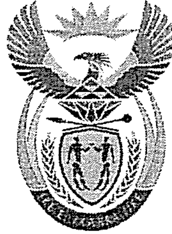


IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG DIVISION, PRETORIA

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

DATE 2010-08-26 SIGNATURE

CASE NUMBER: 33913/07
DATE: 27 August 2010

WEST TRUCKING (BOTSWANA) (PTY) LTD.
PLAINTIFF

V

COMMISSIONER OF SOUTH AFRICAN REVENUE SERVICES
1st DEFENDANT

THE MINISTER OF FINANCE
2nd DEFENDANT

THE DIRECTOR OF PUBLIC PROSECUTIONS
3rd DEFENDANT

THE CROSS BORDER ROAD TRANSPORT AGENCY
4th DEFENDANT

Judgment:
Mabuse J

JUDGMENT

MABUSE J:

1. The plaintiff is a company duly registered and incorporated in terms of the company statutes of the Republic of Botswana. Its

principal place of business is located at Ostrich Farm, Lobatse, in Botswana.

2. The First Defendant is a legal person established as such in terms of the provisions of the South African Revenue Services Act, 34 of 1997(" the Revenue Services Act") read with the provisions of the Customs and Excise Act, 91 of 1964(" the Customs Act"). The second defendant is the Minister of Finance, the third defendant the Director of Public Prosecutions and the fourth defendant the Cross Border Road Transport Agency, a juristic person established in terms of section 4 of the Cross Border Road Transport Act, 4 of 1998 as amended ("the Cross Border Act"), and which has its principal place of business at Building 8, Parkfield Court, 1185 Park Street, Hatfield, Pretoria. The relief sought in this action is directed only against the First Defendant, other defendants having been cited herein merely by reason of their interest in this above matter.

3. On or about 25 November 2004 the First Defendant took possession of, and detained, a trailer with registration number B985ACJ ("the trailer"), the property of the Plaintiff. The reason for and the basis of the First Defendant's action as well as the consequences flowing there from were as follows: The said trailer was detained in terms of the provisions of section 88 (1) (a) of the Customs Act for the purposes of establishing whether it was liable for forfeiture.

4. In terms of the provisions of section 88(1)(a) read with section 87 of the Customs Act, one Gideon Van Loggerenberg ("Van Loggerenberg"), who was at all material times acting as the First Defendant's Senior Customs Officer, issued a detention notice on 22 December 2004 to the Plaintiff's attorneys in which he informed them that the trailer was brought into this country in contravention of the provisions of the Customs Act. He informed

them furthermore that the Plaintiff would be given a final opportunity to furnish the First Defendant with reasons why the said trailer should not be seized in terms of the provisions of section 88(1)(c) of the Customs Act.

5. On or about 8 December 2004 and under case number 4087/2004, the Plaintiff lodged an urgent application ("the urgent application") in the South Eastern Cape Local Division in which it sought an order setting aside the First Defendant's detention of the said trailer and for its release. In the said urgent application, the Plaintiff was the second applicant.

6. On 21 December 2004 the Court adjudged the detention of the said trailer to be lawful and dismissed the urgent application. After the dismissal of its urgent application, the plaintiff sought, and was duly granted, leave to appeal against the judgment of the Court made on 21 December 2004. The Plaintiff failed to pursue the appeal and as a result it lapsed in terms of the provisions of Rule 49(6)(a) of the High Court Rules.

7. Subsequent to the dismissal of the Plaintiff's urgent application and, having found that the trailer had been imported into this country in contravention of the provisions of the Customs Act, the First Defendant, on or about 6 January 2005 seized the trailer in terms of the provisions of Section 88(1)(c) of the Customs Act and notified the Plaintiff. Moreover the Plaintiff had failed to respond to the First Defendant's invitation of 22 December 2004.

8. The consequences flowing from the First Defendant's aforesaid seizure were as follows: The Plaintiff lodged another application ("the second application") in the South Eastern Cape Local Division under case number 3014/2005, for an order in which it sought the First Defendant's seizure of the trailer to be set aside and for its release. In dismissing this second application the

court, on 30 May 2005, found the seizure of the trailer by the First Defendant to be lawful. An application for leave to appeal against the dismissal of the Plaintiff's second application was unsuccessful. After the dismissal of its application for leave to appeal against the said judgment, the Plaintiff petitioned the Supreme Court of Appeals for special leave to appeal against the dismissal of its second application. The petition was refused. After the Supreme Court of Appeals had turned down its petition, the Plaintiff took no further steps towards retrieving the trailer, as a result, the trailer became condemned and forfeited by virtue of the provisions of section 89(4)(d) of the Customs Act.

9. On 20 September 2008 the Plaintiff issued summons in this action against the four Defendants and sought the following orders, in particular, against the First Defendant. In the said summons the Plaintiff alleged, in its first claim, that it was the owner of the trailer with registration number B985ACG registered in the Republic of Botswana; the said trailer was manufactured in 1983 in this country by an entity known as Swan Trailers which no longer existed; on or about 25 November 2004 the First Defendant unlawfully and wrongfully took possession of the trailer and was still in possession of it; alternatively, if it should be found that the First Defendant was no longer in possession of the trailer, the Plaintiff alleged that, the First Defendant disposed of it with the knowledge of the Plaintiff's ownership thereof; and, that the value of the trailer was R185 000,00.

10. In respect of its second claim, the Plaintiff alleged that the First Defendant's conduct in taking possession of its trailer was wrongful and unlawful in that he purported to act in terms of the powers granted to him by the provisions of the Customs Act whilst at all relevant times he had no such powers in respect of the Plaintiff and, or, the Plaintiff's motor vehicle. In the alternative the Plaintiff claimed that the First Defendant should

and ought to have known that he had no powers in terms of the said Act for the aforesaid conduct. The Plaintiff alleged furthermore that the First Defendant knew or ought to have known that the Plaintiff was an entity that derived an income from the trailer and if the First Defendant remained in possession of such trailer, the effect would be the interruption of the Plaintiff's business that would inevitably result in a loss of income to the Plaintiff.

