



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

13/11/2015

APPEAL CASE NO: A406/14

CASE NO:72792/13

In the matter between:

THE COMMISSIONER FOR THE SOUTH
AFRICAN REVENUE SERVICE

Appellant

and

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHERS JUDGES: YES/NO
(3)	REVISED
13/11/2015	<i>Mark Murphy</i>
DATE	SIGNATURE

PRUDENCE FORWARDING (PTY) LTD

First Respondent

GROVEMASTER TRADING
ENTERPRISES 136 CC

Second Respondent

JUDGMENT

MURPHY J

1. This is an appeal against the judgment of Wright J in which he granted an order setting aside the seizure by the appellant of goods contained in a shipping container

and further granted an interim order, pending an internal administrative appeal, ordering the appellant to accept payment of the amount of R64 434,26 and upon payment of which to release the container.

2. The appellant is the Commissioner for the South African Revenue Service ("the Commissioner"). The first respondent is a clearing agent; the second respondent is a business which imports goods from China and distributes them in South Africa. Although the respondents filed an application to introduce further evidence on appeal, it failed to file heads of argument and did not make an appearance at the appeal hearing.

3. The container in question contained blankets or quilts imported by the second respondent from China. The Commissioner detained the container on 23 August 2013 on the basis of his suspicion that the price declared by the second respondent did not constitute the true customs value of the goods, which in his view had been under-declared. The invoice submitted by the second respondent declared the quantity and value of the blankets as 3440 blankets at US\$2,70 each.

4. In terms of section 66 of the Customs and Excise Act¹ ("the Act"), the transaction value of any imported goods shall be the price actually paid or payable for the goods when sold for export to the Republic, subject to adjustments allowing for the addition of *inter alia* commission, brokerage, packing costs, royalties, licence fees, insurance and transportation costs.²

5. Any person entering any imported goods is required to deliver to the Controller a bill of entry setting forth the full particulars in relation to the goods and to make a declaration as to the correctness of the particulars shown on the bill of entry.³ No

¹ Act 91 of 1964

² Section 67 of the Act

³ Section 39(1) of the Act

entry shall be valid unless the true value of the goods on which duty is leviable or which is required to be declared, has in fact been declared.⁴ The exporter of any goods imported into the Republic shall render a true, correct and sufficient invoice, certificate of value and certificate of origin of such goods.⁵ Any person who deals or assists in dealing with any goods contrary to the provisions of the Act, or makes a false statement, knowing it to be false, shall be guilty of an offence.⁶ The goods in respect of which such false statement or false declaration was made shall be liable to forfeiture.⁷

6. Any goods imported contrary to the provisions of the Act or in respect of which any offence under the Act has been committed shall be liable to forfeiture.⁸ Section 88(1)(a) of the Act permits an officer (acting under the authority of the Commissioner) to detain goods for the purpose of establishing whether they are liable to forfeiture under the Act. If the goods are liable to forfeiture under the Act, the Commissioner may seize them in terms of section 88(1)(c). The owner of the goods which have been seized may institute proceedings to claim them. However, section 96(1)(a) of the Act provides that no process instituting legal proceedings against the Commissioner for anything done in pursuance of the Act may be served before the expiry of a period of one month after the delivery of a notice in writing setting forth clearly and explicitly the cause of action and the particulars of the litigant. In order to be valid, the notice must comply with the specific requirements of section 96.⁹ Such notice must be given within 90 days of the seizure.¹⁰ The one month period referred to in section 96(1)(a) of the Act, being the waiting period before which proceedings may be instituted, may be reduced or extended by the Commissioner on good cause shown. If the Commissioner refuses to reduce or extend the period, the High Court may do so, if the interest of justice so requires.¹¹

