REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(SOUTH EASTERN CAPE LOCAL DIVISION)

Case No.: 3014/2005

Date Delivered:

In the matter between:

CBM HOT X-PRESS CC	**1st Applicant**
WEST TRUCKING (BOTSWANA) (PTY) LTD	**2nd Applicant**

and

THE COMMISSIONER FOR SOUTH AFRICAN REVENUE SERVICE	**1st Respondent**
MINISTER OF FINANCE	**2nd Respondent**
DIRECTOR OF PUBLIC PROSECUTIONS FOR THE EASTERN CAPE	**3rd Respondent**
THE CROSS-BORDER ROAD TRANSPORT AGENCY	**4th Respondent**

JUDGMENT

CHETTY, J

[1] The adjudication of this application requires legislative interpretation and it is apposite to commence this judgment by setting out the relevant statutory enactments. The Republic of South Africa is party to a Southern African Customs Union agreement. S 6 of the **Transport Deregulation Act 80 of 1988** under the rubric, Road Transportation agreements with other governments, authorised the State President to:-

> *"(1) . . . enter into an agreement with the government of a country or territory whereby arrangements are made with that government for the control and regulation of the transportation of persons or goods between the Republic and that country or territory."*

Ss (2) provided that: "*an agreement referred to in subsection (1) and any amendment thereof shall be published by the State President by proclamation in the Gazette, shall come into force on the date of signature of the agreement or amendment or on the later date stipulated in the agreement or amendment and shall have the force of law and the provisions thereof shall prevail in the case of conflict between such provisions and the provisions of this Act or any other law.*"

[2] The agreement envisaged by s 6 was duly concluded between the governments of the Republic of South Africa, the Republic of Botswana and the Kingdoms of Lesotho and Swaziland and published in the Government *Gazette* as proclamation 100 on 18 October 1991 as Schedule A to the

Transport Deregulation Act. Its heading proclaims it to be a Memorandum of Understanding (MoU) and announces that the contracting states concluded the agreement because they were: "*desirous of facilitating and maintaining effective road transportation arrangements and, in particular, equitable share in road transportation between their countries.*"

Article 1 of the agreement is the definition section. Of relevance to this application is the definition of vehicle which, in terms of paragraph (h) means: - "*(i) in relation to passengers, any mechanically propelled road vehicle which:*

(aa) is constructed or adapted for, and used on the roads for the conveyance of passengers;

(bb) has at least nine seats in addition to that of the driver; or

(cc) is registered in the territory of one Contracting Part and owned and operated by or on behalf of any carrier authorised in that territory to convey passengers and is temporarily imported into the territory of another Contracting party for the purpose of the international conveyance of passengers to, from or in transit through that territory; and

(ii) in relation to goods, any mechanically propelled road vehicle or trailer or semi-trailer which is:

(aa) constructed or adapted for, and used on the roads for the carriage of goods; and

(bb) registered in the territory of one Contracting party and is temporarily imported into the territory of another Contracting party for the purpose of the international carriage of goods for delivery at or collection from any one point in or in transit through the latter territory."

[3] The objectives of the contracting parties are succinctly stated in Article II of the **Transport Deregulation Act** to be:-

"(a) to 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.

(b) to achieve an equal distribution of permits by January 1992; and

(c) to achieve and maintain an equitable non-discriminatory infrastructure cost recovery system which shall not inhibit the operation of this Memorandum of Understanding . . ."
(emphasis supplied)

[4] The **Transport Deregulation Act,** save for s 6 was repealed by s 53 (2) of the **Cross Border Transport Act 4 of 1998** (the **CBRT**) with the proviso that any schedule to that Act, in *casu,* Schedule A, would continue to be in force as a schedule to the **CBR**T as if it were an agreement entered into in terms of s 2 of the **CBRT.** The reason for its enactment is stated thus in its preamble:-

> ***"SINCE there is a need to improve the unimpeded flow by road of freight and passengers in the region, to liberalise market access progressively in respect of cross-border freight road transport, to introduce regulated competition in respect of cross-border passenger road transport and to reduce operational constraints for the cross-border road transport industry as a whole:***
>
> ***AND SINCE there is a need to enhance and strengthen the capacity of the public sector in support of its strategic planning, enabling and monitoring functions;***
>
> ***AND SINCE there is a commitment to empower the cross-border road transport industry to maximise business opportunities and to regulate themselves incrementally to improve safety, security, reliability, quality and efficiency of services;"*** (emphasis supplied)

[5] To place the present application in proper perspective it is necessary not only to advert to the salient facts but moreover to present a historical overview to the present dispute. Extrapolated from the papers they amount to

the following. The first applicant is a close corporation registered and incorporated in the Republic of South Africa in terms of the **Close Corporations Act.** It conducts its business in the Republic of South Africa. The second applicant is a company registered and incorporated in terms of the company laws of the Republic of Botswana. The second applicant is the owner of a trailer bearing the registration number B985ACT (the trailer). The first applicant habitually utilised or hired trailers from the second applicant. It is not clear from the papers whether the trailer here in issue was merely being utilised on some contractual basis or hired to the first applicant. However, the precise contractual relationship is irrelevant in deciding the matter.

