IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 8712/2001

In the matter between:

TREND FINANCE (PTY) LIMITED 1st Applicant

TREND GEAR ENTERPRISES (PTY) LIMITED 2nd Applicant

and

THE COMMISSIONER FOR THE SOUTH
AFRICAN REVENUE SERVICE 1stRespondent

CONTROLLER OF CUSTOMS, CAPE TOWN 2nd Respondent

JUDGMENT: 8 AUGUST 2005

VAN REENEN, J:

1] The first applicant is Trend Finance (Pty) Limited, a company with a share capital incorporated in accordance with the company laws of the Republic of South Africa and with its principal place of business at 54 Old Mill Road, Ndabeni Industria, Western Cape.

2] The second applicant is Trend Gear Enterprices (Pty) Limited a

company with a share capital duly incorporated in accordance with the company laws of the Republic of South Africa, also with its principal place of business at 54 Old Mill Road, Ndabeni Industria, Western Cape.

3] The first respondent is the Commissioner for The South African Revenue Service (the Commissioner) who has his head office at 299, Bronkhorst Street, New Meuckelneuk, Pretoria, Gauteng.

4] The Second Respondent is the Controller of Customs, Cape Town (the Controller), of 9 Table Bay Boulevard, Cape Town.

5] This application concerns the importation of low cost shoes from the mainland of China during 1998/1999. At the time, the Department of Trade and Industry controlled the importation of inexpensive footwear from, inter alia, China by means of the issuing of import permits in specified quantities per importer. Such permits for the importation of 4000 pairs of footwear were issued on application to a large number of small importers.

6] The second applicant procured the importation of various products, including footwear, into the Republic of South Africa. Such transactions were financed by the first respondent, an associated

company of the second respondent. Both companies were at the time being run by Mr Ismail Essop (Mr Essop) and his three daughters, Amiena, Khaironesa and Shahieda.

7] The second respondent had access to the identity of a number of the small importers to whom permits for the importation of footwear in maximum quantities of 4000 pairs had been granted. The first and second respondents had an arrangement with such permit holders, in the evidence described as a joint venture, in terms whereof they were authorised to procure the importation of footwear against the payment of an agreed amount per pair by utelising such permits. Although the evidence thereanent lacks lucidity such transactions appear to have been structured in the following manner: -

7.1 the first applicant in its role as financier would purchase the shoes from a trading house pursuant to negotiations initiated by the second applicant;

7.2 the first applicant would then sell the footwear to the permit holders whose permits were to be utilised for the importation at the same price at which they were purchased, so that the respective permit holders could qualify as the importers thereof;

7.3 the respective permit holders then invoiced the first applicant - who paid the supplier as well as all the other charges, duties and taxes payable in respect of the importation - only for the

fee agreed for its employment of the relevant permits;

7.4 the first applicant then invoiced the second applicant with an amount that included the rand equivalent of the dollar price paid to the supplier, all clearing costs, the permit fees and all other disbursements as well as compensation due to itself for having acted as financier; and

7.5 the second applicant, on delivery, invoiced the person to whom it had sold the shoes on the basis of the prices agreed to between them.

8] Under bills of entry –

8.1 dated 9 March 1999, 60228 pairs of shoes, alleged to have been supplied by Textrade International Exporters (Textrade) of New India House 6/F 52, Wyndham Street, Hong Kong, under invoices P5936 and P5937 and carried on board the "Nantai Venus" were imported into South Africa at the initiative of the second applicant (the first consignment). The applicants were on 12 March 1999 advised that the first respondent refused to release the consignment. No reasons for such refusal were provided. In order to procure the urgent release of the consignment the first applicant, pursuant to what Mr Essop described as an agreement with the first respondent, made a provisional additional payment of R100 000 under cover of the

prescribed form which recorded that the payment was being made as "provisional payment lodged pending outcome of investigations". The second applicant delivered the shoes of which the consignment consisted to its customer Pep Stores on 10 March 1999;

8.2 dated 11 August 1999, 47900 pairs of shoes alleged to have been supplied by Textrade and carried on board the "Ever Gleamy" were imported into South Africa at the initiative of the second applicant (the second consignment). During 1999, other footwear which had been imported into South Africa at the initiative of the second respondent and had been carried on board the "Sky River", were detained by the first respondent in terms of section 88(1)(a) of the Customs and Excise Act, No 91 of 1964 (the Customs Act). Pursuant to representations made by the applicants' attorney such footwear were subsequently cleared but those comprising the second consignment were detained upon their arrival in Cape Town because the Commissioner's Special Investigations Office believed that the bills of entry did not reflect the true transaction valued thereof. The first applicant in order to procure the release of that consignment, pursuant to an agreement reached with the Commissioner on 20 August 1999, made a provisional payment of R300 000 under cover of the prescribed form which recorded that the payment was being made as "Provisional payment lodged for possible underpayment in Customs Duty and VAT";

8.3 dated 13 August 1999, and 30 August 1999 91380 pairs of shoes alleged to have been provided by Textrade and carried on board the "Ever Gleamy" and the "Ever Growth" (the third consignment) were imported into South Africa at the initiative of the second applicant. That consignment was detained on 13 August 1999 for the same reasons as the second consignment. In order to procure the release of the third consignment the first applicant on 1 September 1999, made a provisional payment of R600 000 under cover of the prescribed form which again recorded that payment was being made as: "Provisional payment lodged for possible underpayment on customs duty and VAT". After the footwear comprising the second and third consignments had been released the second applicant delivered them to its customer, the Foschini Group.

9] The Controller acting on delegated authority from the Commissioner, on 29 March 2001, determined that there had been an underpayment of customs duty and value-added tax in respect of the first consignment

in an amount of R363 371,09 and that a further amount of R732 903 had to be paid in terms of sections 87(1) and 88(2) (a) of the Customs Act. Mr Ebenaeser Beukes (Beukes) in his answering affidavit conceded that certain items on the scheduled that accompanied the Controller's letter were duplicated and that the correct amounts are R344 971,92 and R695 508 respectively. No determination has as yet been made in respect of the second and third consignments.

10] The first- and second applicants, contending firstly, that the Controller's determination of 29 March 2001 falls to be set aside on appeal under section 65(6) of the Customs Act, alternatively, to be reviewed in terms of section 8(1)(c) of the Promotion of Administrative Justice Act, No 3 of 2000 (PAJA), in which event, the first applicant would be entitled to claim payment of the first provisional payment of R100 000; and secondly, that as a reasonable period of time has elapsed since the second and third provisional payments had been made and no determination of underpayment made, the first applicant is entitled to reclaim payment of the amounts of R300 000 and R600 000, instituted motion proceedings on 9 October 2002 against the Commissioner and the Controller in this court in which they claimed the following relief:

> "1. In terms of section 65(6) of the Customs and Excise Act No 91 of 1964 ("the Act"), setting aside the determination contained in the second respondent's letter dated 29 March 2001 (annexure "T" to the founding affidavit of Ismail Essop);

2. in any event, reviewing and setting aside the said determination in terms of section 8(1)(c) of the Promotion of Administrative Justice Act No 3 of 2000, alternatively reviewing and setting aside that portion of the determination imposing a penalty of R732 903 in lieu of forfeiture;

3. directing the first respondent to pay to the first applicant:

3.1 R100 000 together with interest thereon at the prescribed rate from 12 March 1999 to date of payment

3.2 R300 000 together with interest thereon at the prescribed rate from 20 August 1999 to date of payment;

3.3 R600 000 together with interest thereon at the prescribed rate from 1 September 1999 to date of payment.

4. alternatively to prayers 1 to 3 above, directing the respondents to furnish written reasons for:

4.1 the decisions contained in the said letter of 29 March 2001;

4.2 the decision not to refund to the first applicant the amounts set out in paragraph 3 above.

5. granting the applicants further and/or alternative relief; and

6. directing that the costs of this application be paid by the first respondent."

11] The Commissioner and the Controller opposed the relief sought by the first and second applicants and filed answering affidavits. The applicants in response filed a replying affidavit.

12] The matter was set down for hearing on 5 November 2002. The respondents on that date brought an application in which they firstly, sought leave to file the affidavits of Mr Gary van Dyk (Mr Van Dyk) and Mr Gideon Daniel Schreuder (Mr Schreuder) late; and secondly,

requested that the questions of the identity of the entity from which the second applicant purchased the footwear that was supplied by Kedah Company Limited (Kedah) and are reflected in its invoices P5930, P5932, P5933, P5936 and P5937 as well as the transaction value of the footwear referred to in the said invoices be referred for the leading of oral evidence in terms of Rule 6(5)(g).

13] The applicants in turn, brought two applications on notice to the respondents. The one was an application for the striking out of, inter alia, paragraph 10 of the founding affidavit of Mr Beukes in the application that has been referred to in the preceding paragraph and contained a reference to and annexed an unsworn statement of Mr Kenny Cheng Tsin Ki (Mr Cheng). The other was an application for the striking out as inadmissible hearsay or as argumentative, speculative and irrelevant, certain matter in the affidavit of Mr Van Dyk in the event of the application for its admission succeeding. The first of the two applications was wholly successful, but the second only partially.

14] After full argument, I on 16 January 2003 granted an order postponing the main application for the hearing of viva voce evidence in terms of Rule 6(5)(g), on a date to be arranged with the registrar on the following issues:

14.1 the identity of the entity from which the second applicant purchased the footwear listed in Kedah and Textrade invoices P5936 and P5937; and

14.2 the "transaction value" of the footwear referred to in the said invoices and the bills of entry, annexures A1 – 14 to the application,

and ordered that the remaining issues in the main application be determined only once those issues have been adjudicated upon.

15] That order also dealt with certain ancillary matters such as the parties' entitlement to call and subpoena witnesses; discovery; and costs. In the light of what transpired subsequently namely, that essential witnesses were not called to testify, it needs to be stressed that paragraph 8 thereof provided as follows:

> "The evidence to be adduced at the aforesaid hearing shall be that of any witnesses whom the parties or either of them may elect to call, subject however to what is provided below."

Accordingly, the parties' choice of what witnesses they wished to call to testify at the hearing remained untrammelled.

16] The oral evidence was limited to Kedah invoices P5936 and P5937, because only the footwear that formed the subject-matter thereof constituted the first consignment and the footwear to which invoices P5930, P5932 and P5933 related did not form part of either the second

or the third consignments.

17] On 4 September 2004 the applicants' attorney had a notice of set-down, for the hearing of oral evidence on 26 April 2004, served on the respondents' attorneys in Cape Town. It is not in issue that the notice of set-down was served on that date. At the time the attorney who was handling the matter, Me Abeeda Mugjenkar (Me Mugjenkar) was on maternity leave. The notice of set-down was placed in a ringbinder containing the pleadings by Ms Candice Newman, one of the secretaries. She failed to bring it to the attention of Mr Jerome Thomas who deputised for Me Mugjenkar during her absence or to her after she had returned to work on 19 January 2004. Although the matter subsequently received the attention of Me Mugjendar on a number of occasions she did not come across the notice of set-down in the ring-binder in which it had been placed. The first time that it came to her notice that the matter had been set down for hearing on 26 April 2004 was when the respondents' counsel telephonically advised her that he had been approached by the applicants' counsel regarding compliance with the requirements of Practice Note 19. After she had received confirmation from the applicants' attorney that the notice of set-down had in fact been served and a copy thereof faxed to her, the original notice was found in the ring-binder in which it had been placed. Me Mugjenkar immediately informed her clients. As a result, Mr Beukes

communicated with Mr Cheng telephonically and was advised by him that due to other business commitments he was unable to come to Cape Town. He also told him that due to business commitments in Europe and the United States of America he would not be able to do so for the ensuing two months. As the respondents' counsel had insufficient time within which to consult with witnesses and prepare for the hearing, the respondents on 26 April 2004 brought an application for the matter to be postponed sine die. That application was opposed by the applicants. The application was heard by my colleague Traverso DJP, who postponed the hearing to 17 May 2004 and ordered the respondents to pay the wasted costs occasioned by the postponement. She also granted leave that such costs be taxed immediately. The learned judge in addition ordered the respondents to furnish the applicants' attorneys with a copy of Mr Cheng's statement together with copies of all documents "which it is proposed to adduce through Mr Cheng" if it was intended to call him as a witness.

18] Mr Beukes on 27 April 2004 again communicated with Mr Cheng telephonically to enquire about his availability to testify on 17 May 2004 and thereafter. Mr Cheng reaffirmed that he, due to prior business commitments, was unable to come to South Africa on such short notice but expressed a preparedness to do so if given sufficient prior notice. Mr Beukes then communicated with Mr Stephen Lao, Mr Cheng's

assistant, who also intimated that he also would not be able to be present at the hearing due to business commitments. Because of the urgency of the matter the management in the Commissioner's department decided that two of its officials should travel to Hong Kong in order to first-hand establish the identity of the entity that supplied the goods; what the true transaction value thereof was; and to obtain such documents as would have a bearing on the resolution of those issues. As soon as the required authorisation had been obtained Me Ilse Amanda Enslin, the Manager: Litigation (Customs) in the Law Administration Section in the office of the Commissioner and Mr Beukes accompanied by Mr Schreuder caught an flight to Hong Kong on 12 May 2004 and arrived there the following day. They met with Mr Cheng soon after their arrival and with him worked through the unsworn statement that he had made to Messrs Beukes and Snyman in Johannesburg on 4 August 2002 (the unsworn statement). After that task had been completed they went to the Hong Kong and Shanghai Banking Corporation Ltd (HSBC) accompanied by Mr Lao and there spoke to Mr Luke G C Lee (Mr Lee) the Relationship Manager: Commercial Banking as previously arranged by Mr Cheng. Mr Lee, although he had earlier articulated the policy of HSBC not to become involved in any litigation to which neither they nor their client was a party, handed Mr Lao a letter, dated 13 May 2004, (Exhibit P"A") with annexures annexed thereto (Mr Lee's letter). Mr Lee in

response to a request to sign a specimen affidavit that had been prepared by the respondents' legal advisors undertook to discuss the matter with HSBC's legal department and to report the outcome thereof to Mr Cheng. On their return to Kedah's premises Mr Lao handed the letter to Mr Cheng who in turn handed it over to Me Enslin. After all the documentation had been perused again Me Enslin asked Mr Cheng for the original payment advices that had been issued by HSBC. He said that he could not locate them. It then transpired that they were in the possession of Mr Schreuder who had brought them from Cape Town and then produced them. The said payment advices were handed in as exhibit P "B". Mr Cheng confirmed that he had handed them to Mr Van Dyk on a previous occasion. Me Enslin and her entourage then returned to their hotel where they sorted out the documentation and made certain changes to the unsworn statement.

