IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

REPORTABLE

Case no: 5324/2015

In the matter between:

COCONUT EXPRESS CC	**APPLICANT**
And	
THE SOUTH AFRICAN REVENUE SERVICE (CUSTOMS & EXCISE)	**1ST RESPONDENT**
THE MEC FOR HEALTH (KZN)	**2ND RESPONDENT**
RUSSEL COOTE	**3RD RESPONDENT**
MEDITERANEAN SHIPPING COMPANY SA	**4TH RESPONDENT**
THE OFFICER COMMANDING THE WESTVILLE PRISON	**5TH RESPONDENT**
THE COMMISSIONER FOR SARS AND CUSTOMS AND EXCISE	**6TH RESPONDENT**

JUDGMENT

MADONDO J

[1] In this application the applicants seeks an order in the following terms:

1.

"That the applicant's non-compliance with the Uniform Rules of Court be and is hereby condoned and it be given leave that the matter be heard as an urgent one in terms of Rule 6(12)(b).

2.

That the Sixth Respondent be and is hereby held to be in contempt of Court and that:-

(a) The commissioner for the South African Revenue Services Customs and Excise be and is hereby committed to prison for a period of ten days;

(b) That the aforesaid order is suspended for a period of 30 days provided that the said commissioner complies with the provisions of the Court order dated the 5th November 2015 by causing the goods of container number MEDU37236 23 (the goods) to be released for onward transmission to the imported / manufacturer;

(c) That the First Respondent be directed to pay the costs of this application on an attorney and client scale.

3.

That the detention of the said goods by the officials of the First Respondent be declared to be wrongful and unlawful and therefore be release forthwith for onward transmission out of the Republic of South Africa.

4.

That the relief set forth in paragraph 3 above operate as an interim relief pending the return day of the rule nisi.

5.

Further, or other or alternative relief."

FACTUAL BACKGROUND

[2] The applicant carries on business as the importers and exporters of the manufactured products and also acts as an intermediary between the supplier of goods and the eventual consumer thereof.

[3] The distributor of the manufactured products (by the manufacturer in India) is one Shalina Healthcare DMCC, carrying on business at 30th floor, Almas Tower, Jumairah Blake Towers, Dubai UAE (hereafter referred to as "Shalina").

[4] The applicant facilitated the supply of certain pharmaceutical products (cream) between the manufacturer in India and the eventual consumer in Zambia, by placing an order in 730 cartons for the required goods with Shalina. The good were shipped in a vessel Petrohue in container number MEDU372362-3 to Durban Port the port of loading being Nhabasheva and port of discharge Durban. Shalina

invoiced the applicant for the goods. The said container was seized on its arrival at Durban Port, on the 9th of March 2015.

[5] Pursuant to the aforesaid seizure the first respondent issued a notice "detention of containerized goods" in terms of section 88(1)(a) read with section 87 and 102 of the Customs and Excise Act 91 of 1964 (the Act). On 16 March 2015 the first respondent issued a further notice for the removal of the aforesaid container via the scanner depot to a licensed warehouse in Durban.

[6] On the 23rd of March 2015, acting on behalf of the Medicine Control Council (MCC) the first respondent issued a further notice in terms of section 113(8) of the Act. The purpose of such detention was to allow the MCC to make a determination. The matter was referred to MCC for investigation by Russell Coote, the third respondent, and the goods were stored at the MSC Durban, the fourth respondent), to determine whether the importer (the applicant) was licensed to import medicines/creams/lotions of this nature. However, such determination was not made instead, the third respondent on the 24th of March 2015 issued a certificate of seizure and subsequently on 31st of March 2015 a further notice contending that the contents of the container were received in contravention of section 14(1) of the Medicines and Related Substance Controlled Act 101 of 1965 (the Medicines Act). The third respondent added that the container would not be released until after the finalization of the criminal case. Pursuant to the a foregoing the first respondent issued a notice in terms of section 88(1)(c) of the Act on the 20th of April 2015. On the 9th of April 2015 Shalina had indicated that the container be returned to the

country of origin (India). The reason for so doing was according to applicant that Smad Cosmetics Limited in Zambia had cancelled the order due to the delay.

[7] In an endeavour to have the container released negotiations ensured. The investigation was done by detective Captain Govindsamy, the investigating officer, of Durban Central Organised Crime who on 14th April 2015 after conclusion of his investigations indicated that he had no objection to the return of the container to the country of it origin. This implied that there was no criminal case pending. The contained was then detained by Customs and Excise pending its removal to Chemical Suppliers a Customs Bonded Warehouse and eventual to Zambia.

[8] The matter was then referred to the Director of Public Prosecutions (DPP) for considerations, and the Senior State Advocate, Naidoo, in the Organised Crime Section, concluded on 29 April 2015 that the container was never intended to reach South Africa and that its final destination was Zambia. He went on to say that the container was then incurring unnecessary costs and that it ought to be returned to its port of origin.

