REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1)	REPORTABLE: ~~YES~~/NO
(2)	OF INTEREST TO MANY JUDGES: ~~YES~~/NO
(3)	REVISED.

CASE NO: 82686/19

In the matter between:

DRAGON FREIGHT (PTY) LIMITED	First Applicant
TIAN LE TRADING ENTERPRISE CC	Second Applicant
NEW FEELING FASHION DESIGN (PTY) LIMITED	Third Applicant
TINGTING SECRET BEAUTY (PTY) LIMITED	Fourth Applicant
YEALINK TRADING (PTY) LIMITED	Fifth Applicant
LOPORA IMPORT AND EXPORT (PTY) LIMITED	Sixth Applicant
HIQ PACIFIC TRADING CC	Seventh Applicant
FFB IMPORT-EXPORT CC	Eighth Applicant
CALLA TRADING (PTY) LIMITED	Ninth Applicant

and

COMMISSIONER FOR THE SA REVENUE SERVICE	Respondent
SOUTHERN AFRICAN TEXTILE AND CLOTHING WORKERS UNION (SACTWU)	Amicus Curiae

JUDGMENT

Tuchten J:

1 The first applicant is a clearing agent. The second to ninth applicants are importers, each of which has imported one or more containers of clothing from the People's Republic of China (China). In all there are eleven containers at issue in this urgent application.

2 The respondent (SARS or the Commissioner) is vested with the statutory duty to clear and release or, if appropriate, detain and seize, the containers and their contents according to law. The regime by which SARS must do this is contained within the Customs and Excise Act[1] (the Act). Indeed, SARS may only allow goods to be imported into the country if the Act has been complied with - unless the goods are conditionally released on conditions which may include security as the Commissioner may determine.[2]

3 The *amicus* was admitted to the case by Ledwaba DJP on 21 November 2019. Counsel for the *amicus* submitted that I should not come to the relief of the applicants but the *amicus* added little if anything to the factual material before me and the submissions of its counsel in effect repeated in brief the submissions made by counsel for SARS.

4 The applicants seek urgently to review decisions of SARS through its customs arm to detain eight of the eleven containers preparatory to making a decision whether or not to seize them and to seize the remaining three containers, all for alleged non-compliance with the Act. The applicants also ask that they be allowed to seek relief, on these papers as amplified, from what they anticipate will be detention by SARS on grounds similar to the present situation in respect of 19 of containers which are presently on the water en route to this country. In addition the applicants seek procedural relief for their failure to comply with the rules of court and provisions of the Act regarding time periods.

5 I should say at the outset that I do not think that these papers ought to be used as a starting point for any future application. Counsel for the applicants accepted that this should be so and I shall therefore say nothing further in this regard.

6 The application, as I have said, relates to eleven containers of clothing which the applicants seek to import from China. The applicants say that they bought the clothing on terms very advantageous to them. They say that the policy pursued by the current president of the

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1 91 of 1964.
2 Section 107(2)(*a*)(i).

USA to disrupt and destabilise world trade, and particularly the trade conducted by his adversary, China, has led to a situation which they were able to exploit: wholesalers in China have stocks which they are unable to move on the terms and at the prices which even a short while ago obtained. As a result, the applicants say, they were able to buy these substantial quantities of clothing at cut rate prices and, what is more, defer their obligations to pay until the goods they seek to import have been cleared through customs in this country.

7 SARS, through its customs arm, is suspicious of such transactions. For historical reasons, reasonably so But the question is whether that suspicion is in light of the alleged change of circumstances in China still reasonable.

8 The case is complicated by the fact that the actual version of the applicants as to how they were able to make such favourable deals (the applicants' explanatory version) only emerged in all its detail in the applicants' replying affidavit, delivered on 13 November 2019.

9 The reaction of SARS to the applicant's explanatory version was to take refuge in the procedural principle that an applicant's case should be made in its founding affidavit. I think however that the applicants' case was made in its founding affidavit and the explanatory version was produced in response to specific allegations in SARS' answering affidavit.

10 On the first day of argument, on 26 November 2019, I made it clear that as far as possible, I would strive to give all the litigants an opportunity to put before me such evidential material as they thought would advance their cases. Early on the morning of the second day of the argument, 26 November 2019, counsel for SARS elected to deal with the explanatory version of the applicants. I allowed the case to stand for this purpose.

