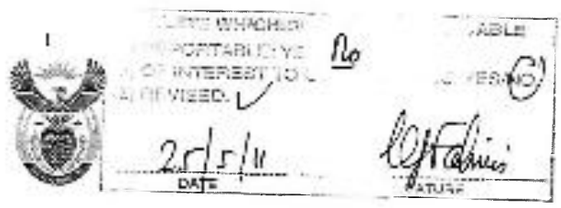

IN THE HIGH NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

25/05/2011
CASE: A677/08

MINISTER OF TRADE AND INDUSTRY, NATIONAL GOVERNMENT	**First Appellant**
THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	**Second Appellant**
THE CONTROLLER OF CUSTOM AND EXCISE	**Third Appellant**

And

EASTERN EAGLE HOME TEXTILE (SA) CC	**Respondent**

JUDGMENT

Fabricius J:

1. This appeal involves a number of questions relating to the second respondent's decision on 28 July 2006 to seize a certain container in terms of the provisions of section 88(1)(c) of the Customs and Excise Act 91 of 1964 ("the Customs Act") and his reasons for doing so.

2. Pursuant to such seizure the present respondent launched an application in the court a quo to have such decision reviewed in terms of various sections of the Administrative Justice Act 3 of 2000 ("PAJA").

3. The application succeeded; substantially on the basis that the relevant export declaration relied upon by the third appellant was inadmissible evidence. Accordingly the decision to seize the relevant container FSCU616654 was set aside, and the second appellant was ordered to reconsider such seizure after conducting a full and proper hearing of all relevant facts, and having due regard to the principles of natural justice.

4. That decision resulted in the appeal before us.

5. It is true that the function of a review court is not to usurp the function of the administrative agency, save in certain circumscribed circumstances. If a decision by an organ of state is rational and lawful within the confines of PAJA, a court will not interfere.

   See: Bato Star Fishing v Minister of Environmental Affairs 2004 (4) SA 490 CC at paragraphs 42 and 48.

6. The appellants case is that the evidence before him showed that the respondent had under-declared the values of the goods imported by it, and that because respondent did not rebut such, the appellant was justified and duty bound to seize the goods in terms of Section 88(1)(c) of the Customs Act.

I must mention that Sections 39(1)(a), (b) and (c), 40(1)(c) and (e), 47, 87(1), 88, 102(4) and 107(2)(a) are also relevant.

7. Before I turn to the process that was followed by the Commissioner, it is convenient to mention what his powers are in terms of the Customs Act, and especially Section 88(1). An officer seizing goods in terms of Section 88(1)(c) is required to hold a suspicion on reasonable grounds that:

   (a) the goods were imported;

   (b) they had been imported without compliance with the provisions of the Act, and

   (c) they were liable to forfeiture.

   Such an administrative act must be exercised in conformity with the requirements of PAJA.

   See: Commissioner SARS v Trend Finance 2007 (6) SA 117 SCA at paragraph 25, and Commissioner SARS v Saleem 2008 (3) SA 655 SCA.

8. The relevant facts can now be summarized:

8.1 On 24 May 2006 the container was stopped and inspected;

8.2 On inspection of the goods the following observations made by the investigating officer, Mr McCourt, caused him to be suspicious:

8.2.1 The packaging of the goods reflected telephone and fax numbers in China and Namibia;

8.2.2 Although the goods were of high quality, the invoice prices thereof were ridiculously low;

8.3 As a result of the aforesaid the goods were detained in terms of the provisions of section 88(1)(a) of the Customs Act, in order to determine whether they were liable to forfeiture;

8.4 In order to enable him to do his investigation, Mr McCourt prepared a so-called "shopping list" in terms of which certain identified and specified information and documentation were requested from the respondent's clearing agent;

8.5 The response which came in terms of the letter annexed to the founding papers as "A9" and "M4", did not address the essence of the request i.e. to furnish documentation that would prove that

the goods were imported in full compliance with the provisions of the Customs Act and, in particular, that the declared values were correct;

8.6 In an attempt to resolve the shortcomings in the respondent's reply and to finalise that investigation, Mr McCourt requested a meeting at the Commissioner's offices in Durban;

8.7 In terms of an e-mail dated 30 May 2006, Mr McCourt informed the Respondent that the scheduled meeting could be obviated if SARS was furnished with the outstanding documentation prior thereto. One of the documents called for was the export bill of entry;

8.8 In terms of an-email dated 1 June 2006, Respondent was advised that the documentation was still being awaited;

8.9 In terms of an email dated 5 June 2006 Mr McCourt:

8.9.1 expressed his loss to understand why the applicant could not furnish the Commissioner with the requested documentation as the obtaining thereof was normally a mere formality;

8.9.2 again pointed out that the goods would not be released unless the bill of export was made available.

