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IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

10 October, 31 October 2006 **CASE NO: 33101/06**

In the matter between:

A Saleem **Applicant**

and

The Minister of Finance **First Respondent**

South African Revenue Service **Second Respondent**

Customs and Excise – detention, sealing and seizure of goods regarded as liable to forfeiture by an officer – officer not properly inquiring into defense of applicant – seizure invalid.

Van Rooyen AJ

[1] This is an urgent application for the setting aside of the seizure of goods in terms of the Customs and Excise Act 91 of 1964 ("the Act") by a senior anti-smuggling officer, Mr. P van der Merwe ("vdM"), in the employ of the Second Respondent, the South African Revenue Service ("SARS").

Background

[2] On Friday the 29th September 2006 vdM detained the goods of a shop known as *Pay Less Fashion*, Brakpan in terms of section 88(1)(a) of the Act. The SARS detention notice *inter alia* reads as follows: (1) it mentions s 88(1)(a) of the Act and under "Particulars of goods seized" the following is written in by hand: "Proof of Imported Goods. For further investigation Shop Sealed. Bag with documents Seal no: 955814. Shop Sealed No : 955812 & 955815". The location of the goods detained and sealed was indicated as "kept at your premises". Information as to how the goods would be released is stated on the document. If supporting documents (Commercial invoice, MAWB, packing list etc) are provided, the goods may be released. VdM told applicant that he could approach him on 3 October 2006.On Monday 2 October the applicant and a Mr.

Chen approached vdM. Mr. Chen was introduced as the owner. Applicant indicated that he was Mr. Chen's spokesperson since Mr. Chen was not fluent in English. VdM was given more or less 10 invoices. They did not contain a proper description of the goods and it could not be gleaned from the invoices that the goods had been delivered to *Pay Less Fashion.*

[3] A formal notice from SARS dated 3rd October 2006 was delivered to the applicant on that day. He was informed that the goods were liable to forfeiture in terms of the Act and that the goods would be seized in terms of s 88(1)(c). On the 5th October the seal was lifted and all the detained goods were seized and removed to a state warehouse in Johannesburg. Some goods, which did not contain labels or other indications that they were imported, were not removed.

[4] Applicant avers that he commenced business approximately a year ago. It is a small venture which sells clothing at low cost to members of the public. He had been purchasing stock from shops in *China City* and in Fordsburg, Johannesburg. He pays his suppliers in cash. He states that he conveyed this to vdM and produced some receipts. VdM expressed his dissatisfaction with the receipts. He undertook to take vdM to his suppliers. The latter was not amenable to his request. The shop was then sealed. A bag of receipts was also sealed. The action taken by SARS, as described earlier, then followed. Applicant states that vdM removed "all of my stock", making it impossible for him to trade. His shop was now "empty" and he did not have money to buy new stock. He submits that the conduct of the Respondents' officials was unlawful and that they had exceeded the powers conferred upon them by the Act. Applicant denies that he had committed any offense that would trigger the seizure provision of the Act. The balance of the statement conveys legal argument.

[5] In his answering affidavit vdM states that the initial detention of the goods and the sealing off of the premises was effected in terms of section 4(12) read with section 88(1)(a) of the Act. After vdM came to the conclusion on the 3rd October that the goods were liable to forfeiture under the Act, the goods were seized on the 5th and removed to a Government warehouse in terms of section 88(1)(c) of the Act. The goods were,

according to vdM, removed in order to enable the applicant to proceed with business at his premises and not to inconvenience him unnecessarily. Not all the goods on the premises were seized, according to vdM. He states that he is advised that the present seizure is in essence provisional and that the Courts have the final say in the matter. Any applicant may reclaim goods seized in terms of the Act. The applicant must, however, in accordance with section 89(1)-(2) read with section 96(c) give one month's written notice before the serving of the process. The said notice must also be given within 90 days after the said seizure and any proceedings must be instituted within 90 days of such written notice.

