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

CASE NO: 35978/07

CLEAR ENTERPRISES (PTY) LTD	Applicant
and	
THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	First Respondent
CROSS-BORDER ROAD TRANSPORT AGENCY	Second Respondent
CART BLANCHE MARKETING	Third Respondent
THE INTERNATIONAL TRADE ADMINISTRATION COMMISSION (INTERVENING PARTY)	Fourth Respondent

CASE NO: 51504/07

CLEAR ENTERPRISES (PTY) LTD	Applicant
and	
THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	First Respondent
CROSS-BORDER ROAD TRANSPORT AGENCY	Second Respondent
CARTE BLANCHE MARKETING	Third Respondent

JUDGMENT

MURPHY J

1. This matter involves two applications launched by the applicant against the respondents in relation to the detention and seizure of certain vehicles by

the agents of the first respondent. The two applications are largely similar, with obvious factual differences, but with substantially similar relief being claimed in terms of similar applicable legal principles.

2. Both applications were opposed by the first respondent ("the Commissioner") only. The International Trade Administration Commission ("the ITAC") sought leave to intervene as a respondent, which leave I refused at the commencement of the proceedings for reasons which I will discuss later.

3. Both applications were set down on the same date and were argued simultaneously. The application brought under case number 35978/07 will be referred to in this judgment as "the first application", while the application brought under case number 51504/07 will be referred to as "the second application".

4. The trucks owned by the applicant relevant to the applications are a Leyland DAF Rigid truck with registration number B955ALU ("the Leyland truck"), a Mercedes Benz truck with registration number B786AKB ("the Mercedes Benz truck"), and an ERF truck with registration number B540AKU ("the ERF truck"). All three trucks were duly licensed and registered in the Republic of Botswana.

5. The Commissioner contends that the trucks were imported into South Africa contrary to the provisions of the Customs and Excise Act 91 of 1964 ("the Act"), and hence are liable to forfeiture in terms of section 87 of the Act. The Commissioner takes the view that the applicant has engaged in a "scam" devised and implemented by its shareholders to import trucks into South Africa with the aim of unlawfully evading the provisions of the Act. In terms of section 88 of the Act various officials are granted the power to detain *inter alia* vehicles and goods for the purpose of establishing whether such are liable to forfeiture. If such goods or vehicles are found to be liable to forfeiture they may thereafter be seized by the Commissioner (section 88(1)(c)). Section 89 lays down certain procedural requirements in respect of any legal challenge to a seizure of a vehicle or goods in terms of section 88.

6. It appears from the evidence that the Leyland truck entered the Southern African Customs Union ("SACU") for the first time through Durban harbour on or about 11 October 2006 and left South Africa by entering Botswana sometime between 11 October 2006 and 24 November 2006, the date when it was registered in Botswana. The Mercedes Benz and ERF trucks were imported into Botswana in 2004 and 2005 respectively.

7. On 23 April 2007, Mr G van Loggerenberg, an employee of the Commissioner, acting in terms of the provisions of section 88, detained the

Leyland truck in Port Elizabeth. The Mercedes Benz and ERF trucks had been detained earlier and simultaneously by Van Loggerenberg also in Port Elizabeth, but on 22 February 2007.

8. The relief sought by the applicant in the first application is in respect of the Leyland truck. In its initial form the relief sought was an order declaring the detention of the truck unlawful (prayer 1), or alternatively, the continued detention of the truck to be unlawful (prayer 2), and also an order directing the Commissioner to immediately restore the vehicle into the applicant's possession (prayer 3). Finally, it sought a declarator in terms which were varied during the course of argument, which in its final form reads:

> "4. That the movement of a vehicle from a country within the common customs area into the Republic of South Africa ("RSA") after such vehicle had been lawfully imported into such other country within the common customs area and such aforesaid movement either:-
>
> a) being pursuant to a permit issued by the competent authority of such other country to a carrier as defined under Article 1(a) of the Memorandum of Understanding on Road Transportation in the common customs area (promulgated by Proclamation 100 in Government Gazette No 13576 on 18 October 1991 and hereinafter referred to as the "MOU"); or
>
> b) pursuant to an exception as provided for under Article VIII of the MOU; and

c) inclusive of when transport is undertaken with such vehicle on a public road in the RSA involving the on and/or off loading of freight between two points within the RSA either by a foreign carrier in terms of an appropriate permit issued in terms of Section 31 of the Cross Border Road Transport Act, 4 of 1998 or without such permit by someone who is not a foreign carrier,

4.1 does not attract import or export duties; and

4.2 is not regarded as goods imported into the Republic of South Africa as envisaged in the Customs and Excise Act, 91 of 1964, unless such vehicle is to be disposed of.

9. In his heads of argument counsel for the applicant indicated in relation to the first application that the applicant would not persist in its claim for the relief sought in prayers 1 and 3. The reason for its so doing is that on 16 October 2007 the ITAC acting in terms of section 41(g) of the International Trade Administration Act seized the truck detained by the Commissioner. As a consequence, the applicant has elected not to persist with the relief sought in prayer 3, aimed at gaining restoration of the vehicle, having decided to pursue relief against the ITAC instead.

10. The second application seeks to review and set aside the seizure by the Commissioner of the Mercedes Benz and ERF trucks, an order for the immediate return of the vehicles and a declarator in the same terms as that sought in the first application. On or about 23 April 2007, as I have said,

Van Loggerenberg detained the Leyland truck in terms of the provisions of section 88 of the Act. A notification was thereafter issued to the applicant and handed to the driver of the Leyland truck. The notification (Annexure FA3 to the founding affidavit) is issued in the name of the anti-smuggling team of The Department of Customs and Excise. It provides a description of the truck and is signed by Van Loggerenberg and informs the applicant that the vehicle is detained in terms of section 88 of the Act to establish whether it is liable to forfeiture.