19] On their return to his offices the next day Mr Cheng told them that Mr Lee had advised him that HSBC was not prepared to allow him to make an affidavit. During an ensuing discussion Mr Cheng handed over to Me Enslin the original Bank Book number CC 441886 (the Bank Book) in respect of account number 474-2-801311 which Kedah held at HSBC Bank and had been drawn from his records (Exhibit P "C"). He also handed her two original pages of a Hong Kong Dollars account, number 474-046265-001 which Kedah held with HSBC

(Exhibit P"D") (the Bank Statement). Mr Cheng also handed to her two original invoices dated 11 February 1999 from Hua Tai Industries (Far East) Co Ltd to Kedah (Exhibit P"E") (the China invoices), containing the references P5936 and P5937 respectively. Me Enslin then made further changes to a draft statement she had prepared for Mr Cheng, whereafter he accompanied them to the offices of the South African Consulate General in Hong Kong. There Mr Cheng, in their presence, deposed to an affidavit to which were annexed copies of documents, marked as Annexures KC 1.1 to 1.37, the originals whereof were in Kehda's possession. At the offices of the Consulate General they also had copies of the original Bank Book, Mr Lee's letter; the Bank Statements, and the China Invoices certified as true copies of the originals.

20] Me Enslin and her entourage departed from Hong Kong for South Africa on 15 March 2004. Their flight arrived at the Johannesburg Airport at 7h00 on 16 May 2004 and they from there took a flight to Cape Town two hours later. They on their arrival provided the respondents' counsel with the documentation which they had obtained in Hong Kong. Those documents were made available to the applicants' counsel on 17 May 2004 at 8h30.

21] Mr Beukes in an affidavit deposed to on 17 May 2004 made discovery

of all the documents that had been obtained in Hong Kong during the period 13 to 15 May 2004. Based on the facts recited in paragraphs 18 and 19 above, the respondents on 17 May 2004, brought an application for the condonation of such late discovery. The application was opposed and answering and replying affidavits were filed. The late discovery on the part of the respondents was condoned but the applicants' right to object to the admission of the discovered documents when produced in evidence was reserved.

22] It needs to be mentioned that the respondents' attorney, in compliance with the provisions of paragraph 4 of the courts' orders of 16 January 2003 and 26 April 2004 respectively, on 3 May 2004 delivered and filed a notice to the effect that Mr Cheng would testify in accordance with the unsworn statement and that the copies of the documents annexed thereto would be used in support of his evidence.

23] Except for one day on which counsel for one of the parties was unavailable, oral evidence was presented during the period 18 May 2004 27 May 2004. Mr Rogers SC for the applicants called as witnesses only Mr Essop and his daughters Khaironesa and Shahieda. The respondents' counsel Mr Schippers SC, assisted by Adv. De Villiers Jansen, called as witnesses only Mr Gordon John Clifford Atkins (Mr Atkins), Mr Beukes and Mr Schreuder.

24] The issues that were referred for oral evidence effect the first consignment only because it is the only one of the three consignments in which the determination which is the subject-matter of an appeal in terms of section 65(6) of the Customs Act and a review in terms of the provisions of PAJA. On my understanding of the applicants' case the only basis on which the repayment of the provisional payments made in respect of the second and third consignments are being claimed is that more than a reasonable period of time, for the investigation of the importation of those consignments, has elapsed; that no determination of underpayment has been issued; and that in the circumstances the first respondent is obliged to refund those amounts.

25] Sight must not be lost of the fact that the referral of certain issues for oral evidence in terms of rule 6(5)(g) did not transform the application into an action but that it retained its character as proceedings brought on notice of motion (See: **Combrinck v Rautenbach and Another** 1951(4) SA 357 (T) at 359 G – H). Accordingly all disputed issues, other than those referred for the hearing of oral evidence, fall to decided on the papers. In view of the fact that the applicants seek relief of a final nature against the respondents on notice of motion - I must not be understood as suggesting that proceedings of that nature are inappropriate - the relief claimed in the event of there being

genuine and bona fide issues of fact, may be granted only if the averments in the applicants' papers admitted by the respondents, together with the facts alleged by the respondents, justify the granting of the relief sought (See: **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984(3) SA 623 (A) at 634 H – I). The applicants' entitlement, if any, to the relief claimed in respect of the first consignment will accordingly, be adjudicated on the basis of the averments made in the papers as amplified by the adduced viva voce evidence and the applicants' entitlement to the relief, if any, claimed in relation to the second and third consignments will be determined on the basis of the averments in the papers only. I shall first consider the relief claimed by the applicants in respect of the first consignment and thereafter deal with the relief claimed in respect of the second- and third consignments.

26] Relying on the judgment in **Metmak (Pty) Ltd v Commissioner of Customs and Excise** 1984(3) SA 892 (T) - in which it was held that it is competent for a single judge to hear an appeal in terms of Section 47(9)(e) of the Customs Act against a determination made by the Commissioner - I have come to the conclusion that a judge sitting as a single judge is not precluded from dealing with an appeal of this nature. That conclusion was arrived at on the basis that Section 65(6) of the Customs Act, in terms whereof the applicants appealed to this

court, is identical in wording to the subsection which was considered in the Metmak case. The learned judge in that matter, save for venturing the view that the word "appeals" in the subsection which was being considered by him, denoted an appeal in a wide sense (at 896 H), expressed the view that it was not clear to him what the exact nature of such an appeal was. Because of the dearth of information on which the first respondent's determination was based, I shall assume in favour of the applicants that this appeal amounts to a complete rehearing and a fresh determination of the merits of the Controller's determination, with or without additional information and the adjudication thereof **de novo** (See: **Tikly & Others v Johannes N.O. & Others** 1963(2) SA 588 (T) at 591 G to H and the decided cases there cited).

27] The determination that forms the subject-matter of this appeal was made by the second respondent in the person of Mr Louw Hermias Nieuwoudt (Mr Nieuwoudt) after he had come to the conclusion that, in conflict with the provisions of section 38(1) read with sections 39(1), 40(1), 47(1), 47 A(1), 65, 66 and 67 of the customs Act, the correct transaction value of the footwear in the first consignment had not been declared and that as a result thereof customs duty in an amount of R219 780,90 and value-added tax in an amount of R143 590,19 had been underpaid. The second respondent, as a consequence,

demanded payment by the second applicant of the sum of such amounts as well as an amount of R732 903 in lieu of forfeiture, in terms of Section 87(1) of the Customs Act.

28] The applicants contend that the amounts reflected in Textrade invoices P5936 and P5937 namely $3.20 and $2.95 per pair reflect the true transaction value. The respondents' contend that the amounts reflected in Kedah invoices P5936 and P5937 namely $5 for the men's and $4.45 for the youths sizes respectively constitute the true transaction value. Accordingly the outcome of this appeal is dependent upon an enquiry into what the true transaction value is of the shoes that constituted the first consignment.

29] Section 66(1) of the Customs Act provides that the transaction value of any imported goods is "… the price actually paid or payable for the goods when sold for export to the Republic" but subject to certain deductions which do not find application. The concept "price actually paid or payable" is, in relation to imported goods, defined in section 65(9) to mean

> "… the total payment made or to be made, either directly or indirectly by the buyer, or to or for the benefit of the buyer for the goods but does not include dividends or other payments passing from the buyer to the seller which do not directly relate to the goods."

30] It is common cause that the shoes that constituted the first consignment are the identical shoes that are described and identified in Kedah Invoices P5936 and P5937. Mr Essop, who is a director of both the applicants, testified on their behalf. He conceded during cross-examination that when Mr Van Dyk, the Purchasing Executive and Manager of the buying department of Pep Stores, approached him to provide a price for the importation of approximately 140 000 pairs of shoes, he was provided with the name of the supplier from whom the shoes had to be obtained, namely Kedah; the price in US Dollars per pair at which Kedah was prepared to sell the shoes to Pep Stores; as well as their style numbers. Mr Essop was prepared to accept that the supplier from whom the first applicant allegedly acquired the said shoes, namely Textrade, must have acquired them from G Assanmal & Co (HK) Ltd of 52 Wyndham Street, 6/F, Hong Kong (Assanmal) who, in turn, could have acquired them from no-one other than Kedah. In view of Mr Atkins' evidence regarding Pep Stores' stringent quality, marketing, labelling and packaging requirements - Mr Essop said that "packaging and all that" had never been discussed with him - as well as the fact that the consignment was not rejected by it, that concession appears to have been made with justification. As the shoes of which the first consignment consisted are purported to have been acquired in terms of Textrade invoices P5936 and P5937, the inference is inescapable that the shoes referred to therein are the identical shoes

referred to in the identically numbered Kedah pro forma invoices and invoices. As far as those shoes are concerned Mr Essop disavowed any knowledge of the nature and the contents of any transactions that might have taken place between Kedah and Assanmal as well as between Assanmal and Textrade. It needs to be mentioned, for the sake of completeness, that Mr Essop in terms of his arrangements with Mr Van Dyk had to acquire from Kedah also the footwear reflected in Kedah invoices P5930, P5932 and P5933. Such shoes were in fact imported. Whereas the shoes reflected in invoice P5933 were also purported to have been acquired from Textrade the footwear in invoices P5930 and P5932 were purported to have been acquired from Oriental Enterprises also of New India House, 6/F, 52, Wyndham Street, Hong Kong. Mr Essop testified that as regards the acquisition of the shoes to which all the aforementioned invoices related, he had dealings with only a Mr Wan of Textrade. However, no explanation was put forward - and none to me appears to be apparent - why some of the shoes were purported to have been acquired from Textrade and others from Oriental Enterprises. It did, however, transpire from the evidence of Mr Essop that Mr Wan is involved in the affairs of Textrade as well as Oriental. That he not only signed the Textrade- but also the Oriental Enterprises invoices is consistent with that evidence. Mr Essop also testified that he has known the undertaking trading as Assanmal for a long time and that the first- and/

or second applicants had in the past had dealings with it; that it is a large trading house in Hong Kong, Singapore and India; and that it and Textrade (and presumable also Oriental Enterprises) "had a joint venture" and had been "working together for years". As is apparent from the Kedah invoices as well as the invoices provided in the names of Textrade and Oriental Enterprises, they and Assanmal have the same physical address in Hong Kong; that the first applicant, on the basis of instructions received, procured payment of the amounts reflected in Oriental Enterprises Invoices P5930 and P5932 and Textrade Invoices P5933, P5936 and P5937 into a US$ account of Assanmal, namely number 00080 – 000131 – 101 – 20 at the Port Villa Branch of Banque Nationale de Paris (BNP); and that, as appears from documentation of which the applicants have made discovery, (Annexures P and Q) the same bank account was being utelised by Textrade, there in my view is no reason to doubt Mr Essop's evidence to the effect that they were commercially related or associated, if indeed they truly were separate entities.

31] Mr Essop, on the basis that, when Mr Van Dyk approached him to provide an all-inclusive price in rand terms for the importation and delivery to Pep Stores' warehouse of the Kedah shoes, the prices of $5 and $4.45 must by then already have been agreed to between Kedah and Pep Stores, was during cross-examination driven to concede that it

just did not make any sense that Kedah would have disposed of the shoes to any other person and at lower prices. That concession, in my view, was fairly made as logic dictates that if Textrade and Oriental Enterprises charged the first applicant $3.20 and $2.95 per pair and allowance is made for some profit to each party in the supply-chain, the price at which Kedah sold the shoes to Assanmal must have been even lower. Faced with that difficulty Mr Essop embraced, with some enthusiasm, the thesis that the shoes constituted excess stock which Kedah had been struggling to dispose of at a time when the demand for shoes world-wide was tardy and importation into South Africa problematical due to the limited availability of import permits. He attributed Mr Wan's alleged ability to have negotiated rock-bottom prices to an enhanced bargaining position brought about by a combination of the aforementioned factors and the applicants' favourable situation of having had access to scarce import permits. Mr Essop's testimony that when Mr Van Dyk and Mr Schalk van der Merwe of Pep Stores approached him for the importation of the shoes from Kedah, told him that Kedah had more than a million pair of shoes in surplus stock that it had been holding for longer than eighteen months; selected a few styles that "were not in that lot"; and orally provided him with their prices in US $ is clearly false. It subsequently transpired that the document that Mr Essop identified as having been shown to him (Record p. 380), was in fact a list of Pep Stores' import

permit requirements for the importation of shoes during the period December 1998 to February 1999.