[6] VdM also averred that according to s 96(c) the Court is only empowered to deal with an application such as the present if the "State, the Minister, the Commissioner or an officer refuses to reduce the one month's notice." The present application is, accordingly barred by this provision since no such notice for reduction was given by the applicant. The usual procedure is that an aggrieved person will approach the Commissioner by means of a letter of demand, where after the Commissioner will reconsider his position.

[7] The background to the present seizure lies, according to vdM, in departmental complaints which were received that it was very difficult to determine ownership of businesses and indications were that businesses were trading with illegally imported goods "due to the fact that invoices and/or importation documentation were not available." On the 29th September, vdM and a colleague approached the applicant. He explained to him that he was investigating whether his business conducted its affairs in compliance with the Act. Also that the primary purpose of his visit was to determine whether the goods offered for sale were imported in accordance with the Act. He then inquired whether applicant had any proof of importation or invoices of the clothing, shoes, bags etc sold in the shop. It was noticed that inscriptions of "Made in China" and Chinese inscriptions appeared on most of the items. The applicant informed him that he was not the owner of the shop, that he did not know who the owner was and that the owner visited the shop from time to time. VdM informed him that he required documentation from whom the goods were obtained. At that stage vdM was *prima facie*

of the opinion that in the light of his observations and the applicant's explanation the goods were liable to forfeiture in terms of s 87(1) of the Act.

[8] VdM granted the applicant an opportunity to provide him with supporting documentation. Up to the application the applicant could only provide him with two or three invoices. However, the goods were not properly described or described at all. The sealed invoices did not relate to the specific business. Only on the 2nd October did vdM realize that a Mr. Chen was in fact the owner. He had seen him at the shop after he had sealed the shop. Had he known that Mr. Chen was the owner, he would have served the detention notice on him. He was provided with ten more invoices, but the goods were, once again, not properly described and it could not be gleaned from the invoices that the goods had been delivered to *Pay Less Fashion.* The few invoices did not, in any way, explain the huge stock. The imported stock was not traceable to any other importer. VdM submits that there could be no doubt that Mr. Chen had a beneficial interest in the stock during the importation thereof. The applicant was also requested to provide vdM with proof of the ownership of the business. On the 2nd October he was handed a copy of a SARS document which reflected a VAT number and an income tax number. The VAT number referred to a Mr. G Char and the tax number to a Mr. PY Lu. He then informed them that since the goods were apparently imported goods and they could not provide him with copies of any importation documents, nor invoices that *Pay Less Fashion* had purchased the goods locally, that the goods were liable to forfeiture. He explained to them what this meant in terms of the Act. Thereafter Mr. Chen applied to be registered for income tax purposes and also applied for amnesty. On the 5th October he seized those goods which, to his mind, were clearly imported and for which Mr. Chen could not supply supporting importation documents. Even if he alleges that he has bought the goods from a local distributor, he must be in a position to furnish invoices so that the goods may be traced to the original importer. Any other interpretation of the Act would leave the respondents powerless. The estimated value of the goods seized is R1,2 million. vdM referred the Court to s 102(1) read with Rule 101.1, s 102(5) and section 87(1) of the Act as having based the seizure.

In closing, vdM stated that he denied all averments of applicant which were inconsistent with his answering affidavit.

Points in Limine

[9] It was firstly argued by Mr. *de Wet*, for the Respondents, that I should dismiss the application on the basis that the applicant was not, in terms of s 96 of the Act, permitted to bring the application before the expiry of a period of one month after delivery of a notice in writing to the respondents. The applicant may, on good cause shown, request from the State, the Minister, the Commissioner or an officer a reduction of the period of one month and if this is refused, a High Court having jurisdiction may, upon application of the litigant, reduce such period where the interest of justice so requires.
I agree with Mr. *Omar*, for the applicant, that s 96 is not applicable to the present matter. S 89 of the Act permits the person from whom goods were *seized* or the owner to institute proceedings *within* 90 days after having notified the Commissioner in writing. If such proceedings are not instituted or delivery is refused then the goods shall, subject to s 90, be deemed to be condemned and forfeited. S 90 provides what the Commissioner is then permitted to do with the goods. However, such forfeiture is subject to remission or mitigation by the Commissioner on application by the owner in terms of s 93.