11. This vehicle was never seized by the Commissioner. As I have already explained, it was ultimately seized by the ITAC on 16 October 2007. However, subsequent to the issue of the detention notice, Van Loggerenberg addressed a letter to the applicant's attorneys dated 23 April 2007, the same date as the detention of the vehicle. That letter reads as follows:

> **"SUBJECT: DETENTION OF VEHICLE IN TERMS OF SECTION 88(1)(A) READ WITH SECTION 87 OF THE CUSTOMS AND EXCISE ACT NO 91 OF 1964**
>
> Our telephone conversation earlier today has reference.
>
> Please be advised that the under mentioned vehicle was detained by this office in terms of Section 88(1)(a) in order to establish whether or not the vehicle is liable to forfeiture in terms of Section 87 of the Customs and Excise act no 91 of 1964, as amended.

1) Leyland DAF truck with reg. B955ALU

The vehicle is currently detained at the Westview State Warehouse in Port Elizabeth under ref. UG 39/2007. A copy of the detention notice are attached herewith. (sic)

This office has *prima facie* reason to believe that the vehicle is not duly imported as provided for in the Customs and Excise Act, 91 of 1964. In this regard your attention is drawn to the judgment handed down in Port Elizabeth in the matter of CBM Hot Express CC & West Trucking (Botswana) (Pty) Ltd v The Commissioner for the South African Revenue Service and others under case number 3014/05.

When the vehicle was detained the driver was questioned amongst other (sic) on the aspect of ownership. The driver indicated that the vehicle was owned by Eric Muller. A delivery note issued by Carte Blanche Marketing was found in the vehicle which would suggest that the vehicle was operating under Carte Blanche Marketing.

You are requested to submit the following documentation and information to this office by 2 May 2007:

a) Proof of due entry in terms of Section 12 and Section 38(1) of the Customs and Excise Act for the importation of the vehicle.

b) Proof of payment of duty and vat on the vehicle. (Customs documents DA500, SAD500 or CCA1).

c) Lease agreements and all contracts in respect of the vehicles.

d) When did the vehicle enter the Republic of South Africa? Please submit proof.

e) What is the purpose of the vehicle in the Republic of South Africa? Please submit copies of transport contracts.

Failure to proof (sic) that the vehicle was duly imported in terms of the Customs and Excise Act will render the vehicle liable to forfeiture as contemplated in Section 87(1). If goods are found to be liable to forfeiture, the Commissioner may seize the goods in terms of Section 88(1)(c) of the said Act.

Your attention is also drawn to the provisions of section 93 of the Customs and Excise Act, and you are hereby invited to make such representations as you deem necessary.

Your co-operation in this matter will be appreciated."

12. The applicant's attorney replied to the letter on 25 April 2007 as follows:

"**MY CLIENT: CLEAR ENTERPRISES BOTSWANA (PTY) LTD - DETENTION OF THEIR VEHICLE: LEYLAND DAF TRUCK REGISTRATION NUMBER B955ALU**

Your letter dated 23rd April 2007 refers.

I confirm that in this instance I also represent Clear Enterprises Botswana (Pty) Ltd.

I attach hereto:-

1. A copy of the Motor Vehicle Licence issued by the Department of Road Transport and Road Safety in the Republic of Botswana for motor vehicle

with registration number B955ALU and which reflects that Clear Enterprises (Pty) Ltd is the owner.

2. A copy of the Certificate of Road Worthiness issued to my client in the Republic of Botswana.

3. A copy of the Southern African Customs Union permit issued to my client.

Your Mr Van Loggerenberg has already been provided with the cabotage permit issued by the Cross Border Road Transport Agency in the Republic of South Africa, but I again attach a copy for ease of reference.

I attach a copy of the Certificate of Incorporation of my client.

I place on record that you contend my client has irregularly dealt with the vehicle detained in this matter. That is denied.

On the 12th April 2007 my client's attorneys in that matter Messrs. De Bruyn Van Der Elst & Bokwa Inc. addressed a letter to the State Attorney acting on your behalf in which they set out the basis upon which the vehicles in that matter entered the Republic of South Africa under the Memorandum of Understanding "MOU". It was pursuant to such agreement that my client brought the vehicle now detained into the Republic of South Africa.

You have repeatedly refused to recognize the MOU as applying to my client, or in writing to deny such fact.

Your attention is again directed at such letter. You have not responded to the invitations extended therein.

My client will act as they may be advised.

Your letter dated the 24th April 2007 refers.

I shall procure confirmation of my mandate and forward same to you."

13. On 26 April 2007 the applicant's attorney addressed a further letter to the Commissioner confirming that the applicant's places of business were in Botswana to be at two addresses in Gabarone and Lobatse. On 3 May 2007, the applicant's attorney addressed another letter to the Commissioner enclosing certain other documentation requested by the Commissioner. However, it contended that such information was irrelevant in that the Memorandum of Understanding did not require such information to be furnished.