[6] The empty trailer was coupled to a mechanical horse when it was stopped at a roadblock within the Nelson Mandela Metro by the first respondent's senior customs and excise officer Mr *Van Loggerenberg.* It is common cause that the fully laden trailer had been offloaded in Uitenhage and was returning to Gauteng. *Van Loggerenberg* noticed that the trailer (unlike the articulated horse) bore a Botswana registration and requested the driver, Mr *Tshabalala,* to furnish him with the requisite importation documents pertaining to the trailer. None were forthcoming. The only documentation proffered related to the mechanical horse. *Van Loggerenberg* detained the trailer in order to ascertain whether it was liable to forfeiture in terms of s 87 of the **Customs Act.**

[7] The trailer's detention galvanised the applicants to launch an urgent application in this Court against the first three respondents under case number 4087/04. The application was opposed and the matter argued before *Leach* J on 17 November 2004. The argument advanced on behalf of the applicants was, as herein, based squarely upon the provisions of the customs union agreement. It is apparent from the judgment that the learned judge considered that the true issue to be determined before him was the question whether *Van Loggerenberg* was lawfully entitled to act as he did. After an examination of the relevant statutory provisions of the **Customs Act** and case law the learned judge concluded 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 the two points in South Africa without any other formalities, but whether the detention of the trailer was illegal.**" The learned judge found that *Van Loggerenberg* was entitled to detain and impound the trailer in terms of the relevant provisions of the **Customs Act** to determine whether it was liable to forfeiture and dismissed the application with costs. An appeal to the Full Court met a similar fate, hence the present proceedings.

[8] As adumbrated hereinbefore the applicants base their case squarely on the provisions of clause 5 of Article VI of the MoU which provides:-

> *"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."*

The applicants contend that as the trailer had not been imported into the Republic of South Africa but used to transport goods between two points in the Republic of South Africa their conduct is sanctioned by the MoU and thus lawful. The first respondent on the other hand contends that the trailer constitutes goods in terms of Article II of the agreement as it had been imported into the Republic of South Africa without the relevant requirements of the **Customs Act** having been complied with and that VAT should have been paid on the customs value of the trailer in terms of the **VAT Act 89 of 1991**. The argument raised by the fourth respondent is that the grant of the declaratory relief sought would render lawful that which the **CBRT** prohibits.

[9] The golden rule in statutory interpretation was articulated by *Joubert* JA, with reference to various authorities, in ***Adampol (Pty) Ltd v Administrator, Transvaal 1989 (3) SA 800 (AD)*** at p 804 B as:-

> ***"The plain meaning of the language in a statute is the safest guide to follow in construing the statute. According to the golden or general rule of construction the words of a statute must be given their ordinary, literal and grammatical meaning and if by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to their ordinary meaning unless it is apparent that such a literal construction falls within one of those exceptional cases in which it would be permissible for a court of law to depart from such a literal construction, eg where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent."***

Clause (5) is clear and unambiguous. In plain language it says that the registration and licensing of vehicles of one contracting party shall be valid for operations in the territories of the other contracting parties without any other requirements or formalities. The whole purpose of the legislation was to facilitate the transportation of goods between the contracting states. S 6 of the **Transport Deregulation Act**, the objectives of the MoU as set out in Article II, the preamble to the **CBRT** and the **CBRT** itself specifically refer to road transportation *between* and *across* the territories of the contracting states. The MoU, although it expressly recognised and preserved the rights of the member states concerned with the regulation of commercial cross-border traffic to apply their domestic laws, clearly does not permit the conveyance of goods between two points within the borders of a contracting state. Each of the legislative enactments referred to above specifically refer to the transportation of goods *between* or *across* the borders of the contracting

states. The MoU is certainly not a licence to do what the applicants contend they are entitled to.

[10] The applicants' admitted conduct in conveying goods between two points within the Republic of South Africa, which they confirm having done for the past 18 months, amounts to cabotage in terms of the **CBRT**. Cabotage is defined in s 1 of the **CBRT** as:

> *". . . transport undertaken on a public road by a foreign carrier with a vehicle which involves:*
>
> *(a) the onloading or offloading of freight or passengers between two points in the Republic; or*
>
> *(b) the onloading of freight or passengers in the Republic for conveyance to a third state which is not the state of registration of the vehicle used for such transport and where such state of registration is not traversed;"*

That conduct no doubt precipitated the intervention of the fourth respondent in these proceedings. The fourth respondent is enjoined by s 4 (3) of the **CBRT** to:

> *". . . perform all such acts and do such things as are reasonably necessary for or ancillary, incidental or supplementary to the*

performance of its advisory, regulatory, facilitatory and law enforcement functions as contemplated in this Act."

Its intervention in these proceedings was therefore statutorily enjoined.

[11] It follows from the aforegoing that the interpretation contended for by the applicants' leads to a patent absurdity. It would permit conduct expressly prohibited in terms of the **CBRT** and the **Customs and Excise Act.** In the result the following order will issue:

The application is dismissed with costs.

D. CHETTY
JUDGE OF THE HIGH COURT