[10] In the present matter there was no formal notification to the Commissioner as such before the application was filed. Section 88(1)(d) provides that the *Commissioner* is authorized to *seize*. This contrasts with s 88(1) which empowers an *officer* to *detain* and s 4(12) which empowers an *officer*, *inter alia*, to *seal*. However, the delegation of powers of the Commissioner to officers in s 3 of the Act, led to vdM's having *seized* the goods. It was, accordingly, quite understandable that applicant's attorney contacted vdM on the 6th October and conveyed to him that an application was being filed. VdM, who was on study leave, requested that a copy of the application should be faxed to his office and the attorney was requested to liaise with a Mr. Nedermeyer. A fax was sent to vdM's office at 16:22 and to Mr. Nedermeyer at 16:51. A Ms Pelle acknowledged receipt and undertook to ensure that the application would be given to Mr. Nedermeyer. The application was also filed with the Registrar of this Court on the 6th October. A time is

not stated, but filing with the Registrar would have followed upon the filing with the State Attorney at 15:30. In the ordinary course an attorney would only file an application against an organ of state with the State Attorney. In the present matter steps were also taken during the afternoon of filing to contact the officer, who had acted on behalf of the Commissioner when seizing the goods. It would, accordingly, be in the interests of justice to regard the notification which took place in the present matter as having sufficiently complied[1] with the notification as required by s 89, even if it were to have taken place a little later than the filing at the Registrar. A robust approach should be taken when compliance with such a rule is considered.[2]

As a last point, vdM pointed out that since Mr. Chen is the owner, the applicant does not have *locus standi* to bring the application. I do not agree: s 89 explicitly permits the person from whom the goods were seized to also file an application.

The points *in limine* are, accordingly, dismissed.

Evaluation of the Merits

[11] It was argued by Mr. de *Wet* that vdM was justified in stating in his letter of 3 October 2006 that the goods were liable to forfeiture in terms of s 87. He had seized the goods as a result of the omission of the applicant to provide the supporting invoices or import documents in terms of ss 101 and 102 of the Act. In his answering affidavit vdM also refers to Commissioner Rule 101.01, which sets out more details.

S 101(1)(a) provides:

> Any person carrying on any business in the Republic shall keep within the Republic in one of the official languages such books, accounts and documents relating to his transactions as may be prescribed by rule and such books, accounts and documents shall be kept in such form and manner and shall be retained for such period as may be so prescribed.

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[2] See *Msoki v Minister of Law and Order and Others* 1990(3) SA 245(C) at 248G-H *per* Hoberman AJ: "I am mindful of the fact that, as stated by Holmes JA, in *Commercial Union Assurance Company of South Africa Ltd v Clarke* 1972 (3) SA 508 (A) at 516B - C, "a robust and practical approach as distinct from a legal one' is to be adopted in dealing with legislative provisions which require a claimant to give due notice prior to the institution of proceedings."; also see *Springs City Council v Occupants of the Farm Kwa- Thema 210* 2000(1) SA 476(LCC) *per* Gildenhuys J.

Rule 101.01 provides as follows:

Any person carrying on a business in the Republic, shall, unless otherwise authorized by the Controller, keep within the Republic on the premises where such business is conducted and in one of the official languages reasonable and proper books, accounts and documents relating to his transactions comprising at least the following – (a) *in the case of imported goods*: copies of the relative import bills of entry, bills of lading or other transport document, suppliers invoices, packing lists, bank stamped invoices, payment advices and other documents required in terms of section 39 of the Act... (s 39 deals with bills of entry) (emphasis added)

S 102(1) provides:

Any person selling, offering for sale or dealing in *imported* ... goods ... shall, when requested by an officer, *produce proof as to the person from whom the goods were obtained* and, if he is the importer or manufacturer or owner, as to the place where the duty due thereon was paid, the date of payment, the particulars of entry for home consumption and the marks and numbers of the cases, packages, bales and other articles concerned, which marks and numbers shall correspond to the documents produced in proof of the payment of the duty. (emphasis added)

S 102(5) provides:

If in any prosecution under this Act or in any dispute in which the State, the Minister or the Commissioner is a party, it is alleged by or on behalf of the State or the Minister or the Commissioner or such officer that any goods...have been imported...it shall be presumed that such goods...have been imported...unless the contrary is proved.