11. The Plaintiff alleged furthermore that, as a direct consequence of the First Defendant's conduct, it suffered a loss of income in the amount of R807 000,00 calculated at R800,00 per day for the period 25 November 2004 to 31 August 2007 and it would continue to suffer damages on a daily basis at R800,00 per day from 26 November 2004 to date of judgment.

12. The Plaintiff contends that the Defendant is obliged to pay it an amount to be calculated at a rate of R800,00 per day reckoned from 25 November 2004 to date of judgment and that the First Defendant refused to make any such payment, notwithstanding a demand having been made for it. Therefore the Plaintiff claims the return of the said trailer; in the alternative, payment of an amount of R885 000, 00 and other ancillary relief.

13. On 17 July 2008, the Defendants delivered their plea and counter claim to the Plaintiff's summons. In its first special plea, the First Defendant pleaded as follows to the Plaintiff's summons:

"*Special Pleas*

1: In terms of section 96(1)(a) of the Customs and Excise Act 91 of 1964 ("the Act) no legal proceedings may be instituted against the State, the Minister of Finance or the Commissioner of South African Revenue Services,(i.e. other words the First Defendant hereinafter referred to as "the Commissioner"), unless a

written notice complying with the particulars set out in section 96(a)(i)(ii) and (iii) has been served on the Commissioner.

2: *In terms of section 3(1)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2000 (" the ILPACOS Act"), no legal proceedings may be instituted against any organ of State unless a written notice setting out the particulars prescribed by section 3(2)(b) of the said Act has been served on the Organ(s) of the State within six months from the date on which the debt became due".*

The First Defendant contends that the Plaintiff failed to comply with either of the above statutory prescripts and prays that the Plaintiff's claims be dismissed with costs.

14. In its second special plea, The First Defendant raised a plea of *res judicata* against the Plaintiff's summons. The First Defendant contends that the Plaintiff is *estopped* from disputing any of the factual or legal issues determined by the Court in either of the two applications launched in the South-Eastern Cape Local Division and in particular the Courts' findings that the detention of the Plaintiff's trailer by the First Defendant was done lawfully in accordance with the provisions of section 88(1)(a) of the Customs Act; that the trailer had been imported into the Republic in contravention of the provisions of the Customs Act and that the seizure of the trailer was done lawfully in terms of the provisions of section 88(1)(c) of the Customs Act.

15. In this matter the Court is concerned only with the special pleas raised by the First Defendant and the Plaintiff's application for condonation for having failed to comply with the provisions of sections 3(1) and 3(2) of the Legal Proceedings Act and the provisions of section 96(1)(a) of the Customs Act, which was filed alongside these special pleas. The Plaintiff requests this Court to

deal with its application for condonation only in the event of this Court upholding the First Defendant's special pleas relating to its failure to give notice in terms of the said Act. In terms of a notice of motion issued on 28 January 2010, the Plaintiff approaches this court for an order in the following terms:

1. *"That, to the extent found necessary and applicable, the Plaintiff's failure to have complied with the provisions of sections 3(1) and 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act(hereinafter referred to as "the Legal proceedings Act"), be condoned in accordance with the provisions of subsection 3(4) of the Legal Proceedings Act.*
2. *That, to the extent found necessary and applicable, the Plaintiff's failure to have complied with the provisions of sections 89(2) and 89(3) read with section 96(1) of the Customs and Excise Act 91 of 1964 be condoned, alternatively that the time periods referred to under section 96(1)(c)(ii) of the Customs Act be extended to the date of service of the summons (Prayer 2), and alternatively further relief ".*

16. The Plaintiff's application for condonation is opposed by the First Defendant. I will now turn to deal with the Plaintiff's failure to comply with the provisions of section 96(1)(a) of the Customs Act and section 3 of the Legal Proceedings Act. The first special plea raised by the First Defendant against the Plaintiff's summons relates to the Plaintiff's failure to give notice as contemplated in terms of the provisions of section 96(1)(a) of the Customs Act and section 3 of the Legal Proceedings Act, prior to instituting the current action. Section 89 of the said Custom Act provides as follows:

"(1) *Whenever any proceedings are instituted to claim any ship, vehicle, container or other transport equipment, plant, material or goods (in this section, section 43*

and section 90 referred to as "goods"), which have been seized under this Act, such claim must be instituted by the person from whom they were seized or the owner or the owners authorised agent (in this section referred to as "the litigant").

The Plaintiff has complied with the requirements of this subsection. In paragraph 7 of its summons, the Plaintiff states that it was the owner of the trailer with registration B985ACG ("the trailer") registered in Botswana. This is not in dispute. Section 89(2) of the said Act provides as follows:

"Any litigant must give notice to the Commissioner in writing before serving any process for instituting any proceedings as contemplated in section 96(1)(a) –

(a) within 90 days after the date of seizure".

17. Section 96 of the Customs Act provides as follows:

"(1)(a)(i) No process by which any legal proceedings are instituted against the State, the Minister, the Commissioner or an officer for anything done in pursuance of this Act may be served before the expiry of the period of one month after delivery of a notice in writing setting forth clearly and expressly the cause of action, the name and place of abode of the person who is to institute such proceedings,(in this section referred to as "the litigant") and the name and address of his or her attorney or agent if any.

(ii) Such notice shall be in such form and shall be delivered in such manner and at such place as may be prescribed by the rule.

(iii) No such notice shall be valid unless it complies with the requirements prescribed in this section and such rules.

(b) Subject to the provisions of section 89, the period of extinctive prescription in respect of legal proceedings against the State, the Minister, the Commissioner or an officer on a cause of

action arising out of the provisions of this act shall be one year and shall begin to run on the date when the right of action first arose.