[9] However, on the 20 May 2015 Shalina indicated that the goods be shipped to its Pharmacy in South Sudan. Notwithstanding all the aforesaid negotiations and the decisions of Govindsamy and Advocate Naidoo the container remained seized. The applicant then lodged an application for the release of the container on 26 May 2015. According to the applicant, it was not the intention of the first respondent to detain the container but it acted on the instruction of the second respondent who intended

to make a determination as to the pharmaceutical or medicinal contents of the container.

[10] On 20 August 2015 the second respondent issued a Government Gazette Notice (GGN739), Annexure “AM3” to the applicant’s founding affidavit, that it was of the opinion that it was not in the public interest that the products listed in the notice, not registered with the council, be made available to the public and declared these medicines undesirable.

[11] On 5 November 2015 the applicants’ application served before this court for the release of the container from the warehouse of the fourth respondent where it then stood. The application was opposed. However, the order was taken by consent. But, the GGN739 was not made available to the applicant prior to the hearing of the opposed application.

[12] In terms of the order the container was to be uplifted from the fourth respondents’ warehouse and delivered by the South African Police Services (SAPS) to a state owned warehouse within the jurisdiction of the Durban High Court. The container was to be held there pending the outcome of the criminal investigation. In the event of no decision to prosecute being made within thirty (30) days the applicant was entitled forthwith to remove the container and ship same to the import or manufacturer in accordance with GGN739 at its own expense. It was recorded in court that the first respondent had withdrawn all its detention orders in respect of the container and its contents.

[13] Pursuant to the order the second respondent issued a handing over certificate dated 20 November 2015 and in terms of which the said container was handed over to the SAPS.

[14] In a letter dated 1 December 2015 Captain Gopalsamy of the SAPS indicated that he had completed his investigation and that the container should be returned to the manufacturer/wholesale in terms of GGN739. Following such decision, on 10 December 2015 Shalina (the importer) indicated that the container be removed to its branch offices at an address in Democratic Republic of Congo; Shalina Pharmacy, No.532 Chausee. Laurent, Avenue Desire Kabila, Lu Bumbashi, RDC.

[15] On 22 December 2015, CJC Logistics advised that SARS Tactical Unit seized the goods following the correspondence exchanged between CJC Logistics and SARS. In the letter dated 22 January 2016 the first respondent avers that the goods were in terms of the court order supposed to have been kept at the state bonded warehouse within the jurisdiction of the Durban High Court. However, to the contrary, the goods were kept in the applicant's warehouse in Johannesburg.

[16] The first respondent was then of the view that the conduct of the applicant was in contravention of section 18(13) of the Act and invited the applicant to make an election to be dealt with in terms of the provisions of 91. Further, if the applicant were to elect to be dealt with under section 91, it would be required to advise the first respondent accordingly, and agree in writing to abide by the decision, and to deposit an amount of R5, 000 in terms of the aforesaid section. The first respondent also placed various restrictions on the movement of the container, and it concluded by

saying that once all the restrictions had been complied with it would consider uplifting the detention placed on the goods.

[17] Further, the applicant was in terms of sections 4(4) and 101 of the Act requested to provide the office of the respondent with the following details:

(i) The export bill of entry, full particulars of the driver, copy of his passport and vehicle registration details;

(ii) Date of proposed export and port of exit to be used;

(iii) The route the truck would be utilising;

(iv) Proof of payment to the transporter;

(vi) Signed copy of clearing instructions.

[18] Further, the first respondent advised the applicant that the Tactical Interventions Unit (TIU) considered the removal of the said goods from the jurisdiction of the Durban High Court to be contempt of the court order on the applicant's part. The applicant had instructed Rebecca of the fourth respondent to prepare the documents for the movement of the container from the fourth respondent's premises to DRC. The same instruction was communicated to SAPS and the attorneys of the first respondent. The documents prepared by the applicant's clearing agents indicated the destination of the goods to be DRC. No mention was made of Zimbabwe or the border post Beitbridge. The applicant is baffled why the officials of the first respondent now contend that there has been a deviation in terms of section 18(13) of the Act.

[19] As allegedly, there has been contravention of the provisions of section 18(13) of the Act, the first respondent avers that it is therefore entitled to impose penalties in terms of section 91 of the Act, which provides for administrative penalties. The applicant submits that the first respondent is creating reasons to seize the goods which are presently still under the detention.

[20] According to the applicant the goods were released from the state warehouse by the police and given to the applicant for export and at the time of detention the goods were in the process of being exported. The applicant alleges that it furnished the information required for the movement of the container relating to the details of the driver and his passport number the details of the vehicle as well as the route and border posts the goods would pass through. Further, applicant's clearing agents indicated that the applicant was prepared to lodge the deposit of R5 000.00 pending the finalisation of the shipment. According to the applicant the first respondent is frustrating the fulfilment of the High Court order obtained on 5 November 2015. Further, the first respondent is in breach of section 29 of the Medicines Control Act by failing to comply with GGN739.