S 78(1) provides:

Any person who contravenes any provision of this Act or who fails to comply with any such provision with which it is his duty to comply, shall, even where such contravention or failure is not elsewhere declared an offence, be guilty of an offence."[3]

[12] It was not in dispute that vdM is an officer in terms of s 4 of the Act. S 88(1)(a) of the Act provides that an *officer* may detain goods at any place for the purpose of establishing whether those goods are liable to forfeiture under the Act.[4] It has been held that the officer is not required to apply the *audi alteram partem* rule when deciding to

[3] *Obiter,* I should mention that this kind of general criminalization in legislation is questionable within the spirit, if not the letter, of section 35 of the Constitution of the Republic of South Africa. Every person detained is entitled to be informed promptly of the reason for being detained. When the existence of an offense is dependent on a general clause such as ss 101 or 102, the Constitutional rights of a detainee are at risk. The reverse onus for prosecutions in section 102(5) is also Constitutionally questionable – see *S v Zuma and Others* 1995 (2) SA 642 (CC).

[4] See *South African Revenue Service (Customs and Excise) v Desmonds Clearing and Forwarding Agents CC* 2006 (4) SA 284 (SCA) where it was held that the officer was entitled to detain but that since there had been no contravention of the Act the trailers, which were drawn by a truck which had broken down, had to be released from detention after the investigation.

detain.[5] However, s 88(1)(a) must, in terms of s 39(2) of the Constitution of the Republic of South Africa, be interpreted in accordance with the spirit, purport and objects of the Bill of Rights. S 14 of that Bill protects privacy as a fundamental right. Privacy includes the right of everyone not to have their possessions seized. S 36 sets out the justifiable limitations. The limits of protection will vary according to the circumstances. What will be unreasonable in regard to a private home could very well be reasonable in connection with a business.[6] S 88(1)(a) should, accordingly, be interpreted as requiring that the officer, before he *detains*, must have reasonable grounds[7] to suspect that the goods are goods which, after further examination, might be (imported) goods liable to forfeiture.[8] S 88(1)(c) provides that if such goods are liable to forfeiture under the Act the *Commissioner* may *seize* those goods. All officers are authorized by s 3 to perform any duty or exercise any power conferred upon the Commissioner. Any decision made by such an officer may, however, be withdrawn retrospectively by the Commissioner.

[13] VdM avers that when he first arrived at the shop he explained who he was and that he was investigating whether the applicant was conducting his affairs in accordance with the Customs and Excise Act. He then enquired whether applicant had any proof of importation documentation or invoices to prove from whom the goods had been obtained. He also informed him that he was detaining all the goods in the shop in the light of the

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[5] *Henbase 3392 (Pty) Ltd v Commissioner, SA Revenue Services, and Another 2002(2) SA 180(T).* In the same judgment Van der Westhuizen J, however, said that for seizure and forfeiture the *audi* rule had to be applied.

[6] See *Magayane v Chairperson,North West Gambling Board and Others* 2006(5) SA 250(CC) at para [55].

[7] As interpreted in the light of s 39(2) of the Constitution –see *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) where Langa DP (as he then was) says at [52]: "The proper interpretation of s 29(5) therefore permits a judicial officer to issue a search warrant in respect of a preparatory investigation only when he or she is satisfied that there exists a reasonable suspicion that an offence which might be a specified offence has been committed. The warrant may only be issued where the judicial officer has concluded that there is a reasonable suspicion that such an offence has been committed, that there are reasonable grounds to believe that objects connected with an investigation into that suspected offence may be found on the relevant premises and, in the exercise of his or her discretion, the judicial officer considers it appropriate to issue a search warrant. These are considerable safeguards protecting the right to privacy of individuals. In my view, the scope of the limitation of the right to privacy is therefore narrow. It is now necessary to consider briefly the purpose and importance of s 29(5)." What applies for a judicial officer would, most certainly, also apply to an inspector who detains to establish whether the goods are liable to forfeiture in terms of s 87.