32] Although the unrefuted evidence presented on the applicants' behalf shows that the first applicant in fact paid the amounts reflected in Textrade invoices P5933 , P5936 and P5937 as well as in Oriental Enterprises invoices P5930 and P5932 into a bank account in the name of Assanmal and Mr Beukes had to concede that no evidence that additional amounts had been paid by them to Textrade and Oriental Enterprises for shoes imported under those invoices could be found, despite the fact that the applicants had provided him with all documents that he required, not even a shard of evidence was presented of any transactions between Textrade and Oriental Enterprises on the one hand and between Assanmal and Kedah on the other hand. Mr Wan, to whom Mr Essop had allegedly given a mandate to enter into negotiations with Kedah on the applicants' behalf and is likely to have been able to contribute to the resolution of the issues that were referred for oral evidence, was not called to testify in deference to a request to that effect on his part. The only other known witness capable of making a contribution to the resolution of those issues, namely Mr Cheng, did not testify either. As the respondents and their attorneys were unable to procure his attendance in South Africa on 26 April 2004 (the date on which the hearing of oral evidence

had earlier been set down) or 17 May 2004 (the date to which the hearing had been postponed by Traverso DJP), their counsel as regards the transaction value of the shoes, were obliged to rely on circumstantial evidence only. Mr Rogers relying on the fact that Mr Cheng's failure to testify at the criminal prosecution of Mr Essop because of the then prevailing SARS virus - an excuse the genuiness whereof he questioned - and resulted in Mr Essop's acquittal, requested this court to draw adverse inferences from Mr Cheng's failure to have attended the hearing. Although his criticism of Mr Cheng's failure to have testified at the criminal trial may not be totally devoid of merit, his unavailability to testify on the previous occasion as well as at the hearing before me, in my view, needs to be considered on its own merits. On the first occasion his presence had to be procured on five days' notice due to the fact that the notice of set-down had not come to the notice of the respondent's attorney. As far as the present hearing is concerned Traverso DJP postponed it to 17 May 2004, despite the fact that Mr Beukes in an affidavit filed in support of an application for the postponement of the matter, said that Mr Cheng told him on 23 April 2004, that he was willing to testify but unable to come to South Africa "within the next two months" and would be in the United States of America for the month of May. As is apparent from the evidence of Mr Atkins as well as the facts deposed to by Mr Beukes and also Me Enslin (in the condonation application), Mr Cheng appears

to be running a business operation that places inordinate demands on his availability. In the circumstances I am not prepared to draw any adverse inferences from his failure to have testified.

33] The respondents' legal representatives, faced with the reality that Mr Cheng would not be available to testify at the hearing, arranged for him to depose to an affidavit before the South African Consulate General in Hong Kong and sought to have it as well as the annexures thereto admitted as evidence in terms of the provisions of the Law of Evidence Amendment Act, No 45 of 1988 (the Evidence Amendment Act) and the Civil Proceedings Evidence Act, No 25 of 1965 (The Civil Proceedings Evidence Act). They also sought to have Mr Lee's letter (exhibit P "A"); the payment advices (exhibit P "B" 1 – 5); the Bank Book (exhibit P "C"); the Bank Statements (exhibit P "D" 1 and 2) admitted in terms of the provisions of the Electronic Communications and Transactions Act, No 25 of 2005 (the ECT Act).

34] Mr Rogers objected against the acceptance in evidence of Mr Cheng's affidavit (exhibit P "J") on primarily two grounds. The first was that it in essence amounted to the filing of an affidavit in motion proceedings, both late and out of its ordinary sequence, and cannot be admitted, in the absence of a substantive application in which details sufficient to enable the court to exercise its discretion in a judicial manner and set

out eg. an explanation for the lateness that negatives mala fides or culpable remissness (See: **James Brown & Hamer (Pty) Ltd v Simmons N.O.** 1963(4) SA 567 (A) at 660 F) and the absence of prejudice incapable of being remedied by an appropriate order for costs (See: **Transvaal Racing Club v Jockey Club of South Africa** 1958(3) SA 599 (W) at 604 C), and that such an application, in any event, cannot succeed because of the exceptional dilatoriness on the part of the respondent to have obtained the required affidavit and placed it before the court. The second was that when an opposed application has been referred for the hearing of oral evidence the defined issue(s) fall to be decided solely with reference to the oral evidence. The last submission was based thereon that, on the basis of the decision in **Drummond v Drummond** 1979(4) SA 161 (A) at 166 **in fine**, to have regard to what is contained in affidavits would constitute a misdirection. Accordingly, he submitted, that to receive Mr Cheng's affidavit would be an exercise in futility.

35] I am of the view that the respondents have not sought to have Mr Cheng's affidavit received late and out of sequence and as part of the evidentiary material on the basis whereof any issues, other than those that have been referred for oral evidence, have to be decided, but that it should be considered only in relation to the issues that have been referred for oral evidence. In the circumstances, the requirements for

the acceptance thereof, late and out of sequence, do not, in my view, find application. **Drummond's** case (supra), appears to be, distinguishable on the facts. In that case the court, despite having referred a particular issue for the hearing of oral evidence, relied on what the deponent, who failed to testify at the hearing, had said on affidavit about that particular issue in an affidavit originally filed in that application. In the instant case Mr Cheng did not depose to any of the original affidavits filed in the application: in fact an attempt to have his unsworn statement admitted failed in that it was ordered to be struck out. In the circumstances I incline to the view that **Drummond's** case (supra) does not stand in the way of Mr Cheng's affidavit being received.

36] As already stated, the respondents seek to have Mr Cheng's affidavit admitted under the Law of Evidence Amendment Act as well as the Civil Proceedings Evidence Act. Section 3(1) of the Law of Evidence Amendment Act renders hearsay evidence, defined in section 3(4) as any evidence "whether oral or in writing the probative value of which depends on the credibility of any person other than the person giving such evidence" admissible, "subject to the provisions of any other law". The words "subject to" in a statute normally denote what is dominant and what is subordinate. As that to which a provision is subject is paramount and overrides it in the event of any conflict (See: **S v**

Marwane 1982(3) SA 717 (A) at 747 H – 748 A; **Zantsi v Council of State, Ciskei and Others** 1995(4) SA 615 (CC) at paragraph 27; **Chevron Engineering (Pty) Ltd v Nkambule** 2003(5) SA 206 (SCA) at paragraph 16), I shall first consider whether or not Mr Cheng's affidavit is admissible under the Civil Proceedings Evidence Act. That act provides for the admissibility of documentary evidence, more in particular, statements defined as "any representation of fact, whether made in words or otherwise" and undoubtedly encompasses an affidavit in view of the provisions of section 34(4) (See: **Schrimper and Another v Monastery Diamond Mining Corporation (Pty) Ltd and Another** 1982(1) SA 612 (O) at 614 E – F). I shall thereafter consider, if necessary, whether Mr Cheng's affidavit could be admitted also under the provisions of the Law of Evidence Amendment Act as was done in **Magwanyana and Another v Standard General Insurance Co Ltd** 1996(1) SA 254 D & CLD).

37] Section 34(1) of the Civil Proceedings Evidence Act provides as follows -

> "In any civil proceedings in which direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall on production of the original document be admissible as evidence of that fact, provided –
>
> a) …
>
> b) the person who made the statement is called as a witness in the

> proceedings unless he is dead or unfit by reason of his bodily or mental condition to attend as a witness or is outside the Republic and it is not reasonably practicable to secure his attendance or all reasonable efforts to find him have been made without success"

Section 34(2) of that act provides-

> "The person presiding at the proceedings may, if having regard to all the circumstances of the case he is satisfied that undue delay or expense would otherwise be caused, admit such statement as is referred to in sub-section (1) as evidence in those proceedings –
>
> a) notwithstanding that the person who made the statement is available but is not called as a witness;
>
> b) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or if the material part thereof proved to be a true copy."

38] As the applicability of Section 34 of the Civil Proceedings Evidence Act is dependent on the outcome thereof, it must first be determined whether the hearing before me amounted to "civil proceedings where direct oral evidence of a fact would be admissible". I have already found that the fact that certain issues were referred for the hearing of oral evidence did not transform the application into a full-blown trial action. The purpose of the referral was specifically for the presentation of oral evidence on the issues as formulated by me. In my view, there cannot be any doubt that the proceedings before me were of a civil nature and that because of the referral direct oral evidence of facts relating to those issues were admissible. In the premises I am satisfied

that the proceedings before me qualify as civil proceedings where direct oral evidence of a fact would be admissible.

39] It is common cause that Mr Cheng, at all times material, was outside the Republic of South Africa. I also am satisfied that, on the evidence at my disposal it was not reasonably practicable to have secured Mr Cheng's attendance for any part of the hearing. I have furthermore considered the contents of Mr Cheng's affidavit in the light of all the evidence that I have at my disposal and am satisfied that the facts therein would be admissible by means of direct evidence, save for the transactions evidenced by the annexures to Mr Lee's letter of 13 May 2004 (exhibit P "A"), to the extent that they reflect communications between HSCB and BNP, do not fall within his personal knowledge and would not be admissible in evidence unless admissible under any of the statutes referred to in paragraph 33 above. It has not been placed in issue that the affidavit of Mr Cheng which the respondents are seeking to have admitted is original and bears his signature.

40] Section 34(3) provides that nothing in the section in which it appears should render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated, involving a dispute regarding any fact which the statement might tend to establish. Mr Rogers submitted that Mr Cheng was such a person.

Whatever the exact meaning of that concept, it, in view of the provisions of section 35(1), is accepted that the mere existence of an incentive to conceal or misrepresent facts does not **per se** render a person interested (See: **Colgate-Palmolive v Elida-Gibbs (Pty) Ltd** 1990(2) SA 516 (W) at 518 C – E). The term "interested" in the English statute from which the South African provision is derived, has been interpreted to signify that, apart from pecuniary or proprietary interest, "a real likelihood of bias" would disqualify a statement from being admitted (See: **Bearmans Ltd and Another v Metropolitan Police District Receiver** [1961] All ER 384 (CA) at 394 c – e). In **Boshoff v Nel** 1983(2) SA 41 (NC) Lichtenberg J, at 44 F – G, said that such an interest was not limited to "… blote geldelike belang nie, maar dit sluit ook 'n persoonlike belang hetsy finansieël of andersins in, mits so 'n persoonlike belang nie te ver verwyderd is nie". Thát approach was followed by Van Blerk AJ in **United Tobacco Co Ltd v Concalves** 1996(1) SA 209 (W) at 214 E – G. I am in agreement with Mr Rogers that the enquiry does not concern the truth or falsity of the statement, but whether the maker thereof had an interest of the required nature in a particular version being established and that a court, by virtue of the provisions of Section 34(5), is entitled to draw reasonable inferences from the statement itself as well as the other circumstances of the case. Mr Rogers submitted that good reasons existed why Mr Cheng should be regarded as "a person interested" for

the purposes of Section 34(3). He submitted, in my view correctly, that Mr Cheng as the Managing Director and the sole decision-maker of Kedah has a material financial interest in its fortunes as Pep Stores and Kedah have had a close business relationship for a period of in excess of 20 years. On the evidence presented, Pep Stores is Kedah's biggest single client by far and its continued success as a business is dependent on the continuation of that relationship. He also pointed out that Pep Stores actively assisted the respondents by having provided them with of their own documents and obtaining documents from Kedah which show that the shoes had been disposed of at the prices Kedah and Pep Stores had originally agreed upon and that Pep Stores was represented in the group that visited Hong Kong in early May 2004. He further submitted that Mr Cheng had for a substantial period of time prior to the date on which he deposed to his affidavit, represented to Pep Stores that he had sold the shoes referred to in Kedah invoices P5936 and P5937 at the prices reflected therein and that if he were to have admitted that he had sold them at lower prices, it in all probability would have destroyed the long-standing relationship between Kedah and Pep Stores, a relationship he would have been anxious to preserve. Mr Rogers further submitted that as Mr Cheng, arising from Kedah's relationship with Pep Stores, had a very real financial interest to persisting with the version that the shoes were sold at the higher prices it sufficed to make him an "interested person". He

for good measure, also relied thereon that Mr Cheng, by persisting with his original version, would have protected himself against the possibility of criminal prosecution in the future for having falsified the documents that he had provided to Pep Stores and submitted that he, on the basis of what he had said in the penultimate paragraph of his unsworn affidavit, could well have believed that a criminal prosecution would be a consequence if he were to have deviated therefrom.

41] The problem with those submissions is that they proceed from the premise that Kedah in fact disposed of the shoes of which the first consignment consisted to Textrade/Assanmal at less than the prices that had originally been agreed to between itself and Pep Stores: an issue central to one of the issues that has to be decided namely, what the true transaction value of the shoes was. What should be borne in mind, however, is that neither Kedah nor Pep Stores are parties to these proceedings but that they concern a dispute of a purely fiscal nature between the respondents and the applicants namely the underpayment of import duties and other taxes and charges. Pep Stores' erstwhile employees as well as Mr Cheng are no more than witnesses in that dispute who have chosen to co-operate with those whose duty it is to investigate matters of that nature. It is not been suggested even that such conduct renders a person interested within the meaning of section 34(3). In any event, in the first place, any

anxiousness on the part of Mr Cheng to preserve Kedah's relationship with Pep Stores, in my view, could at best possibly have amounted to an incentive on his part to conceal or misrepresent facts which, in view of the provisions of section 35(1), only affects the weight of the evidence contained in his affidavit and not the admissibility thereof. In the second place, the evidence presented on behalf of the respondents completely destroyed the factual basis of Mr Essop's thesis of why Kedah would have been prepared to sell the shoes at a reduced price. In my view those considerations militate strongly against any facile acceptance that Mr Cheng had an incentive to and in fact misrepresented the true facts in his affidavit. I accordingly incline to the view that Mr cheng is not a "person interested" within the meaning of section 34(3).

