IN THE HIGH COURT OF SOUTH AFRICA
(BOPHUTHATSWANA PROVINCIAL DIVISION)
CASE NO: CA 8/2004

In the matter between:

DANIEL GULUBE **APPELLANT**

AND

THE STATE **RESPONDENT**

MMABATHO:

LANDMAN J
GCABASHE AJ

JUDGMENT

LANDMAN J:

[1] On 23 August 2004 the appellant was found guilty of an offence of contravening Regulation 237 read with Regulations 248 and 333(n) of the National Road Traffic Regulations published by notice 225 of 17 March 2000 and ss 69 to 73 and 89 of the National Road Traffic Act 93 of 1996. It is alleged that on 6 March 2005 and on the N4, a public road in the district of Zeerust, the appellant wrongfully operated a combination of vehicles whilst the permissible

maximum combination mass load of 56 000kg was exceeded. The actual mass was 74 620kg. The combination of vehicles was therefore overloaded by 18 620kg.

[2] The appellant was represented at the trial by Mr A P Den Hartog (who also argued the appeal). Mr Den Hartog handed up a list of admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977. All the essential elements were admitted, save for wrongfulness.

[3] The only issue for determination by the learned Magistrate was whether the appellant's conduct was unlawful as a result of an agreement (Memorandum of Understanding) concluded within the South African Customs Union comprising the government of the Republic of Botswana, the Kingdom of Lesotho, the Republic of South Africa and the Kingdom of Swaziland (the agreement). The memorandum was promulgated in Government Gazette No. 13576 dated 13 October 1991, proclamation no. 100 of 1991. In concrete terms the issue to be decided was whether a Botswana registered vehicle, which was not necessarily overloaded in terms of the legislation in Botswana, could operate on a road in South Africa whilst it was overloaded in terms of South African legislation.

[4] The learned Magistrate found that it would lead to an absurdity in the event of the agreement prevailing above the

National Road Traffic Act of South Africa. He found that the appellant was not immune from prosecution and found him guilty.

[5] Section 6(1) of the Transport Deregulation Act 80 of 1988 empowered the State President to enter into an agreement with the government of a country or territory whereby arrangements are made with that government for the control and regulation of a transportation of persons or goods between the Republic and that country or territory. Subsection 6(2) provides that:

> "An agreement referred to in sub-section (1) and any amendment thereof, shall be published by the State President by Proclamation in the Gazette, shall come into force on the date of signature of the agreement or amendment or on the later dated stipulated in the agreement or amendment and shall have the force of law, and the provisions thereof shall prevail in the case of conflict between any such provisions and the provisions of this Act or any other law." (My emphasis.)

[6] The agreement in question was concluded and added to the Custom Union Agreement. It came into operation in 1991. The appellant relies upon article para (7) of article VI which reads as follows:

> "Weighing certificates from checking points in the territory of one Contracting Party shall be valid in the

territories of the other Contracting Parties. This shall not, however, prevent the weighing and checking of the load by the competent inspection authorities at any time."

[7] Mr Den Hartog contends that a vehicle registered in Botswana, which complies with the legislation pertaining to the loading of vehicles, does not commit an offence in the Republic of South Africa in this regard. He says it was common cause between the parties that the Government of Botswana issues a weigh bridge certificate when the vehicle either enters or exits its borders. The South African government does not. Therefore no weigh bridge certificate is issued. He submits that there can be no doubt that on an interpretation of the SACU agreement. The weighing certificate of Botswana is valid in South Africa.

[8] Mr Den Hartog also pointed out that the proviso to clause (7) of article VI allows the South African authorities to weigh and check the load at any time. He submitted that the purpose of the proviso is merely to establish whether the load is in accordance with the documentation provided and also whether the weight is consistent with the weigh bridge certificate which has been issued. Essentially he submitted that it enables the authorities to determine whether an additional load has been added or some of the load removed.

[9] Mr Den Hartog referred to an analogous situation. The certificate of roadworthiness must also comply with the legislation of Botswana in this instance. He submitted that on a proper interpretation of the agreement, should Botswana have certain requirements, i.e. only one head lamp and the vehicle is issued with a roadworthy certificate under those circumstances, the vehicle enters South Africa, which legislation requires two head lamps, the vehicle will be roadworthy for purposes of operations in the Republic of South Africa in that it has a Botswana roadworthy certificate.