14. Prior to the Leyland truck being detained by the Commissioner, a cabotage/temporary permit was issued by the Cross-Border Road Transport Agency, the second respondent, in terms of the Cross-Border Road Transport Act 4 of 1998, in respect of the Leyland truck. The permit authorised and was restricted to the conveyance as set out in the description annexed to the cabotage permit. The route description was defined as: "goods between points situated within the Republic of South

Africa". The permit was also issued subject to certain standard conditions (see Annexure FA8 of the founding affidavit). Paragraph 15 and 16 of the conditions of the cabotage permit make it clear that the permit is only valid until the date specified in the permit and for the route specified. The date of the permit is recorded as being valid from 11 April 2007 until 25 April 2007.

15. The applicant has contended that the Leyland vehicle was brought into South Africa unladen and had thereafter been used within South Africa by the third respondent, Cart Blanche Marketing CC, strictly in accordance and with due compliance with the provisions stipulated in the cabotage permit issued by the second respondent.

16. The term cabotage is defined in the Cross-Border Road Transport Act 4 of 1998 as follows:

> "Means transport undertaken on a public road by a foreign carrier with a vehicle which involves -
>
> (a) the on-loading or off-loading of freight or passengers between two points in the Republic; or
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> (b) the on-loading 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."

17. Section 31 of the Cross-Border Road Transport Act 4 of 1998 prohibits cabotage. However, in terms of section 31(2) the Regulatory Committee appointed in terms of the statute must give effect to the prohibition on cabotage, but may consider lifting the prohibition on cabotage and issue an appropriate permit in a case where the state of a foreign applicant accords a South African carrier equal treatment in this regard; or it is satisfied that there is no South African carrier who can provide a similar service and where lifting the prohibition is in the best interests of the Republic.

18. The applicant has made application for more than one cabotage permit and has provided a motivation to the second respondent for that purpose. That motivation (Annexure FA28 to the founding affidavit) reads as follows:

> **"MOTIVATION TO THE CROSS BORDER ROAD TRANSPORTATION AGENCY "CBRT" PRETORIA FOR THE ISSUE TO CLEAR ENTERPRISES (PTY) LTD REGISTERED IN BOTSWANA "The Company" OF CABOTAGE PERMITS IN TERMS OF THE CROSS BORDER ROAD TRANSPORT ACT, ACT 4 OF 1998 AS AMENDED "The Act"**
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> ---
>
> The company applies to the CBRT for the issue to the company of cabotage permits on the motivation set out hereunder:-
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> 1. The company is the owner of motor vehicles registered in Botswana and undertakes carriage of goods as envisaged in the Memorandum of Understanding on Road Transportation in the common custom area

pursuant to the Customs Union Agreement between the government of Botswana, Lesotho, South Africa and Swaziland "MOU".

2. The company vehicles enters the Republic of South Africa in accordance with the Southern African Customs Union Agreement concluded on 12 December 1969 and/or Article II or VIII of the MOU.

3. The company vehicles are duly registered and licenced in Botswana and are valid for operations in the Republic of South Africa pursuant to the MOU.

4. 4.1 The Regulatory Committee may consider lifting the prohibition on cabotage and issue an appropriate permit in a case where:-

The state of a foreign applicant accords a South African carrier equal treatment in this regard (Section 31(2)(a) of the Act).

4.2 The Southern African Customs Union Agreement concluded on 12 December 1969 provides in Article 15 thereof that:-

"Each contracting party undertakes to extend to the motor transport operators registered in areas of the other contracting parties treatment no less favourable than that accorded to motor transport operators registered within its own area for the conveyance of goods ... for reward or in the course of any trade or business."

4.3 It is common cause that Botswana accords South African carriers treatment no less favourable than that accorded to Botswana carriers within Botswana. As the Committee is aware South African carriers in Botswana are issued permits styled "BA" permits to undertake conveyance of goods from one point in Botswana to another point in Botswana.

5. It is accordingly respectfully submitted that the company in these circumstances should be afforded the opportunity of being granted cabotage permits in accordance with Section 31(2)(a) of the Act.

6. In addition it is submitted that:-

The company qualifies for the issue to it of cabotage permits in accordance with Section 31(2)(b) of the Act for the following reasons:-

6.1 A South African carrier namely Cart Blanche Marketing CC who has contracted with Volkswagen, to transport their goods between two points within the Republic of South Africa. Cart Blanche Marketing CC in rendering the service to Volkswagen utilizes the vehicles of South African carriers on a subcontract basis which vehicles are owned by such contractors and registered in the Republic of South Africa. Such contractors are according to Cart Blanche Marketing CC unable to fulfill their transport needs within the Republic of South Africa and have approached the company to render such services within the Republic of South Africa.

6.2 Cart Blanche Marketing CC will it so require independently confirm the aforegoing facts.

6.3 Verification of such facts will be found in the fact that Cart Blanche Marketing CC will pay for all permits issued to the company. Such fees as may be prescribed by yourselves.

6.4 It is respectfully submitted that the use by Cart Blanche Marketing CC of the services of the company as set out above is in the interests of the Republic of South Africa in terms of the Act and the MOU."

19. From the above, it is then clear that the applicant's vehicle registered and licensed in Botswana was brought into South Africa unladen, according to the applicant, not for the purpose nor with the intention of disposing of the vehicle. Upon entering South Africa, all relevant information in respect of the vehicle was detailed in the register at the Skilpadsnek border post desk. The vehicle, according to the applicant, was intended to be utilized in South Africa for a specific period of time by the third respondent, mainly Cart Blanche Marketing CC ("Cart Blanche"). The use of the vehicle by Cart Blanche was in accordance with an oral agreement of hire in respect of the vehicle between Cart Blanche and the applicant. The applicant contends that it was also in terms of the cabotage permit. However, the applicant also avers that because Cart Blance is a South African closed corporation it did not require a cabotage permit. Accordingly, the applicant is of the view

that the vehicle was not imported into South Africa subsequent to its licensing and registration in Botswana and was not disposed of by the applicant in South Africa. Thus, the applicant's vehicles, including the Leyland truck, are from time to time utilized by clients of the applicant such as Cart Blanche in terms of oral agreements which clients then conduct transport of goods, in accordance with the terms and conditions of a permit issued, such as the cabotage permit.