11 The first decision I have to make is whether the applicants' failure to comply with the rules as to time limits should be condoned: in short whether I should hear this case as a matter of urgency. It is not in dispute that what I called in *Mogalakwena Municipality v Provincial Executive Council, Limpopo and Others*[3] the primary consideration, must be decided in the applicants' favour: the applicants will not receive substantial redress at a hearing in due course. This is because while the containers remain uncleared, the applicants must pay substantial fees for wharfage costs and the like. In addition, this coming Friday, 29 November 2019, is what is termed in the retail industry Black Friday. I have been unable to learn why this date is given this name but by all accounts it is an annual day upon which retailers and the public combine in a frenzy of trading, at discount prices. Unless I decide

3 2016 4 SA 99 GG para

this case before Black Friday, the applicants will lose their chance to participate in the day's trading.

12 SARS case on urgency is that the urgency is self-created, because the applicants spent several months negotiating with SARS and trying to satisfy its requests for information. I do not think that this conduct ought to count against the applicants at all but even if it were to count, in the exercise of my discretion I would still find for the applicants on urgency. SARS has managed to put its case before me despite the short time periods available to it and the prejudice to the applicants is substantial. The order I propose making will further reduce the risk of prejudice to SARS.

13 In addition, this case was specially allocated to me so it is the only case on my role. No other litigants have been prejudiced because this case jumped the queue.

14 SARS further argues that it has not been afforded the month's notice contemplated in s 96(1) of the Act. The applicants asked SARS in their founding papers to reduce the period under s 96(2). SARS did not respond in its papers to this request but its counsel took the point in their heads that no reduction of the period had been given by SARS

15 In such a case, the court may reduce the period where the interest of justice so requires. In my view it does; for the same reasons as the case should be heard urgently.

16 SAS suspicion that the 11 containers were sought to be imported contrary to the provisions of the Act arose because the alleged transaction value asserted by each of the applicants was so low.

17 SARS acted under s 88(1)(*a*):

> An officer, magistrate or member of the police force may detain any ship, vehicle, plant, material or goods at any place for the purpose of establishing whether that ship, vehicle, plant, material or goods are liable to forfeiture under this Act.

18 Forfeiture, in its turn is dealt with in s 87(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.

19 All this translated in the present case, essentially, to the question whether the applicants had misstated the transaction values at which they wished to bring the clothing into this country. Transaction value is identified in s 66(1) read with s 65(1). Section 66(1) reads:

> Subject to the provisions of this Act, the transaction value of any imported goods shall be the price actually paid or payable for the goods when sold for export to the Republic, adjusted in terms of section 67, provided—
>
> (*a*) there are no restrictions as to the disposal or use of the goods by the buyer other than restrictions which—
>
> (i) are imposed or required by law;
>
> (ii) limit the geographical area in which the goods may be resold; or
>
> (iii) do not substantially affect the value of the goods;
>
> (*b*) the sale or such price of the goods is not subject to any term or condition for which a value cannot be determined;
>
> (*c*) no part of the proceeds of any disposal, use or subsequent resale of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in terms of section 67;
>
> (*d*) subject to subsection (3), the seller and the buyer are not related within the meaning of subsection (2)(*a*).

20 SARS suspicion was based on considerations applicable before the president of the United States embarked upon his campaign of disruption of China's trade. SARS was alerted to the applicants' contention that the rules of the game had changed. SARS put up no evidence in the papers as originally framed, which ran to well over 900 pages and contained supplementary affidavits on both sides.

21 On the second day of argument, counsel for SARS sought and was granted time to put up affidavits in response to the applicants' explanatory version. The case stood down from the morning of the second day of argument until the next day for this purpose.

22 SARS further affidavits took this issue no further. This was because, as SARS disclosed for the first time, an international agreement had been concluded between this country and China. This international agreement precludes SARS from approaching suppliers in China direct for information. It must direct its questions for information in this regard to the government of China. China has not responded to the requests for information made by SARS.

23 I find the applicants' contentions plausible and established for present purposes. SARS might still be able to adduce evidence to contradict the applicants' explanatory version in relation to future consignments and nothing I say or find in this judgment should be read as

precluding SARS from making a case in this regard in any further litigation. But the consequence is that the applicants' allegations in this regard stand undisputed.