[10] Mr Den Hartog contends that nothing prohibits the authorities from inspecting a vehicle in order to see whether it complies with the roadworthy certificate issued in the Botswana area. The vehicle, however, is not required to comply with South African legislation. He referred to the unreported judgment of **TCS Freight (Pty) Ltd v the Minister of Transport and Others** held in the High Court of South Africa, Transvaal Provincial Division under case no. 24718/03 where the Honourable Mr Justice Daniels made an order in the following terms:

> "(1) The Second Respondent is interdicted to prosecute the Applicant or its employees for road traffic offences where such offences would not be prosecutable pursuant to the terms of the bilateral agreement on road transportation between the Republic of South Africa and Zimbabwe published by the State President of the Republic of South

Africa on 27 March 1998 in Regulation Gazette 6130 read together with the Transportation Deregulation Act, 80 of 1988 and the Cross Border Road Transportation Act, 4 of 1998."

[11] The order was made by agreement. No judgment was delivered. Mr Den Hartog submits that the order implies that as a result of the bilateral agreement in existence in the Republic of South Africa and Zimbabwe, the Second Respondent, being the national director of public prosecutions, was not entitled to prosecute the applicant even though such conduct would have constituted an offence in terms of our law.

[12] In my opinion the appeal must succeed. I do not think that the lawfulness of the appellant's conduct is supported by the clause upon which Mr Den Hartog relies. The certificate showing the weight or the mass of the load does no more than provide a mechanism to ascertain whether there has been compliance with a legal prescript.

[13] The critical clauses are clauses (4) and (5) of article VI. These clauses read:

"(4) All vehicles used in international transport pursuant to this memorandum of Understanding shall be suitable and roadworthy for the transport operations for which they are licensed."

"(5) Registration and licensing of vehicles in the territory of one Contracting

Party shall be valid for operations in the territories of the other Contracting Parties without any other requirement or formality."

[14] I understand this to mean that if a vehicle or combination of vehicles is licensed according to Botswana law to carry a load of a certain mass, that vehicle or combination of vehicles may carry that load in the territory of the Republic of South Africa without infringing South African law should our law may permit such a vehicle or combination to carry a lesser load.

[15] Although para (1) of article VI provides that the provisions of the agreement do not derogate from the application of the provisions of national laws and regulations imposing any restrictions and controls on grounds of inter *alia* , it must be read subject to clause (5) (set out above) and s 6(2) of the of the Transport Deregulation Act 80 of 1988, which allow the provisions of an agreement to prevail in the case of conflict between it and the provisions of any other law.

[16] No evidence was produced as to the registration of the vehicle or combination of vehicles. However, the public prosecutor accepted the appellant's admissions and thereby accepted that the combination of vehicles which was driven by the appellant was registered in Botswana and that it was not according to the law of that country not overloaded. I do not know whether the concession was correctly made, but it is binding. In any event the state, upon whom, the onus

rested of showing that an offence had been committed did not prove that the vehicle was not exempt from the ambit of the sections and regulations of the National Road Traffic Act 93 of 1996 set out in the charge sheet.

[17] Mr Balipile, who appeared for the respondent, conceded that conviction and sentence could not be allowed to stand.

[18] Although it seems highly undesirable from a safety aspect and the deleterious effect of such loads on our roads, I am of the opinion that the appeal must succeed. Nevertheless there is, I believe, an urgent case to be made out for the harmonization of the vehicle registration laws and other related laws of the SADEC countries to standardize the permissible maximum combination mass load (and the method of arriving at it) which is safe and which does not damage our roads.

[19] In the premises the appeal is upheld and the sentence and conviction are set aside.

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A A LANDMAN

JUDGE OF THE HIGH COURT

I agree.

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L. GCABASHE

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

DATE OF HEARING:	12 AUGUST 2005
DATE OF JUDGMENT:	26 AUGUST 2005
FOR THE APPELLANT:	ADV A P DEN HARTOG
FOR THE RESPONDENT:	ADV I T BALEPILE
APPELLANT'S ATTORNEY:	SMIT STANTON INC
RESPONDENT'S ATTORNEY:	THE DIRECTOR OF PUBLIC PROSECUTIONS