[21] It is the first respondent's contention that it was under the impression that the applicant wanted to take the goods out to Zimbabwe from Beitbridge and not Grobblersburg. Secondly, on the address of the manufacturer, it is not stated that the manufacturer is based in Democratic Republic of Congo. Thirdly, the applicant failed to obtain permission from it (first respondent) in terms of section 18(14) of the Act to re-package the goods in another warehouse. The first respondent subsequently issued a detention notice that goods are detained in terms of section 88(1)(a) and

that “the goods are kept at the applicant’s premises”. The section entitles an officer or magistrate or member of the police force to detain the goods for the purpose of establishing whether they are liable to forfeiture.

[22] It is argued on behalf of the applicant that the conduct of the first respondent is in contravention of the applicant’s right in terms of the court order to have goods returned to its manufacturer or importer and in this case the chosen importer or manufacturer being its branch offices in DRC within a period of 30 days. According to the applicant the court order supersedes the provisions of the Act.

ISSUES

[23] The question for determination in this matter are:

(a) whether the court order dated 5 November 2015 has the effect of superseding the provision of the Act;

(b) whether the first and sixth respondents are in contempt of the foresaid court order.

(c) whether the detention of the goods by the first and sixth respondents is lawful.

Does the 5 November 2015 court order supersede the provisions of the Act in that it relieves the applicant from complying with the provisions of the Act when dealing with the goods in question?

[24] It is common cause between the parties that the applicant sought and obtained the court order dated 5 November 2015 by consent in the following terms:-

1. “That container bearing reference MEDU3723623 shall forthwith be uplifted from its present location held in the fourth respondent’s warehouse and then delivered

by the South African Police Service (SAPS) to a state bonded warehouse within the jurisdiction of the Durban High Court.

2. The SAPS shall have all the powers contemplated in terms of the Criminal Procedure Act in dealing with the container during the course of the investigation in paragraph 4 below and any subsequent prosecution, if any,
3. That the aforesaid container shall be held in the said state bonded warehouse, pending the investigation in paragraph 4 below and during any prosecution, if any.
4. SAPS shall conduct an investigation in terms of the Criminal Procedure Act,
5. Should no decision to prosecute be made within 30 (thirty) days of this order, the applicant is entitled to forthwith remove the said container thereafter and ship the container to the importer or manufacturer in accordance with Government Notice 739 dated 20 August 2015 at its own expense.
6. It is recorded that the first respondent has withdrawn all its detention orders in respect of the container and its contents.
7. That the issue of costs in respect of the second and third respondents is reserved and adjourned sine die.
8. There is not order of costs, in respect of the first respondent."

[25] It has been argued on behalf of the applicant that the detention of the goods, which are the subject matter of this application, is in contravention of the order granted on 5 November 2015 as well as section 29 of the Medicines Act by failing to comply with GGN739. According to the applicant the conduct of the officials of the first respondent is aimed at frustrating the fulfilment of the High Court Order.

[26] It is the applicant's submission that in terms of paragraph 1 of the order the SAPS were to uplift the container from the fourth respondent and place it in a bonded warehouse for 30 days pending their (police) investigation. It was not the obligation of the applicant. According to the applicant the first respondent has misconstrued what in applicant's submission is couched in clear and unambiguous terms.

[27] The applicant contends that as there was no decision to prosecute was made in terms of paragraph 5 of the order the applicant was entitled forthwith to remove the said container and thereafter ship it to the importer or manufacturer (without specifying an address) .Paragraph 6 of the order states that the first respondent has withdrawn all its detention orders in respect of the container and its contents.

[28] To the contrary, the first respondent contends that there has been a contravention of the provisions of section 18(13) of the Act and that, therefore, it intends to invoke the provisions of section 91, which provides for administrative penalties. The applicant contends that in terms of the court order it is not obliged to comply with the provisions of the Act when transporting (exporting) goods in question from the Republic of South Africa to a country of its final destination. It has been argued that, in fact, according to the applicant the court order should be interpreted as superseding the provisions of the Act.

[29] Upon proper construction of the 5th November 2015 court order its import is not that the container had to be handled or dealt with in violation of the provisions of the Act. Even if the court order were to exempt the applicant from complying with the provisions of the Act the court is not entitled to countenance illegality. In *Schierhout v Minister of Justice* 1926 AD 99 at 109 it was held that our law has long recognised that any act performed contrary to the direct and express prohibition of the law is void and of no force and effect. In Cool Ideas v Hubbard 2014(4) SA 474 (CC) at pp492, 498 (paras 55, 77) on this point the Constitutional Court said the following:-

> "It cannot be expected of a court of law in such circumstances to disregard a clear statutory prohibition – that would be inimical to the principle of legality and the rule of law. To do so would amount to undermining the purpose of the legislation.
>
> ….
>
> It is a basic principle of our laws that a court can never lend its aid to the enforcement of an illegal act. An act that has been performed in violation of a statutory prohibition may, generally, have no legal consequences."