⁴ Section 40(1)(c) of the Act

⁵ Section 41(1) of the Act

⁶ Sections 83 and 84 of the Act,

⁷ Section 84 of the Act

⁸ Section 87(1) of the Act

⁹ Section 96(1)(a)(iii) of the Act

¹⁰ Section 89(3) of the Act

¹¹ Section 96(1)(c) of the Act

7. As I have mentioned, the Commissioner detained the container containing the goods imported by the second respondent on the basis of his suspicion that there was a false declaration of their value, thus rendering them liable to forfeiture. In the subsequent weeks representatives of the respondents and the Commissioner engaged in negotiations regarding the goods and the supply of additional information by the respondents to the Commissioner. Further documentation requested by the Commissioner was not forthcoming to his satisfaction. The second respondent indicated that it was amenable to an increase in the declared value of the goods and tendered a provisional payment for the release of the goods. The negotiations endured throughout September and October 2013. The Commissioner was specifically requested to exercise his discretion in terms of section 107(2)(a)(i) of the Act which reads:

“Subject to the provisions of this Act, the Commissioner shall not, except on such conditions, including conditions relating to security, as may be determined by him or her, allow goods to pass from his or her control until the provisions of this Act or any law relating to the importation, exportation, transshipment or transit carriage through the Republic of goods have been complied with in respect of such goods.”

8. The respondents, concerned about demurrage and storage costs while the goods were detained, urged the Commissioner to release the goods and either to increase the declared value on a without prejudice basis, or to accept security in the form of a “provisional payment” as contemplated by the exception provided for in section 107(2)(a)(i) of the Act. The respondents also relied upon Article 13 of the General Agreement on Tariffs and Trade (“GATT”) which states:

“If in the course of determining the customs value of imported goods, it becomes necessary to delay the final determination of such customs value, the importer of the goods shall nevertheless be able to withdraw them from customs if, where so required, the importer provides sufficient guarantee in the form of a surety, a deposit of same or other appropriate instrument covering the ultimate payment of customs duty for which the goods may be liable. The legislation of each member shall make provision for such circumstances.

Section 74A of the Act provides that the interpretation of sections 65, 66 and 67 (dealing with the value of goods) shall be subject to the Agreement on Implementation of Article VII of GATT. Section 107(2)(a)(ii) of the Act is the domestic legislative provision contemplated in Article 13 of GATT which aims at the facilitation of the release of imported goods while the Commissioner investigates their true value.

9. The respondent calculated what it maintained was a reasonable provisional payment in the amount of R64 343,26 being the customs duty and VAT payable on an increased value of the goods at R253 120.

10. The Commissioner refused to agree to release the goods from detention against the proffered payment of security. His reasons for refusing the request appear clearly in his answering affidavit. The Commissioner regards certain commodities or classes of commodities as high risk imports which call for special attention and specific measures to ensure proper compliance with the Act. One such class is textile products, which include blankets of the type that form the subject of this appeal. Fraud in the importation of textiles is rife, in particular imports emanating from China, and is perpetrated by under-declaring the value and/or quantity of the declared goods. The effect is a loss of revenue to the fiscus and a weakening of the local textile industry. The Commissioner had reason to believe that the respondents were engaged in such irregular importing practices and were associated with other entities importing substantial amounts of textile products illegally.

11. The Commissioner consequently has become more vigorous in his investigation of these imports. In order to do a proper investigation more than the primary documents (the purchase order, the contract of sale and delivery notes) are required. The Commissioner accordingly asked the importer to provide a broader range of documentation and information. He therefore directed the respondents to complete a

customs and excise valuation questionnaire (Form DA55). In a letter of 20 September 2013 the Commissioner asked for the following:

- “1. A list of all goods purchased and imported from overseas suppliers over the past two years.
2. Explanations of the whole procurement process i.e. how are prices and production requirements negotiated? Please provide correspondence thereof.
3. Method used to place orders and order confirmations.
4. Supplier Invoices as prescribed.
5. Proof of payment of supplier invoices over the past two years.
6. Copy of Grovemasters Trading Enterprise 136 CC past 6 months bank statement.
7. Importer written clearing instructions/power of attorneys unless exempted by rule.
8. Any agreement between importer and clearing agent.
9. Proof of registration of the clients business entity (CIPC and SARS).
10. Proof of business addresses e.g. Utilities bill or lease agreement etc.
11. List of customers supplied to in South Africa over the past two years.
12. List of current employees in your employ including their ID numbers.
13. List of warehouses or storage facilities where goods are taken to after obtaining Customs releases and requisite proof of such.”