(c)(i) *The State, the Minister, the Commissioner or an Officer may on good cause shown reduce the period as specified in paragraph (a) or extend the period specified in paragraph (b) by agreement with a litigant.*

(ii) *If the State, the Minister, the Commissioner or an Officer who refuses to reduce or to extend any period as contemplated in subparagraph(i), a High Court having jurisdiction may, upon application of the litigant, reduce or extend any such period where the interest of justice were requires.*

2. *This section does not apply to the recovery of a debt contemplated in any law providing for the recovery from an organ of state of a debt described in the law."*

18. Section 96(1)(a)(i) provides that such notice must set out clearly and explicitly the prospective litigant's cause of action. The intention of the legislature in providing that the notice referred to in section 96(1)(a)(i) should clearly and explicitly set out the cause of action is to afford the party upon whom such notice is served or given enough time to investigate the matter, and if possible, to consider settling it in order to avoid incurring unnecessary costs.

19. In **Controller of Customs v. Juiffre 1971 (2) SA 81 (R)** at p.84A, the Court defined the phrase "cause of action' as being "every fact which will be necessary for the plaintiff to proof if traversed in order to support its right at the judgment of the Court. It does not comprise every piece of evidence which is necessary to proof such fact, but every fact which is necessary to be proved".

20. Section 3 of the Institution of Legal Proceedings Act provides as follows:

"3 (1) no legal proceedings for the recovery of a debt may be instituted against an organ of state unless-

(a) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute legal proceedings in question; or

(b) the organ of state in question has consented in writing to the institution of that legal proceedings –

(i) without such notice; or

(ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).

(2) A notice must –

(a) within six months from the date on which the debt became due be served on the organ of state in accordance with section 4(1); and

(b) briefly set out –

(i) the facts giving rise to the debt; and

(ii) such particulars of such debt as are within the knowledge of the creditor.

(iii) For the purposes of subsection (2)(a)) –

(a) a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge; and

(b) a debt referred to in section 2 (2)(a), must be regarded as having become due on a fixed date.

(IV) (a) If an organ of state relies on a creditor's failure to serve the notice in terms of subsection (2)(a), a creditor may apply to a Court in the jurisdiction for condonation of such failure.

(C) *The Court may grant an application referred to in paragraph (a) if it is satisfied that:*

(I) the debt has not been extinguished by prescription.

(II) good cause exists for the failure by the creditor; and

(III) the organ of state was not unreasonably prejudiced by the failure."

21. Section 1 of the Institution of Legal Proceedings Act defines debt (as being debt arising from any cause of action)-

(a) which arises from delictual, contractual, or any other liability, including a cause of action which relates to or arises from any –

(i) act performed under or in terms of any law; or

(ii) omission to do anything which should have been done under or in terms of any law; and

(b) for which an organ of state is liable for payment of damages."

22. The Plaintiff concedes that it did not comply with the provisions of section 96(1) of the Customs Act and the provisions of section 3 of the Institution of the Legal Proceedings Act in that it did not send any formal notices to the First Defendant in terms of the provisions of the said Acts.

23. However, the Plaintiff's counsel argued that the two applications heard in the South Eastern Cape Local Division, coupled with the letter dated 3 March 2005 constitute, according to him, its substantial compliance with the provisions of section 3(1) or 3(2) of the Legal Proceedings Act and section 89(2) and (3) read with 96(1) of the Customs Act. It was argued on behalf of the Plaintiff that the contents of the aforementioned documents, gave sufficient details of what the Plaintiff had contemplated and therefore constituted sufficient notices for the purposes of the current action by the Plaintiff against the First Defendant.

24. He argued furthermore that the requirements pertaining to statutory notice of the internal litigation have been held to be directory and not peremptory and notices which substantially comply therewith have been held to satisfy the directions of such provisions. In **Avex Air (Pty) Ltd vs Borough of Vryheid 1973(1) SA 617 AD at 621 G-H** the Court stated that:

"Hampering as it does, the ordinary rights of an aggrieved person to seek the assistance of the courts, sec 254(2) must be restrictedly construed and not extended beyond its expressed limits. (Benning v.Union Government 1914 AD 180 at p.185). No particulars not expressly prescribed by the section, such the legal basis of the local authority's alleged liability, or the amount claimed in a money claim, need therefore be set forth in a notice under section 254(2).

It was common cause that, in so far only as section 254(2) prescribes the nature of the particulars which are to be included in a written notice under that section, its provisions are directory and not peremptory, and that a notice which substantially complies therewith, therefore satisfies the directions of those provisions. (Administrator, Transvaal v. Husband 1959(1)(SA) 392 (A.D.) at p. 394; Commercial Union Assurance Company Limited v. Clarke 1972(3) SA 508 A.D. at p. 516).

The object of sections 254(2) is clear. It is to ensure that the local authority concerned is timeously performed of a thread of legal proceedings contemplated against it, and of sufficient particulars of its alleged act or commission to enable it to investigate the matter to and to consider its position in regard to the claim to be made before becoming involved in the cost of legal proceedings. The achievement or otherwise in any particular case of the object of sec. 254(2) is clearly of importance in deciding whether there has been substantial compliance with the requirements of section 254(2)."

25. On the basis of the aforementioned authority it was argued on behalf of the Plaintiff that although no formal notice has been forwarded to the First Defendant prior to the current action by the Plaintiff against the Defendants, there has however been substantial compliance with the statutory requirements.

"Although the wording of section 3 is couched in peremptory terms, it cannot be construed as peremptory in the strict of the word, if the section is read as a whole and more particularly with reference to section 3(4) thereof.