In the matter of *Matthew Lester v Mdlambe Municipality* (514/12) [2013] ZA SCA 95 (22 August 2013) at paragraph 24, with regard to the public bodies charged with the duty of upholding the law, the Supreme Court of Appeal said:-

> "… the courts have a duty to ensure that the doctrine of legality is upheld and the to grant recourse at the instance of public bodies charged with the duty of upholding the law."

[30] It has been conceded by Mr Maharaj, the counsel for the applicant that the applicant's attorneys made an undertaking in court on 5 November 2015 that in dealing with the container the applicant would comply with the provisions of the Act. Therefore, it is needless to determine whether or not the applicant was obliged to comply with the provisions of the Act when handling or dealing with the container in question. However, I have to determine whether the first and sixth respondents in detaining the goods in question acted in violation of the provisions of the court order.

Are the first and sixth respondents in contempt of the court order?

[31] It has been argued on behalf of the applicant that it was recorded in the court order that the first respondent had withdrawn all its detention orders in respect of the container and its contents. It is the first and sixth respondents' contention that it has been the recent cause of action or infraction that has led to the subsequent detention

of the applicant's goods. The goods in question have not been seized yet but they have merely been detained in terms of section 88(1)(a) of the Act.

[32] Before the dealing with the alleged contraventions of the court order by the applicant, I find it appropriate to state what transpired after the granting of the order of the 5th November 2015. Consequent to there being no decision to prosecute made, on conclusion of the police and after the lapse of the thirty (30) day period, the goods were then released to be shipped to the original manufacturer. Following the court order of 5 November 2015 granted in favour of the applicant, the container was released to the applicant consequent to there being no decision to prosecute was made within thirty (30) days after the conclusion of the investigation by SAPS. The container was then in terms of the court order to be shipped to the importer or manufacturer. However, the first and sixth respondents aver that the applicant's subsequent dealing with the container in question has been in contravention of the provisions of the Act in various respects.

[33] The first alleged contravention occurred when FBN Transport, acting on the instruction of the applicant's agent, CJC Logistics, being not a licensed remover of goods in bond as required by section 64D of the Act transported the goods from the forth respondent's depot to CJC Logistics warehouse in Wadeville, Germiston, and unpacked it on 21 December 2015. Section 64D (1) provides:

> "no person, except if excepted by rule, shall remove any goods in bond in terms of section 18(1)(a) or for export in terms of section 18A, or any other goods that may be specified by rule unless licensed as a remover of goods in bond in terms of subsection (3)."

[34] The goods being transported to Wadeville were destined to be transported by road to the Democratic Republic of Congo. The route that the vehicle would use when transporting the goods would have been N1 to N11 to the border in Grobblersburg. It is the first and sixth respondents' contention that in terms of the order the applicant was, after the release of the container from the SAPS, entitled forthwith to remove the said container and ship it to the importer or manufacturer. According to the respondents the applicant intended to contravene the court order by transporting the goods by road as opposed to shipping them. It is not in dispute that when FBN Transport removed the goods from the bond warehouse was not in possession of the required license to do so.

[35] The applicant contends that the word "ship" in the court order should be construed as including transportation by road. In section 1 of the Act the word "Ship" is defined as "any ship, vessel or boat (including a flying boat) of any kind whatsoever. The *Longman Dictionary Contemporary English Dictionary* defined "ship" as to cause to be carried by ship. On proper construction of the court order it does not authorise the conveyance of the container by road to Wadeville, the storage and unpacking of the goods there. The applicant was after the release of the container expected to have the container shipped from Durban to the country of its final destination that could be India (where the manufacturer was) or Zambia (where the importer allegedly was). Taking it to Wadeville by road and unpackaging it there was never contemplated. It follows therefore that the conduct of the applicant to transport the goods by road to Wadeville was in contravention of the court order.

[36] The second alleged contravention is that the FBN Transport when removing the goods in bond it had not received the authority of the Controller order as section 18(1)(a) of the Act directs. Rule 18.02 of the Act provides:

> "Except as otherwise provided in section 18 and the rules no goods shall be removed in bond until the remover has been authorised by the Controller to so remove the goods."

It has not been disputed that the remover of the goods was not authorised by the controller to do so.

[37] The third alleged contravention is the diversion of the goods' county of last destination without the approval of the commissioner. The goods in question were originally entered on the 9th March 2015 under customs purpose code "WH" for the purpose of being stored in a customs and excise warehouse under deferment of duty. The country of destination depicted on the bill of entry was "ZA" (South Africa). The applicant had indicated via its clearing agent that the goods would be stored in a warehouse in South Africa and would ultimately be entered for home consumption.