42] In the circumstances and because in my view the requirements prescribed by sections 33, 34 and 35 of the Civil Proceedings Evidence Act have been met the affidavit of Mr Cheng exhibit P "J" is admitted as evidence in these proceedings. That conclusion disposes of the admissibility of Cheng's affidavit only and not the weight to be attached thereto. It also obviates the need to consider whether Mr Cheng's affidavit is admissible also under the provisions of the Law of Evidence Amendment Act.

43] The annexures to Mr Cheng's affidavit, annexures KC 1.1 to 37, consist of certified copies made from the records in his possession, the originals whereof he says were sent to his bank HSCB at the time of the transactions to which they pertain, in order to obtain payment. Also annexed to Mr Cheng's affidavit as annexures are certified copies made from the original documents still in his possession and had been handed to Me Enslin or Mr Schreuder namely –

43.1 The China Invoices relating to shoes the article number whereof corresponds with kedah invoices P5936 and P5937 (annexures KC 1 and 2) (exhibit P "E");

43.2 five payment advices KC 4 to 8, (Exhibit P "B") received from HBSC relating to invoices numbers P5930, P5932, P5933, P5936 and P5937;

43.3 the Bank Book - KC 9 (Exhibit P "C"); and

43.4 the Bank Statements (Exhibit P "D").

As annexures KC 1 – 37 to Mr Cheng's affidavit were produced and identified by a witness in whose lawful custody they were at the time, they have been properly proved (See: **Howard & Decker Witkoppen Agencies and Fourways Estates (Pty) Ltd v De Sousa** 1971(3) SA 937 (T) at 940 F). That is not the position as regards Mr Lee's letter as well as the annexures thereto which evidence communications between HSBC and PNB, and clearly constitute hearsay, and would be admissible in evidence only if they meet the requirements of any of the three statutes referred to in paragraph 33 above.

44] The respondents' counsel have sought to have also Mr Lee's letter and the annexures thereto admitted in terms of section 34 of the Civil Proceedings Evidence Act. It must be stated at the outset that I find myself in full agreement with Mr Rogers' submission that the respondents' counsels' contention that Mr Lee's letter asserts that letters of credit UB12033 and UB111572 were duly paid is incorrect. All that the letter asserts is that certified true copies of documents relating to specified transactions are attached thereto. In any event, as there is no evidence that Mr Lee had personal knowledge of the underlying transactions evidenced by those annexures and it is common cause that he had not examined the originals thereof, he could not on the basis of personal knowledge have stated that they were true copies. Accordingly, such factual averments as are contained in his letter are clearly hearsay. In the premises it is not been shown, as is required by section 34(1)(a)(i) that he had personal knowledge of the matters dealt with in the said letter. I am further not satisfied that it has been shown, as is required by section 34(1)(b), that it was not reasonably practicable to have secured Mr Lee's attendance. In the circumstances I have come to the conclusion that Mr Lee's letter - excluding the annexures thereto - is not admissible in terms of the provisions of the Civil Proceedings Evidence Act.

45] Are the annexures to Mr Lee's letter admissible under the Civil

Proceedings Evidence Act? Section 34(1) provides for the admission of a document as evidence if they contain any statement made by a person. Section 34(4) in turn provides that a statement shall not be regarded as having been made by a person unless "the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognised by him in writing as one for the accuracy of which he is responsible." There is no indication in any of the said annexures that any of them were authored in that sense, and there furthermore is no person identified who can be considered as having assumed responsibility for the accuracy of the statements therein contained. It is common cause that the said annexures are not original documents as is required by section 34(1). If the original of a document cannot be produced, section 34(2)(b) allows that a copy thereof proved to be a true copy, may be produced. Based on Beukes's evidence of what Mr Lee had told him, the said annexures were produced from HSBC's microfiche records, which it is common cause, themselves are copies. The only evidence available to show that the said annexures are true copies is the hearsay statement that they were certified by Fanny Cheng on the basis of other copies namely, HSBC's microfiche records. In the circumstances I incline to the view that the annexures to Mr Lee's letter are also not admissible in terms of the provisions of the Civil Proceedings Evidence Act.

46] What must be considered next is whether Mr Lee's letter and the

annexures thereto are admissible in terms of section 3 of the Law of Evidence Amendment Act. They would be so admissible if I hold the opinion that it is in the interests of justice that they be admitted. Any opinion arrived at in that regard has to be based on a consideration of the nature of the proceedings; the nature of the evidence; the purpose for which such evidence is tendered; the probative value thereof; the reason why the evidence is not adduced through the person on whom the probative value thereof depends; and any prejudice that the admission of the evidence may entail to a party; and any other factor that in the opinion of the court should be taken into account.

47] Whilst Mr Lee's letter speaks for itself, a perusal of the annexures thereto shows that they, in the main, consist of five letters under cover of which HSCB forwarded certain documents (identified only by abbreviations which have not been clarified), drawn under Documentary Credits UB 12033 and UB 111572 and were presented to BNP for the payment of the amounts reflected on specified bills as well as the latter's written responses thereto by means of letters, telexes and facsimile transmissions. In two instances, unlike in the case of the others, there are no remittance advices but merely copies of computer printouts headed: "Exports Payment Pending Transactions Generation Report" without any explanation of what that is supposed to convey. The purpose of having the annexures to Mr Lee's letter admitted was

clearly to show that Kedah received payment from Assanmal of the amounts reflected in its invoices P5930, P5932, P5933, P5936 and P5937, an aspect that concerns the central issue to be decided namely, what the transaction value of the shoes was. The probative value of the said annexures, in my view, is not high. It shows at best that Assanmal made payment to Kedah for the shoes whereas the issues for decision are the identity of the party from whom the **first applicant** acquired the shoes and the price paid by it to that party. Mr Essop conceded that Assanmal must have purchased the shoes from Kedah but not at the prices reflected at its invoices. Although relevant in the context of determining probabilities, the fact that Assanmal paid Kedah makes no direct contribution to the enquiry as regards the prices at which Textrade and Oriental Enterprises acquired and sold them. No reasons were provided for why the persons on whom the probative value of the said annexures depend were not called to testify, other than the obvious one that they in all probability are employees of HSBC and BNP in Hong Kong and were unlikely to be co-operative to testify in regard to litigation that does not involve their employers. One knows, on the basis of hearsay, that that was the attitude of HSBC. In addition thereto that the reliability as well as the significance and role of the said annexures in the dealings between HSBC and BNP could not be tested by means of cross-examination and/or placed in their proper perspective, they relate to transactions to which, according to the

applicants, neither they nor Textrade and/or Oriental Enterprises were parties. No information was provided, and such information is not apparent from the documents themselves, of the identity of the originators of the said annexures as well as their status in HSBC and BNP. In the circumstances it is difficult to properly assess their reliability. Accordingly their admission, in my view, would inevitably entail a measure of prejudice to the parties. As was pointed out by the respondents' counsel, the details appearing in those annexures tie in neatly with the other documents that have been proved and appear to enhance their probative value and facilitate the conclusion that their admission will be in the interests of justice. That submission is superficially attractive but, in the absence of evidence about their significance in the discharge of the obligations that form the subject-matter of this enquiry, the risk arises that their evidentiary value might be overestimated. As in my view the possibility of such risk overshadows the limited evidential value thereof, I incline to the view that it is not in the interests of justice that they be admitted as evidence in terms of the Evidence Amendment Act. In any event, Mr Lee's letter and the annexures thereto, themselves are annexures to Mr Cheng's affidavit. On the basis of what has been stated earlier in this paragraph, they clearly constitute hearsay based on hearsay and in some instances, based on other hearsay. In my view hearsay of that nature does not fall within the definition of hearsay in section 3(4) of the

Evidence Amendment Act. It furthermore, in my view, would not be in the interests of justice that evidence of so tenuous nature should be admitted. In my opinion those constitute further reasons why Mr Lee's letter and the annexue thereto should not be admitted in terms of the Evidence Amendment Act.

48] As already mentioned the respondents' counsel also contended that the annexures to Mr Lee's letter as well as exhibits P "B", P "C" and P "D" should be admitted in evidence in terms of the provisions of the ECT Act as they constitute communications by means of data messages which is therein defined as "data generated, sent, received or stored by electronic means and includes … a stored record" (data in turn is defined as "electronic representations of information in any form").

In view of the earlier finding that exhibits P"B", P"C" and P"D" have been properly proved, through Mr Cheng, there in my view, is no need to consider whether they are admissible also under the provisions of the ECT Act.

49] Are the annexures to Mr Lee's letter admissible in terms of the provisions of the ECT Act?

It is clear from the definitions of "data" and "data message" that a "data message" is something which exists in electronic form as a result of having been generated, sent, received or stored by electronic means. Section 15(4) of the ECT Act provides that in the circumstances therein stated a data message or "a copy or printout of or an extract from such data message" is admissible in evidence "and rebuttable proof of the facts contained in such record, copy, printout or extract". It is clear that when that subsection refers to a "data message" being admissible, it is referring to the adducing of evidence

in electronic form such as the handing in of a computer disc and envisages the possibility that a "copy or printout of or an extract from" the data message might be adduced instead of the "data message" itself, provided that it is certified to be correct by an officer in the service of the person who made the data message. As a data message can exist only in an electronic form a "copy" thereof must necessarily connote an electronic copy rather than a piece of paper. A "printout" would be an original document printed out from a computer capable of converting a data message into written hardcopy form. An 'extract" from a data message would simply be a part thereof but would itself be something existing in electronic form. None of the annexures which the respondents seek to have admitted under section 15 of the ECT Act is in electronic form: at best, it could be argued that some of them constitute "printouts" of data messages. The said annexures would appear to be nothing more than pieces of paper rather than information in electronic form and accordingly cannot be either "data messages" or "copies" or "extracts" from data messages.

Are they printouts of data messages? For there to be a "printout" of a data message, it must be shown that prior to the creation thereof electronic representations of information had been generated, sent, received or stored by electronic means. The mere creation of a written document by typing on an electric typewriter or on a personal computer does not involve the creation of "data messages" and accordingly, the resultant document cannot be regarded as a "printout" or a "data message". There was no evidence whatsoever as to how the annexures to Mr Lee's letter came into existence.

> A party seeking to rely on the provisions of section 15(4) of the ECT Act would have to show that the document sought to be handed in is a printout of information existing in electronic form. Such evidence is completely lacking in this case. At least one of the documents purports to be a facsimile and a number of others were clearly not sent electronically since they refer to attached enclosures. Even if the underlying content of the annexures existed as data massages, it does not follow that they are "printouts". A "printout" is the very document generated by a computer in a printed form and it is only if such a printout is appropriately certified that it would be admissible in terms of the said subsection. None of the annexures to Mr Lee's letter appear

to be printouts in that sense. They are not even copies made directly from original printouts. One knows, based on hearsay, that they were copied from microfiche records, which are themselves simply photographic copies of something else. Any certification of the said annexures as true copies established no more that that they are true copies of the microfiche records of HSBC. Nobody has purported to certify that the documents on which the microfiche records are based are correct printouts of data messages. Accordingly the purported certification of the annexures by Fanny Cheng was ineffectual.

A party wishing to rely on certification under subsection 15(4) of the ECT Act would have to produce admissible evidence that the certification was made by a person who is an officer in the service of the person who "made" the data message. The respondents have only adduced hearsay evidence namely, Beukes's evidence as to what Lee had told him to that effect.

There is yet a further difficulty. Under that subsection a certified printout can be relied upon only if the certification has been made by an officer in the service of the person who "made" the data message. Since the respondents rely on certification by an alleged official of HSBC they had to prove by means of admissible evidence that the underlying data messages were made by HSBC. No such evidence was adduced. Annexures 1.3, 1.6(2), 1.7, 1.12 and 1.15 to Mr Lee's letter are ostensibly documents made by BNP and not HSBC and

annexures 1.2, 1.5 and 1.11 ostensibly suggest that they were made by BNP or an intermediary organisation facilitating electronic communication between banks.

In view of the aforegoing I incline to the view that the annexures to Mr Lee's letter are not admissible in terms of the ETC Act.

50] The probative value to be attached to the factual averments in the affidavit of Mr Cheng and the documents annexed thereto, other than annexure CK 12, shall be assessed on the basis of the totality of the evidence at my disposal.

51] Mr Atkins was the only witness who was in a position to shed light on the dealings between Pep Stores and Kedah in relation to the shoes of which the first consignment consisted as well as the other shoes acquired in terms of invoices P5930, P5932 and P5933. Mr Atkins, who was already retired at the time of the hearing, was employed by Pep Stores for over a period of forty years. During the first 19 years thereof he was involved in the manufacture of shoes. It entailed the design and cutting of patterns; the creation of different ranges of shoes across different categories at low prices; and the physical manufacturing thereof. During the next 20 years he was the senior buyer, initially of all footwear departments and later of only the men's. He described his primary objective as having to investigate and ferret

out opportunities for the acquisition of low-cost footwear internationally. He testified that Pep Stores predominantly sold basic utility footwear of a low cost. Purchases were made during the first part of the year for the winter range and during the second part of the year for the summer range. As a result of a policy shift on the part of management to compete with the more stylish merchandise offered by other groups of retailers at the lower end of the market, the buyers of the men's and women's shoe departments of Pep Stores visited the United Kingdom and Germany to acquaint themselves in the fashion trends in shoes as fashion-wise Europe is six months ahead of South-Africa and also to purchase samples of shoes that could be reproduced in China and would fit in with the new marketing approach the management wanted to implement. Pep Stores as part of that approach provided a money-back guarantee in respect of the goods sold by it.