20. With regard to the Mercedes Benz truck and the ERF truck, these were detained, as I have said, on 22 February 2007. Similar documentation in respect of them was delivered by the applicant to the Commissioner. These vehicles were brought into South Africa unladen from Botswana and were parked on premises in Port Elizabeth where they were detained. The applicant states that these vehicles were not used by the applicant or any other entity before they were detained, because they were awaiting the necessary cabotage permits to be issued. Because the Commissioner is of the view that these vehicles are liable to forfeiture, he has seized both of them in accordance with the provisions of section 88(1)(c) of the Act.

21. To recap: with regard to the Leyland truck, the applicant takes the position that it was entitled in terms of the provisions of the cabotage permit issued in respect of the Leyland truck to carry goods between two points within the Republic of South Africa during the period of validity as stipulated in the

permit and that it at all times acted in compliance with and in accordance with the provisions of the Memorandum of Understanding and the cabotage permit. The Memorandum of Understanding is the memorandum referred to as "the Memorandum of Understanding on Road Transportation in the Common Customs Area" which was published as a schedule to the Transport Deregulation Act 1988. I will discuss the provenance of the memorandum in due course. As regards the trucks forming the subject of the second application, these according to the applicant, were not imported but were merely awaiting cabotage permits and would similarly benefit from the provisions of the Memorandum of Understanding.

22. The exchange of correspondence between the Commissioner and the applicant with regard to the truck established that the Leyland truck was a secondhand truck at the time it was imported into Botswana in October or November 2006. The Commissioner points out that no documentation proving compliance with the Act has been furnished, because it is the applicant's case that the Leyland truck had not been imported into South Africa but had been used to transport goods in terms of the Memorandum of Understanding in terms of the valid cabotage permit. According to the evidence retrieved by the Commissioner from records, the Leyland truck entered South Africa through the Skilpadshek border post on 6 December 2006 and remained in South Africa until the date of its detention. The

vehicle therefore was only in Botswana for a period of one and a half months before it was brought into South Africa.

23. With regard to the Mercedes Benz and ERF trucks, the Commissioner contends that there is no factual information which enables the Commissioner to verify the applicant's explanations pertaining to the use of the trucks since their arrival in the customs union and the legitimacy of the agreements in terms of which the trucks have been operated. According to the documentation available, both trucks were secondhand trucks imported into Botswana during 2004/2005. There is no evidence regarding when the trucks were first brought into South Africa, despite the Commissioner having requested such evidence. Although cross-border transport permits in respect of both vehicles were issued by the relevant Botswana authority, they were issued for transport to be undertaken between Botswana and South Africa and were only valid for the period 23 February 2007 until 22 May 2007. No evidence could be found that the two trucks actually undertook cross-border trips during the said period. After considering the evidence, the Commissioner was satisfied that the applicant failed to prove that the two trucks had not been imported into South Africa and accordingly decided to seize them in terms of section 88(1)(c) of the Act on 13 May 2007, after having detained them on 22 February 2007.

24. Before the Commissioner acquires the power to detain or seize vehicles such as those subject to the present dispute, the jurisdictional precondition for his doing so must be objectively established, being that set out in section 87 read with section 88(1) of the Act, namely (as relevant in the present dispute) that they constitute "goods imported... or otherwise dealt with contrary to the provisions of this Act or in respect of which any offence under this Act has been committed". Section 87 and section 88(1) read as follows:

> "87. **Goods irregularly dealt with liable to forfeiture.** - (1) Any goods imported, exported, manufactured, warehoused, removed or otherwise dealt with contrary to the provisions of this Act or in respect of which any offence under this Act has been committed (including the containers of any such goods) or any plant used contrary to the provisions of this Act in the manufacture of any goods 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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> (2) Any -
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> (*a*) ship, vehicle, container or other transport equipment used in the removal or carriage of any goods liable to forfeiture under this Act or constructed, adapted, altered or fitted in any manner for the purpose of concealing goods;

(*b*) goods conveyed, mixed, packed or found with any goods liable to forfeiture under this Act on or in any such ship, vehicle, container or other transport equipment; and

(*c*) ship, vehicle, machine, machinery, plant, equipment or apparatus classifiable under any heading or subheading of Chapters 84 to 87 and 89 of Part 1 of Schedule No. 1 in which goods liable to forfeiture under this Act are used as fuel or in any other manner, shall be liable to forfeiture wheresoever and in possession of whomsoever found.

88. 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.

(*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.

(*b*A) No person shall remove any ship, vehicle, plant, material or goods from any place where it was so detained or from a place of security determined by an officer, magistrate or member of the police force.

(*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.

(*d*) The Commissioner may seize any other ship, vehicle, plant, material or goods liable to forfeiture under this Act.