See **Dauth and Others v. Minister of Safety and Security and Others 2009 (1) SA 189 (NC) at p.194E.** Relying on the authority of **Van Niekerk v. Verwoerdburgse Stadsraad 1989 (4) SA 324 of TPD,** counsel for the plaintiff stated that with reference to the predecessor to the Legal Proceedings Act having been Limitation of Legal Proceedings (Provincial and Local Authorities Act 94 of 1970, the Court held, *inter alia,* that under certain circumstances where it is clear that a defendant had already given attention to a matter, and had come to a decision in that regard, it would be an utmost technical approach to make it compulsory for a further notice to be given calling upon a defendant to again consider a matter. The court stated the following in the said authority:

> *"Legislative provisions requiring a claimant to give due notice prior to the institution of proceedings have more than once engaged the attention of this court; and the court has adopted a robust and practical approach as distinct from a legalistic one. Each case must be dealt with in the light of its own language, scope and object and the consequences in relation to justice and convenience of adopting one view than the other."*

In Van Niekerk's case the court quoted with approval the following passage from **Mbali v. Minister of Police 1984 (2) SA 596(TK) at 598 D:**

> *"It has become an accepted principle that since these provisions restrict ordinary rights of individuals in regard to the institution of legal proceedings, they are to be strictly interpreted against the authority in whose favour they are imposed and benevolently interpreted in favour of persons upon who they are binding."*

26. It was submitted on behalf of the Plaintiff that similarly, as with section 2(1)(a) of the Limitations of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970, section 3(1) of the Legal Proceedings Act does not require that a notice should accord with the Plaintiff's particulars of claim. According to the Plaintiff's counsel, all that is required is that the Defendant must be given notice of the facts that gave rise to the debt and such particulars thereof as are within the knowledge of the creditor. Such knowledge must be tested at the moment when the notice is given.

27. A notice with no implicit preference to the fact that the Plaintiff contemplates instituting legal proceedings would still be found to be sufficient under the circumstances where such intention is implicit in the letter, as it clearly was in respect of paragraphs 43 to 45 of the founding affidavit in the Plaintiff's urgent application. The said paragraphs of the urgent application whose founding affidavit was deposed to by one Michelle Jennifer Airey, the managing member of the First Applicant (the First Applicant was CBM Hot Express CC) state as follows:

"43. The conduct of the First Respondent by detaining the trailer and persisting in detention, is severely detrimental to the Applicants. This trailer generates an income of approximately R5000,00 per day and

performs road transport in terms of multimillion rand contracts with entities such as Volkswagen South Africa (Pty) Ltd, Dana Spicer Axles, Nissan S. A. etc.

44. The daily loss by the applicants therefore amounts to at least R5000,00 and there is therefore an obligation on the applicant to mitigate these damages.

45. By bringing the application the applicant is mitigating its damages and attempting to minimize any possible harm for damages it could later have against the First Respondent for the unlawful detention of the vehicle."

28. The essential purpose of these provisions has been stated as presenting the defendant with timeous opportunity to investigate the basic facts of the matter and secondly to enable such defendant to decide, before becoming locked in mitigation, whether he wishes to meet, settle or contest the claim. See Abramse v. East London Municipality and Another; East London Municipality v. Abramse 1997 (4) SA 613 is here at 623 E to 624 A. See also Alpen v. The Administrator, Cape 1995 (4) SA 850 CPD. The purpose of such a notice is to prevent the defendant from being served with an arcane court process. With reference to the authorities of the Abramse and Alpen matters, the counsel for the Plaintiff argued that the notice referred to in the above section does not have to be meticulous in setting out the cause of action.

29. To show that the First Defendant had sufficient knowledge of the Plaintiff's claim and had properly investigated it, the First Defendant vehemently opposed both the urgent application as well as the second application in which comprehensive affidavits, setting out all facts that related to the conduct of the First Defendant in respect of the trailer that had been detained and the First Defendant is also strenuously defending the current action against it. All these show

that the First Defendant has full knowledge of the facts upon which the Plaintiff's claim is based. Accordingly all the indications show that there has been substantial compliance with the provisions of section 96(1)(a) of the Customs Act. What the First Defendant will be doing, so it was argued by the counsel for the Plaintiff, in claiming that the Plaintiff has not complied with the provisions of section 96(1)(a)(2) of the Customs Act, despite the facts that appeared clearly in the applications and also the contents of the letter dated 3 March 2005, is tantamount to a demand for a second notification. On this basis, Plaintiff's counsel contended that the First Defendant's first special plea should be dismissed.

30. Counsel for the Plaintiff also argued that the First Defendant's second special plea should be dismissed on the basis that the current action was not based on the same cause of action as the urgent application and the second application in the South-Eastern Cape Local Division. He relied on the authority of **National Sorghum Breweries Limited (t/a Vivo African Breweries) vs International Liquor Distributors (Pty) Ltd 2001 (2) SA 232 SCA at 239** in which the Court stated as follows:

"The requirement for successful reliance on the acceptio were, and still are, idem actor, idem reuse, iadem ras and iadem res and eadem causa petendi. This means that the acceptio can be raised by a defendant in a later suit against a plaintiff who is demanding the same thing on the same ground; ... or which comes to the same thing, "on the same course for the same relief" ... ; or which also comes to the same thing,....whether "same issue" had been elucidated upon."

31. According to him, the essential touchstone to be applied in such a case is that one should look at the claim in its entirety and compare it with the first claim in its entirety and then determine whether the same thing is demanded on the same ground. What is meant hereby is that one should analyse and establish very closely the grounds on

which the applications were brought and compare such grounds with the grounds upon which the current action is brought. If it should be found that the same grounds that had already been ventilated on previous occasions constitute the grounds upon which the current action is based, one can safely raise this special plea of *res judicata* for, the issues between the parties will have been dealt with in the first instance, in this case, in the applications. In the case of National Sorghum Breweries the court stated as follows:

"*The mere fact that there are common elements in the allegations made in the two suits does not testify the exeptio - one must look at the claim in its entirety and compare it with the first claim in its entirety. If this is done in this present case, the differences are so wide and obvious that one simply cannot say that the same thing was claimed in both suits or that the claims were brought on the same grounds.*"

32. In deciding whether strict compliance with the necessity of the same cause of action and same subject matter should be relaxed, is purely within the discretion of this Court. In this regard, it was so submitted by the Plaintiff's counsel, an equitable discretion should be exercised without rigidity, the overriding and paramount considerations being the overall fairness and equity so as to ensure the avoidance of injustice between litigants. Counsel for the plaintiff referred to certain paragraphs in the First Defendant's affidavits and argued that, on the basis of the allegations contained in the said paragraphs, the First Defendant has himself admitted that the current cause of action differs from the cause of action in the urgent and second applications.