12. The Commissioner supplemented this request with a further request for information in a letter of 30 September 2013 as follows:

- “1. A form DA55 “Valuation Questionnaire” (Have to be fully completed)
2. Is this the first importation from the supplier?

3. When was the first importation from the supplier? What was imported? Is this transaction linked to be negotiations linked to the negotiations from the first import and production cycle?
4. A list of all goods purchased and imported from the supplier over the past two years?
5. Explanations of the whole procurements i.e. how are prices and production requirements negotiated? Please provide correspondence thereof.
6. Transport document or such other document in lieu thereof (e.g. Original bill of lading, Way bill, Arrival notification etc.).
7. Invoices as prescribed.
8. Shipper statement of expenses and cost of freight, transportation of the container from factory to the place in South Africa (Port of Entry).
9. Method used to place order and order confirmation.
10. Importer written clearing instruction/power of attorneys unless exempted by rule.
11. Any permit, Certificate or other authority issued under any other law authorising the importation of goods or any documents related to such goods.
12. Exchange control form.
13. Proof of registration of the clients business entity (CIPC and SARS).
14. Proof of business addresses e.g. Water bill.
15. Copy of all correspondence between importer and supplier and any intermediary.
16. Any agreement between Importer and clearing agent.
17. Administrative expenses (Please be specific)
18. Cost used in the production of the imported goods. Raw material, components and parts, labour cost, ratio per unit, operational cost, until cost and overhead expenses per unit (All these cost should be supported by documentary proof).

13. The respondents claimed that they furnished as much of the information as they could, to the best of their ability. The Commissioner considered their responses to be evasive, incomplete and “not the response expected from a compliant importer”.

14. In the light of his dissatisfaction with the information provided to him, the Commissioner refused to release the detained container of goods against payment of security.

15. In consequence, the respondents on 29 November 2013 filed a notice of motion giving notice that they would on 17 December 2013 seek an order, on an urgent basis, for the following relief:

"2. Granting the following interim relief to the Applicants, pending the institution of an internal administrative appeal and, if unsuccessful, review proceedings in respect of the value of the goods, within twenty-one (21) days from date of an order granted by this Honourable Court:

2.1 That the Commissioner is ordered to release the container, described as GESU 6850705;

Alternatively to prayer 2.1,

2.2 That the Commissioner is ordered to accept a provisional payment of R64 343.26, alternatively a reasonable amount in respect of container GESU 6850705, and upon payment of this amount to release the said container."

16. Although not including a relevant prayer in the notice of motion, the respondents in their founding affidavit requested the court in terms of section 96(1)(c)(ii) of the Act to reduce the one month notice period required by section 96(1)(a) of the Act, on the grounds that it would be in the interest of justice for the application to be heard on an urgent basis in view of the on-going financial loss the detention of the goods was causing them.

17. In the course of further investigations, the Commissioner obtained information and a copy of an invoice from the Bank of Taiwan – being the bank through which the second respondent effected payment to the supplier in China – which reflected the quantity of the blankets imported as 17090 and the price thereof as US\$7.00 each. The value of the consignment was reflected to be US\$119 630 and not US\$9288 (3440xUS\$2, 70) as declared. This was confirmed by an invoice sent by the supplier of the blankets to the Bank of Taiwan. In terms of the local currency, this invoice suggested that goods worth R1 184 337 were declared at a value of R86 250. According to the Commissioner, the customs duty payable on the blankets based on the true customs value thereof amounted to R218 664,25, together with VAT of R196 119,27, with the total amount payable to the Commissioner by the respondents being R414 783,52.