25. The term "goods" is defined in section 1 to include "all wares, articles, merchandise, animals, currency, matter or things". The definition being so wide thus would include a vehicle for the purposes of section 87(1), for instance an imported vehicle on which duty has not been paid. The reason for forfeiting such a vehicle would thus be different to the reason contemplated in section 87(2) where forfeiture is permitted in the case of vehicles which were used in the removal or carriage of any other goods liable for forfeiture. Accordingly, there is no basis to conclude that the reference in section 87(2) should be construed to limit the meaning of the word "goods" in section 87(1). In other words, a vehicle may be both goods and a means of conveyance. When the vehicle as goods is imported or dealt with contrary to the provisions of the Act, it is liable to forfeiture for that reason. However, where the vehicle is used as a means of conveyance in respect of other irregularly imported goods, then the ground for forfeiture is that it was used as a means of conveyance. In other words, the Commissioner has the power under section 87(1) read with section 88(1) to regard an imported vehicle on which duty has not been paid as "goods" and to detain it for the purpose of determining whether it is liable to forfeiture and then on concluding that such is liable to forfeiture to then seize it in terms of section 88(1).

26. The applicant's first submission is that the Commissioner did not have the power to detain and seize the vehicles because the vehicles had not been imported into South Africa, nor had they been dealt with contrary to the provisions of the Act, nor had any offence been committed. Its defence is that the scheme in which it was engaged was entirely lawful and in keeping with the provisions of the SACU Agreement and various other legislative instruments arising out of that agreement. The position it takes is evidenced most clearly in the terms of the declaratory relief that it seeks. It contends that the movement of the vehicle from a country within the common customs area into South Africa after such vehicle has been lawfully imported into that other country and such movement either being pursuant to a permit issued by the competent authority of such other country to a carrier as defined in the Memorandum of Understanding or pursuant to an exception as provided for in the Memorandum of Understanding; and inclusive of when transport is undertaken with such vehicle on a public road in South Africa involving the on and/or offloading of freight between two points within South Africa either by a foreign carrier in terms of an appropriate permit issued in terms of section 31 of the Cross-Border Road Transport Act of 1998 or without such permit by someone who is not a foreign carrier, does not attract import or export duties; and is not regarded as goods imported into South Africa as envisaged in the Act, unless the vehicle is to be disposed of. Stated in a different way, the applicant is contending that the movement of a Botswana

vehicle from Botswana pursuant to a permit issued by the Botswana authorities or pursuant to one of the exceptions stipulated in the Memorandum of Understanding, even if it involves cabotage by a foreign carrier, or the loading of freight between two points within South Africa by a non-foreign carrier using the vehicle, would not constitute the importation of goods into the Republic of South Africa and would thus not attract import duties, unless the vehicle is disposed of.

27. The position taken by the applicant requires some regard to be had to the legislative and regulatory framework.

28. In 1969 the countries of Botswana, Lesotho, South Africa and Swaziland concluded the Southern Africa Customs Union Agreement ("the 1969 SACU-agreement"). The agreement was one envisaged in the provisions of section 51 of the Act, the purpose of which being the maintaining of a free interchange of goods between the countries and the applying of the same tariffs and trade regulations to goods imported from outside the common customs area. Provision was made for the respective contracting parties not to impose duties on goods imported from outside the common customs area, being the territorial areas of the contracting parties, on importation of such goods from the area of another contracting party.

29. Article 15 of the SACU-agreement deals with rail and road traffic. In terms of it the contracting parties undertake that the transit through their areas of goods imported from outside the common customs area or exported to a country outside the common customs area from the areas of the other contracting parties shall not be subject to transport rate discrimination. Each contracting party is obliged to ensure that the tariffs applicable within its areas to the conveyance of goods by publicly owned transport to and from the other areas of the common customs area shall be no less favourable than the tariffs applicable to carriage of similar goods within its area. In terms of Article 15(3) each contracting party undertakes to extend to the motor transport operators registered in the area of the other contracting party's treatment no less favourable than that accorded to motor transport operators registered within its own area for the conveyance of goods or passengers for reward or in the course of any trade or business.

30. On 18 October 1991, with reference to Article 15 of the SACU-agreement, the government of the contracting parties being desirous of facilitating and maintaining effective road transportation arrangements, and in particular, equitable shares in road transportation between their countries agreed to a Memorandum of Understanding on Road Transportation in the Common Customs Area. By virtue of the powers vested in the State President by section 6 of the Transport Deregulation Act 80 of 1988, the State President

added the Memorandum of Understanding as Schedule A to the Transport Deregulation Act 80 of 1988.

31. Article II(1)(a) stipulates as the main objective of the contracting parties entering into the memorandum to be:

> "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."

32. Article III(1) provides that a permit shall be required for the carriage of goods or the conveyance of passenger under this Memorandum of Understanding except as otherwise provided for in Article VIII.

33. Article VIII makes provisions for exemptions and provides that no permit shall required in certain circumstances. The one relevant to the present dispute is Article VIII(h) namely for the movement of unladened vehicles.

34. Article IX(5) provides that the law of each contracting party shall within its territory apply in respect of all matters not regulated by the Memorandum of Understanding.

35. Article III(6) provides that permits that are issued under the Memorandum shall be as set out at Annexure B of the Memorandum. The wording of Annexure B has some relevance. Each permit is required to include the following statement:

> "This permit entitles the holder mentioned below to temporarily import the vehicle specified herein, subject to the terms and condition of this permit, into the country specified herein for the purpose of carrying goods or passengers for hire or reward or in the course of his industry, trade or business."

36. Other provisions of the Memorandum of Understanding provide that the registration and licensing of vehicles in the territory of one contracting party shall be valid for operation in the territory of another contracting party without any other requirement or formalities and that certificates of roadworthiness or fitness issued in the territory of one contracting party shall be valid in the territories of another contracting party.