33. In the First Defendant's opposing affidavit which was deposed to by Hester Adriana Myburg, the following is stated:

"3.20 *If one has regard to the contents of annexures "EMI"and "EM4" (and specifically annexures "Q" and "R" to the SECLD application), it is clear that:*

3.20.1 *Any notice which may have been given in terms of the earlier applications and the letters attached thereto constituted notice in terms of section 96 of the Plaintiff's intention to claim the relief which was sought in the earlier applications, namely, the release of the trailer and certain declaratory relief. There was no claim for damages in this instance:*

3.20.2 *The relief sought in the earlier applications flowed from the detention and seizure of the trailer by the Commissioner in terms of sections 88(1)(a) and 88(1)(c) of the Customs Act respectively (i.e. the proceedings related to acts which were done in pursuance of the Customs Act). In the present action the Plaintiff states that the trailer was purportedly detained and seized in terms of the Customs Act;*

3.20.5 *Although the earlier applications and these action stem from the same acts (i.e. the detention and seizure of the vehicle), the legal bases of any applications and these actions differ. The cause of action relied upon in the earlier applications differs from the cause of action in this action in that in the earlier applications the return of the trailer was claimed on the basis that the trailer was allegedly operating lawfully in*

South Africa within "the confines of the Customs Union Agreement as per Government Gazette Nr. 13576 of 18 October 1991, proclamation 98 of 1991". In this regard, Leach J states on page 4 of his judgment, (annexure "EM2") that "the applicant's contention that there was no reason for Van Loggerenberg to have impounded the trailer is based squarely upon the provisions of the Customs Union Agreement concluded between the various South African Countries."

3.22 In the present action, the Plaintiff seeks the release of the trailer, alternatively payment of an amount of R185 000,00 (being the alleged value of the trailer) as well as the damages sustained due to the Plaintiff having allegedly suffered a loss of income. Save for the release of the trailer, the relief sought in this action differs substantially from the relief sought in the earlier application."

34. He relied on the authority of **Yellow Star Properties 1020 (Pty) Ltd v. MSC Department of Development Planning and Local Government**, **Gauteng 2009 (3) SA 577 SC at page 587 A-B** that the principle of estoppel, which finds its genesis in the English law, is not part our law and consequently that we are only dealing here with the issue of *res judicata*. In the said authority of Yellow Star Properties 1020 (Pty) Ltd, the Court stated at paragraph 22 as follows:

"It has been recognised though that the strict requirements of the acceptio, especially those read into eadem res or eadem

pedendi causa, the same relief and the same cause of action may be relaxed where appropriate. Where a Defendant raises a defence that the same parties are bound by a previous judgment on that same issue (viz idem actor and iadem quaestio), it has become common place to refer to it as being a matter of so called "issue estoppel". But that is merely a phrase of convenience adopted from English law, the principles of which have not been subsumed into our law, and the defence remains well of res judicata. Importantly, when dealing with issue estoppel, it is necessary to stress not only that the parties must be the same but that the same issue of fact or law which was an essential element of the judgment on which reliance is placed must have arisen and must be regarded as having been determined in the earlier judgment."

35. Counsel for the Plaintiff submitted finally that a proper reading of the particulars of claim and the judgment delivered in the said applications confirmed that the second special plea, both in respect of *res judicata* and *estoppel* should fail. He applied for the dismissal on the said grounds of the First Defendant's second special plea on the basis that the causes of action in the current action differ materially from the cause of action in the applications.

36. The Plaintiff applied for condonation in the event of this court finding that the first special plea should be upheld for having failed to comply with the provisions of the legislative prescripts referred to in the First Defendant's first special plea. It has applied for such failure to be condoned and for the relief sought as set out in its notice of motion to be granted. In accordance with the provisions of section 3(4) of the Legal Proceedings Act, this Court may grant an application for condonation, should it be satisfied that the debt has not been extinguished by prescription; or a good cause exists for the failure by Plaintiff to comply with the prescribed procedure; and that the First Defendant would not be unreasonably prejudiced by the failure.

37. It was submitted on behalf of the Plaintiff that the debts claimed by the Plaintiff have not become extinguished by prescription. The Plaintiff's counsel made this submission by reason of the fact that the First Defendant has not pleaded any prescription of the Plaintiff's claim as the summons in this action was issued and served within a period of three years from the date upon which the First Defendant took possession of the Plaintiff's trailer. In the premises, the Court can grant condonation even in circumstances where a summons has been issued and the Plaintiff has not complied with the provisions of section 3 of the Legal Proceedings Act. It is indeed so that the First Defendant has not raised prescription to the Plaintiff's claims. In the **Minister of Safety and Security v. De Wet 2009 (1) SA 457 SCA** at page 461, paragraph 10 the Court stated:

> *"In my view the argument loses sight of the purpose of condonation; it is to allow the action to proceed despite the fact that the peremptory provisions of section 3(1) have not been complied with. Section 3 must be read as a whole. First it sets out the prerequisites for the institution of action against an organ of State; either a written notice or consent by the organ of State to dispense with the notice. Second, it states that the requirements must be met in order for the notice to be valid. And third, it states what the creditor may do, should he or she have failed to comply with the requirements of subsection (1) and (2), he or she may apply for condonation for the failure. Thus either a complete failure to send a notice, or the sending of a defective notice, entitles a creditor to make the application. Even this qualified: it is only "if an organ of state relies on the creditor's failure to serve a notice" that a creditor may apply for condonation. If the organ of state makes no objection to the absence of the notice, or a valid notice then no condonation is required. In fact, therefore, the object of the organ of state is a*

jurisdictional fact for an application for condonation, absent with application would not be competent.

Paragraph 11:

It follows that where no notice at all is given by the creditor, and the organ of State relies on the failure, the creditor can nonetheless apply for condonation. A fortiori, if the notice set out of time, condonation may be granted. The argument that the application for condonation must preceed the issue and service of summons (and that if it does not the summons is ineffective), is unpersuasive. It should also be borne in mind that where no notice is given, the organ of State's objection will in all likelihood only be made for the first time after the proceedings have been instituted."