[38] On 7 April 2015 the applicants' clearing agent applied to enter the goods, under the purpose code "RIT" (which means removal in transit) for exportation to "2M" which means Zambia.

[39] In the Notice of Motion of the initial application, the applicant sought that it (the applicant) or its authorised agent / supplier be permitted to remove the goods so that they might be shipped to its manufacturer in India or the new purchaser in South Sudan. On 20 May 2015 the applicant was allegedly advised that the manufacturer

(owing to delay) managed to secure a new buyer of the goods in South Sudan, hence the goods were then to be shipped to South Sudan.

[40] It was only recently the commissioner has become aware that the goods were actually destined for the Democratic Republic of Congo. This became apparent after the commissioner had requested to be provided with a new entry. This occurred on 23 December 2015 after the goods were detained in terms of section 88(1)(a) of the Act. On 25 January 2016, a bill of entry was passed in which the goods country of destination was the republic of Congo. It is not in dispute that the goods last country of destination is the Democratic Republic of Congo.

[41] It is the contention of the first and sixth respondent's that it is apparent that the applicant clearly intended to divert the goods to the Democratic Republic of Congo and in so doing, as it had not obtained the permission from the commissioner for such diversion, it contravened the provisions of the Act. The applicant has allegedly diverted the goods as contemplated in section 18(13)(a)(i) of the Act by removing goods in bond to a destinations other than that declared on the bill of entry for removal in bond. The intended destination for the goods was first Zambia then South Sudan and now the Democratic Republic of Congo. It is the first and sixth respondent's submission that apparently the goods were never intended to reach their intended destination be it the manufacturer in India or new importer in South Sudan. The respondents allege that there is a strong suspicion that the applicant never intended to export the goods but rather to sell same, unlawfully, to the unwitting South African public. Though it has not been canvassed whether or not the applicant intended to sell the goods unlawfully in South Africa it is common cause

between the parties that the goods' last country of destination is now the Democratic Republic of Congo. However, there is nothing to suggest that for such diversion the applicant obtained the approval of the commissioner.

[42] The fourth alleged contravention is that the applicant in contravention of section 18(13)(b)(i) read with Rule 18(14) unpackaged the goods in Wadeville without the knowledge of the Controller. Section 19(13)(b)(i) of the Act provides:

> "notwithstanding the provisions of paragraph (a) the commissioner may, in such circumstances and subject to such conditions as the commissioner may prescribe by rule permit goods in transit through the Republic or any class or kind of such goods to be delivered to any place approved by him for the purpose of –
> (ff) re-packaging the goods…"

It has been admitted on behalf of the applicant that the goods were unpackaged without the knowledge of the commissioner and in the absence of the officials of the commissioner. Nor is it alleged that any application was ever made to the controller, in whose area of control repackaging was to be done, for the re-packaging.

[43] The onus is on the applicant to prove beyond reasonable doubt that the first and sixth respondents wilfully disobeyed the court order when the commissioner detained the goods for the second time on 23 December 2015. For an act to constitute contempt, an intention to defeat the course of justice must have been established. See Roberts v Chairman, Local Road Transportation Board, and others (1) 1980(2) SA 472(C) at 488.

[44] The standard of proof in cases of this nature was set in *Fakie No v CCI Systems (Pty) Ltd 2006 (4) SA 326 (SCA) at 344 (paragraph 42).* The applicant has

"to prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and *malafides*) beyond reasonable doubt. But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and *malafides*. Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *malafide*, contempt will have been established beyond reasonable doubt."

[45] In the present case, it is common cause that the order was obtained by consent and the first and sixth respondents were fully aware of it. However, in my view, the applicant has failed to prove that in detaining the goods the respondents acted in contempt of the court order. Instead, evidence in this regard has clearly demonstrated that at all times relevant hereto, the respondents have been acting in accordance with the provisions of the Act and the court order. Further, that the applicant has been labouring under a mistaken belief but not bona fide that because of the court order it is entitled to flout the provisions of the Act in dealing with or handling the container in question, despite the undertaking by its attorneys to abide with the provisions of the Act. Also, the evidence has demonstrated that the applicant has in various instances violated the court order. As indicated earlier, there is nothing contained in the court order that relieves the applicant from the duty to comply with the provisions of the Act when dealing with the container in question which could reasonably justify the applicant's belief and subsequent conduct. In the premises, I am not satisfied that the applicant has succeeded to discharge the onus resting on it to prove non-compliance with 5 November 2015 court order on the part of the first and sixth respondent.

(b) Is the first and second respondents' detention of the goods in question lawful?