24 SARS explanation for its failure to investigate was based in large measure in the papers as initially framed around a questionnaire which it issued to the applicants. This questionnaire was a form document not tailored to the specific facts of the present case. I invited counsel for SARS to tell me which of the questions might be relevant to the present case. Counsel referred to questions 5, 8-10 and 20-24.

25 I find no relevance at all in these questions, particularly because the applicants had committed themselves to the applicants' version, backed up by all appropriate documents. I should add that the second and fifth applicants did indeed provide a written response to the questionnaire. The other applicants did not respond to the questionnaire. I need not delve into the reasons why the other applicants did not respond to the questionnaire. It is in my view obvious that SARS may ask a prospective importer for information and may draw appropriate inferences from a failure to supply the information requested.

26 But because of the lack of relevance of the questions and the fact that SARS has the explanatory versions of the applicants, I see no merit in SARS' contention, made repeatedly in its answering affidavit, that it was not obliged to come to investigate further of its own accord to enable it to come to conclusions for the purposes of s 88.

27 But in fact, SARS did come to conclusions in relation to three of the containers. This was because on a physical examination of the contents of the containers, it was found that garments had been misdescribed in the documents presented to customs or there had been errors in the quantities of garments said to have been packed in the container. In some cases, the documents stated that more of a category of garment was contained in the container in question so that the importer was paying more duty than it properly should have.

28 The evidence shows that this type of error is routinely corrected and the errant importer is charged an additional fee which the applicants in question stand ready to pay. In these circumstances it seems to me that the decisions to detain were made irrationally or for an improper purpose.

29 So the applicants' case is that in three cases, there was an actual decision to detain and in the remaining eight cases there was a culpable failure as contemplated in the Promotion of Administrative Justice Act 4[4] to take a decision. There is in my view simply no warrant for the proposition that SARS is entitled to take the position that until it has received what it

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[4] 3 of 2000.

considers an adequate response to its questionnaire, it may detain goods and refrain from deciding whether to seize them. It may certainly draw appropriate inferences from a failure or refusal to supply information but it may not refuse to make a decision because what it regards as relevant information has not been provided.

30 On the footing that the applicants' explanatory version has been established, I find that SARS' suspicion that the goods were being brought in at transaction costs that were lower than the true transaction costs was unreasonable. SARS applied a certain economic model to the transactions to come to its conclusion that the transactions were suspicious. But given the correctness of the applicants' explanatory version, the economic model used by SARS was outdated and wrong.

31 The decisions to seize in the three cases to which I have referred were made on grounds which manifestly did not justify seizure. The errors detected by SARS are routinely corrected and attract fees where such corrections need to be made. Nothing in this judgment or in the order which I propose making should be read as to disentitle SARS to these fees.

32 It is difficult, too, to resist the conclusion that SARS made the three seizure decisions because of its suspicion that the transaction values had been misstated. On any basis, the seizure decisions were irrational or made on improper considerations or on failing to take into account proper considerations. The seizure decisions must be set aside.

33 There is another ground why the seizure decisions must fall. no notice to the relevant applicants of SARS' intention to consider seizing the contents of the containers was given to the applicants before the decisions were made. This was because SARS used incorrect addresses when it attempted to serve the notices of intention to seize on the relevant applicants. There was thus a failure to hear the applicants before the seizure decisions were made.

34 Counsel for SARS submitted that while the claims for relief consequent upon the alleged failure to take decisions were justiciable in this application, the claims in relation to the three containers where decisions to seize had been made were not. This argument was based on *Thusi v Minister of Home Affairs*[5] in which it was held that a claim for relief consequent upon a failure to take a decision should not be converted by amendment to include a claim for relief when it turned out that a decision had in fact been made.

35 I do not regard the statements of the learned judge relied upon by counsel as being of general application. These statements were made in relation to the specific facts of the case

5 2011 2 SA 561 KZP

before the court. In my view much in this regard will turn on the terms of the notice of motor, before amendment and considerations of fairness. Ultimately, the question is whether the respondent has had a fair opportunity to deal with the case sought to be made against it.

36 In the present case, the relevant prayer of the notice of motion read initially:

> Review and set aside the Commissioner's decision not to release the 11 containers ... and that it be ordered that the goods be immediately released by he Respondent. Alternatively, reviewing and setting aside the Commissioner's decision not to release the goods against provisional payment by the Applicants.

37 In their replying affidavit, the applicants gave notice of their intention to seek an amendment to the notice of motion by including the following prayer:

> Review and set aside the Commissioner's decision to seize any of the 11 containers and that it be ordered that the goods then be immediately released by the Respondent.

