since that particular time Chirimba has grown and more labourers have, *inter alia*, been employed and certain factors have to be taken into account in computing the percentage which were not taken into account by Wainer.

On the other hand, criticism of Rabson's opinion by Wainer and the first respondent, includes the allegation that Rabson wrongly interpreted the relevant provisions of the Act and therefore wrongly calculated his percentages. He left out the cost of certain items which should be included as part of the denominator (below the line) and wrongly included certain cost factors which should not be included as part of the numerator (above the line). If these calculations are done correctly, Rabson's conclusion that a percentage of approximately 28% is reached would be significantly and substantially lower, to the extent that the 25% requirement would not be met.

The first respondent argues that in terms of the provisions of section 6(ii) of the trade agreement, and section 46 of the Act, read with rule 46, the position is that all goods produced or manufactured in Malawi may be imported to South Africa free of customs duty, but that

goods shall not be regarded as having been produced or manufactured in Malawi, unless 25% of the production costs of those goods is represented by materials produced and labour performed in Malawi. Only the cost to the manufacturers of materials wholly produced or manufactured in Malawi, and the cost of labour directly employed in the manufacture of the goods, may be included. The first respondent therefore argues that section 46 must be interpreted "conjunctively" and not "disjunctively." The 25% must be made up of both material and labour and could not only be based on labour. To put it simply, an importer would not be entitled to the full rebate, if all the material is imported from the east or from anywhere else outside Malawi, and all the labour takes place inside Malawi. The applicant disagrees with this submission, but argues even if some material has to be of Malawian origin they still comply, with reference to a number of factors. The respondent argues that the material which the applicant may use and which is acquired in Malawi, for example thread, does not qualify for inclusion because only materials wholly produced or manufactured in Malawi qualify. The investigating team found, amongst other things, that no thread is manufactured in Malawi. It is also argued from the side of the respondent that for example packaging and swing tags could not be taken into account as far as the calculation of the percentage is concerned. This also applies, according to the first respondent, to certain elements regarding labour which takes place in Malawi, for example with regard to

administrative and supervisory staff.

It is also submitted from the side of the first respondent that one must take the spirit and aims of the trade agreement into account as it appears from the earlier-mentioned preamble, namely to accelerate economic development and to diversify the economy of Malawi. These aims (of acceleration of the economic development of a country, and diversification of its economy) do not seem to be aimed at a situation where only cheap labour and nothing else is used in that country, and where most of the material comes from elsewhere.

Be this as it may, this is an application for interim relief pending the final relief which is being sought, as mentioned in prayer 2 of the applicant's notice of motion.

In the application for final relief to be instituted by the applicant, the central issue to be determined by a court may indeed be whether the requirement of 25% is met and whether the importer is entitled to a full rebate, or obliged to pay the full duty. This question is also at the core of the earlier mentioned application for a declaratory order pending in the WLD, referred to by the applicant in prayer 2 and in its founding papers. Therefore it is neither necessary nor appropriate for me to make a final determination as to the correctness and validity of the Wainer and Rabson opinions and all other evidence regarding the dispute between the parties with reference to the exact computation of the percentage. What is at stake at this stage is the detention by the first respondent of the goods on 19 or 20 April. The

first respondent relies especially on section 88(1)(a) of the Act, and then also on section 107(2), as the basis for its decision to detain. It is not required by the Act that it must be conclusively determined that the 25% requirement is not complied with in order to entitle the first respondent to detain. Section 88(1)(a) mentions detention for the purpose of establishing whether the goods are liable to forfeiture. If the evidence is so clear that the goods imported by the applicant do comply and are not liable to forfeiture, that there can be no basis for the first respondent to detain the goods, and that there is in other words nothing to establish, then the first respondent's decision to detain would be unfounded and would be purely arbitrary. The question is whether there is some reasonable basis for the first respondent to hold a belief or opinion that the provisions of the Act may not have been complied with in order to bring its concerns about establishing certain issues and holding security into play.