[46] It is common cause between the parties that the goods were once against detained on 23 December 2015, after their release following the court order of 5 November 2015. According to the first and sixth respondent, on 23 December 2015 the commissioner detained the goods in terms of section 88(1)(a) of the Act at an unlicensed warehouse in Wadeville, Germiston. The purpose of the detention was to ascertain whether the goods had been dealt with contrary to the provisions of the Act and whether or not the goods were liable to forfeiture. Subsequent to such detention, the applicant caused an urgent application to be brought on 2 February 2016. It is the applicant's contention that the goods, being moved in terms of a court order across the border must be understood to be in transit, and as such exempted from customs and excise duties.

[47] Section 88(1)(a) provides:-

> "(1)(a) An officer, magistrate or member of the police force may detain any ship, vehicle, plant, material or goods at any place for the purpose of establishing whether that ship, vehicle, plant, material or goods are liable to forfeiture under this Act."

Prior to the detention of the goods the first respondent issued a section 88(1)(a) Notice to the applicant since the first respondent believed that the container in question had been handled contrary to the provisions of the Act. The purpose was to establish two things:- whether the goods had been handled contrary to the provisions of the Act, and whether there were liable to forfeiture. Section 87(1) of the Act provides that any good dealt with contrary to the provisions of the Act are liable to

forfeiture, ‘whosesoever, and in possession of whomsoever found’. The officials are in terms of the Act entitled to issue a detention notice for the purposes of establishing whether the goods were dealt with irregularly and whether were liable to forfeiture in terms of section 87(1) of the Act. See *also Minister of the Interior, Transkei, and another v City News Agency (Pty) Ltd1992 (2) SA 407 (Tka) at p 410 (ber Dumbutshena JA); Henbase 3392(Pty) Ltd v Commissioner, South African Revenue Service, and another 2002(2) SA 810 (T) at P187.*

[48] The applicants contention is that the goods are in transit to its final place of destination to the manufacturer and or exporter beyond the common customs area, and that the authority for the goods vests with SAPs in the person of Capt. Gopalsamy, in terms of the court order, In *Ammoolla Group Ltd and Others v The Gap Inc. and Others* 2005 (2) SA 412 (SCA) it was held that goods in transit or transhipped through the Republic are not hit by the prohibition in section 2(1)(b) of the Counterfeit Goods Act 37 of 1997 at p 414 E-G. The applicant admittedly states that the goods have not been dealt with in accordance with the provisions of the Act.

Are the goods in transit?

[49] The next question for decision is whether the situation of the goods in question is such that they can be said to be goods in transit, and therefore falling beyond the customs of this country. The Shorter Oxford English Dictionary (p2347) defines the word “transit” as passing through or over or across, and the Longman Dictionary of Contemporary English as “the act of passing over, across or through.”

In *Tieber v Commissioner for Customs and Excise 1992(4) SA 844(A) at p849, as per Goldstone JA,* goods in transit were defined as “goods which are landed in this country but destined for conveyance to another county”. Customs and excise duties are paid on all goods which are brought into the Republic other than goods only in transit.

[50] In *Tieber* case, the appellant and is girlfriend had agreed with some principals in Zimbabwe to transport on their behalf unwrought gold, foreign currency and travellers cheques (the consignment) from Zimbabwe to Switzerland. They made reservations for airline flights from Gaborone to Zurich via Jan Smuts and Frankfort airports, intending to remain in transit at both airports. They checked in their baggage, including the consignment, from Gaborone to Zurich. Upon arrival at Jan Smits Airport, the appellant and his girlfriend were informed that their flight to Frankfort had been delayed by 12 hours. They therefore decided to spend some of the time at their home in Johannesburg. Later that day the appellant took his girlfriend to the airport where she alone boarded the aircraft, it having been decided between them that in order to save one air fare the girlfriend alone would complete the journey to Frankfort and Zurich. In the meantime, however, unbeknown to appellant and his girlfriend, the two suitcases containing the consignment had been opened and searched by police officers at the airport and detained there. Later that same day the police arrived at the appellant’s apartment with the two suitcases and he was arrested and a charge laid against him. The Attorney – General declined to prosecute the appellant and the charge was formally withdrawn. Thereafter, however, the respondent seized the consignment, acting in terms of the provisions of the Customs and Excise Act 91 of 1964. The foreign currency was returned to the

appellant but not so the unwrought gold and the travellers' cheques, and the appellant was later informed by the respondent that the gold had been seized in terms of Section 83 read with s 87(1) and 88(1) of the Act.