38. In paragraph 25 of its founding affidavit the Plaintiff gave reasons why no further notices other than the urgent and second applications and the letters addressed to the First Defendant and attached to the respective applications were given. According to the Plaintiff, it had not been advised to the contrary by its legal advisers that it needed to serve formal or proper notices on the First Defendant. The Plaintiff also explains the reasons why the application for condonation was only brought during January 2010. The Plaintiff's counsel submits that this is a matter in which the Court could exercise its discretion in the favour of the Plaintiff and grant condonation for its failure to comply with the provisions of the said Acts.

39. It was argued on behalf of the Plaintiff that the First Defendant has not shown any prejudice in the Plaintiff's failure to give proper notice or notice at all and firstly that he could not show any prejudice because the First Defendant has not laid any basis for the prejudice. Accordingly, the Plaintiff's counsel submits that condonation should be granted in this case. The First Defendant only complained about

the Plaintiff's failure to comply with the legislative requirements of said sections without presenting any argument that he was prejudiced by such failure.

40. In my view, unless the First Defendant can show that he suffered prejudice as a result of the Plaintiff's failure to comply with the provisions of section 96(i)(a) of the Customs Act and section 3 of the Legal Proceedings Act, his first special plea cannot succeed.

"*I am not prepared to accept, as a rule applicable to all cases of irregularity in the proceedings of private tribunals, the proposition that an irregularity which is calculated to prejudice a party entitles him to have the proceedings set aside. No doubt such irregularity prima facie gives such right, but it is clear that in this particular case the irregularity caused such party no prejudice, in my judgment he is not so entitled..........*

In respect of civil cases a test has been formulated in various decisions in Provincial Courts, for instance, Stemmer v. Sabina (1910 T.S. 479) and Ablasky v. Bulman (1915 T.P.D. 71), where it was held that if the irregularity complained of is calculated to prejudice a party he is entitled to have the proceedings set aside unless the Court is satisfied that the irregularity did not prejudice him". See Jockey club of South Africa v Feldman 1942 A.D. 340 at p.359.

Applying this test to the First Defendant's special plea, I am satisfied that it was not his case that he was prejudiced by the Plaintiff's failure to comply with said sections.

41. In reply, counsel for the First Defendant submitted that the Plaintiff's first application, that is the urgent application, was brought against the detention of the trailer and the second application was brought against the seizure of the trailer. He submitted further that after the judgments of the Courts, especially the urgent application, in the SECLD, the provisions of section 89(4), came into effect. Section 89(4) state as follows:

"Whenever goods are seized and in consequence of the seizure, no proceedings are instituted as contemplated in this section or have been instituted and have been dismissed in the following judgment of the High Court, the judgment by the Supreme Court of Appeal, the goods consensual, subject to the provisions of subsection 90, did deemed to be condemned and forfeited."

On this basis, it was argued on behalf of the First Defendant that in view of the fact that the Plaintiff has not challenged the orders made by the Court in the applications, the goods are deemed to be condemned and forfeited. However, it was argued by counsel for the Plaintiff that, on the contrary, section 93 of the said Custom's Act 91 of 94 states as follows:

"1. *The commissioner may, on good cause shown by the owner thereof, direct that any ship, vehicle, container or other transport equipment, plant, material or other goods detained or seized or forfeited under this act be delivered to such owner, subject to" certain conditions.*

The judgments of the Courts in the applications stand and unless they are challenged and set aside constitute *res judicata.*

42. It was argued on behalf of the First Defendant that the test with regards to *res judicata* is not whether or not the cause or causes of action are the same, but whether or not the issues in dispute during the applications and in the current action are the same. This court was referred to certain portions of the judgment of Leach J as proof that the issues in the said application were the same as the issue which constitutes the basis on which the current action is brought against the First Defendant. On that basis the First Defendant claims that there are good grounds for the granting of the second special plea.

43. In terms of our law he who alleges must prove. Here I wish to refer to the lapidary of Davis A.J.A in **Pillay vs Krishna and Another 1946 AD 946 at page 951:**

"It consequently becomes necessary to deal with the basic rule which govern the incidents of the burden of proof- the onus probandi- for, upon them the decision of this case must ultimately rest. And it should be noted immediately that this is a matter of substantive law and not a question of evidence; Tregea and Another vs Godart and Another (1939 AD 16 at p.32).

Accordingly where a party pleads that a point in issue has become a *res judicata* by reason of a previous judgment he must show: that there has already been a prior judgment; in which the parties were the same; and, that the same point was in issue.

See **Jacobson v Havinga t/a Havinga's 2001 (2) SA 177 at page 179 E-F**.

44. It is not in dispute between the parties that there is already a prior judgment in this matter. I refer in particular to the two applications; nor is it in dispute that the parties were the same, save that in the urgent and second applications, the current plaintiff was the second applicant. It is nevertheless not in dispute that the Plaintiff and the First Defendant were involved as parties in the two applications. With regard to the First Defendant's second special plea the test is whether or not the same point that was an issue in the said applications is the same point that is an issue in the current action.

45. It is interesting to note the arguments by both counsel. Plaintiff's counsel used the phrase *"cause of action"* while the First Defendant used the words *"the issues"*. There does not seem to be any material difference between the two as one can use the phrase "cause of action" and the word "issue" interchangeably. In **International Sorghum Breweries (t/a Vivo African Breweries) v. International Liquor Distributors (Pty) Ltd 2001 (2) SA 232 SCA** the Court set

out the test that should be applied in the determination of whether or not the same issues were involved in two cases when it stated that the fundamental question was, to put it succinctly, whether the issue now before Court had been finally disposed of in the first action. It is immaterial whether or not the issues came up in an action or not. The Court set out the procedure that should be followed in a determination whether or not the issues were common in both the current action and the second application when it stated that:

> *"The mere fact that there were common elements in the allegations made in the two issues did not justify exceptio, one had to compare the second claim in its entirety with the first claim in its entirety."*

46. In the above case, the Court dismissed the special plea of *res judicata* in the following circumstances: the appellant and the respondent had in December 1994 concluded certain written agreements in terms of which the respondent had obtained the right to distribute one of the appellant's products for a sum of R150 000,00. Subsequently the respondent, alleging breach of contract, instituted an action against the appellant in the Magistrate's Court for claiming payment of R150 000,00. The appellant failed to contest the action and the respondent was granted judgment by default. Some months later the respondent instituted a second action, this time in a provincial division, in which it claimed from the appellant the damages suffered as a result of its alleged breach of contract. To this, the appellant filed a special plea of *res judicata* contending that the action was not maintainable because the issue had already been disposed of in the Magistrate's Court. The special plea was dismissed on the basis that the respondent's claims for restitution and damages were two separate actions.