37. There is some uncertainty about the current status of the Memorandum of Understanding in its guise as Schedule A to the Transport Deregulation Act 80 of 1988. However, the parties have advanced their cases on the basis that the Memorandum of Understanding still finds application.

38. As I have already explained, the essence of the applicant's case is that the vehicles were brought into South Africa from Botswana unladen and

accordingly did not require permits in terms of Article VIII(h). In respect of the Leyland truck, the applicant contends that it was utilized only with a cabotage permit issued by the second respondent and in accordance with an oral agreement of hire between the applicant and Cart Blanche. In respect of the Mercedes Benz and ERF trucks these were merely parked at premises in Port Elizabeth and were not being utilized as they were waiting for the cabotage permits to allow them to be utilized. Accordingly, the applicant submits that none of the trucks had been imported into South Africa and nor has it ever intended to dispose of them within South Africa.

39. As I understand the applicant's primary contention it is alleged that when Van Loggerenberg decided to detain and seize the vehicles, his conduct constituted administrative action in terms of the provisions of the Promotion of Administrative Justice Act ("PAJA"). A court or tribunal has the power to judicially review administrative action *inter alia* if the administrator who took it was not authorised to do so by the empowering provision (section 6(2)(a)(i)); if a mandatory and material procedure or condition prescribed by an empowering provision was not complied with (section 6(2)(b)); if the action was procedurally unfair (section 6(2)(c)); or the action was materially influenced by an error of law (section 6(2)(d)).

40. Although the applicant has raised various other grounds of review, its principal grounds of review are that the Commissioner, or at least Van

Loggerenberg, was not authorised by the empowering provision to detain and seize the vehicles primarily because the action was materially influenced by an error of law in relation to the scope and application of the Memorandum of Understanding. In short, in arranging its affairs as it did, the applicant did not import the vehicles into South Africa and consequently the condition precedent for detention and seizure had not been established. Because the vehicles were brought into the country unladen no permits were required.

41. While the applicant relies directly on the Memorandum of Understanding, the correct approach is that the rights, if any, derive not from the Memorandum of Understanding, but in domestic law would derive from their incorporation into the Transport Deregulation Act as Schedule A.

42. Counsel for the Commissioner, Mr. Meyer, has submitted that the Memorandum of Understanding in fact finds no application. The key purpose of the Memorandum of Understanding was to regulate the carriage of goods and the conveyance of passengers *between* or *across* the territories of the contracting parties. Moreover, a *vehicle* defined in the Memorandum of Understanding to mean in relation to goods any mechanically propelled road vehicle or trailer or semi-trailer which is 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 point in or in transit through the latter territory". Article IV deals explicitly with goods transported under the Memorandum of Understanding. It provides as follows:

> "1. A carrier of one contracting party may import either an empty or laden vehicle temporarily into the territory of another contracting party for the purpose of carrying goods including return loads -
>
> (a) between any point in the territory of one contracting party and any point in the territory of another contracting party; and
>
> (b) in transit across the territory of a contracting party."

43. Article IV(2) specifically provides that the competent authority of each contracting party is required to issue permits to carriers in its territory to engage in the carriage of goods referred to in sub-article 1 of article IV. Article IV(3) includes a prohibition that a carrier of one contracting party shall not carry goods between two points in the territory of another contracting party. This latter prohibition is aimed directly at the kind of activity which the applicant seeks to carry on in South Africa, although indirectly through agreements with parties such as the third respondent, Cart Blanche.

44. Mr Meyer submitted that from the expressly stated objectives and the various provisions cited that the only matters regulated by the Memorandum of Understanding are the undertaking of cross-border transportation of goods and the commission of cabotage. He submitted further that the factual basis of the applicant's case demonstrated quite clearly that the trucks were not being used for cross-border transportation but for the carriage of goods between points in South Africa. Accordingly, the Memorandum of Understanding finds no application. The Memorandum of Understanding is clearly related only to the temporary importation of vehicles into the territories of other contracting parties for the limited purposes there described. The domestic laws of the contracting parties remain applicable in their respective territories in respect of all matters not regulated by the Memorandum of Understanding, including then the permanent importation of vehicles and the regulation of intra-road transportation activities.

45. The word "import" is not defined in the Act. In *Beckett & Co Limited v Union Government* 1921 TPD 142, the court considered the meaning of the word "import" as used in the Wheat Conservation Act 17 of 1918, in which "import" was also not defined. Wheat flour had been landed in Durban initially with the purpose of immediately reshipping it to Mozambique. Whilst in Durban, however, the flour was resold to be exported abroad. The court held that the flour had been imported. Wessels JP stated (at 149):

"It appears to me that goods must be regarded either as being in transit or as having been imported. As soon as they are landed at a Union port and are not actually on their way to some other port, but are waiting in Union territory to be disposed of to the advantage of the importer, they are not in transit, but are imported."

The learned judge continued (at 151):

"They (the plaintiffs) may have thought that by so doing (storing the flour in a bonded warehouse at the instance of the customs officials) the goods were still in transit but that can make no difference to the legal aspect. No expression of opinion on the part of customs officials can alter the law or alter the character of the cargo of flour. It was the duty of the plaintiffs to make up their mind whether they would persist in their intention to treat the goods as being in transit or not."

In the same judgment Bristowe J reasoned as follows (at 153):

"If goods are intended to be used in the Union they can not be said to be not imported. And used includes not merely consumption, but also dealing with them, selling them, speculating with them. If contracts in regard to them are entered into or intended to be entered into in this country, then, in my opinion that is dealing with them in this country and they must be regarded as imported."