In my opinion there is a dispute between the parties involving experts on both sides with regard to the 25% requirement. I do not have to, and perhaps cannot at this stage, make a final finding as to this compliance or lack of it. I am not convinced finally, or on a *prima facie* basis, that the applicant's goods do comply with the requirement. The opinions put forward by the first respondent, for example the report of Wainer, provide sufficient evidence at this interim stage to satisfy me that there was a reasonable basis for the first respondent's concerns about compliance with the Act and

for/...

for the decision to detain.

8. THE LEGAL BASIS OF THE DETENTION

This brings me to the issue which I found most problematic, namely to determine the precise and exact legal basis for the first respondent's decision to detain the goods. The first respondent repeatedly states in the founding papers that the detention took place in terms of section 88(1)(a), but also invokes section 107(2)(a), and furthermore refers to section 102, the presumption or onus provision. The respondent sometimes does this on an "and/or" basis, presumably implying either that the detention took place in terms of more than one of these provisions, read together, or that it took place on the basis of a specific provision, but that it does not really matter which provision, because the conduct would be authorised by one or more of these provisions anyway. It was strongly argued on behalf of the applicant that the relevant clauses cannot be read together, because they deal with completely different issues and procedures. Therefore the first respondent has to make a clear choice. Furthermore, section 88(1)(a) on which the respondent relies most of the time, does not authorise them to detain in the manner and for the purpose which they did detain. It is the contention of the applicant that the first respondent simply uses and abuses section 88(1)(a) to achieve a purpose for which it has not been invented and is not intended, namely to either strangulate businesses like the applicant's or to force them to pay the duty, albeit it on a provisional basis, or at least to provide security.

I have looked at this possibility with some concern. Section 88(1)(a) allows for detention for the purpose of establishing whether goods are liable to forfeiture under the Act. The applicant argues that there is no need for the respondent to establish whether the goods are liable to forfeiture, because the first respondent claims that they have already established this to the extent that they verily believe that the 25% requirement has not been complied with. I take it that the first respondent's perhaps overstated belief or conviction is intended to mean or to convey the message that there is at least reason to believe that the Act has not been complied with, which would entitle them to detain. But the first respondent has clearly indicated a willingness to release the goods as soon as the applicant pays the provisional duty and on 11 April they did do so with the previous container.

The question is whether the first respondent is legally entitled to do that. From a reading of the respondent's papers it is also clear that although they rely first and foremost on section 88(1)(a), their primary intention is not to detain the goods in order to give them the opportunity to at least physically investigate certain matters, but that the issue of security is important to them. If the goods are released and it then turns out that the duty is indeed payable, which the first respondent strongly believes is the situation, the respondents and the state stand to lose millions of rands in duty because of the inability to enforce payment at that stage. So, the question is whether section 88(1)(a)

could /...

could be used for this purpose if read together with section 107(2), which deals more specifically with security. On behalf of the applicant it is argued that it cannot.

Let me start with a perspective which perhaps does not favour the respondent's approach and which relies on a more literal and narrow interpretation of section 88(1)(a). The sub-section allows for detention for a very specific purpose, namely to establish whether goods are liable to forfeiture. Forfeiture is dealt with in section 87. Section 88(1)(C) deals with seizure, which seems to be a step between detention and forfeiture. So, the question is how the respondent, the Commissioner, is expected to "establish" whether the goods are liable to forfeiture in terms of section 88(1)(a). One possibility is probably a physical examination of the goods or of certain samples of the goods. In order to do so, the goods have to be detained by the Commissioner. If such a physical examination reveals, for example, that the goods in the container are entirely different from the goods which form the subject of the respondent's suspicions or concerns, the goods would of course have to be released immediately. If the examination on the other hand establishes that the goods are liable to forfeiture, the respondent presumably has to proceed with the further steps of seizure and forfeiture. On this interpretation, section 88(1)(a) has nothing to do with security and could not be used to enforce payment of duty, but only to provide an opportunity for the investigation which may be necessary to do the

establishment /...

establishment mentioned in 88(1)(a). In this case the respondent has also not indicated that any immediate steps are being taken to establish whether their concerns are valid and whether the goods are in fact liable to forfeiture. Instead the first respondent indicated that the goods could be released on payment.

