

**IN THE HIGH COURT OF SOUTH AFRICA
DURBAN AND COAST LOCAL DIVISION**

CASE NO 7839/2003

In the matter between :

DESMONDS CLEARING & FORWARDING AGENTS CC

Applicant

And

**THE SOUTH AFRICAN REVENUE SERVICE
(CUSTOMS & EXCISE)**

Respondent

J U D G M E N T

HUGO J:

The following facts in this matter are common cause. During about April 2003 the Applicant acting on behalf of Mashbury Motors a company in Zimbabwe imported a truck tractor together with a trailer loaded with a further four trailers and spares and accessories for delivery to Mashbury Motors in Zimbabwe.

These items were imported as a unit and were destined to travel to Zimbabwe propelled by the truck which would tow the trailer laden with the further four trailers.

The bill of entry was signed and dated on the 22nd April 2003 .

Apparently it is the custom that when goods are imported for transit to be conveyed on the roads, the vehicles are temporarily released so that a road worthy certificate might be obtained. In this case that was done and the trucks were removed to a firm called Truck and Car Repair Services and subsequently to the Westmead Test Centre where a certificate of road worthiness was issued in respect of the truck and the load bearing trailer. Once this had been done, a twenty one day plate was issued by the licensing authorities permitting the truck and load bearing trailer to be on the roads for a period of twenty one days.

On the 13th May 2003 the respondent's officials examined the vehicles and the certificates obtained and released the goods for transit to Zimbabwe.

It is alleged by the applicants that shortly after leaving the warehouse the truck encountered difficulties in respect of its gear box and it became evident that it would not be able to haul the trailers to Zimbabwe.

Although the respondents are somewhat suspicious about this allegation no countervailing evidence was produced. The truck was uncoupled from the trailers and it proceeded on its way. The trailers were left at the yard of Sensation Trucking in Springfield Park, Durban.

It was here that the trailers were detained by the respondent ostensibly in terms of section 18(13)(a) of the Act in as much as it was alleged that the goods had been diverted as intended in that section.

Section 18(13)(a) of the Act provides :

"no person shall, without the permission of the Commissioner, divert any goods removed in bond to a destination other than the destination declared on entry for removal in bond but deliver such goods or cause such goods to be delivered in the Republic except into the control of the Department at the place of destination."
(My emphasis)

It is the contention of the respondent that the leaving of these trailers at Springfield Park constituted a diversion and that it was therefore entitled to retain the goods.

All of this occurred on the 4th June 2003 the letter advising applicant of this reads in part as follows :

"an inspection conducted at Sensation Transport premises, 9 & 10 Ebonyfield, Springfield Park Durban resulted in the following ;

Premises not being licensed in terms of section 21 of the Customs and Excise Act as a storage warehouse.

Noted the following :

contravention of section 18(13) as an offence as described in section 80(1)(c) of the Customs and Excise Act No 91 of 1964 as amended "

This letter gave rise to a letter by the Applicant's attorneys to the Customs Department in which the detention was queried. This letter in turn gave rise to a following letter. By the Department in which the following was said amongst others:

"We confirm that your client did divert the goods without the permission of the Commissioner your client should have sought the necessary permission from the

Commissioner to divert the goods as soon as they realised that same could not be avoided. "

Mr Kissoon-Singh SC on behalf of the applicants has argued that the actions of the applicant did not constitute a diversion. He emphasised that the word 'divert' means in the context of this section "cause to change course or take a different route" (Concise Oxford English Dictionary s.v. 'divert')

While Springfield Park is not on the direct route from Durban to Beit Bridge it does not constitute a major departure from that route. It is to be noted that section 18(3)(a) in context required a diversion of goods

"to a destination other than a destination declared on entry for removal in bond in addition to the delivery of such goods - - - in the Republic."

The question is therefore whether the facts in this case show that the goods were diverted to a destination other than the destination declared and whether the goods were delivered in the Republic.

On the facts alleged by the applicant and which have not been directly refuted by the respondent it emerges clearly that there was not a material diversion as in my view would be required by the section and nor was there a delivery of the goods as intended in the section.

The only route description to which my attention has been drawn is that contained in the permit issued by the cross-border road transport agency which has this description :

"goods from point situated within the Republic of South Africa through the RSA/ Zimbabwe border at Beit Bridge border post to points situated within Zimbabwe."

Now this description would permit for any route to be taken in South Africa provided it ended up at Beit Bridge within the period allowed by the permit.

The permit was valid until the 26th May 2003 and had therefore expired by the time of the detention of the trailers.

This permit however is not anything other than a permit permitting the use of self propelled vehicles on the Country's roads for the purpose of taking such vehicles out of the Country. It does not effect the transfer of goods in transit to another country. And it seems to me has no effect on the provisions of section 18(13)(a). That section does not deal with vehicles that have overstayed their welcome in the Country and that deals only with vehicles that have been diverted to a destination other than that declared.