18. Relying on this information, the Commissioner in his answering affidavit gave the respondents notice in terms of section 3(2) of the Promotion of Administrative Justice Act¹² (“PAJA”) of his intention to seize the goods in terms of section 88(1)(c) of the Act and invited the respondents to furnish him with evidence and submissions in their replying affidavit as to why the goods should not be seized.

19. In the replying affidavit the respondents contended that the Commissioner had obtained the documentation irregularly and that it would have been impossible to fit 17090 blankets in the container. They denied that the documentation from the Bank of Taiwan related to the container in issue and claimed that the SARS investigator, Mr Setshedi, had not inspected the container.

20. After consideration of the respondents’ replying affidavit, the Commissioner seized the goods on 13 December 2013. In a letter addressed to the applicants, dated 13 December 2013, the Commissioner stated:

¹² Act 3 of 2000

"Having considered the contents of the replying affidavit together with all the other evidence in his possession the Commissioner is satisfied that the blankets have been dealt with in breach and/or non-compliance with the provisions of section 38(1), 39(1)(a), 40(1) of the Customs Act. They have therefore been dealt with irregularly as contemplated by section 87(1) and are hereby seized in terms of the provisions of section 88(1)(c) of the Customs Act.

21. In paragraph 6 of the letter the Commissioner drew the respondents' attention to relevant statutory provisions in the event that they should seek legal redress. He stated:

"Should you wish to impugn any of the decisions recorded herein you are referred to the provisions of section 7, read with section 9 of PAJA and section 77C of the Customs Act read with the rules thereto. Your attention is also drawn to the provisions of section 89 and 93 of the Customs Act. In addition you are referred to the imperative provisions of section 96(1) of the Customs Act which are to be complied with before judicial proceedings can be instituted."

22. At the hearing of the application on 17 December 2013, the respondents handed up an amended notice of motion together with a supporting affidavit. The notice of motion included a prayer for an order:

"That the seizure of the goods contained in Container GESU 6850705 on 13 December 2013 be set aside."

The respondents in addition sought the same interim relief regarding the release of the container and the payment of a provisional payment as claimed in the original notice of motion.

23. After hearing argument the court granted the following order:

- "1. That this matter be dealt with as a matter of urgency and dispensing and condoning the time periods as prescribed in the Rules, the procedure and form of service by reason of urgency of the matter in terms of rule 6(12)(a);
2. That the seizure of the goods contained in Container GESU 6850705, on 13 December 2013, be set aside;
3. That the following interim relief is granted to the applicants, pending the institution of an internal administrative appeal and, if unsuccessful, review proceedings in respect of the value of the goods, within 21 (twenty one) days from date of an order granted by this Court:
 - 3.1 That the Commissioner is to accept a provisional payment of R64 343.26, in respect of container GESU 6850705, and upon payment of this amount to release the said container;
4. That the question of costs is reserved. Once the internal administration appeal and review proceedings referred to in prayer 3 are finalised any party may set down the matter for the question of costs. (*sic*)

24. The order setting aside the seizure constituted final relief.

25. The appellant sought leave to appeal, while the respondents gave notice of their intention to bring an application for execution of the order pending the appeal in terms of rule 49(11). The application in terms of rule 49(11) was settled in the following terms:

"In the dispute between the parties regarding the suspension of the operation of the order granted on 17 December 2013 ("the suspension application") they have come to the following agreement:

1. The respondent will release the goods against payment of R164 000.
2. The amount will be kept in trust in an interest bearing account earmarked for this matter by MacRobert Attorneys Inc, the attorneys acting for the respondent.

3. This money will be in lieu of the goods and at the final outcome of this matter, it will be dealt with as if it were the goods.
4. The amount so agreed, in lieu of the goods, is for the purpose of settling the suspension application and is not to be construed as an admission by either party as being the correct customs value of the goods.
5. The suspension application is to be postponed sine die, costs reserved.”

26. When the container was eventually opened, it was discovered that the blankets had been removed or stolen. But for paragraph 3 of the settlement agreement, which provides that the money paid in exchange for the release of the blankets will substitute the blankets and will be dealt with as if it were the blankets, this appeal would have no practical effect and could have been disposed of in terms of section 16(2)(a)(i) of the Superior Courts Act.¹³ A finding on appeal favourable to the Commissioner, however, will permit him to seize the money currently held in trust.