[51] In this case, the applicant alleges that the final destination of the goods was Zambia. The Bill of Trading No MSCUIX598999 indicates the shipper as M/S SHALINA HEALTH CARE DCC of 30th Floor, Almas Tower, JLT Dubai and the consignee as Coconut express CC of Gardenview, Bedfordview, South Africa. The port of loading is NHAVA SHEVA, and the port of discharge is Durban. Place of delivery is Johannesburg, South Africa. Zambia does not appear at all in the Bill of Trading. The goods in question were consigned to a person and place in South Africa and it had later to be delivered at Johannesburg. It could perhaps later be consigned to Zambia. However, according to the Bill of Landing the goods' county of final destination is South Africa. In the circumstances, it is inevitable to conclude that the goods were imported to South Africa to be delivered to a particular person at a particular address. Section 1 of the Act does not define the word 'import' but the word 'importer' as follows:

> "'importer includes any person who, at the time of importation –
> (a) own any goods imported;
> (b) carries the risk of any goods imported;
> (c) represents that or acts if he is the importer or owner of any good imported;
> (d) actually brings any goods into the Republic;
> (e) is beneficially interested in any way whatever in goods imported;
> (f) acts on behalf of any person referred to in paragraph (a), (b), (c), (d) or (e)"

The applicant falls squarely within the definition of the importer: Further, the goods landed in South Africa, being the country of the final destination and handled. The goods were by no means brought to the Port of Durban for transit but to be later

delivered at Johannesburg in South Africa, Durban being a port of discharge. Therefore, the applicant's contention that the goods were on transit could not be sustained. *See also section 10(1)(a) of the Act.*

Is the detention of goods in question lawful?

[52] I now turn to deal with the question whether the detention of the container by the first and sixth respondents in terms of section 88(1)(a) is lawful. *The Supreme Court of South Africa in Commissioner, South African Revenue Service v Trend Finance (Pty) Ltd and Another* 2007(6) 117 (SCA) at 130 (paragraph 29) held:

> "In terms of the words of section 88(1)(a) of the Act, such detention is 'for the purpose of establishing whether … goods are liable to forfeiture under this Act: A limitation must be read into that section to the effect that the right to detain goods only endures for a period of time reasonable for the investigation which the section contemplates to be made, but no longer. There is no sufficient reason for the continued deprivation of the property once the purpose for the deprivation (to investigate whether the property is liable to forfeiture under the Act) is no longer justified, and the continued deprivation would accordingly be arbitrary as meant by section 25 of the Constitution. See FNB case 7…. I therefore conclude that once a reasonable period of time for the necessary investigation has elapsed, the commissioner has no further right to retain either the goods or provisional payments made to secure their release."

[53] The goods in this case are detained for the purpose of establishing, firstly, whether they have been dealt with contrary to the provisions of the Act and whether they are liable to forfeiture. The applicant has confessedly stated that it dealt with the container contrary to the provisions of the Act in various respects: In contravention of section 64D (1) the remover of the goods from Durban to Wadeville, Germiston, was not licensed to do so in terms of the Act. Secondly, the applicant in contravention of section 18(13)(a)(i) diverted the goods in bond to a destination other than the

destination declared on entry without the permission of the commissioner. The officials of the first and sixth respondents, have been under the impression that the goods would be exported to Zambia through, Zimbabwe, Beitbridge route not Grobblersbrug. Thirdly, the country of the goods final destination has been changed without the approval of the commissioner from Zambia to Democratic Republic of Congo on 25 January 2016. Fourthly, the applicant has in contravention of section 18(12) of the Act determined the roads and routes and the means of carriage of the goods from Durban to Gauteng and from Gauteng to Democratic Republic of Congo without the concurrence of the commissioner. The goods were in terms of the court order to be shipped but the applicant has attempted to export them by road. Lastly, in contravention of section 18(13)(b)(i) of the Act where it has been unpackaged without the approval of the commissioner, and it has been conceded on behalf of the applicant that such unpackaging has taken place in the absence of the officials of the first and sixth respondents. Section 83(a) makes it a criminal offence to deal with goods contrary to the provisions of the Act punishable on conviction by a fine not exceeding R20, 000 or treble the value of the goods in respect of which such offence committed or to five (5) years' imprisonment. The goods in respect of which such offence has been committed shall be liable to forfeiture. In the premises, the respondents are fully entitled to investigate the alleged contraventions of the provisions of the Act, and this has been established.

[54] With regards to the second reason for the detention of the goods section 88(1)(a) allows for detention for a very specific purpose, namely, to establish whether goods are liable to forfeiture. Whereas, section 88(1)(c) deals with seizure, which seems to be a step between detention and forfeiture.

[55] The commissioner can establish whether the goods are liable to forfeiture in terms of section 88(a)(a) by physical examination of the goods or of certain samples of the goods. In order to do so, the goods have to be detained by the commissioner. If such physical examination reveals that the goods are not liable to forfeiture, the goods will have to be released immediately. If the examination on the other hand establishes that the goods are liable to forfeiture, the commissioner has to proceed with the further steps of seizure and forfeiture. See *section 88(1)(e); Henbase 3392 (Pty) Ltd case, supra at* p195I – 196A-C.