8.10 Under cover of a letter dated 5 June 2006 the Commissioner was furnished with a letter from the applicant's Chinese supplier, explaining that they did not have the requested document;

8.11 As it became evident that the applicant had no intention of furnishing the Commissioner with the requested documentation, and the export bill of entry in particular, Mr McCourt approached the shipping line and managed to obtain a copy from them;

8.12 Consequent upon obtaining the export bill of entry, Mr McCourt, per email dated 6 June 2006, advised the Respondent of the said fact as well as of the fact that the values reflected in the export bill of entry were drastically lower that the values reflected in the invoice lodged with the Commissioner upon entry of the goods. Based on the aforesaid evidence the applicant was called upon to explain the discrepancies in the values and again advised that the goods would not be released unless an acceptable explanation was given;

8.13 Under cover of the letter of dated 12 June 2006 (annexure "A24", p97) the Commissioner was furnished with a letter from

the respondent, stating that it could not give an explanation as to why the values were different.

8.14 Mr McCourt met with representatives of the applicant on two occasions, to wit on 28 and 29 June 2006;

8.15 At the aforesaid meetings the applicant's representatives were:

8.15.1 advised that the goods would not be released unless proof of proper compliance with the Customs Act was furnished;

8.15.2 advised that in particular, such proof would have to include an acceptable explanation for the discrepancy between the values in the export bill of entry and the documentation lodged with SARS;

8.16 On 12 July 2006 respondent addressed an email to Mr Beyers Theron, the head of customs operations unit, informing him of the history of the matter, and requesting him to intervene;

8.17 Mr Beyers Theron responded in terms of an email dated 25 July 2006. In his reply he pointed out that the Applicant had been requested to furnish the Commissioner with specific documents,

that undertakings that the requested documentation and information would be furnished were given, but that the same had yet not been furnished, and also urged that the requested documents be provided as soon as possible;

8.18 Respondent in turn responded in terms of an email dated 27 July 2006. In this response none of the allegations made by Theron were disputed, or even challenged, and it simply raised the "defence" that the requested documentation was not normally requested and that the co-operation that had been rendered to date "was done purely to assist Durban with the ongoing investigations";

8.19 In terms of a letter dated 28 July 2006 the goods were seized in terms of the provisions of section 88(1)(c) of the Customs Act. The seizure notice also contained the reasons for the Commissioners decision to seize the goods;

8.20 The Commissioner was subsequently advised that the reasons set out in paragraphs 1, 2, 3, 6 and 7 of the seizure notice were unsustainable. Acting on the said advice the Commissioner:

8.20.1 abandoned his reliance thereon;

8.20.2 limited his decisions to the grounds as set out in paragraph 4 read with paragraph 5 of the seizure notice.

9. The commissioner was of the view, confirmed by the evidence of Mr. Desai, that having regard to the quality of the goods, the values reflected in the relevant invoice were extremely low.

10. As far as the Chinese Export Bill of Entry is concerned, there can be no doubt that it related to the container and goods in question, for the following reasons:

10.1 According to the export bill of entry it related to container with number FSCU6166554;

10.2 According to the bill of entry the goods were imported in container with number FSCU6166554;

10.3 According to the two letters from Dong Ying the goods were imported in container with number FSCU6166554;

10.4 In the founding affidavit respondent, in dealing with the reasons given by the Commissioner for his decision to seize the goods, explained that the export bill of entry was in any event provided by the shipping company, The said statement by necessary

implication accepted that the document obtained from the shipping line pertained to the consignment in issue;

10.5 In all of the correspondence addressed to the Commissioner the issue relating to the export bill of entry was treated on the basis that it pertained to the container and the goods in issue;

10.6 It should be evident from the evidence above that:

10.6.1 The origin of the export bill of entry was not an issue;

10.6.2 the export bill of entry had to be lodged with the Chinese customs authorities for purposes of exporting the container;

10.6.3 it related to the goods exported/imported in container number FSCU6166554

These facts were at all times prior to the seizure decision accepted by the Respondent and thus common cause between the parties.

11. The court a quo therefore erred in this regard in finding that such export bill was inadmissible evidence.

12. The explanations offered by the respondent did not properly address the evidence on the value of the goods obtained by the Commissioner, and were insufficient to rebut the presumption created by Sections 102(4) and (5) of the Customs Act.

13. Accordingly the court a quo erred in not dismissing the respondent's application.

14. The following order is therefore made:

14.1 The appeal succeeds with costs.

14.2 The order of the court a quo is set aside and substituted with the following order: "The application is dismissed with costs including costs of 2 counsel."

Date: 25 May 2011

I H FABRICIUS J

I agree: MSIMEKI J

I agree: MATOJANE J

Judges of the High Court North Gauteng Division