52] Mr Atkins having purchased a men's casual leather shoe, sold under the Caterpillar brand, took a direct flight to Hong Kong where he met with Mr Cheng during the latter part of September 1998. He prior to arriving in Hong Kong requested Mr Cheng to obtain and source samples of appropriate soles. They met in a sample room on Kedah's premises which is reserved exclusively for the use of the representatives of Pep Stores. The confidentiality of the dealings between Pep Stores and Kedah is of so stringent a nature that not

even the representatives of other entities in the Pepkor Group were given access to that room. Mr Atkins testified that, in an endeavour to match the leather uppers of the Caterpillar with samples of soles which Mr Cheng had in the interim obtained, they cut one of a pair of the shoes in halve lengthwise so as to be better able to study its construction. After they had finalised that process he entered full particulars of the specifications of the shoe he wanted to be manufactured into a document called a Discussion Book. Each item in the Discussion Book was given a reference number unique to that item eg, the number B25667 which appears in the first column of the Kedah invoices. Mr Atkins, at the time, had in his possession a list that reflected the different categories of shoes that Pep Stores required, the target prices thereof, as well as an inflow-plan provided by its merchandising department. The target prices of $4.70 and $4.25 for the men's and youths versions of the type of shoe that was being envisaged were conveyed to Mr Cheng. Those prices were based on Mr Atkins' knowledge of the prices at which casual leather shoes could be obtained in China and India. The Discussion Book was signed in duplicate by both Mr Atkins and Mr Cheng and a copy of the relevant entries handed to Mr Cheng. Although the evidence thereanent is not crystal clear it would appear that Mr Atkins' first visit to Kedah came to an end at the end of September 1998.

53] Mr Atkins accompanied by another buyer namely, a Mr Kruger again visited Kedah during the period middle October to the beginning of November 1998. That visit had a dual purpose. The one was to inspect and finalise the samples of the shoes Mr Cheng had in the interim arranged to be manufactured. The other was to attend the Canton Trade Fair which was held in Quanzhou on the mainland of China during the second half of October 1998. Mr Cheng, when presenting the samples to Mr Atkins, told them that he required $5.20 and $4.65 per pair for the men's and youths sizes respectively. Mr Atkins did not immediately accept or reject that offer but first visited the Canton Trade Fair in order to acquaint himself with what was available and to establish prevailing prices for shoes of the same nature and quality. At the trade fair Mr Atkins reported the prices Mr Cheng had in mind to his superior Mr Van Dyk, who also attended the fair, and they arranged to meet in Hong Kong at a later stage. After Mr Atkins had returned to Hong Kong negotiations about the price commenced. Mr Cheng after animated phone calls to presumably the manufacturer of the shoes accepted prices of $5 and $ 4.45 respectively. Satisfied with the samples that had been presented and agreement having been arrived at as regards the prices, Atkin's entered the specifications; descriptions; the total number of shoes that were required; the size ratio; and delivery times as prescribed by Pep Stores' merchandising department into a document called the Requisition Book. He also

entered that department's detailed and stringent packaging and labelling requirements. Mr Atkins expressed the view that the completed Requisition Book brought into being bilateral obligations between Kedah and Pep Stores. After the deal had been concluded Messrs Atkins and Kruger completed a gross-profit report and presented it as well as samples of the shoes to Mr Van Dyk in Kedah's sample room.

54] On his return to South Africa Mr Atkins expressed his concern about the availability of import permits to Mr Van Dyk and it was then decided to approach Mr Essop. Because of fears that the Chinese new-year in the beginning of February would disrupt the manufacture and timeous delivery of the shoes, and in order to facilitate the completion and acceptance by Pep Stores of the so-called "blue seal" samples i.e. master samples against which compliance with the agreed specifications could be assessed, Messrs Atkins and Kruger were required to return to Hong Kong, at Kedah's expense, during the first half of December 1998. The reason for the urgency was that the shipment and delivery dates were tight and it was necessary to ensure that the shoes were manufactured before the Chinese new-year during which factories in China traditionally come to a standstill. Another consideration was that Pep Stores closed for their Christmas break from approximately 20th of December to the 20th of January.

55] Mr Atkins on his return to South Africa processed an order to the second applicant and faxed it, together with Pep Stores' labelling requirements, to Kedah. That order, described by him as a confirmation order, contained supply and delivery details, colours, sizes and references to the Discussion- and Requisition Books. It was common cause that that order was not uplifted by the second respondent from premises of Pep Stores as arranged. Mr Atkins testified that Kedah only sent pro forma invoices when it was in receipt of a confirmation order and that the sending of such an invoice constituted an acknowledgement of the conclusion of a transaction.

56] Of the approximately 140 000 pairs of shoes that the second applicant had undertaken to acquire from Kedah and supply to Pep Stores, 32 634 pairs, in respect of which pro forma invoices P5931 and P5940 had been issued by Kedah, were not supplied. That the second applicant failed to supply such shoes is common cause. What is not common cause is the reason for such failure. Mr Essop said that it was because Mr Wan could not reach an acceptable agreement as regards the prices at which those shoes could be acquired. Mr Atkins in turn testified that Mr Essop had told him that there was "a little bit of a problem" with import permits. That such problems existed is vehemently denied by Mr Essop. That there was a problem of some

sort concerning import permits is confirmed by the contents of a faxed message the second applicant sent to Pep Stores on 11 February 1999 (as exhibit I), in which it requested that the shipment consisting of the shoes in the aforementioned two invoices be extended "due to the delay in receipt of confirmation for the balance of the permit". That letter also contained the following handwritten request:

"Please extend until 30-4-99."

In response, to that request Absa Bank was requested to extend the letter of credit it had issued to the second applicant to 15 May 1999. Mr Atkins testified that as he had become frustrated with the fact that he could not get a definite answer from Mr Essop as regards when those shoes would be acquired and imported into South Africa. As it later transpired that it was possible to import them on import permits that were available to Pep Stores at a lower cost, he cancelled the order that had been placed with the second applicant. Pep Stores itself later imported the shoes from Kedah and cleared them. Those shoes as well as further shipments brought in later that year were imported at the prices originally agreed to between Kedah and Mr Atkins.

57] Although it was originally planned to use the brand names "New Yorker" in respect of certain of the shoes and "Nautical" in respect of other it was later decided that only the "New Yorker" brand would be used. That explains why the article numbers of identical shoes differ

on some of the invoices. He said that that brand name appeared on the side and the tongue of the shoes apart from the rubber logos at the back and the front thereof. Mr Essop said that no-one told him that the shoes would be branded and that had he known it he would not have agreed to import them. That they were so branded puts paid to any suggestion that the shoes of which the first consignment consisted were redundant and slow-moving. Apart from that, Mr Atkins testified that he only once in his life purchased a job-lot. That evidence contradicts Mr Essop's evidence that it is the practice of Pep Stores to buy job lots at rock-bottom prices.

58] The undisputed evidence of Mr Atkins was that customers returned defective shoes to Pep Stores in terms of the "money-back" guarantee soon after the marketing thereof had commenced. Complaints were prevalent: about 20% of sales. Such shoes were returned to Kedah for testing in an attempt to eliminate any defects in future consignments. He said that he, for that purpose, visited the factory that manufactured the shoes in Ningbo, China and as a result thereof as well as the laboratory tests that had been performed the specifications of the shoes were upgraded. According to him the shoes were originally manufactured by only one factory but that an additional factory was brought in, in order to assist with the production for the 1999 summer season.

59] Mr Atkins denied vehemently that it was possible that the first applicant could have obtained the shoes at $ 3.20 and $ 2.95 from Textrade and Oriental Enterprises. He when asked in evidence-in-chief to say why he said that it was impossible, replied as follows:

> "Why do you say it's impossible? --- Firstly I'd done my homework, I'd done my sourcing. I'm fully aware of costs of raw materials – or was at that particular time; it's part of my job - and was given the exposure to prove - at that point in time remember I wasn't aware of any $ 3.90 whatever the other price was. I was working around realistic costs, and the company, based on what I bought previously, what was available to me, not only China - India, Pakistan, Indonesia, wherever - and that all was put on record in my (indistinct – bumping against microphone) documentation for discussion with my superiors.

Mr Atkins, in you 21 years experience as a buyer, have you bought a leather shoe of this nature, i.e. as in the New Yorker range, at $ 3.20? --- No.

Can you get one at that price? --- No.

That kind of shoe? --- No. We've been sent to all the most probably – if I may explain M'Lord, China at one state was very cheap, but it's become expensive in relation to other outsets. It could be Indonesia, whatever, parts of India. So we've all – part of our job was to go and ferret or look out for new markets, niches – you know, markets or areas that produced cheap footwear. And I must confess, I have never come across prices like that."

When it was during cross-examination put to him by Mr Rogers that such prices were attainable because unlike Pep Stores, the second applicant was in possession of the necessary permits and Kedah could not divulge to Pep Stores the prices it had sold the shoes at to Assanmal and others as it would have placed the prices agreed to in respect of "millions and millions of pairs of shoes" in jeopardy, he replied as follows:

> ''As far as I'm concerned the prices quoted as I said earlier on, were totally

> and completely improbable, whether out of china, whether out of India, whether out of Pakistan. And the exposure that we got in the middle trip to go to China, to counter nego – look at prices of styles or leather casuals or whatever, we never, never came close to those prices. They were far above the prices that we eventually paid. And from the ensuing seasons, still never ever came up against prices like that."

In view of the positive impression Mr Atkins made on me as a witness and bearing in mind his vast exposure to and close involvement in the footwear industry, both locally and internationally those replies carry much weight.

60] I have repeated the evidence of Mr Atkins in such detail merely to drive home the point that the shoes of which the first consignment consisted were specially developed and manufactured with a view to being marketed in South Africa as from March 1999 and that no possibility whatsoever existed that they constituted redundant stock Kedah or anyone else was struggling to dispose of. That, and the fact that the availability of import permits placed Textrade in a superior bargaining position, were the only grounds Mr Essop could advance as reasons why Kedah, despite the fact that it had reached an agreement with Mr Atkins to sell the shoes to Pep Stores for $ 5 and $ 4.45 f.o.b. Hongkong, and having accepted the confirmation order(s) by having provided Pep Stores with pro forma invoices, would have disposed of

them to Assanmal/Textrade and Oriental Enterprises at prices even lower than were reflected on Textrade invoices P5936 and P5937. Mr Essop, in my view, presented a warped picture of the importance of the import permits to which the second applicant's had access. Mr Essop, correctly, conceded that Pep Stores had already reached agreement with Kedah on the purchase price of the shoes by the time he was approached by Mr Van Dyk. On the evidence, that could have happened only after Mr Atkins had returned to South Africa after his second visit to Hongkong namely, during the early part of November 1998. When those prices were agreed to, neither Mr Atkins nor Mr Chen were influenced by the availability or non-availability of import permits. In the circumstances it is difficult to understand why the availability or non-availability of import permits, less than two months later, would have had such a depressing effect on the prices that Kedah would be prepared to sell the shoes to any other party. It had an enforceable agreement with Pep Stores in place and undertook to supply the shoes to Textrade/Assanmal only to accommodate Pep Stores who was making use of import permits to which the first applicant had access. Whether or not Pep Stores was in possession of import permits was of no concern to Kedah. Its only remaining obligation was to ship the shoes from Hongkong to South Africa. The obligation to have obtained import permits, absent any involvement on the part of the second applicant, would have been that of Pep Stores

itself. Why Kedah would have been prepared to sacrifice a portion of an agreed price as profit merely because Pep Stores could not obtain import permits is beyond comprehending. Mr Atkins also testified that he telefaxed a copy of the order that Pep Stores had placed with the second applicant to Kedah. That was not disputed and is further confirmed by the fact that the first set of pro forma invoices were marked for the account of the second applicant. It would therefore have been clear to Kedah that Pep Stores was purchasing the shoes through the second applicant and that it remained interested in acquiring the shoes at the prices that had previously been agreed upon between Mr Atkins and Cheng and were reflected in its pro forma invoices. In view of the longstanding and close relationship between Kedah and Pep Stores, as well as the latter's importance as a client, it is highly improbable that Mr Cheng would have sold the shoes at a substantially lower price to an unknown party without first requiring Pep Stores to take delivery of and make other arrangements for the importation thereof into South Africa. In any event, as import permits were issued in March and September every year and Pep Stores itself was entitled to a sizable allocation, the problem of non-availability of import permits was merely a temporary one and not insurmountable as Pep Stores could have, either temporarily reallocated permits earmarked for the importation of other shoes, as happened in the case of invoices P5931 and P5940, or have approached other permit

holders. Mr Essop, if he is to be believed, still had unused permits available. The cherry on the top, however, is that Mr Essop expects this court to believe that he, despite the fact that he had reached an agreement with Pep Stores to acquire and sell the shoes in the aforementioned invoices to it, at prices that he admitted included a profit, would have sacrificed the deal and have forfeited a guaranteed profit, merely because Kedah was no longer prepared to sell them at reduced prices. It is not been explained why Kedah would have changed from an anxious seller prepared to sacrifice a portion of an agreed price to one insisting on being paid the full price within such a short space of time afterwards.