[8] For purposes of sealing it is explicitly required in s 4(12) that the officer must have reason to believe that any contravention under this Act has been or is likely to be committed in respect thereof or in connection therewith.

Chinese labels and Chinese inscriptions on the goods and the applicant's indication that he was not the owner. He required importation documentation or proof from whom the goods were obtained.

[14] In so far as detention and sealing are concerned, Mr. *Omar,* for the applicant, argued that the immediate detention and sealing of the shop had been too drastic a step. It prohibited the applicant from trading and exercising his right to run a business in terms of s 22 of the Constitution.[9] In *Affordable Medicines Trust and Others v Minister of Health of RSA and Others*[10] Ngcobo J said at [59]-[60]:

> [59] What is at stake is more than one's right to earn a living, important though that is. Freedom to choose a vocation is intrinsic to the nature of a society based on human dignity as contemplated by the Constitution. One's work is part of one's identity and is constitutive of one's *dignity*. Every individual has a right to take up any activity which he or she believes himself or herself prepared to undertake as a profession and to make that activity the very basis of his or her life. *And there is a relationship between work and the human personality as a whole. 'It is a relationship that shapes and completes the individual over a lifetime of devoted activity; it is the foundation of a person's existence'.*
> [60] Though economic necessity or cultural barriers may unfortunately limit the capacity of individuals to exercise such choice, legal impediments are not to be countenanced unless clearly justified in terms of the broad public interest. Limitations on the right to freely choose a profession are not to be lightly tolerated. But we live in a modern and industrial world of human interdependence and mutual responsibility. Indeed we are caught in an inescapable network of mutuality. Provided it is in the *public interest and not arbitrary or capricious, regulation of vocational activity for the protection both of the persons involved in it and of the community at large affected by it is to be both expected and welcomed.* These considerations are reflected in the text of s 22. (footnote omitted and emphasis added)

[15] There is no indication on the papers that vdM or his personnel did anything after detention to "establish" whether the goods were imported. Applicant was expected to provide the supporting documentation and, in the absence thereof, the investigation would be complete. Given the serious nature of the intervention by way of detention and sealing and the invasion of the right to trade and the dignity of the applicant, I believe that it was not enough for vdM – judged on the papers – to have done nothing more than wait upon the applicant to provide proof. The term "establish" must surely mean much more than waiting upon the applicant. It implies investigation. The inactivity after detention of the officer involved justifies the reasonable inference that he never intended

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[9] S 22 provides:"Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."

[10] 2005 (6) BCLR 529 (CC); 2006 (3) SA 247 (CC) at para [59]-[60]

to investigate further. In fact he contends that officers would be "powerless" if they could not depend on the applicant's having to provide proof by way of documentation. The ambit of an investigation would, of course, depend on the circumstances of each case. In the present matter there could not, reasonably, have been more than a suspicion that the goods were imported goods in terms of s 88(1). VdM states that he was *prima facie* of the view that the goods were subject to forfeiture as a result of the "Made in China" tags and the absence of importation documentation or proof from whom the goods were purchased. He was, accordingly, entitled to detain for purposes of establishing whether the goods were subject to forfeiture. I am of the view that the mere fact that goods bear tags that they are "Made in China" is not sufficient in itself to justify an inference that the goods were imported. The global commercial village in which we live, makes it possible for all sorts of advertising and labels. Even the mark "Polo" has been shown to be local, in spite of a similar international mark by Ralph Lauren.[11] Further investigation by vdM and his team should have been conducted. If there was fear that the goods could be removed if not sealed, an alternative less invasive arrangement should have been made – at least for a few days more. Before an officer is permitted to seal he or she must, in terms of s 4(12), have reason to believe that any contravention under the Act has been or is likely to be committed in respect thereof or in connection therewith. Officers must constantly bear in mind that as organs of the State they have to act in the public interest, as stated by Ngcobo J in the *Affordable Medicines*[12] case. I doubt whether the immediate action was in the public interest and justified the intervention in the rights of the applicant and his employer to earn a living and their dignity. In spite of my concerns in this regard, I need not dwell on the detention and sealing any longer. The issue before me is whether the decision to seize after detention was valid.

