REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

NOT REPORTABLE
Case number: **231/2000**

In the matter between:

HENBASE 3392 (PTY) LTD Appellant

and

THE COMMISSIONER FOR SOUTH AFRICAN REVENUE SERVICE First Respondent
THE MINISTER OF TRADE AND INDUSTRY Second Respondent

CORAM: **HEFER ACJ, MARAIS, SCOTT, NAVSA JJA and CHETTY AJA**
HEARD: **17 MAY 2001**
DELIVERED: **31 MAY 2001**

Customs and Excise Act No 91 of 1964 – Malawi/ South Africa Trade Agreement - whether certain detained goods should be released *pendente lite*.

JUDGMENT

CHETTY AJA:

[1] The governments of South Africa and Malawi have entered into a trade agreement to encourage trade between the two countries and facilitate access to each other's markets. The agreement was concluded in terms of s 51 of the Customs and Excise Act 91 of 1964 ("the Act"). The issue in the appeal is whether certain garments imported from Malawi comply with the conditions of the Act, the Rules promulgated thereunder, and the agreement.

[2] The litigation commenced with an urgent application in the Witwatersrand Local Division of the High Court where the appellant sought a mandamus directing the respondent to release a container of garments which the latter had caused to be detained at the Beit bridge border post, pending the decision of the question whether customs duty was payable on the consignment in terms of the trade agreement. The application was dismissed with costs. Leave was however granted to appeal to this Court.

[3] Section 51(1)(a) of the Act permits the reciprocal importation of goods, produced or manufactured in any territory in Africa with which the Republic has concluded a trade agreement, free of duty or at special rates of duty. Sec 46 reads as follows:

"46. **Origin of goods.** – (1) For the purposes of this Act, except where any agreement contemplated in section 49 or 51 otherwise provides, goods shall not be regarded as having been produced or manufactured in any particular territory unless–

(a) at least twenty-five per cent (or such other percentage as may be determined under subsection (2), (3) or (4)) of the production cost of those goods, determined in accordance with the rules, is represented by materials produced and labour performed in that territory;

(b) the last process in the production or manufacture of those goods has taken place in that territory; ..."

[4] Rule 46, promulgated by the commissioner pursuant to the provisions of s 120(1)(e) is in the following terms:

"46.01 In the calculation, for the purposes of section 46, of the cost of materials produced and labour performed in respect of the manufacture of any goods in any territory, only the following items may be included

(a) the cost to the manufacturer of materials wholly produced or manufactured in the territory in question and used directly in the manufacture of such goods; and

(b) the cost of labour directly employed in the manufacture of such goods.

46.02 In the calculation, for the purposes of section 46, of the production cost of any goods in any territory, only the following items expended in the manufacture of such goods may be included –

(a) the cost to the manufacturer of all materials;

(b) manufacturing wages and salaries;

(c) direct manufacturing expenses;

(d) overhead factory expenses; and

(e) cost of inside containers."

[5] The relevant provisions of the agreement are Articles 2 and 6(ii) which, shorn of non material parts, reads:

"Article 2

Subject to the provisions of this Agreement, the Government of the Republic of South Africa shall allow all goods grown, produced or manufactured in Malawi to be imported into South Africa free of customs duty.

Article 6

Goods shall not be regarded as having been produced or manufactured:

(i)...

(ii) in Malawi, unless at least twenty-five per cent, or such other lower percentage as may from time to time be agreed upon between the Parties in respect of specified goods manufactured in Malawi, of the production cost of those goods shall be represented by materials produced and labour performed in Malawi and the last process in the production or manufacture of such goods shall have taken place in Malawi."

[6] The question is whether the garments which were detained, complied with the 25% local content requirement. Whilst the appellant's case is that they did, the respondent's contention is that they did not. The appellant relies mainly on an affidavit by Mr J L Rabson; the respondent mainly on a report and affidavit by Mr H E Wainer. The garments were manufactured in Malawi by Chirimba Garment Manufacturers (EPZ) Ltd ("Chirimba"). Chirimba operates on a cut, make and trim basis using fabrics manufactured in Taiwan and exported in bulk to Malawi. The principle issue between Rabson and Wainer is whether the manufacturing costs of the fabrics and certain expenses incurred in Malawi are to be included in the production costs. Urging us to accept Rabson's views counsel for the appellant addressed us at length on these matters. But I find it unnecessary to deal with his argument because it is quite clear that Wainer's report casts serious doubt on the

validity of Rabson's conclusions. That in itself is fatal. I nevertheless turn to consider the balance of convenience.

[7] I agree with the finding of the court *a quo* that the balance of convenience favours the respondent. In effect the respondent is demanding that the appellant either provisionally pays or furnishes security for the payment of duty in order to procure the release of the goods . That such a demand may validly be made emerges from s 107(2) of the Act. The appellant has consistently claimed that it will experience serious cash flow problems should it be required to pay provisional duty; but it has advanced no reasons why it should not provide security. Its own averments, together with the absence of evidence that it is possessed of any assets worth mentioning, goes a long way towards showing its inability to pay any duty that may eventually be found to be due.

[8] It follows that the appeal will have to be dismissed.

[9] Appellant's counsel argued that his client was wrongly ordered to pay all the respondent's costs in the court *a quo* and should not be ordered to pay all the respondent's costs in this court. He submitted in effect that the appellant was compelled to present an urgent application to the court *a quo* without full knowledge of all the facts because the respondent had not allowed the appellant an

opportunity to be heard before the decision to have the goods detained was taken, and did not inform the appellant that they had been detained in terms of s 88(1) and would only be released upon payment of provisional duty or the furnishing of security. The submission is plainly without substance. The appellant rushed to court within hours after the goods had been detained. It has only itself to blame if it did so without ascertaining the correct facts. I must say, however, that the appellant's founding affidavit leaves me with little doubt that the deponent knew precisely what the facts were.

The appeal is accordingly dismissed with costs which are to include the costs occasioned by the employment of two counsel.

D CHETTY
ACTING JUDGE OF APPEAL

CONCUR:

HEFER ACJ)
MARAIS JA)
SCOTT JA)
NAVSA JA)