61] I, in view of the aforegoing, incline to the view that the reasons advised by Mr Essop for Kedah's alleged willingness to have sold the shoes of which the first consignment consisted, at prices lower than the prices that had been agreed to between Mr Atkins and Mr Chen, are completely without substance. No other reason has been put forward or even suggested and none appears apparent to me, why he would have done so. That conclusion negatively impacts on Mr Essop's credibility, who in a number of other respects, to which I have already alluded to earlier, did not favourably impress me as a witness. What in my view particularly tarnished his credibility was his disavowal of the correctness of the statements in paragraphs 40 and 41 of the founding

affidavit to the effect that Kedah had issued invoice P5937 to the second applicant; that such invoice merely constituted a quotation; that the applicants had indicated to Kedah that they were not interested in buying the shoes at the prices reflected therein as well as the reasons therefore namely, a misapprehension on the part of the applicants' legal representatives in drafting the founding affidavit; as well as Mr Essop's failure to have studied the draft more carefully before signing it. I am in agreement with the submission of the respondents' counsel that those explanations do not bear scrutiny. Firstly, as the applicants' legal representatives are highly experienced, competent and responsible practitioners, who were well versed in all the facts of the case, it is highly unlikely that they would have misapprehended any of the facts. In any event, Mr Essop testified that he was a careful businessman who peruses documents with care so that it is unlikely that he would not have corrected them if he, at the time, were to have thought that there were any errors in paragraph 40 and 41 as is apparent from the fact that he in fact made a correction to paragraph 9 of the founding affidavit. Secondly, the statement in paragraph 41 that "… the applicants indicated to Kedah that they were not interested in buying the shoes at the price reflected in the pro forma invoice" is consistent with the following statement made by the second applicant in a facsimile transmission (Exhibit "T") in response to a facsimile transmission directed to it by the first respondent on 14

February 2001 and to which a copy of pro forma invoice P5937 had been annexed: "These goods were offered to Trend Gear Enterprises (Pty) Ltd, who in turn showed no interest." Thirdly, on 21 August 2001 at a stage when both the applicants' attorney and Mr Essop knew that it was the first respondent's case that the applicants had bought the shoes reflected in Kedah pro forma invoice P 5937 as well as other pro forma invoices, at the prices reflected therein, the applicant's attorney in a letter addressed to the first applicant stated categorically that: "… the pro forma invoice served merely as a quotation in respect of goods being offered, which quotation, for understandable reasons, was not accepted." That is exactly what is stated in paragraph 40 of the founding affidavit, so that there could not have been any misapprehension at the time the founding affidavit was drafted.

62] What evidential weight should be attached to Mr Cheng's affidavit save for what is clearly hearsay and not admissible in terms of the Evidence Amendment Act, the Civil Proceedings Evidence Act and the ECT Act? I shall disregard the following passages as they are clearly hearsay and no submissions to the contrary have been made:

59.1 the first two sentences in paragraph 3;

59.2 the third sentence in paragraph 4; and

59.3 the fourth sentence in paragraph 13.

I also accept that the statements in paragraph 2 to the effect that Mr Van Dyk selected the style and quality of the shoes required as well as the statement in paragraph 10 to the effect that the amounts paid to Kedah were the same as those negotiated with Mr Van Dyk, are inaccurate to the extent

that no reference is made to the role that Mr Atkins played thereanent.

I shall also not lose sight of the fact that I have already found that the contents of paragraph 15 as well as the documents that are referred to therein are inadmissible.

63] A perusal of Mr Cheng's affidavit shows that a not insignificant number of the factual averments therein are either supported by or in line with the documentation that is annexed thereto and the evidence adduced by Mr Atkins. One of the averments in paragraph 4 of the said affidavit, to the effect that Mr Cheng had personally spoken to a person with the name of Tiger (Mr Essop admitted that he is so known) is strenuously denied by Mr Essop. However, Mr Atkins told the court that when he told Mr Essop to liaise with Kedah his response was that he and Mr Cheng "had come a long way" and he persisted with the correctness of that statement when he was challenged thereanent during cross-examination. The reliability of the statement in paragraph 17 of the said affidavit to the effect that it was a term of Kedah's agreement with Pep Stores that any deficiencies in the shoes, quality-wise would be Kedah's responsibility and not Assanmal's, was confirmed by the evidence of Mr Atkins as regards how the defects that manifested themselves were dealt with. Other than that the truthfulness and reliability of the factual averments contained in Mr Cheng's affidavit have not been tested by cross-examination and could not be subjected to challenges by means of averments in other affidavits, there in my view, is little reason to assign a reduced evidentiary weight to it. I say

so because of all the factual statements therein only the averments in paragraph 4 thereof directly involved Mr Essop and all the others relate to dealings and transactions that do not directly concern or involve the applicants and Textrade/Oriental Enterprises and clearly reduce the potentiality of such adverse consequences as could flow from a absence of cross-examination and challenges by means of assertions in other affidavits.

64] In my view, it is not only extremely improbable on the evidence before me, that Kedah would have sold the shoes of which the first consignment consisted to anyone other than Pep Stores and at prices lower than what had been agreed to between them but it is further abundantly clear from the admissible factual averments in Mr Cheng's affidavit and the admissible documents annexed thereto that Assanmal, for whose account and at whose risk Kedah Invoices P 5936 and P5937 were issued, provided it with letters of credit Numbers UB 12033 and UB 111572 not only for the amounts reflected therein but also in respect of invoices P 5930, P 5932 and P 5933 and that Kedah in fact, received payment of the amounts reflected therein as is confirmed by Exhibits P "C" and "D". Mr Cheng's statement to the effect that Assanmal's sole function was to have provided letters of credit on behalf of the second applicant as the real purchaser has the ring of truth to it as it is extremely unlikely - in view of the duration and

nature of the relationship between it and Pep Stores as well as the circumstances relating to the creation of the designing and the get-up of the shoes - that Kedah would have risked disposing of the shoes to an entity other than Pep Stores or someone who was contractually bound to supply them to Pep Stores. Even if it is assumed, despite the involutedness of the relationship between Textrade, Oriental Enterprises and Assanmal, that the latter acquired the shoes in its own name and disposed of them to Textrade and/or Oriental Enterprices it is equally improbable that it would have done so at a loss.

65] In the premises I find that the transaction value of the shoes that constituted the first consignment were $ 5 per pair in respect of mens' sizes and $ 4.45 per pair in respect of the youths sizes and not $ 3.20 and $ 2.95 as contended by the applicants. It follows logically from that finding, that the applicants have not succeeded in showing that the Controller erred in having found that those amounts constituted the true transaction values of the shoes and having employed it as a basis for the determination made by him on 29 March 2001.

66] It follows that I am of the view that the relief sought in prayer 1 of the Notice of Motion stands to be refused.

67] The applicants, "in any event", seek an order reviewing and setting

aside, in terms of Section 8(3) of PAJA, the whole of the determination of 29 March 2001, alternatively, of that portion thereof that imposed "a penalty" in lieu of forfeiture. The concept "in any event" which is normally equated with "in any case" has been interpreted as being appropriate to convey the notion of supplementation or clarification of an immediately preceding proposition (See: **Born v Born** 1970(4) SA 560 (C) at 564 G – H). In the circumstances it is necessary to consider the relief claimed in prayer 2 of the notice of motion, despite the fact that the relief claimed in prayer 1 is to be refused.

68] It was not in issue between the parties that the provisions of PAJA, which came into operation on 30 November 2000, were applicable. It is trite that the source of administrative law is now the Constitution of South Africa, 1996 (See: **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others** 2004(7) BCLR, 687 (CC) at paragraph 22) and that PAJA was enacted to give effect to the rights encompassed in subsections 33(1) and (2) thereof. It was said in the **Bato** Star case (at paragraph 27) that a litigant who seeks to have administrative action reviewed is required to clearly identify both the facts and the specific provisions of PAJA on which the cause of action is based. The applicants fell somewhat short in that respect.

69] The respondents' counsel contended that this court could not entertain

granting prayer 2, because the first applicant had failed to comply with the provisions of Section 7(2)(a) of PAJA which preclude a court from reviewing administrative action thereunder unless any internal remedy provided for "in any other law" has first been exhausted. They identified section 93(2) of the Customs Act as such a remedy. The said subsection provides as follows:

> "The Commissioner may, on good cause shown mitigate or remit any penalty incurred under this Act on such conditions as the Commissioner may determine."

In my view, all that sub-section does is to confer a discretionary power on the Commissioner. It does not prescribe a specific remedy which an aggrieved party is obliged to invoke. Accordingly, such a party's choice of remedies remains unimpaired. The respondents' counsel, in my view correctly, did not identify the appeal procedure referred to in section 77B(1) of the Customs Act as such a remedy as it clearly is merely a permitted alternative to the institution of proceedings eg a review. In the circumstances I incline to the view that the applicants are not precluded from seeking the relief claimed in prayer 2 of the notice of motion.

70] An ineluctable consequence of the finding that the transaction values of the shoes were $5 and $4.45 per pair respectively, is that liability for the payment of import duties was assessed and paid on a value lower than the true transaction value thereof. As in terms of section 39(1) of

the Customs Act liability for payment of import duties arises upon "due entry" of goods, it is axiomatic that the second applicant - who procured the importation of the shoes as part of a joint venture with the different permit holders and effected entry by means of a clearing agent appointed by it - is liable for the payment of the difference between the amount actually paid and the amount that should have been paid. As the quantum of that amount was arrived at by means of an arithmetic calculation based on prescribed rates, and did not entail any conduct or action of an administrative nature on the part of the Controller or his delegatee, the determination, to the extent that it served to advise the second applicant of the quantum of its liability for any amounts underpaid, it in my view, is not susceptible of judicial review on any basis.

71] Section 38(1)(a) of the Customs Act imposes a duty on every importer of goods to make due entry, as contemplated in section 39 of that act within seven days after the date of the landing thereof by submitting to the Controller a bill of entry in the prescribed form that fully sets out the particulars required; by subscribing to a declaration as to the correctness of the particulars shown in the bill of entry; and by paying all duties due on the goods. Duty on imported goods, in terms of Section 47(1) of the Customs Act, becomes payable when such goods are entered for home consumption. Section 40(1)(c) of the Customs

Act provides that no bill of entry shall be valid unless it, inter alia, declares the true value of the goods to which it relates. It accordingly is an implied consequence of the finding that the incorrect transaction value of the shoes of which the first consignment consisted was reflected in the different bills of entry, that there was a failure to comply with the provisions of the Customs Act and that such failure, in terms of the provisions of section 78(1) thereof, constitutes a criminal offence.

72] Section 87(1) of the Customs Act provides that any goods imported contrary to the provisions of that act, or in respect of which any offence under that act has been committed, shall be "liable to forfeiture wheresoever and in possession of whomsoever" they are found. Subsections 88(1)(a) and (b) provide that such goods may be detained - the heading to the section is "seizure" - wheresoever they are found and, if necessary, removed and stored at a place of security, even for the purpose of determining whether they are liable to forfeiture. Section 88(2)(a)(i) of the Customs Act provides that if such goods cannot readily be found, the Commissioner may demand from any person who imported such goods, removed or otherwise dealt therewith contrary to the provisions of that act or committed any offence thereunder (and by doing so rendered them liable to forfeiture), payment of "an amount equal to the value for duty purposes … of such goods plus any unpaid duty thereon".

The second respondent clearly based the determination that the second applicant is liable for the payment of an amount of R732 903 "in lieu of forfeiture" on the provisions of that subsection.

73] The review of the determination is being sought on the grounds –

Firstly,that the respondents did not follow a fair procedure or afford the applicants a fair hearing before making the determination;

Secondly, in the alternative, that the respondents did not afford them a fair hearing before demanding payment of an amount equal to the value thereof for duty purposes, namely, R695 508; and

Thirdly, that the determination was arbitrary and capricious as it was made on inadequate and insubstantial grounds.

74] The third ground can be disposed of quickly. I have already found that on the evidence before me the transaction value of the shoes was higher than was declared and that finding effectively emasculates the averment that the determination was made on inadequate and insubstantial grounds.

75] The first and second grounds undoubtedly fall within the compass of section 6(2)(c) of PAJA which provides that a court has the power to judicially review administrative action if it was procedurally unfair.

76] Horn AJ in **Deacon v Controller of Customs and Excise** 1999(2) SA 905 (SE) - a matter in which the issue was whether the decision of the Controller to seize an imported motor vehicle in terms of section 88(1)(c) of Customs Act, without having followed substantive and

procedural fairness and without having complied with the rules of natural justice - held that conduct on the part of the Controller in terms of section 87 and 88 of the Customs Act, in general, is not exempt from the constitutional requirements of just administrative action and the principles of natural justice. Van der Westhuizen J in **Henbase 3392 (Pty) Ltd v Commissioner South African Revenue Service and Another** 2002(2) SA 180 (T), subsequently upheld on appeal, expressed agreement with the approach in **Deacon's** case but held that, unlike in the case of "seizure" and "forfeiture", deviation from the principles of natural justice were justified in the case of "detention" as it merely constitutes a preliminary step in the process of establishing whether there should be a forfeiture. I am in agreement with the conclusion arrived at in the aforementioned two cases and accept that the determination under consideration constituted administrative action within the meaning thereof in PAJA and accordingly, had to be procedurally fair if it were to pass muster. No contrary submissions have been advanced.

77] Content is given to the concept "procedurally fair administrative action" by section 3(2)(b) of PAJA which provides as follows -

> "(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1) –
>
> a) adequate notice of the nature and purpose of the proposed administrative action;

b) a reasonable opportunity to make representations;

c) a clear statement of the administrative action;

d) adequate notice of any right of review or internal appeal, where applicable; and

e) adequate notice of the right to request reasons in terms of section 5."

Those five requirements, which are considered to constitute the core elements of procedural fairness, may be departed from in the circumstances set out in subsection 3(4) which provides as follows:

"(a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).

b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including –

(i) the objects of the empowering provision;

(ii) the nature and purpose of, and the need to take, the administrative action;

(iii) the likely effect of the administrative action;

(iv) the urgency of taking the administrative action or the urgency of the matter; and

(v) the need to promote an efficient administration and good governance."