The respondent has a different view of the legal procedures that were followed, it refers to a notice of detention of goods in terms of section 88(1)(a) of the Act dated either the 27th or 28th May 2003 which reads in part :

"the goods mentioned hereunder are hereby detained in terms of section 88(1)(a) read with section 87 of the Customs and Excise Act No 91 of 1964 as amended to establish whether such goods / materials are liable to forfeiture"

the letter then goes on to say :

"you are required to comply with the provisions of section 102 of the said Act on or before the 4th June 2003 failing which the goods will be seized in terms of Section 88(1)(c) of the Act."

this letter was followed up by the letter I have already quoted in which it was allegedly found that the goods had been diverted and were liable to penalties. Judging from this letter it was not decided at that time to seize or forfeit the goods concerned. Quite clearly also, the purpose for which they had been detained in terms of section 88(1)(a) had been investigated and found that an offence in terms of section 18(13) had been committed. If that finding was wrong then clearly the further detention of the property could not occur. There is no finding on the papers before me that any other reason was found for the seizure or forfeiture of the trailers concerned.

The detention of the goods in terms of section 88(1)(a) cannot be faulted and indeed did not form part of the attack of the applicant. The upshot of that detention and the findings made as a result thereof are however subject to attack. On the papers before me I find no warrant for finding that these goods were diverted as intended in section 18(13) nor that they were delivered as intended in that section.

It is quite clear from the tenor of the letters I have referred to, at no stage did the Commissioner decide to seize the trailers concerned. In a letter dated 12th June 2003 the Commissioner writes :

"We confirm that your client did divert the goods without the permission of the Commissioner. Your client should have sought the necessary permission from the Commissioner to divert the goods as soon as they realised the same could not be avoided.

In light of the above we advise that the penalties demanded in our letter dated 4th June 2003 still stand and that the detained goods will not be released until the same is paid."

There is no indication here of a seizure or a forfeiture.

In my opinion the detention of the goods on the grounds of the contravention of section 18(13) was misconceived and that the respondent was not entitled to detain such goods in terms of that section.

The respondent however purports to seize the goods in its further answering affidavit. Paragraph 67 thereof reads :

"Having regard to the allegation set forth in this affidavit more particularly the circumstances surrounding the detention of the trailers the misrepresentations made by the applicant, the persistent continuing failure of the applicants to provide an acquittal in respect of the truck referred to in these papers and other contraventions of the Act by the applicant the respondent hereby exercises its power in terms of section 88(1)(c) of the Act and formally notifies the applicant that it hereby seizes the said trailers. A written notification to this effect will be delivered to the applicant in due course."

This paragraph is in my view a cynical abuse of the litigation in this case and is in any event so vague and so much based on misconception that the seizure purported to be made is in itself suspect. I have found nothing in the Act that prevents goods imported as a unit from being separated if such separation becomes necessary. If that is so then the failure of the applicant to deal with the truck does not justify a seizure of the trailers. The "other contraventions of the Act "

are not specified and cannot possibly form the basis of a seizure. I have already dealt with the alleged diversion of these trailers.

The respondent also questions the alleged *locus standi* of the applicant which is not the owner of the goods but loses sight of the fact that section 89 of the Act provides as follows:

"Whenever any proceedings are instituted to claim any ship, vehicle, container or other transport equipment - - - - which had been seized under this Act such claim must be instituted by the person from whom they were seized or the owners authorised or an authorised agent. "

If that is so in respect of seizure it must be even more so in terms of detention prior to seizure. The person from whom the goods were removed or detained must clearly have *locus standi* to challenge such detention .


In conclusion, far from regarding the applicant's actions as suspect the actions of the Revenue Services in this matter are far from perfect. An affidavit was filed in response to the application which was subsequently replaced under circumstances that are suspicious in the extreme. The high handed action reflected in the correspondence also does not redound to the credit of the respondent. The whole tenor of the opposition to this application smacks of a last ditch attempt to justify what was clearly an incorrect procedure by the Department from the outset.

I believe therefore that the applicant must succeed but in the light of the time that has passed such success must be tempered. The applicants must obviously obtain new road worthy certificates in respect of the trailers concerned they must obtain

a fresh cross-border permit and the goods must be removed and transported in accordance with the Act and Regulation.

Subject to the previous paragraph the application succeeds and an order is made in terms of paragraphs A, B and C of the Notice of Motion.

The respondent is directed to pay the costs of the application.

A handwritten signature in black ink, appearing to be 'P. J. J.', is written over a faint rectangular stamp or box. The signature is somewhat stylized and overlaps the lines of the stamp.

Date of hearing : 11 June 2004
Date of Judgment : 30 June 2004
Counsel for the Applicant : Adv M Maharaj, instructed by Naidoo
Maharaj Inc
Counsel for the Respondent : Adv T N Aboobaker SC with Adv D
Sridutt,

instructed by the State Attorney.