IN THE HIGH COURT OF SOUTH AFRICA

(SOUTH EASTERN CAPE LOCAL DIVISION)

CASE NO.: 4087/04

In the matter between:

CBM HOT X-PRESS CC	First Applicant
WEST TRUCKING (BOTSWANA) (PTY) LTD	Second Applicant
and	
THE COMMISSIONER FOR SOUTH AFRICAN REVENUE SERVICES	First Respondent
MINISTER OF FINANCE	Second Respondent
DIRECTOR OF PUBLIC PROSECUTIONS FOR THE EASTERN CAPE	Third Respondent

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JUDGMENT

LEACH, J:

The first applicant is a close corporation which conducts business as a road carrier from a base in Germiston. The second applicant is a company registered and incorporated in Botswana, and the owner of a large trailer having registration letters and number B 985 ACG ("the trailer") which was being used by the first applicant in the course of its business on 25 November 2004 when it was detained and impounded by a Customs and Excise officer, one Van Loggerenberg. In these proceedings, brought as a matter of urgency, the applicants seek return of the trailer.

The first applicant had used the trailer to carry a load from Pretoria to two companies in Uitenhage. It was unladen and on its way back to Gauteng when both it and the truck/tractor being used to tow it were seized. While the trailer remains impounded, the truck/tractor, which is registered and licensed in South Africa, was released on 26 November 2004 and no more need be said about it.

detention of the trailer provoked an exchange of correspondence between the applicants' attorney and Van Loggerenberg who insisted upon being provided with certain documents, including those showing proof of the trailer's entry into South Africa in compliance with s 12 of the Customs and Act No. 91 of 1964 ("the Customs Act") before he would release it. The applicants contend that they have no such customs documents as, so they say, such documents are unnecessary and are in fact not issued by reason of a Customs Union agreement which shall mention in more detail below. They therefore instituted these proceedings as a matter of urgency, seeking an order obliging the first respondent, the Commissioner for the South African Revenue Service, to release the trailer, alternatively, authorising the sheriff to remove the trailer from the respondents or from wherever he might find it and return it to them. The second and third respondents were joined as interested parties, but they both declined the invitation to enter the lists.

In his answering affidavit, the first respondent raised a number of *in limine* objections to the matter being heard, including the alleged non-joinder of

certain interested parties. Only two of these objections were persisted in during argument. The first related to the second applicant's failure to provide security for the first respondent's costs while the second related to an alleged lack of urgency. In regard to the first issue, the applicants conceded that the second applicant was obliged to provide security for costs by reason of the fact that it is a *peregrinus*. In due course, a letter from ABSA bank instructing that it held a sum as security for the first respondent's costs in these proceedings was accepted as sufficient security, and nothing further need be said about this issue.

However, the first respondent persisted in his argument that these proceedings were not sufficiently urgent for this Court to hear the matter. In seeking to persuade me that the matter was not that urgent, counsel for the first respondent relied heavily upon the judgment of Kroon J in this court in *Caledon Street Restaurants CC v D'Aviera* (unreported case no. SECLD 2656/97 of 7 November 1997) do not think it is necessary to analyse this judgment in any way. In his customary fashion, my learned colleague dealt in detail with the relevant authorities and principles applicable to matters of this nature. Ultimately, it seems to me, the court is vested with a discretion to be exercised judicially in the light of all the relevant facts and circumstances of a particular case. In the light of the considerable financial implications flowing from the detention of the trailer, the fact that if the parties have to wait until after the current court recess this matter will not be heard for some 6 weeks, the inconvenience this would cause to all concerned and bearing in mind that, in hearing this matter, would not be prejudicing any other litigants awaiting

an opportunity for their causes to come before court, decided that the interests of justice demanded that the matter be dealt with at this time. Having ruled accordingly, heard argument on the merits of the dispute to which now turn

The applicants' contention that there was no reason for Van Loggerenberg to have impounded the trailer is based squarely upon the provisions of the Customs Union Agreement concluded between various Southern African countries. South Africa has been a party to a Customs Union agreement since 29 June 1910, the terms of which were amended from time to time. On March 1970 a Customs Union agreement concluded by South Botswana, Lesotho and Swaziland in terms of s 51 of the Customs Act (and published in government notice no. R3914 12 December 1969) came into operation. Article 2 thereof provides that the parties to the agreement shall not impose any duties on goods produced or manufactured in the commons customs area on importation of such goods from the area of any other contracting party. While it was, in any event, contended by the applicants that the trailer does not constitute "goods" as defined in the Customs Act, submitted that, even if it did, no import duties would therefore apply as a result of this provision.