38 The amendment sought was opposed on the ground that it was not competent to attack the decision to seize on the ground I have already mentioned.

39 In my view, the initial prayer was wide enough to encompass both situations. The applicants' case was that their goods were being unlawfully withheld from them. I grant the amendment but doubt that it was even necessary on the facts of the present case.

40 It follows then that the applicants must succeed. I turn to the question of remedy, which under PAJA must be equitable. It may be that the last word on the factual issue I have identified has not yet been spoken and that in the case of these future equivalent imports, SARS can demonstrate that its concerns are justified. For that reason, I shall direct SARS to release all eleven containers against provisional payment of duty and of any charges pursuant to inaccurate customs documentation. SARS formally conceded during argument that the goods in the eight containers in respect of which decisions to seize had not been made should be released against provisional payment.

41 SARS is concerned that a release of the containers against an industry norm of 10% will lead to the situation that the goods will be sold and unavailable for seizure and forfeiture in due course if SARS' concerns are found to be justified. For that reason, SARS asks for a very high provisional payment, based on what it claims ought to have been reflected as the true transaction values.

42 A further consideration which leads me to order release against provisional payments is that the applicants have no less than 19 containers on the water which they will seek to clear in circumstances similar to the present. This means that much of the force of SARS' concern that the goods presently in issue will be placed beyond its reach is dissipated: if

SARS is right, it can establish its case against the allegedly errant applicants according to law and execute, by way of anti-dissipation interdict or otherwise, against the 19 containers of clothing which will shortly sail into SARS' jurisdiction.

43 Counsel for the applicants put up a draft which provided for provisional payments of 100% of the value of the present consignments. Counsels' figures were of course based on the transactional values asserted by the applicants. As these transactional values have been established for present purposes, it would in my view be irrational to order payments on the basis of a suspicion as to the "true" transactional value held by SARS but not established as having been reasonable.

44 Costs must follow the result, including the costs of two counsel. I therefore hold that SARS must release all eleven containers to the applicants against provisional payments as specified in the order below, payment of duty calculated on the transactional values advanced by the applicants and payment of all SARS' usual charges arising from inaccurate customs documents

45 I make the following order:

1 The application is heard on an urgent basis in terms of Rule 6(12) and all the requirements with regard to form and service provided for in the Uniform Rules of Court are dispensed with

2 The non-compliance with the period of 30 days specified in section 96 (1)(*a*)(i) of the Customs and Excise Act, No 91 of 1964 is condoned.

3 The Commissioner's decision not to release the 8 containers (EGHU9706330, MSKU9476816, MRKU3495191, TCNU1677060, EITU1526903, DRYU9573963, TEMU6264829 and TEMU8845611) referred to hereunder is reviewed and set aside and, subject to 5 below, the respondent is ordered immediately to release such containers and the goods contained in them.

4 The Commissioner's decision to seize 3 containers (MSKU1672026, BSIU9249814 & TLLU4768117) is reviewed and set aside and, subject to 5 below, the respondent is ordered immediately to release such containers and the goods contained in them.

5 Release of the goods referred to in paragraphs 3 and 4 of the order is dependent on the applicants paying the customs duties calculated on the transactional values of the goods as assessed in accordance with the documents submitted by them to the respondent, all fees due to the respondent lawfully determined on the basis of any error as to quantities of goods or tariff categorisations made by the applicants

and provisional payments being made by the applicants to the respondent in the amounts set out in the schedule below:

N	IMPORTER	CONTAINER	PROVISIONAL PAYMENT
1	Yealink	EGHU9706330	R178 173,00
2	Tingting	BSIU9249814	R180 671,00
3	Calla	MSKU9476816	R177 710,00 :
4	Calla	MRKU3495191	R177 855,00
5	FFB	TCN U1677060	R558 186,00
6	Tingting	MSKU1672026	R185 451,00
7	Yealink	EITU1526903	R178 477,00
8	Lopara	DRYU9573963	R59 645,00
9	Yealink	TEMU6264829	R185 333,00
10	New Feeling	TEMU8845611	R580 194,00
11	Tian Le	TLLU4768117	R183 815,00

6 The respondent is ordered to pay the costs of the first to ninth applicants, such costs to include the costs of two counsel.

NB Tuchten

Judge of the High Court

27 November 2019