27. The Commissioner has raised four issues on appeal. The most compelling and essentially dispositive ground of appeal is that the respondents failed to comply with the peremptory provisions of sections 89(2) and 96(1) of the Act and hence the court lacked jurisdiction to set aside the seizure of the goods. Section 89(2), it will be recalled, requires any litigant to give notice to the Commissioner before serving any process for instituting any proceedings as contemplated in section 96(1)(a) within 90 days after the date of the seizure or the conclusion of an internal administrative appeal. The relevant subsections of section 96(1) provide as follows:

- “(1)(a) (i) No process by which any legal proceedings are instituted against the State, the Minister, the Commissioner or any Officer for anything done in pursuance of this Act may be served before the expiry of a period of one month after delivery of a notice in writing setting forth clearly and explicitly the cause of action, the name and place of abode of the person who is to institute such proceedings (“in this section referred to as the litigant”) and the name and address of his/her attorney, if any.

¹³ Act 10 of 2013

- (1)(c) (i) The State, the Minister, the Commissioner or any officer may on good cause shown reduce the period specified in paragraph (a) or extend the period specified in paragraph (b) by agreement with the litigant.
- (ii) If the State, the Minister, the Commissioner or an officer refuses to reduce or to extend any period as contemplated in subparagraph (i), a High Court having jurisdiction may, upon application of the litigant, reduce or extend any such period where the interest of justice so requires.”

28. The respondents gave written notice of their intention to seek interim relief in the form of an order to release the container against payment of a provisional payment. They gave no similar notice in respect of the new cause of action introduced by the amendment in which they sought to review and set aside the seizure of the goods. The interim relief they sought had in effect become moot. It was therefore incumbent upon them to serve the relevant notice and to obtain the agreement of the Commissioner or the sanction of the court to reduce the one month period in respect of the new cause of action involving a review of the seizure decision. This was not done. The respondents could not rely on the notice they served to obtain the release of the goods from detention. Section 96(1)(a)(i) of the Act makes it plain that the notice must relate to a specific cause of action, which is required to be set forth “clearly and explicitly” in the written notice. And section 96(1)(a)(iii) provides that no notice shall be valid unless it complies with the requirements prescribed in the section. Thus, since no notice was delivered in respect of the review, and neither the Commissioner or the court agreed to a reduced period, the jurisdictional conditions precedent were not fulfilled, and the court accordingly lacked jurisdiction to grant the final relief it granted, in the form of an order setting aside the seizure of the goods. For that reason alone, the appeal must succeed.

30. The Commissioner has objected also to the fact that he was not afforded the opportunity to file papers in response to the application to review his decision to seize the goods. The application was in effect made from the bar, with the amended notice of motion and supplementary affidavit being handed up in the course of

argument. This offends the tenets of natural justice and in itself constitutes a successful ground of appeal.

31. Furthermore, the review of the seizure could only be competent under PAJA. The only evidence upon which the review application was based was a two page supplementary affidavit. It sets out no grounds for review. The case for review is made out in two paragraphs as follows:

- “4. The detention was unlawful at the time when the purported seizure occurred. At the time of the purported seizure, the Respondent had been detaining the container for 110 days. The Respondent then seized the goods, without opening the container.
- 5. The Respondent’s act of seizure was clearly intended to frustrate the relief sought by the Applicants. The notice of seizure was delivered whilst this application for urgent relief had been pending. This conduct is in contempt of this Honourable Court and warrants a punitive costs order.”