[16] S 87 states the criterion which is applicable in deciding whether goods are liable to forfeiture and, accordingly to be seized. The relevant part of the section provides as follows:

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

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[11] *LA Group Ltd v & Another v B & J Meltz Ltd and Others* [2005] JOL 15756(T).
[12] *Supra.*

found: provided that forfeiture shall not affect liability or 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. (emphasis added)

In *Capri Oro (Pty) Ltd v Commissioner of Customs & Excise*[13] Cloete AJA (as he then was) stated:

The phrase "contrary to the provisions of this Act" cannot be interpreted as congruent with the phrase "in respect of which any offence under this Act has been committed" as the one or the other phrase would then be tautologous. *The conclusion is inescapable that an offence under the Act is sufficient, but not necessary, to render the goods liable for forfeiture under s87(1).* (emphasis added)

It was, accordingly, understandable that vdM considered whether the applicant had acted contrary to ss 101,102 and Rule 101.01. They all deal with supporting evidence.

[17] When applicant was confronted by vdM he asked vdM to accompany him to his suppliers where he had bought the goods for cash. In terms of s 102 he was "selling, offering for sale or dealing" in what, *prima facie* seemed to be imported goods. The section requires that applicant must "produce proof as to the *person* from whom the goods were obtained, and if he is the importer or manufacturer or owner (proof) as to the place where the duty due thereon was paid...". However, vdM refused to accompany applicant to such persons and thus made it practically impossible for him to produce proof as to the persons from whom the goods were obtained. It might be said that the appropriate *modus operandi* for applicant would have been to have convinced those persons to accompany him to vdM. But this would amount to an unreasonable and impractical approach.

[18] The seizing of goods is a serious matter which impacts upon both privacy and dignity. Within a rule of law state,[14] organs of state, such as the officer acting in the place of the Commissioner, should apply his mind properly to the jurisdictional facts, of which he must be convinced of, before seizing. To simply base the decision to seize on the absence of supporting documentation was not justified. Of course, the first leg of s 102

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[13] 2001(4) SA 1212 at 1218 A.

[14] In *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others*[14] Chaskalson P (as he then was) stated that the exercise of public power is regulated by the Constitution: "One of the constitutional controls referred to is that flowing from the doctrine of legality."[14] This approach is based on the rule of law. A warrant issued by a magistrate or a decision by an inspector who acts without such a warrant, must be based on the jurisdictional facts necessary to permit him to issue that warrant.

could be satisfied by providing proof by way of invoices. But that is not what s 102 necessarily requires: the applicant could have produced proof in another manner *eg* by taking the officer to the persons from whom he had bought the goods. There is no absolute requirement of documentation here. There was, accordingly, a substantial omission; an omission to consider a factual circumstance which the applicant said existed and could exonerate him. Had vdM or a member of his staff accompanied the applicant and it amounted to a wild goose chase, the officer could at least have said that he had seriously attempted to consider the full range of relevant facts in terms of s 102.

[19] Rule 101.01 does not take the matter further. It deals with the *importer's* having to keep import bills of entry, bills of lading or other transport documents, suppliers invoices, packing lists, banked stamped invoices, payment advices and other documents required in terms of s 39 of the Act. The applicant stated to the officer that he was not an importer and, therefore, the said documents (which must, narrowly, be read on the basis of *cognoscitur a sociis*) deal with the typical documents which an *importer* must have. This is also true of s 39, to which Rule 101.01 refers.