47. I now turn to a comparison between the current action and the two applications that the Plaintiff brought in the South-Eastern Cape

Local Division. At the outset I wish to point out, and this was confirmed by both counsels, that the first application which was launched on an urgent basis on 8 December 2004 came as a result of the First Defendant having detained the trailer in question in terms of the provisions of section 88(1)(a), read with section 87 of the Customs Act, while the second application followed on 30 May 2005 after the seizure of the Plaintiff's trailer. It is indeed so that the first application led to the judgment of Leach J. whereas the second application led to the judgment of Chetty J. I will deal later at length with the judgment by Leach J. in comparison with the current action, suffice as to mention that the urgent application was dismissed.

48. After the dismissal of the urgent application, the First Defendant, acting in terms of the provisions of section 88(1)(c) seized the said trailer and notified the Plaintiff accordingly. The provisions of section 88(1)(C) provide as follows:

> "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."

The reasons for the seizure of the trailer were contained in the answering affidavit of Gideon Christiaan Van Loggerenberg (page 304 to 305 of the record), the First Defendant's senior customs and excise officer. In view of the fact that the reasons enumerated by the said Van Loggerenberg in his answering affidavit are not relevant for the purpose of the issues before this Court, I will not refer to them, save to mention that the Plaintiff was formally notified by the First Defendant about the seizure of the trailer in the First Defendant's letter dated 8 January 2005. The said letter read as follows:

> *"RE: SEIZURE OF ROAD TRAILER WITH REG. B985ACG IN TERMS OF SECTION 88(1)(C)*

This office facsimile dated 22/12/2004 and the facsimile dated 28/12/2004 refers.

After consideration of all the information provided in the affidavits filed in the application to the High Court, as well as the correspondence and documentation provided, I am of the opinion that the trailer with registration number B985ACG was dealt with contrary to the provisions of the Customs Access Act 91 of 1964 and it is therefore liable to forfeiture.

This office is not prepared to hold the seizure over pending the outcome of the client's appeal.

The trailer is hereby seized in terms of section 88(1)(c) of the Customs and Excise Act.

On your suggestion to pay a fine under protest, I point that the Customs and Excise Act does not provide for such an action.

Your attention is respectfully drawn to sections 89, 93 and 98 of the Customs and Excise Act as well as section 5 of the Promotion of Administrative Justice Act, 3 of 2000. Copies of the relevant sections of the Customs and Excise Act is attached hereto.

Yours faithfully
Gideon Van Loggerenberg,
p/ controller of Customs and Excise".

49. On 3 March 2005, the Plaintiff's legal representatives at the time wrote a letter in which they did not only acknowledge receipt of the First Defendant's letter dated 8 January 2005 but also stated as follows:

"1. *We refer to the above matter and in particular your letter dated 8 January 2004 in terms of which you have formally seized the said vehicle in terms of section 88(1)(c) of the Customs and Excise Act.*

2. *We hereby give notice in terms of section 89 that our client hereby institutes a claim as owner of the vehicle.*

3. *We furthermore hereby notify you in terms of section 96(1)(a) of the Customs and Excise Act 91 of 1964 that should you fail to release the vehicle, proceedings will be instituted against the High Court of the Eastern Cape Local Division returned hereof.*

4. *4.1 Our client, West Trucking (Botswana) (Pty) Ltd is the owner of the vehicle.*
4.2 The trailer was manufactured in 1983 in the Republic of South Africa by an entity known as Swan Trailers.

5. *In the premises therefore, it is our client's contention that it is entitled to delivery and release of the vehicle.*

6. *Should you fail to deliver or release this vehicle within the (1) one month of delivery hereof, legal proceedings will be instituted against yourself for return and/or delivery of the vehicle and moreover for a declaratory order pertaining to interpretation of the Customs Union Agreement and Transport Regulation Act."*

50. After a flurry of correspondence between the attorneys of the two parties, and in particular on 30 May 2005, the Plaintiff launched the second application under number 3014/05 in the South Eastern Cape Local Division. This is the application that culminated in the

judgment of Chetty J. Still the Plaintiff was the second applicant in this application.

51. In the urgent application, the Defendant sought the following relief:

> *"2. That the First Respondent be ordered to release a trailer with registration number B985ACJ, which trailer is detained by the First Respondent in terms of section 88(1) (a) read with section 87 of the Customs and Excise Act, 91 of 1964 to the Applicants, alternatively the Sheriff is authorised to remove the trailer from the Respondents and/or wherever he may find it and return it to the Applicants."*

52. In the second application the Plaintiff had sought the following order against the First Respondent:

> *"2. That the First Respondent be ordered to release the trailer with registration number B985ACJ, which trailer is detained by the First Respondent in terms of section 88(1)(a) and has been seized by the First Respondent in terms of section 88(1)(c) read with section 87 of the Customs and Excise Act, 91 of 1964 to the Applicants, alternatively the Sheriff is authorised to remove the trailer from the Respondents* wherever he may find it and return *it to the Applicants."*

It is as clear as crystal in the above mentioned paragraphs that what the Plaintiff sought in those orders was delivery of the trailer.