A further Customs Union agreement was promulgated in Government Gazette no. 13576 of 18 October 1991 Concluded in terms of s 6(2) of the Transport Deregulation Act no. 80 of 1988, this agreement has the force of legislation which prevails in the case of conflict between the provisions of the Customs

Union agreement and any other law of South Africa and is, as understand it additional to the 1969 Customs Union agreement. *Inter alia*, the objectives of the 1991 agreement were stated in clause 1(a) of Article II thereof to be

> "(T)o regulate the carriage of goods and the conveyance of passengers by road for reward, or in the course of a carrier's own industry or trade, between or across the territories of the Contracting Parties, in such a manner as to ultimately achieve an equal distribution of traffic among the carriers of the Contracting Parties;"

Importantly, clause 5 of article VI of the 1991 agreement provides that:

> "Registration and licensing of vehicles in the territory of one Contracting Party shall be valid for operations in the territories of the other Contracting Parties ***without any other requirement or formalities***" (My emphasis).

The effect of this, so it was argued on behalf of the applicants, is that a vehicle being used for the carriage of goods within the area of the Customs Union is itself not regarded as being 'goods" imported into a country as envisaged by s 10(1) and s 51 of the Customs Act when brought from Botswana into South Africa. Moreover, as the applicants had produced documented proof of the trailer being currently licensed and registered in Botswana, so the argument went, it was not necessary for them to produce any other documents in order to use the trailer lawfully in South Africa as it was being operated within the confines of the Customs Union and under the provision of the two Customs Union agreements I have mentioned

The applicants also placed emphasis upon the presently unreported judgment of Swart J in *Airey & Others v The Cross Border Road Transport Agency & Others* (TPD case no. 23959/03 delivered on 12 May 2004) in which it was held that a local carrier using a vehicle registered in one of the other Customs

Union States to transport goods between two points in the Republic of South Africa without a permit, does not commit an offence under the Cross Border Road Transport Act no. 4 of 1998 merely because the vehicle is registered in a State other than South Africa

On the strength of this authority, the applicants argument, as understood it is that although the trailer was owned by a company in Botswana (the second applicant) it could be freely used within the area of the Custom Union, that it could be brought into this country from Botswana without attracting import duties and without being regarded as "goods" imported into this country, and that it could be used to convey goods within the Custom Union, including in particular between points in South Africa, without any other requirement or formalities other than it being registered and licensed in Botswana Accordingly, it is contended that the first applicant's use of the traileron a round trip between Pretoria and the Eastern Cape had been lawful and the detention of the trailer had therefore been illegal

The first respondent, on the other hand, denied that the detention of the vehicle was unlawful As understood him counsel for the first fespondent did not seek to argue that the applicants' legal contentions based on the Customs Union agreements were incorrect or that a trailer registered and licensed in Botswana required any further formalities before it could be used in South Africa under the aegis of the Customs Union agreement However, he submitted that the applicant's contentions were essentially irrelevant to the true issue,

As a starting point, while conceding that a vehicle used to transport goods back and forth across the Botswana /South Africa boundary may well not be regarded as "goods" imported into this country by reason of the Customs Union agreement– in contradistinction to its cargo – counsel for the first respondent argued that did not mean that a trailer could not be" imported" when moved from one country to another and that, if it is imported, then like any other article it is to be regarded as "goods" as envisaged by s 10(1) of the Customs Act and the import procedures of the Act would have to be followed