32. There is no basis for concluding that the seizure was in contempt of court. There was no existing court order, and certainly no evidence that the Commissioner had deliberately disobeyed any court order in relation to the dispute in respect of these goods. But more germane is the fact that no specific review grounds are identified or set forth in the supplementary affidavit. No explanation is given as to why the seizure decision was unlawful, unreasonable, irrational or procedurally unfair. Litigants who seek to review administrative action are obliged to identify clearly both the facts upon which they base their cause of action, and the legal basis of their cause of action, and normally that will require them to specify the provisions of PAJA upon which they rely.¹⁴ The supporting affidavit handed up by the respondents made no reference whatsoever to PAJA and merely stated that at the time of the seizure the detention of the goods was unlawful and that the seizure was intended to frustrate the relief sought. No explanation was given as to why the detention was unlawful and the court *a quo* itself furnished no reasons for its decision to set the seizure aside. No

¹⁴ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) para 26-27.

case based upon the legal provisions of PAJA was made out justifying the order of the court *a quo* setting aside the seizure. Hence, the appeal should succeed on that ground also.

33. Finally, with regard to the merits, the court *a quo* erred in its understanding of a concession made by counsel to the effect that the Commissioner was prepared to accept that there were 3440 blankets rather than 17090. The effect and objective of the concession, in light of the documentation from the Bank of Taiwan and the amount of the invoice, was that the value of each blanket would have been US\$34,78 and thus there was still a significant under-declaration. Moreover, the respondents did not furnish adequate proof in rebuttal of the Bank of Taiwan documentation and the invoice sent by the supplier to the bank. The invoice is compelling *prima facie* proof that the value of the goods had been under-declared. The respondents have not adequately answered why the bank was in possession of documentation indicating a purchase in the amount of US\$119 630, as opposed to the declared value of US\$9460. They have produced other documentation setting out imports in an aggregate amount of US\$847 446,85; but have singularly neglected to explain how the consignments were made up or which entries related to the container in question. Section 102(4) and (5) of the Act place an onus upon the respondents to prove compliance with the Act. They failed to discharge that onus by furnishing credible evidence of payment that controverted the supplier's invoice. That obliged the court *a quo* to regard the *prima facie* proof as conclusive. As a result there was no basis to set aside the seizure or to order the Commissioner to release the goods.

34. For all the foregoing reasons, the appeal must succeed. In the premises the following orders are made:

- i) The appeal succeeds with costs, such to include the costs consequent upon the employment of two counsel, including senior counsel.

- ii) The order of the court *a quo* is set aside and substituted with the following order:

"The application is dismissed with costs, such to include the costs consequent upon the employment of two counsel, including senior counsel."

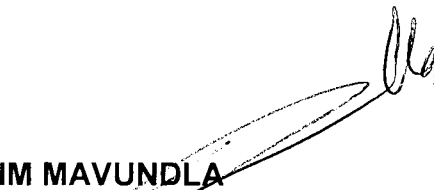


Handwritten signature of John Murphy in black ink.

JR MURPHY

JUDGE OF THE HIGH COURT

I agree

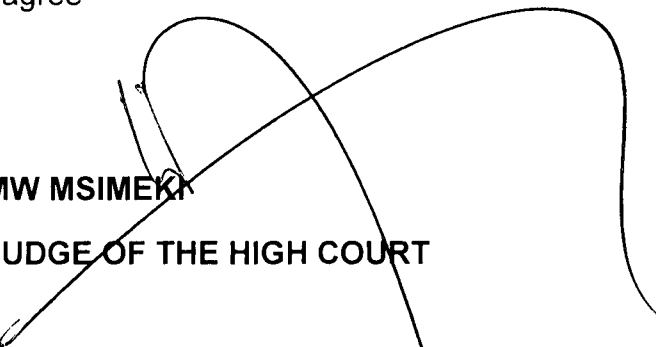


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NM MAVUNDLA

JUDGE OF THE HIGH COURT

I agree



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MW MSIMEKI

JUDGE OF THE HIGH COURT

Date Heard:

21 October 2015

Counsel for Applicant:

Adv. JA Meyer SC, Adv. MPD Chabedi

Instructed by:

MacRobert Attorneys

Counsel for First and Second Respondents:

No Opposition

Instructed by:

Chen & Lin Attorneys

Date of Judgment:

13 November 2015