46. In *Commissioner of Customs and Excise v Strauss and Others* 1998(4) SA 593 (T) van Dijkhorst J referring to these *dicta* stated as follows (at 599F):

"It is clear from the above that the physical importation for use in the customs union amounts to "import" in terms of the Act, which creates the obligation to pay customs duty. The fact that use was to be temporary is irrelevant. The fact that the first respondent may have thought such importation to fall outside the scope of the Act (he in fact did so) is irrelevant. His subjective view of the legal implications of his acts is of no moment."

47. In the present case, although the evidence is uncertain on whether the applicant intended to permanently bring the vehicles into the country, it is on its own version quite evident that it intended to deal with the goods in the country and as such they can be regarded as being imported. Moreover, in terms of section 10(1)(c) of the Act for the purposes of the Act all goods consigned to or brought into the Republic shall be deemed to have been imported into the Republic, in the case of goods brought to the Republic over land, at the time when such goods entered the Republic. In other words, goods consigned to or brought into the Republic are deemed to have been imported and deemed further to have been imported at the time when such goods entered the Republic over land. It is evident from the provisions of chapter 5 of the Act that all imported goods are required to be cleared and declared for the purposes of liability for and payment of duties. Section 38(1)(a) provides that every importer of goods shall within 7 days of the date on which such goods are in terms of section 10 deemed to have been imported, or within such further time as the Commissioner may allow, make due entry of those goods in the form prescribed. In terms of section 39(1) a person entering any imported good for any purpose in terms of the

provisions of the Act shall deliver to the controller a bill of entry in the prescribed form setting forth the prescribed particulars and shall pay all duties due on the goods.

48. The Commissioner relies on the presumption in section 102(5) of the Act to the effect that the goods are presumed to be imported and that the onus rests on the applicant to rebut that presumption. Section 102(5) reads:

> "If in any prosecution under this Act or in any dispute in which the State, the Minister or the Commissioner or any officer is a party, it is alleged by or on behalf of the State or the Minister or the Commissioner or such officer that any goods or plant have been or have not been imported, exported, manufactured in the Republic, removed or otherwise dealt with or in, it shall be presumed that such goods or plant have been or (as the case may be) have not been imported, exported, manufactured in the Republic, removed or otherwise dealt with or in, unless the contrary is proved."

This provision makes it clear that the onus is on the applicant to produce evidence and documentation that the vehicles were not imported.

49. Likewise section 102(4) creates a presumption regarding the payment of duties. Insofar as the provision is relevant, it reads as follows:

> "If in any prosecution under this Act or in any dispute in which the State, the Minister or the Commissioner or any officer is a party, the question arises whether the proper duty

has been paid.....it shall be presumed that such duty has not been paid.....unless the contrary is proved."

50. The applicant has adduced no evidence and indeed has made no averment that it intends to return the vehicles to Botswana. Its contention is that it is entitled to engage in the scheme in which it engages by virtue of the provisions of the Memorandum of Understanding and a cabotage permit. There is accordingly no evidence countering the presumption of an importation nor the presumption that duty has not been paid. In any event, it s common cause that duty was not paid on the importation of the vehicles because the applicant does not consider them to have been imported.

51. From the above analysis it seems inescapable that at least *prima facie* the vehicles were imported and dealt with contrary to the provisions of the Act in that there was no compliance with sections 38 and 39 of the Act. Accordingly, the jurisdictional precondition for the exercise of power under sections 87 and 88 is present. A detention of the vehicle in terms of section 88(1)(a) is an interim measure pending the investigation into liability for forfeiture. If the goods are found to be liable to forfeiture, then the Commissioner may seize them in terms of section 88(1)(c) of the Act. The conclusion which I have reached therefore is that Van Loggerenberg was not influenced by an error of law regarding the applicability of the Memorandum of Understanding in the circumstances of this case for the reasons advanced by Mr Meyer. Accordingly, the mandatory condition

prescribed by the empowering provision, namely that the power can only be exercised if the goods were imported contrary to the provisions of the Act has in fact been complied with and accordingly the administrative action was authorised by the empowering provision as required by sections 6(2)(b) and 6(2)(f)(i) of PAJA. The applicant is not saved by the fact that it has paid duties to the Botswana government when the vehicles were imported into the Southern African Customs Union. The question is not whether duties were paid on import into SACU but whether duties were paid when the vehicles were imported into South Africa.

52. The applicant in its founding papers has raised in general terms grounds of review that the Commissioner acted unreasonably and took into account irrelevant facts and information and accordingly also failed to properly apply his mind to the questions involved. The case in this regard is not made out with reference to distinct failures. They relate, it seems to me, in the main to the Commissioner's unwillingness to agree to the interpretation of the legal framework sought by the applicant. The evidence discloses that the Commissioner fully apprised the applicant of his view and sought from it information with a view to rebutting the presumptions created by the statute. Information was furnished in less than complete form, but nevertheless the Commissioner applied his mind to it and considered all relevant considerations. Insofar as the Commissioner is alleged to have taken into account irrelevant considerations, such as an alleged incestuous

relationship between the various parties involved, such considerations if indeed irrelevant did not materially influence the ultimate decision. The Commissioner's decision in the final analysis was that the vehicles were imported contrary to the provisions of the Act and that conferred upon him sufficient power to act in the manner in which he did lawfully and reasonably. I do not understand the applicant to argue that there has been any procedural unfairness. It is quite evident that the applicant has been given a sufficient opportunity to put information before the Commissioner with a view to changing his viewpoint. No case has been made before me that the seizure of the vehicles is a disproportionate penalty in violation of any constitutional rights.