So it could perhaps be argued that if all the goods are released, the first respondent could not take any further steps to establish what they need to know, because the goods are out of their possession and control. (10)

However, this narrow and perhaps fragmented approach seems to be problematic. Firstly, the process of "**establishing**" mentioned in section 88(1)(a) does not necessarily refer only to a physical examination. It could also refer to other proceedings, even a full hearing or legal proceedings. In this case the respondent is apparently of the opinion that from its side enough has been done to justify at least a preliminary conclusion that the duty is payable. However, the door is left open for the applicant to show (20) the contrary. This is where section 102 comes in, placing an onus onto the applicant. Therefore, until the issue in question has been finally established, the detention is authorised by section 88(1)(a). Furthermore, if section 88(1)(a) narrowly and literally means that detention may only take place for the purposes of "**establishing**", and therefore only until it is established whether the goods are liable to forfeiture or not, and then for example a physical examination establishes that the goods are indeed liable to (30)

forfeiture, there would be no further ground for this detention. What had to be established, has after all now been established. The respondent would then have to proceed with seizure and forfeiture. But if just administrative procedures are required and the rules of natural justice are to be adhered to before seizure can take place, there would naturally be a time gap between the point of establishment and the steps that follow. In this period the goods may then no longer be detained, because there is nothing more to establish and section 88(1)(a) does not allow detention for the purpose of security. The goods would then have to be released and could be distributed and sold, which would render the seizure and the other steps to follow practically impossible and the process meaningless.

This tends to lead me in the direction of concluding that the respondent's submission that section 88(1)(a) has to be read together with the other provisions, for example section 107(2), is not as legally nonsensical as contended on behalf of the applicant. The applicant's approach seems to be an overly-literal and perhaps fragmented one.

An overview of the Act as a whole in order to determine the context of the relevant clauses strengthens this impression. The Act consists of 12 chapters dealing with, *inter alia*, definitions in 1, administrative aspects and the duties and powers of the Commissioner in 2, importation and exportation in 3, warehouses and storage in 4, and clearance etc of goods and liability for and payment of duties in 5. Anti-dumping and related

aspects /...

aspects are dealt with in chapter 6. Section 88 appears in chapter 11, entitled "Penal Provisions" dealing with, *inter alia*, offences, punishment, false documents and declarations, and forfeiture in section 87. As previously mentioned, the heading of section 88 is indeed "Seizure". Section 107 forms part of the last chapter, chapter 12, under the heading "General" and this chapter deals with a variety of general aspects, rather than with a specific category or sphere of activities or procedures. The application of this last chapter seems to be of an overriding and general nature. The heading of section 107 is indeed "Expenses of landing, examination, weighing, analysis, etcetera." Section 107(2)(a), on which the respondent relies, starts with a reference to the other provisions of the Act. It then states explicitly that the Commissioner shall not allow goods to pass from his control, until the provisions of the Act have been complied with, except on certain conditions, including conditions related to security. Section 107 is clearly a clause with a wider and more general meaning, rather than with a specific purpose and intended application. It places a general duty on the Commissioner.

This view, namely that the clauses should be read together, also seems to be the opinion of the author H S Cronje in the loose-leaf work *Customs and Excise Service*, published by Butterworths (Service Issue II) October 1998 at 11-18(1) with reference to the heading "Section 88 Seizure"/...

Seizure" and especially with reference to footnote 56 as well as at 12-24 and 12-25 in the part dealing with section 107. I briefly wish to quote one or two. For example pages 11-18(1) the learned author states the following:

"Under (1)(a), an officer, magistrate or member of the police force may detain any ship, vehicle, plant, material or goods at any place for the purpose of establishing whether the ship, vehicle, plant, material or goods are liable to forfeiture under this Act."

He then refers to footnote 56. In footnote 56 the following is stated -

"See F - The duty imposed on the Commissioner in terms of section 107(2)(a)."

The rest of this footnote also contains other information. I quote another paragraph on the same page:

"'Liable to forfeiture under the Act' includes the provisions of sections 13(6), 36(6)(C), 75(20), 83, 84, 85, 86 and 87 and section 19(3)(B) of the Customs Union Agreement."