78] Section 3(3) of PAJA provides that an administrator, in order to give effect to the right of procedurally fair administrative action, in his discretion, may give the person whose rights or legitimate expectations are materially and adversely affected thereby an opportunity to –

"(a) obtain assistance and, in serious or complex cases, legal representation;

b) present and dispute information and arguments; and

c) appear in person."

There is no evidence that the Controller, as delegatee of the

Commissioner, considered or was required to consider the discretion reposed in him by subsections 3(3) and (4).

79] The circumstances that led to the detention of the first, second and third consignments have already been set out in detail in paragraph 8 above.

80] After the shoes of which the said three consignments consisted of had been detained and preceding the making of the determination on 29 March 1999, the following communications thereanent took place between the applicants' and the respondents' representatives –

80.1 Mr Swersky, the applicants' attorney, on 5 August 1999 made certain written representations to the respondents. That letter does not form part of the papers.

80.2 Mr Essop and two of his daughters met with Mr Beukes during March 2000 and again on 6 December 2000. Mr Essop made representations to the effect that no additional amounts in respect of the underpayment of import duties and value-added tax should be levied and also requested that the provisional payments should be repaid.

80.3 Mr Essop and two of his daughters on 18 January 2001 again met with Mr Beukes. During that meeting the representations that had been made during the previous two meetings were repeated.

80.4 In response to a letter addressed to the first applicant by the Commissioner on 1 February 2001, regarding the customer value of the goods in invoice P5937 dated 17 December 1998 and bill of lading No HKGCPT 0015/A/HO, the second applicant, in a letter dated 12 February 2001, advised the Commissioner that it had not imported any cargo against that invoice or bill of lading.

80.5 The Commissioner by means of a facsimile transmission dated 14 February 2000, to which copies of the aforementioned invoice and bill of lading were annexed, requested compliance with the request contained in his letter of 1 February 2001, within 30 days. The second applicant, on the same

date, respondent with the terse statement that "These goods were offered to Trend Gear Enterprises (Pty) Ltd, who in turn, showed no interest".
80.6 Mr Essop and two of his daughters on 12 March 2001 met with Mr Beukes for the fourth time and reiterated the representations that had been made on the previous three occasions.
80.7 Mr Swersky on 16 March 2005, addressed a letter to the Commissioner to which he annexed a letter from Absa Bank which he averred governed the relationship between the applicants and "such parties importing the goods in each instance"; a copy of a letter dated 23 August 1999 from Textrade setting out the numbers of the invoices relating to the goods in respect of which the provisional payments had been made; and copies of the relevant invoices indorsed by Absa Bank to the effect that foreign exchange had been provided as well as bills of lading which he contended, showed that all amounts due to Textrade had been duly paid. He also stated that, inasmuch as the applicants had not been shown the documents supporting the allegation that the values that had been declared for customs duty purposes were incorrect and the applicants also had not been given a hearing "in connection with the action which you propose to take" such action would be wrongful and unlawful and demanded payment, within 10 days, of an amount of R1 000 000.

81] The following communications took place after the determination had been made –

81.1 Mr Swersky, on 5 April 2001, addressed a letter to the Commissioner in which he, inter alia, pointed out that two entries in the schedule that had been annexed to the determination, amounted to a duplication; complained that the applicants had not been enlightened of the manner in which the increased value of each consignment had been determined; and demanded to be furnished with the relevant documentation, within 7 days, failing which proceedings would be instituted for the repayment of the provisional payments. It was also said that as the second applicant had not imported any goods, liability for the amount claimed in the determination was repudiated.

81.2 Mr Swersky, on 29 May 2001, addressed another letter to the Commissioner, the gravamen whereof was that he demanded immediate repayment of an amount of R900 000 made as provisional payments in respect of the second- and third consignments, failing which, to provide reasons for such failure in terms of section 5 of PAJA; disavowed that the second applicant was the importer of the shoes to which the first payment of R100 000 related, but admitted that it had acquired ownership thereof from the importers who had declared the value thereof at the prices that had been paid to Textrade. He in the circumstances called upon the Commissioner to withdraw the determination, failing which, to provide written reasons in terms of section 5 of PAJA, and demanded written responses to specific questions in terms of that section. The letter concluded with a statement that the Commissioner was not entitled to have made the determination without first having afforded the applicants a hearing in compliance with the provisions of section 3 of PAJA.

81.3 Mr Beukes accompanied by Mr Nick Snyman, the Criminal Investigating Officer in the Office of Special Investigations in the office of the Commissioner, met with Mr Swersky in the latter's office, on 18 June 2001. Mr Beukes testified that he explained to Mr Swersky the reasons why the determination had been made and also elucidated all the different sections of the Customs Act that were referred to therein. He also allowed Mr Swersky access to a leverach file containing the documents he had collected by then and allowed him to make copies of whatever documents he wanted to photocopy. He also explained the provisions of section 93 of the Customs Act to him. Mr Beukes admitted during cross-examination that he did not fully divulge details of the evidence available to the Commissioner and that he did not tell Mr Swersky what exactly it was that the applicants were being accused of.

81.4 Mr Swersky on 21 August 2001, addressed another letter to the Commissioner in which he acknowledged that it had been conveyed to him on 18 June 2001 that the Commissioner contended that the purchase price of the shoes were higher than what had een declared and that the applicants' demand for the release of the provisional payments was ill-founded; dealt with in the different relevant Kedah invoices which, it was contended, merely constituted quotations that had not been accepted as the shoes could be acquired at a substantially lower price; pointed out that the goods were purchased from Textrade in terms of invoices dated 10 February 1999 and from Oriental Enterprises in terms of invoices dated 5 February 1999 and that such transactions and the payment in terms thereof were substantiated and corroborated by the invoices and bills of entry that had been provided to the Commissioner; and furthermore, repeated the demand that written reasons be provided.

82] I have enumerated the communications between the applicants' and

the respondents' representatives in such detail in order to establish whether and if so, the extent to which they constitute compliance with one or more of the core elements of fair administrative action. Although the general rule is that natural justice must be observed before a decision is taken, subsequent compliance may suffice in exceptional circumstances (See: **Nortje en 'n Ander v Minister van Korrektiewe Dienste en Andere** 2001(3) SA 472 (SCA) at 480, paragraph 19). It is for that reason that even communications that took place after the determination had been made were considered. However, none of the considerations that are regarded as sufficient to justify the subsequent compliance with the requirements of just administrative action, such as urgency; impracticability because of the number of persons involved; the possibility that prior compliance will defeat the purpose of the action; and that the decision is merely provisional and relevant to the enquiry whether the requirements of procedural fairness have been complied with, are present in the communications enumerated in paragraph 81 above,.

83] The affidavit of the Controller, Mr Nieuwoudt is the only source of the considerations that had been taken into account by him in having made the determination. He said the following thereanent:

> "As already stated, I issued the notice dated 29 March 2001, to the second applicant. In levying unpaid customs duty and VAT and demanding payment of the sum of R732 903,00 in annexure "W" to the founding affidavit, I had

> regard to the oral representations by Mr Essop (as conveyed to me by Mr Beukes) as to why unpaid customs duty and VAT should not be levied and, an amount in lieu of forfeiture not be demanded. I also had regard to the documents that Mr Essop provided to SARS and the correspondence by his attorney. After careful consideration of the issues and the representations as aforesaid, I concluded that it would be appropriate to issue the said notice to the second applicant."

That he did not have regard to anything else is amply apparent from the following laconic statement:

> "I should point out that it is not conceded that the applicants were entitled to be heard in relation to the actions taken"

In the circumstances it must be accepted that all he had regard to before issuing the determination were Mr Beukes' second-hand report of Mr Essop's oral representations to him; the documents that Mr Essop had provided to the Commissioner; and the correspondence that had emanated from the applicants' attorney.

84] There was no evidence presented on behalf of the respondents that the applicants had been advised that the Controller considered exercising his discretion to demand payment in lieu of forfeiture. According to the evidence of Mr Beukes Mr Essop's oral representations were restricted to his companies' liability for the under-payment of import duties and value-added tax. In the circumstances he could not have conveyed to Mr Nieuwoudt any representations relating to the exercise by him of the discretion vested in him by section

88(2)(a)(i) of the Customs Act. Similarly, the applicants' attorney's letters, save for a vague reference in the letter referred to in paragraph 80.7 above to the "action you propose to take", but was not elucidated, do not make any reference to payment in lieu of payment but address other issues. As neither of the applicants nor their attorney possessed any knowledge that the Controller considered exercising the said discretion against them, and were furthermore not afforded any opportunity to make representations thereanent - not even the vicarious representations that Mr Nieuwoudt refers to could have encompassed that - I incline to the view that the requirements of procedural fairness were violated. The failure to have notified the applicants that the Controller was considering exercising his discretion against the applicants and without having given them an opportunity to make representations beforehand, clearly offended against the mandatory requirements of subsections 3(2)(b)(a) and (b) of PAJA.

85] I accordingly incline to the view that the applicants have succeeded in showing that they are entitled to an order in terms of the alternative order in prayer 2 of the notice of motion.

86] The applicants in prayer 3 of the notice of motion claim repayment of the provisional payments of R100 000, R300 000 and R600 000 respectively together with interest thereon at the legally prescribed

rate. The claim for the repayment of the amount of R100 000 is premised on the appeal or the review relating to the first consignment succeeding. As the appeal has failed and the review was successful only to the extent that the determination required the applicants to pay an amount of R695 508 in lieu of forfeiture and furthermore, the bases on which that claim was premised have fallen away, prayer 3.1 of the notice of motion, in my view, cannot succeed.

87] Payment of the amounts of R300 000 and R600 000 are claimed on the basis of the following averments in the founding affidavit:

> "SARS has had more than a reasonable period of time to investigate the importation of the second and third consignments. Despite this fact, no determination of underpayment has been issued. In the circumstances, I submit that SARS is obliged to refund to the first applicant the second and third provisional payments totalling R900 000."

Mr Beukes' response in his answering affidavit was that the shoes comprising the second and third consignments were sold to the Foschini Group and that the enquiry into that transaction has not been concluded as yet and that the amended amount payable in lieu of forfeiture namely, R695 508, exceeds the amount of the provisional payments. He further denied that the Commissioner was obliged to refund the amount of R900 000 to the first applicant. That denial accords with an earlier statement in his answering affidavit (paragraph 29 page 202), that the applicants' liability to the Commissioner will

exceed their own claim against the Commissioner and may be set off in terms of the provisions of section 114(1)(c) of the Customs Act. Those averments were denied by Mr Essop in his replying affidavit.

88] It is the applicants' case that the making and the refunding of the provisional payments are not regulated by the Customs Act or the rules formulated thereunder and that since such payments were made pending further investigation by the Commissioner, he is under a legal obligation to refund such payments as he, despite the fact that a reasonable time has elapsed, has not issued a determination of under-payment. Mr Rogers submitted that since the provisional payments constituted a form of security in lieu of the goods of which the second and third consignments consisted "the presumed intention of the parties must have been that provisional payments would be refunded if no adverse determination is made after allowing a reasonable period of investigation". Mr Schippers took issue with that approach on the basis that as the Commissioner and Controller were acting in terms of a statutory power conferred on them by the Customs Act, there was no room for the application of notions unique to the law of contract, to the relationship that flowed from the demand for and the payment of the provisional amounts of R300 000 and R600 000 respectively.

89] The Commissioner's authority to have detained the second and third

consignments for the purpose of establishing whether they were liable to forfeiture in terms of section 87 of the customs Act, has not been questioned in these proceedings. Once such goods were detained, the Commissioner, by virtue of the provisions of section 107(2)(a) of the Customs Act was precluded from allowing them to pass from his control except "on such conditions, including conditions relating to security, as may be determined by him." It appears that the Commissioner was acting in terms of that subsection when he released the second and third consignments against the payment of the provisional amounts.

90] Mr Essop in his founding affidavit states that the Commissioner as a result of a suggestion made by him "agreed" to release the first consignment against the payment of a provisional amount of R100 000; that the provisional payment of R300 000 in respect of the second consignment was made "in the same way" as in the first consignment; and that "the same procedure was followed" to procure the release of the third consignment against the payment of a provisional amount of R600 000. Mr Beukes did not join issue with any of those statements in his answering affidavit. The two forms which accompanied those payments specifically recorded that they were made as –

> "Provisional payment lodged for possible underpayment in Customs Duty and VAT"

Such forms are headed "Application to Make Provisional Payment"

and were signed by a representative of the applicants' clearing agents, Western Cape Clearing Services. The following wording appears immediately above the said signature:

> ''I/We Western Cape Clearing Services hereby undertake to comply with the requirements of the customs and Excise Act and the regulations in respect of the goods or circumstances to which this payment relates within the understated period determined by the Controller"

(The underlined words were handwritten and the remainder formed part of the printed form).

The said forms further contain the following provision under the heading "For Official Use Only":

> "The provisional payment may be accepted provided the relative requirements are complied with within (period)"

Signatures were appended in the spaces provided for the signature of the "Controller of Customs and Excise" on the right hand side of the page. At the same level but on the left hand side of the page, there are date stamps of "Customs and Excise, Cape Town" that purport to have been applied thereto on 20 August 1999 and 1 September 1999 respectively.

Based on the aforegoing facts there appears to have been prior negotiations between the Commissioner and Mr Essop and/or the clearing agent appointed by him that resulted in the filling out and signing of the "Application to Make Provisional Payment" which was formally accepted by the Controller. On those facts the notion of

agreements that resulted from the acceptance of offers sits quite comfortably. It would therefore appear that when Mr Essop used the concept "agreed" in paragraph 21 of his founding affidavit it was used in a technical sense.