[20] Finally, the officer should have investigated whether the goods were in deed imported goods. For all he knew the goods were manufactured in South Africa, in spite of the "Made in China" tags and the Chinese inscriptions on the goods. My impression is that the officer focused only on one aspect: the insufficiency of invoices. The officer has, with respect, misunderstood the jurisdictional facts of which he should have been convinced in terms of s 102 when he decided to seize. If his reference to s 102(5) was intended to invoke the reverse onus, then that was also wrong. The reverse onus applies to a prosecution or a dispute with the Minister, the Commissioner or an officer at a later stage and cannot relieve the officer of his initial duty to properly consider and be convinced that the jurisdictional facts were present for a seizure. I might mention that it would seem urgent that the Legislature review the powers of officers in section 4 in the light of the judgment of the Constitutional Court in *Magayane v Chairperson,North West Gambling Board and Others.*[15]

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[15] 2006(5) SA 250(CC).

[21] The Bill of Rights, according to s 8 of the Constitution, binds all organs of state and demands high standards of respect for the rights thus enshrined. The Customs and Excise Act grants enormous powers to officers and, given the fact that they do not even need a warrant from a magistrate, those powers must be exercised with the utmost respect for the rights of persons who fall under their jurisdiction. The officer had seriously to apply his mind to the existence of the jurisdictional facts and it was not for the applicant to convince him in the sense of an onus. This was no prosecution where a pre-democratic onus on the accused could exist. S 102 requires proof of the person from whom he bought and if such a person is pointed out by the applicant, the officer should decide, after discussion with such a person, whether it amounts to "proof" judged in the context of all the relevant factors. The officer's decision is an administrative decision based on the probabilities. Onus, in the sense of a criminal or civil trial, does not arise. I am, in any case, convinced that in a criminal trial the reverse onus would be Constitutionally interpreted to mean an evidential onus. Even in a civil dispute where deprivation of rights of an individual is in issue, the onus should not be more than an evidential one where the State seeks to seize. Nevertheless, at the heart of the error of the officer lay his omission to inquire properly so as to come to a rational decision.[16]

[22]The facts in the present matter differ substantially from the facts in *Capri Oro (Pty) Ltd v Commissioner of Customs & Excise*[17] where it was clearly established that the jewels had been brought into the country unlawfully and that that had been sufficient to seize the jewels in terms of the Act. In *Standard Bank van Suid-Afrika h/a Stannic en 'n Ander v Minister van Veiligheid en Sekuriteit* [18] it is also stated that it was not in dispute that the vehicle had been imported illegally. In the present matter the dispute was whether applicant was, indeed, an importer or had bought from another person.

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[16] *Shoprite Checkers (Pty) Ltd v Ramdaw NO* 2001 (4) SA 1038 (LAC). Also see *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 (3) SA 265 (CC): "[87] The role of the Courts has always been to ensure that the administrative process is conducted fairly and that decisions are taken in accordance with the law and consistently with the requirements of the controlling legislation. If these requirements are met, and if the decision is one that a reasonable authority could make, Courts would not interfere with the decision." – *per* Chaskalson CJ.

[17] 2001(4) SA 1212 (SCA).

[18] 1998(3) SA 924(O) at 928-9.

[23] My conclusion is, accordingly, that it clearly emerges from the answering affidavit that vdM did not apply his mind rationally to the relevant issues. This made his decision to seize invalid.

I order as follows:

1. The seizing of the goods from the applicant's premises at shop 7, Brakpan Plaza, Voortrekker Road is declared to have been unlawful
2. The Second respondent must, at its own costs, restore into applicant's possession at the said shop the goods listed in Schedule A on or before Friday 27 October at 16:00.
3. Second Respondent must pay the costs of the applicant

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JCW van Rooyen
Acting Judge of the High Court
31 October 2006

For the Applicant : Zehir Omar from Zehir Omar Attorneys Johannesburg

For the Respondents : HJ de Wet instructed by the State Attorney, Pretoria