53. It follows from the above analysis that Van Loggerenberg had reasonable grounds for detaining and seizing the vehicles and that the presumptions operated to invest his exercise of discretion with a lawful, reasonable and procedural character. In the as yet unreported decision of *The Commissioner for the South African Revenue Service v Saleem* (case number 21/07) the Supreme Court of Appeal held that where a person is unable to produce documentation requested by the Commissioner this would normally constitute sufficient grounds for the Commissioner to conclude that the goods were liable to forfeiture and thus would entitle him to seize them. The case dealt with counterfeit goods, nevertheless the principles are equally applicable to the present case where the applicant

has failed to produce sufficient documentation which might have gone some way to prove compliance with the Act and thus rebutted the presumption that the goods were imported. In that decision Combrink JA held as follows (at paragraphs 12-13):

> "Faced with imminent seizure and forfeiture of the goods, one would have expected of a honest trader that he would have obtained copies of all relevant documents from his suppliers together with particulars of the person or the persons from whom he had purchased them with their contact details....I therefore take issue with the Judge in the court below that Van der Merwe had to do more by way of investigation than wait for documentary proof from respondent in order to establish that the goods were illegally imported. I also cannot agree that there was an obligation on Van der Merwe to accompany respondent to his suppliers. As stated earlier, respondent was under a statutory duty to maintain books of accounts and documents and to reflect from whom the goods were purchased. These provisions, I suggest, were introduced in the Act for the very purpose of facilitating the policing of the importation of goods into the country. The respondents inability to produce any such documents together with the suspicious conduct recorded above, were in my view sufficient grounds for Van der Merwe to reasonably conclude that the goods were liable to forfeiture. He was therefore entitled to seize them."

54. In relation to the Leyland truck the Commissioner only detained the vehicle for the purpose of determining whether it was liable for forfeiture. The ITAC seized it later and separate proceedings are pending with regard to the lawfulness and reasonableness of that seizure. Accordingly, whether or not the cabotage permit will save the Leyland vehicle from seizure is a matter

still to be determined in those proceedings. The seizures of the Mercedes Benz and ERF trucks by the Commissioner are presumptively lawful and reasonable by virtue of the applicant failing to produce sufficient documentation regarding the activities of those vehicles after they entered the country to the extent that the allegation of importation and non-payment of duty can be rebutted. There are no log books or the like outlining the trucks movements inside South Africa after entry and before their detention.

55. In view of the conclusions I have reached with regard to the merits, it is unnecessary to consider the Commissioner's point *in limine* about whether the founding affidavit was indeed an affidavit because it had not been duly attested to. I am prepared to assume, without deciding the matter, that the founding affidavit was indeed an affidavit for the purpose of determining the application on the merits.

56. Likewise, I consider it in the interests of justice to extend the time period in relation to the second application. In terms of section 89 of the Act, any proceedings challenging a seizure are to be instituted within 90 days of delivery of a notice as contemplated in section 96 of the Act, which notice in turn has to be delivered within 90 days after the date of seizure. In practice this means that the appropriate proceedings are to be instituted within 180 days from the date of seizure. The second application was not instituted within 90 days of the date of the section 96 notice. The applicant has

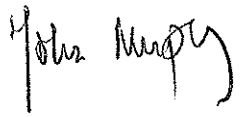
provided full reasons for the failure to have instituted the proceedings within 90 days and I was satisfied by them that it would be in the interests of justice rather to deal with the issues on the merits, as I have done, and accordingly I am prepared to extend the period. In the light of the decision to which I have come, it is not necessary to deal with the reasons.

57. At the commencement of the hearing, I dismissed the application of ITAC to intervene in the application between the applicant and the Commissioner. The application to intervene was predicated on the fact that ITAC had seized the truck in question but that the applicant had made no mention of that seizure in its replying affidavit and persisted with the relief sought against the Commissioner, namely that the detention and the continued detention of the vehicle be declared unlawful and that the vehicle be immediately released. By the time the matter was argued before me the applicant had abandoned that relief in relation to the Leyland vehicle and sought only a declarator that the detention of the vehicle was unlawful. It seems to me that the intervention of ITAC in the circumstances was no longer necessary in the light of that concession. Accordingly, I dismissed the application for intervention but reserved the costs of the application for intervention for determination by the court hearing the application for review of ITAC's decision to seize the trucks. In the event of the applicant not bringing an application to review that decision within 90 days of the order the intervening party may set the matter down for determining the costs. As

I have just explained, the reasoning for that order was that ITAC had no further interest in the present application other than the question of costs which I consider will be best dealt with after determination of the lawfulness and reasonableness of ITAC's conduct in relation to the seizure of the Leyland truck. To have granted the application for intervention after the concession was made would have only added unnecessarily to the applicant's costs.

58. With regard to the costs of the two main applications, I am satisfied that the matter was of sufficient complexity to justify employing two counsel.

59. In the premises, the applications under case number 35978/07 and case number 51504/07 are dismissed with costs, including the costs incurred in employing two counsel.



JR MURPHY
JUDGE OF THE HIGH COURT

Date Heard:	7-10 October 2008
For the Applicant:	Adv IJ Zidel SC, Johannesburg Adv JC Uys, Johannesburg
Instructed By:	Eugene Marais Attorneys, Johannesburg
For the 1st Respondent:	Adv JA Meyer, Pretoria Adv LG Kilmartin, Pretoria
Instructed By:	The State Attorney, Pretoria
For the Intervening Party:	Adv AF Arnoldi SC, Pretoria Adv T Khatri, Pretoria