91] I find Mr Schippers' submission that the notion of a relationship of a contractual nature was inapposite in the circumstances because the Commissioner had exercised a statutory power, unconvincing. In my view section 107(2)(a) of the Customs Act merely empowered the Commissioner and his designate, the Controller, to have determined the terms of the conditions under which the goods were to be released. In my view, nothing in that subsection precluded the Commissioner and/or the person delegated by him from determining such conditions by means of negotiations and agreement with any party who sought their release. Accordingly Mr Rogers' invocation of the presumed intention of the parties, in my view, is not inappropriate.

92] A presumptive intention simply means an inferred intention (See: **Van der Merwe** et al: **Contract: General Principles,** (Second Edition) at 259). The term which the applicants seek to be inferred into the agreement between them and the Commissioner / Controller is that the provisional payment would be refunded if no adverse determination is made after allowing a reasonable period for investigation.

93] Brand JA, in **Botha v Coopers and Lybrand** 2002(5) SA 347 (SCA), with admirable lucidity, enunciated the nature and manner of proof of a tacit ("stilswyende") term, in the following terms, at 359 E – 360 E:

> ''Deur erkenning te verleen aan 'n stilswyende term, word aan die onuitgesproke bedoeling van die partye dieselfde gesag aan hulle uitgesproke bedoelings verleen. Aangesien dit by 'n silswyende term per difinisie gaan om 'n bedoeling, wat nooit in woorde uitgedruk is nie, I die bepaling daarvan afhanklik van 'n afleiding. Juis omdat aan hierdie term wat op 'n afleiding gebaseer is dieselfde gewig gegee word as aan dit wat die partye uitdruklik ooreengekom het, is die afleiding van 'n stilswyende term slegs geregverdig as dit met 'n groot mate van sekerheid gemaak kan word. Daarom sê Rumpff HR in **South African Mutual Aid Society v Cape Town chamber of Commerce** 1962(1) SA 598 (A) op 606 B dat
>
> > "'n stilswyende bepaling alleen dan in 'n kontrak ingelees sal kan word wanneer die Hof oortuig is dat daar inderdaad 'n bedoeling was dat die betrokke bepaling in die kontrak opgesluit lê en dat al die partye tot die kontrak sodanige bedoeling gehad het'.
>
> [23] Die vermaarde toets vir die vastelling of die afleiding van die beweerde stilswyende term wel geregverdig is, is die sogenaamde nie-amptelike buitestaander- ('officious bystander') oftewel die 'buitestaander-toets' wat reeds dikwels in die verlede deur hierdie Hof toegepas is. (Sien byvoorbeeld **Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration** 1974(3) SA 506 (A) op 533 A – B en **Wilkens NO v Voges** 1994(3) SA 130 (A) op 137 A – D). Hierdie toets het sy oorsprong in die volgende dictum van Scrutton LJ in **Reigate v Union Manufacturing Co**

(Ramsbottom) Ltd and Elton Cap Dyeing Co Ltd [1918] 1 KB 592 (CA) (118 LT 479 at 483) op 605:

'A term can only be implied if … it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties, "What will happen in such a case" they could both have replied, "Of course so and so will happen; we did not trouble to say that; it is too clear." Unless the court comes to some such conclusion as that, it ought not to imply a term which the parties have not expressed.'

[24] Oor die jare is die buitestaander-toets in beslissings van ons Hoewe verfyn en sy praktiese bruikbaarheid daardeur verhoor. So het Colman R, byvoorbeeld, in **Techni-pak Sales (Pty) Ltd v Hall** 1968(3) SA 231 (W) op 236 H – 237 A beslis dat die afleiding van 'n stilswyende term slegs geregverdig is indien die buitestaander se vraag 'a prompt and unanimous assertion of the term' by beide partye tot die ooreenkoms sou ontlok het. As een van die partye, byvoorbeeld, sou aandui dat hy eers die saak verder wil oorweeg of dat hy eers seker onduidelikhede wil opklaar voordat hy sy antwoord gee, slaag die beweerde stilswyende term nie die toets nie. 'n Verdere vereiste wat ook al gestel is, is dat 'n stilswyende term slegs afgelei kan word as dit vir duidelike formulering vatbaar is. Of, soos Trollip AR dit stel in **Desai and Others v Greyridge Investments (Pty) Ltd** 1974(1) SA 509 (A) op 522 H – 523 A:

'I do not think that it is either clear or obvious which of those forms of the term should prevail, and hence that none can be implied. The reason is that the implication of a term depends upon the inferred or imputed intention of the parties to the contract … and once there is difficulty and doubt as to what the term should be or how far it should

> be taken it is obviously difficult to say that the parties clearly intended anything at all to be implied.'
>
> [25] By beantwoording van die vraag wat waarskynlik die partye se antwoord op die buitestaander se tersaaklike vraag sou wees, laat die Hof hom hoofsaaklik lei deur die uitdruklike terme van die ooreenkoms en die omringde omstandighede ten tyde van kontraksluiting (Sien byvoorbeeld **South African Mutual Aid Society** (supra) op 606 C en **Alfred McAlpine & Sons (Pty) Ltd** (supra) op 531 in fine)). Dit is egter ook toelaatbaar om te kyk na die optrede van die partye na die sluiting van die ooreenkoms. Hierdie ondersoek is gerig op die vraag of die latere optrede van die partye versoenbaar ismet die bewering dat die stilswyende term deel gevorm het van hulle kontrak. (Sien byvoorbeeld **Wilkens NO v Voges** (supra) op 143 C – D) en **Christie** (op cit op 196).)"

94] In applying the officious bystander test to the facts of the instant case I shall have regard to a number of considerations. The first is that the forms pursuant to which the two provisional payments under consideration were made state that they were made "for possible underpayment" of customs and excise duty. That phrase clearly conveys uncertainty about the correctness of the amounts that had been paid and presupposed that some investigation would ensue. That some investigation in fact took place is apparent from the evidence of Mr Beukes. The second is that the total of the amounts paid provisionally is substantial, especially if it is borne in mind that

they were paid by a little-known, local, family-run, private company. The third is that the Commissioner is under an obligation to fulfil his statutory mandate to administer the Customs Act, the primary purpose whereof is the levying and collection of customs and excise duties. Section 44(11)(a) of that act, provides that save in the event of fraud, misrepresentation, non-disclosure of material facts or any false declarations there shall be no liability for the underpayment of duty on any goods after a period of two years from the date of acceptance of a bill of entry or where such underpayment was discovered during an inspection, two years prior to the date on which such inspection commenced. A two year deadline is to be found also in subsections 65(7) and 69(6) of the Customs Act. An implication of those provisions is that some expedition in the performance of his duties by the Commissioner (and his officials) as regards to the recovery of underpaid customs and excise duties is required. The fourth is that the Commissioner (and his officials) as part of the public administration, are obliged by virtue of the provisions of section 195(1) of the Constitution of South Africa, 1996, to apply the democratic principles enshrined in the Constitution and should act both ethically and accountably (See: **President of the Republic of South Africa & Others v South African Football Union and Others** 2001(1) SA (1CC) at 62 paragraph 13) and without arbitrariness (See: **Pharmaceutical Manufacturers of South Africa: In re ex parte**

President of the Republic of South Africa 2000(2) SA 175 (CC) at 707, paragraphs 83 – 85). I, in the light of the aforegoing considerations, incline to the view that if the officious bystander would have asked those involved in the conclusion of the agreement what would happen in the event of the Commissioner failing to complete his investigations, despite the elapsing of a longer than reasonable period of time, they would promptly and unanimously have replied that the provisional payments should be refunded. In the premises, I find that the tacit term contended for by Mr Rogers forms part of the parties' agreement.

95] Despite the fact that the amounts of R300 000 and R600 000 were paid on 20 August 1999 and 1 September 1999 respectively no determination relating to an underpayment in respect of the second and third consignments has as yet been made by the Commissioner. Although the Commissioner is not under a statutory or any other obligation to make a determination, it is apparent that he intends doing so as Mr Beukes in his answering affidavit foreshadowed that one would be made as soon as the investigation has been completed. Unlike, in the case of the first consignment, the investigation into the second and third consignments, other than consultations with Mr Essop and two of his daughters - during which he provided all the documents in the applicants' possession to Mr Beukes - only the following steps

were taken. Mr Beukes met with the tax manager of the Foschini Group, Mr Marc van Est (Mr Van Est) and requested him to provide him with the "actual values" of the footwear acquired from the second applicant. Mr Beukes in response, in a facsimile transmission, provided him with the style numbers and the unit prices of the shoes as declared by the second applicant. Mr Beukes on 8 January 2001, at the offices of the Foschini Group, took delivery of a letter from Mr van Est to which was attached a list that showed the US $ unit prices, "used by the Foschini Group as a basis for its price negotiations with the second applicant", that generally, were lower than the US $ prices declared on importation. No reasons were provided for the Commissioner's failure to have issued a determination despite the fact that a period of longer than five years has elapsed since the second and third consignments were detained. In my view the elapse of a period of longer than five years between the detainment and the issuing of a determination could not by any stretch of the imagination be considered as a reasonable period. A norm against which the unreasonableness of the Commissioners' failure to have issued a determination can be assessed is to be found therein that goods of which the first consignment consisted were detained on 12 March 1999 and the determination issued on 29 March 2001. In my view the Commissioner, in breach of the tacit term of the parties' agreement, failed to issue a determination within a reasonable time. It follows that

the first applicant is not entitled to retain the amounts of R300 000 and R600 000 respectively and that they should be refunded to whomsoever is legally entitled thereto.

96] Prayer 3 of the notice of motion is formulated on the basis that the first applicant is entitled to the repayment of such amounts, ostensibly, because they were paid by means of cheques drawn on its banking account as well as that "To the extent that the right to reclaim the provisional payments might previously have vested in WCCS [Western Cape Clearing Services], that letter has confirmed that such claim now vests in Trend Finance" (paragraph 6 of the applicants' attorney's letter, Annexure Y to the founding affidavit). It however, is common cause that the permit holders, other than having placed their permits at the second applicant's disposal against the payment of a fixed amount as a fee, did not play any role in the importation of the consignments in respect of which the provisional payments were made and that the first applicant's role was limited to that of a financier of the different transactions, for which it received a fee from second applicant. The second applicant, according to Mr Essop, acquired ownership of the goods of which those consignments consisted "upon importation" and thereafter disposed of them to its South African customers. In the circumstances the second applicant had a direct interest in procuring the release of the said consignments. The inference appears to be

inescapable that when Mr Essop and the clearing agents negotiated with the Controller for the release of the said consignments they represented second applicant and that the provisional amounts were paid by the first applicant in its capacity as the financier of the second applicant and in the discharge of an obligation incurred by the latter. On that basis the party entitled to repayment is the second applicant and not the first applicant. The latter's right to be recompensed by the former is a separate issue that need not be considered. In the premises the first applicant, in my view, is not entitled to an order in terms of prayers 3.2 and 3.3 of the notice of motion.

97] Am I precluded from granting those prayers in favour of the second applicant?

The notice of motion contains a prayer for further and/or alternative relief. The considerations that determine whether such a prayer can be invoked for the granting of an order or prayer other than that set out in a summons or notice of motion were set out by Berman J in **Luwala and Others v Port Nolloth Municipality** 1991(3) SA 98 (C) at 112 D – E. Whether the first applicant was entitled to the relief in prayers 3.2 and 3.3 was fully ventilated in the papers. That the second applicant is entitled to such relief and not the first applicant is clearly indicated in the papers and has been established by satisfactory evidence. To grant prayers 3.2 and 3.3 in favour of the second applicant would furthermore not amount to the granting of relief substantially different to that which had been claimed originally but appears to be a self-evident consequence of the breach of the tacit term of the agreement reached between the first respondent represented by the second respondent and the second applicant represented by Mr Essop and its clearing agents. In the premises the relief claimed in prayers 3.2 and 3.3 of the notice of motion, in my view, should be refused to the extent that they were sought in favour of the first applicant but be granted in favour of the second applicant. That conclusion is gratifying in that it will obviate the need for further litigation in this already inordinately long drawn-out saga.

98] The applicants' attorney in a letter dated 29 May 2001 demanded that the provisional payments be refunded and in that letter as well as in a

further letter dated 21 August 2001, demanded that written reasons be furnished in terms of the provisions of section 5(2) of PAJA. Those demands fell on deaf ears. However, as the basis on which the applicants claimed to be entitled to a refund of the provisional payments is unrelated to any violation of their right to fair administrative action, the presumption in section 5(3) of PAJA is not of any assistance to them.

99] The following orders are made: -

a) The relief claimed in prayer 1 of the Notice of Motion is refused.

b) The alternative relief claimed in prayer 2 of the Notion of Motion is granted. Accordingly the determination contained in the second respondents' letter of 29 March 2001 (annexure "W" to the founding affidavit of Mr Ismail Essop) is reviewed and set aside but only to the extent that it determined that an amount of R732 903 (the amended amount is R695 508) is payable in lieu of forfeiture.

c) Prayer 3.1 of the Notice of Motion is refused.

d) Prayers 3.2 and 3.3 of the Notice of Motion are granted and the first respondent is ordered to pay the second applicant an amount of R900 000 plus interest thereon, at the legally prescribed rate of interest, a **tempore morae**, but subject to the first respondent's entitlement to invoke set-off.

e) The first respondent is ordered to pay the applicants' costs of suit on a party and party basis.

100] I in conclusion wish to express my gratitude to counsel for their thorough and helpful heads of argument as well as oral argument.

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D. VAN REENEN