53. In the summons commencing the current action the Plaintiff seeks the following order:

> *"Return of the trailer with registration number B985ACG."*

Although the order that the Plaintiff seeks in the current action refers to the registration number and letters of the trailer as

B985ACG, there is no dispute that the correct number is B985ACJ. I accept that this is but an error. This order that the Plaintiff seeks in the current action is the same order that the Plaintiff sought in the applications launched on 8 December 2004 and also on 30 May 2005. In essence the same relief that the Plaintiff has sought in the two previous applications, is also the same relief that it now seeks in this current action. In this action the Plaintiff seeks the delivery or return of the said trailer on the basis, firstly, that it is the owner of the said trailer; secondly, that it was manufactured in this country; thirdly that the first defendant unlawfully and wrongfully took possession of the trailer and is still in possession thereof; in the alternative the Plaintiff claims a sum of R185 000,00 being the value of the trailer in the event of the First Defendant not being in possession thereof.

54. Clearly the Plaintiff's current action is based on the ground that the detention of the trailer by the First Defendant and its subsequent seizure as notified on 8 January 2005 was unlawful. It contends that the trailer was not properly seized despite the fact that the letter dated 8 January 2005 clearly indicates that the said seizure was carried out in terms of section 88(1)(c) of the Customs Access Act.

55. It is also clear from the judgement of Leach J that the Plaintiff holds the view that the initial detention of the trailer was illegal. For instance the Court stated on page 6 (in the last 3 lines of the 2nd paragraph):

"Accordingly it is contended that the First Applicant's use of the trailer on around between Pretoria and Eastern Cape had been lawful and the detention of the trailer has therefore been illegal."

The Court also said the following on page 6 (the first two lines of the third paragraph):

"The First Respondent, on the other hand denied that the detention of the trailer was unlawful."

56. That the Plaintiff's contention in the urgent application was that Van Loggerenberg had acted unlawfully in impounding the trailer, is clear from the following portion of the judgment by Leach J:

"In the light of these, counsel for the First Respondent, in submitting that Van Loggerenberg had acted unlawfully in impounding the trailer." See page 8 of the judgment.

57. It is clear that, as in the current action, the issue in the urgent application was whether or not the detention of the trailer by Van Loggerenberg was lawful. This allegation that the First Defendant had detained the trailer unlawfully is the same issue that the Plaintiff relied on in the urgent application when he sought the order for the release of the said trailer. In order to succeed with his claim in the current action, the plaintiff would have to prove that the First Defendant acted unlawfully and wrongfully when it took possession of its trailer, issues which have already been decided in the two applications.

58. I further wish to refer to further paragraphs in the judgment of Leach J in which it is clear that the issue that the Court had to decide in the said urgent application, is the same issue upon which the Plaintiff has now brought his action for the release of the trailer:

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

lawfully be used to convey goods between two points in South Africa without any other formalities, but whether the detention of the trailer was illegal." See pages 10-11 of the said judgment.

59. Again the judge in the said judgment stated as follows:

"In considering this latter question, it seems to me to be irrelevant whether the facts will ultimately show that the trailer was not imported illegally into the country and was being lawfully used under the aegis of the Customs Union Agreement. The issue is purely whether Van Loggerenberg was entitled to detain it under section 88(1). It is not suggested that he is not an "officer" as envisaged by the section. It is not suggested by the applicant that he did not have the power to seize articles in terms of the section. I therefore do not see how it can be held that his actions were unlawful." See page 11 at the 2nd paragraph.

On page 12 of the same judgment the Court stated that:

"I do not see how I can find that it can be said that merely because the applicants allege that the trailer was not imported into this country but was being used lawfully under the aegis of Customs Union Agreement, the detention of the trailer was illegal when Van Loggerenberg was entitled under section 88(1)(a) to detain it for the very purpose establishing whether the facts as alleged by the applicants are true."

60. Finally, in the second application, the Court also stated the following with regard to the issue. In referring to the judgment by Leach J, Chetty J stated the following in paragraph 7:

"It is apparent from the judgment that the learned Judge considered that the true issue to be determined before him was the question whether Van Loggerenberg was <u>lawfully</u> entitled to act as he did. After an examination of the relevant statutory provisions of the

Customs Act and case law the learned Judge concluded that; "... the argument advanced on behalf of the applicants in fact begs the question – which is not whether there is a Customs Union Agreement in terms of which a trailer licensed and registered in Botswana can lawfully be used to convey goods between the two points in South Africa without any other formalities but whether the detention of the trailer was illegal." The learned judge found that Van Loggerenberg was entitled to detain and impound the trailer in terms of the relevant provisions of the Customs Act to determine whether it was liable for forfeiture and dismissed the application with costs. An appeal to the Full Court met a similar fate, hence the present proceedings."

61. Accordingly, I am satisfied that the First Defendant established not only that there has already been a prior judgment in which the parties were the same but also that the same points were in issue. Accordingly, the special plea of *res judicata* raised by the First Defendant against the Plaintiff's action must succeed.

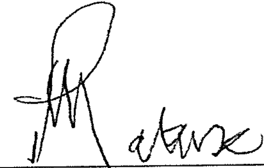
62. I am also satisfied that the Plaintiff has made a good case for condonation. In the result, I make the following order:

    1) The First Defendant's Special Plea that the Plaintiff has not complied with the provisions of Section 96(1)(a) of the Customs and Excise Act 91 of 1964 ("the Customs and Excise Act") as well as the provisions of section 3(1)(a) read with section 3(2)(b) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2000 ("the Legal Proceedings Act") is hereby dismissed with costs.

    2) The Plaintiff's application for condonation in respect of non-compliance with both the provisions of sec. 96(1)(a) of the Customs and Excise Act 91 of 1964 and sec 3(1)(a) and 3(2)(b) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 is hereby granted with costs.

3) The First Defendant's second special plea of *res judicata* is hereby upheld, with costs.

4) The Plaintiff's action is accordingly dismissed, with costs.



P.M. MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Applicant's Attorneys:	*Eugene Marais Attorneys*
Applicant's Counsel:	*Adv. Johan Uys*
Respondent's Attorneys:	*The State Attorney*
Respondent's Counsel:	*Adv. Arnold Meyer (SC)* *Adv. Lindsey Kilmartin*
Date Heard:	*16 August 2010*
Date of Judgment:	*27 August 2010*