The word "import" is not defined in the Customs Act Whether or not a particular movement of an article across an international border results in it being imported may be a question of some debate in any given case, a great deal turning on whether the article in question can be said to merely be in transit at the time or whether it is to be used, consumed, dealt with or sold once in the country – see *Commissioner of Customs & Excise v Strauss & Others* 1998(4) SA 593(T) at 598-599 and the authority there cited In the present case, it is fortunately unnecessary to decide whether the trailer was in fact imported into this country Suffice it to record that the applicants deny that it was imported from Botswana (their case being that it has merely been brought from that country and is being used in this country pursuant to the Customs Union agreements) whereas the first respondent wishes to investigate whether or not it has in fact been imported

In the light of this, counsel for the first respondent, in submitting that Van Loggerenberg had acted unlawfully in impounding the trailer, founded his argument upon sections 87 and 88 of the Customs Act which, *inter alia*, provide as follows:

> "87(1) Any goods imported contrary to the provisions of this Act or in respect of which any offence under this Act has been committed ...shall be liable to forfeiture wheresoever and in possession of whomsoever found: Provided that forfeiture shall not affect liability to any other penalty or punishment which has been incurred under this Act or any other law, or liability for any unpaid duty or charge in respect of such goods.
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> 88(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.
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> (b) Such ship, vehicle, plant, material or goods may be so detained where they are found or shall be removed to and stored at a place of security determined by such officer, magistrate or member of the police force, at the cost, risk and expense of the owner, importer, exporter, manufacturer or the person in whose possession or on whose premises they are found, as the case may be.
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> (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."

It is apparent from these provisions, that three different stages are envisaged – firstly, ***a detention*** as referred to in s 88(1)(a); secondly ***a seizure*** as referred to in s 88(1)(c); and thirdly, ***a forfeiture*** as dealt with in s 87. In regard to these stages, I agree with the comment of Van der Westerhuizen J in *Henbase 3392 v Commissioner, South African Revenue Service, & Another* 2002 (2) SA 180 (T) at 188 that the ***seizure*** under s 88(1)(c) presumably follows on the ***detention*** referred to in s 88(1)(a) and precedes the ***forfeiture*** referred to in s 87.

Bearing this in mind, it is necessary at this stage to pause, take breath and consider the precise ambit of the issue in the present case Although, during the course of argument, counsel averted to the decision of Horn AJ (as he then was) in this court in *Deacon v Controller of Customs and Excise* 1999 (2) SA 905 (SE) in support of a contention that it was necessary for the rules of natural justice to apply to administrative actions taken under the section, it is necessary to bear in mind that the learned judge was there dealing solely with a decision of seizure taken under s 88(1)(c) – whereas here what is in issue is the detention of the trailer under s 88(1)(a). And while in the *Henbase* case, Van der Westerhuizen J approved the general approach the *Deacon* case that the conduct of the Commissioner in terms of sections 87 and 88 of the Act in seizing and detaining goods should not be exempt from the constitutional requirements of just administrative action and the common-law principles of natural justice, he held that detention under s 88(1)(a) was the very first step to set in motion a process of establishing whether forfeiture should take place and that to require a hearing before detention made little sense and was impractical The learned judge therefore held that the *audi* principle had to be regarded as excluded in respect of a decision taken at that stage that stage which, if correct, would mean that Van Loggerenberg had not been obliged to afford the applicants a hearing before he detained the trailer

It is not necessary for present purposes to decide whether the learned judge's conclusion in this latter respect was correct or not. Indeed, the issue was not fully debated before me. But the decision in that regard again draws attention

to what is truly in issue and what needs to be stated, namely, that the applicants *in casu* have come to court alleging that the first applicant's lawful possession of the trailer was disturbed by the trailer being impounded and that it should therefore be returned. They did not seek to attack Van Loggerenberg's exercise of the powers confirmed on him by the Customs Act or to review his actions as administratively unfair. The importance of this is illustrated by the following passage from the judgment of Cloete AJA (as he then was) in *Capri Oro (PTY) Ltd v Commissioner of Customs and Excise* 2001(4) SA 1212(SCA) at 120DH where, after having referred to the *Deacon* case, *supra*, he said:

> "But in that matter the applicant attacked the Commissioner's exercise of the power conferred on him by s 93.... In the present matter the appellants did not attempt to make out such a case. ***It appears necessary to state the obvious: There is a fundamental distinction between a case that a seizure of goods took place in circumstances not sanctioned by the Act; and a case which accepts that goods were legitimately seized, but seeks to impugn the exercise of the discretion vested in the officials mentioned in s 88, or the Commissioner by s 93.*** In the *Tiffany's Jewellers* case this Court (at 587B-C quoted the following passage in *Vincent & Pullar Ltd v Commissioner for Customs and Excise* 1956(1) SA 51(N) and (at 587 *–in fine*) expressly approved it:
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> '(T)he only ground upon which the Court could declare a seizure as invalid, would be if it were made illegally. The Court has no discretion in regard to the question as to whether or not the breach of the customs regulations was one which was so serious as to justify a seizure and forfeiture. The discretion on those questions is clearly vested in the Commissioner under s 143.'
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> The s 143 to which reference was made corresponds to s 88 of the Act; and the same reasoning applies to s 93." (My emphasis).

A similar position seems to me to prevail in the present case. Van Loggerenberg's decision is not being attacked. The only issue is whether he was lawfully entitled to act as he did. Accordingly, in my view, counsel for the respondent was clearly correct in submitting that the argument advanced on behalf of the applicants in fact begs the question – which is not whether there

is a Customs Union agreement in terms of which a trailer licensed and registered in Botswana can lawfully be used to convey goods between two points in South Africa without any other formalities, but whether the detention of the trailer was illegal

In considering this latter question, it seems to me to be irrelevant whether the facts will ultimately show that the trailer was not imported illegally into the country and was being lawfully used under the aegis of the Customs Union agreement The issue is purely whether Van Loggerenberg was entitled to detain it under s 88(1) It is not suggested that he is not an "officer" as envisaged by the section. It is not suggested by the applicant that he did not have the power to seize articles in terms of the section. therefore do not see how it can be held that his actions were unlawful. He is, after all, empowered under the section to detain any vehicle for the purpose of establishing whether it is liable to forfeiture under the Act And that will be the case under s 87(1) of the Customs Act if, despite the applicants' protestations of denial, it is eventually established that the trailer was imported into this country contrary to the provisions of the Act (even if it was used to convey a cargo under the Customs Union agreement)

Van Loggerenberg says it is his intention to investigate whether the trailer has been imported, and there is nothing on the papers to gainsay that to be the case That being so, even if the first applicant was in fact lawfully using the trailer, Van Loggerenberg was entitled to detain it.

The applicants are of course not left without recourse As understand the Customs Act, in terms of s 89(1) thereof they are entitled to institute proceedings to claim the trailer in question subject to a notice being given under s 96(1)(a). But on the papers as they presently stand, do not see how can find that it can be said that merely because the applicants allege that the trailer was not imported into this country but was being used lawfully under the aegis of the Customs Union agreement, the detention of the trailer was illegal when Van Loggerenberg was entitled under s 88(1)(a) to detain it for the very purpose of establishing whether the facts as alleged by the applicants are true.

As have said, this Court can only declare the detention as invalid if it was made illegally and the discretion vested in Van Loggerenberg was itself not in issue before me. However, even if it was, in the light of the fact that the trailer appears to have been in this country for an extended period of time (since 2003) without those using it being in possession of the requisite customs documents (which Van Loggerenberg says should have been issued to it but which the applicants deny are issued – and for purposes of deciding this matter on the papers it is necessary to accept Van Loggerenberg's allegations in that regard) one would be hard pressed to find that Van Loggerenberg could not reasonably have held a suspicion in regard to the possible importation of this trailer. But it is unnecessary to deal with this issue any further as it is not pertinently before Court.

First respondent's counsel argued that Van Loggerenberg must be afforded the opportunity of doing precisely what he is entitled to do under the section in question *viz* to investigate whether the trailer in question is potentially liable to forfeiture under the Customs Act. In my view he is correct, and the applicant has failed to make out a case for the relief that it seeks

The application is therefore dismissed, with costs.

17/12/2004

L.E. LEACH
JUDGE OF THE HIGH COURT