In other words, the section immediately preceding section 88, namely section 87, is not the only provision in the Act where forfeiture is relevant, and to which section 88 refers.

I quote briefly from page 12-24, where the following statement occurs under the heading *"Section 107 - Expenses of landing, examination, weighing, analysis, etcetera:"*

"In (2)(a):- 'Subject to the provisions of this Act'

could relate for example to the provisions of section 113(8)(d).

The provisions are peremptory and when detaining goods for examination the Commissioner (an officer) is giving effect to this statutory injunction which may also be for the purpose of ascertaining whether the goods are liable to forfeiture as provided under section 88(1)(a)."

This learned author clearly brings section 88(1)(a) into the picture when the meaning of section 107(2)(a) is discussed. The question could then again be asked whether, as far as the respondent is in fact relying on section 107(2), the rules of natural justice are not applicable to the Commissioner's conduct, namely his keeping of control until the provisions of the Act have been complied with. Clearly any party should be given a proper opportunity to show that the Act has been complied with and that there is no need for the Commissioner to retain control. However, this does not alter my earlier view that a hearing is not required prior to the initial step of **detention** referred to in section 88(1)(a).

9. CONCLUSION

In returning to the earlier-mentioned requirements for interim relief, as sought in this application, the requirements for an interim interdict, I conclude that a clear right or alternatively a *prima facie* right has not in my opinion been established by the applicant in this case. I am not persuaded that the applicant has a right to import the relevant goods under a full rebate of duty and that the respondent has therefore acted unlawfully to

detain the goods in terms of the provisions of the Act. Even if the first requisite of a *prima facie* right has been met, the requirements of balance of convenience and irreparable harm have to be taken into consideration. As far as the balance of convenience is concerned, a court must weigh the prejudice the applicant will suffer if the interim interdict is not granted against the prejudice the respondent will suffer if it is, bearing in mind of course that the ruling may later prove to be wrong. The applicant alleges that if it is not permitted to import the goods in question without provisionally paying the very high duty, it would not only have to breach its contractual obligations with outlets or retailers such as Mr Price, but that it would also run into massive financial difficulties which could lead to its demise and to the collapse of not only the applicant, but also the manufacturing business in Malawi.

On the side of the first respondent it is alleged that once the goods are released without any security, the goods will be distributed and sold. Therefore the interim order will have the effect of a final order. If the applicant is indeed not in a position to pay the duty now on a provisional basis, it is unlikely that the applicant will later be able to pay at all. Seizure and forfeiture will then be impossible after the release of the goods. Therefore the state may wrongfully be deprived of large amounts of money in duties owed to it.

In weighing these two scenarios, one must avoid a rigid belief that the state is always more powerful than individuals or juristic persons such as companies and

that for example financial prejudice to the state is less serious than financial prejudice to so-called private entities, because the state's money does not belong to anybody in particular and its resources are almost unlimited. The state has a duty to the public as a whole and to all individuals to collect taxes diligently, not only in order to meet its responsibilities in terms of the enormous need for resources inside South Africa, but also in order to be fair to those individuals and juristic persons who do pay their taxes (in the wide sense of the word) in a law abiding and diligent manner. I do not get the impression that the applicant is a small and vulnerable private entity. According to the applicant's papers, the applicant and Line-Out are obliged to deliver garments to the value of R150 million per year to Mr Price. This is an application for interim relief. If the outcome of the main application is against the applicant, the duty will have to be paid anyway and the consequences thereof will have to be faced by the applicant. If the applicant now has to lay out the money and the outcome of the final determination is in the favour of the applicant, I cannot see why there is not a very strong possibility that the applicant would be able to get its money back. The state is unlikely to become completely bankrupt within this period of time. I find it hard to accept that a concern of the applicant's nature is not in a position to arrange for some kind of temporary facilities or to meet the demands or need for security on the side of the first respondent on a provisional and hopefully acceptable basis.

Therefore/...

Therefore I am of the opinion that the balance of convenience does not favour the applicant's case.

After having earlier determined that the matter was to be heard as one of some urgency, I order that the application be dismissed with costs, including the costs of two counsel.

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