[56] In the present case neither the first respondent nor the sixth respondent has indicated that any immediate steps have been taken to establish whether the respondent's concerns are valid, and whether the goods are in fact liable to forfeiture. The transgressions by the applicant will regard to the irregularly handling of the container are accurately documented in the correspondence between the parties even prior to the granting of the court order on 5 November 2015 were so documented. It could not therefore be a hassle to establish such infractions by the applicant within thirty (30) days of the detention. More so, the applicant has admittedly said that it did not comply with the provisions of the Act in dealing with the goods since it believes that the authority relating to the control of the goods lies with the SAPS in terms of the court order.

[57] Once the relevant breach of the statutory provisions has been proved the goods are liable to forfeiture and are seized "are deemed to be condemned and forfeited". See section 88(1)(c) and (d). Section 87(1) of the Act provides that goods

exported or otherwise dealt with contrary to the provisions of the Act or in respect of which an offence has been committed or liable to forfeiture “wheresoever or in possession of whomsoever found.”

[58] Section 88(1)(a) provides that any officer may detain any goods at any place for the purpose of establishing whether are liable to forfeiture. In the present case the goods are detained at the applicants place. The respondents have not taken any steps yet to seize the goods let alone declaring them liable to forfeiture and forfeited. In *Commissioner South African Revenue Service v Trend Finance (Pty) Ltd and Another, supra* at p130 D-G it was held that under section 88(1)(a) of the Act, detention is for the purpose of establishing whether goods are liable to forfeiture under the Act, a limitation has to be read into that section to the effect that the rights to detain goods endured only for a period of time reasonable for the investigation which are section contemplates is to be made, but no longer. Also, the commissioner’s right to retain provisional payment made pursuant to a condition for the release of the goods imposed by him in terms of section 93(1)(c) has to be subject to the same limitation. Once a reasonable period of time for investigation has elapsed, the commissioner has no further right to retain either goods or provisional payments made to secure their release.

[59] In the letter dated 22 January 2016 (addressed to the applicant) the first respondent indicated in which respects it alleged that the applicant had acted contrary to the provisions of the Act , as outlined above, and it expressed its opinion that the applicant had contravened seciton18(3). Therefore, the applicant was requested to advise the first respondent’s offices in writing whether it elected to be

dealt with in terms of section 91, and that it agreed to abide by the first respondent's decision, and to deposit the sum of R5000 in terms of section 91. Also, in terms of section 4(4) and section 101 of the Act to provide the first respondent with documentation and information as set out in the said letter (DM10). The first respondent concluded by saying:

> "Once the above have been complied with TIU will be in a position to consider uplifting the detention currently place on goods."

[60] The applicant avers that the required documentation and information have since been furnished to the first respondent. Also, the applicant has deposited the required amount of R5, 000. But, since then the respondents have not taken any action. Nor has the respondent as yet acted in terms of section 89(1) in respect of the goods in question and seized them. Section 90(1) provides:

> "Any… goods which have been seized under this Act shall be deemed to be condemned and forfeited and maybe disposed of in terms of section 90 unless the person from whom such goods have been seized or the owner thereof or his authorised agent gives notice in writing, within one month after the date of seizure to the person seizing or to the controller in the area where the seizure was made, that he claims or intends to claim the said …goods under the provisions of this section."

[61] Since the detention of the goods the respondents have not taken any steps towards the seizure and ultimate forfeiture of the goods in question. In *Secretary for Customs and Excise and Another v Tiffany's Jewellers (Pty) Ltd 1975(3) SA 578(a)* it was held that the phase "liable to forfeiture as used in 587(1) was said to bear ordinary and plain grammatical meaning of those words namely ; subject to forfeiture" see also *Concise Oxford Dictionary,* 1973 ed. The court held that the context in which the phrase is used in the section does not indicate that the goods

are *ipso facto* forfeited, confiscated, or condemned when they are seized. Section 113(8) does not postulate automatic forfeiture.

[62] In terms of section 91(1)(a)(i)(ii) the applicant after receipt of the letter of Intention to Raise Debt by the commissioner agreed to abide by the commissioner's decision and deposited with the commissioner the amount of R5000, pending the finalisation of the shipment of goods. The commissioner in terms of this section is required to determine the matter summarily and he might, without legal proceedings, order forfeiture by way of penalty of the whole or any part of the amount so deposited or secured. In their papers the respondents have not disclosed what steps they have so far taken in this regards. Nor is there anything to demonstrate that the commissioner has acted in terms of section 91 and imposed any administrative penalties as contained in the section. What is more apparent from the papers is that the respondents now detain the goods in order to force the applicant to comply with their demands which are not related to either seizure or forfeiture of goods in question.

[63] Detention may only take place for the purposes of establishing whether the goods are liable to forfeiture or not. If the physical examination establishes that the goods are indeed liable to forfeiture, there would be no further ground for further detention. In the present case, what has to be established has after all been established. It has been established that the applicant has irregularly dealt with the goods, and which conduct in terms of section 87(1) renders the goods liable to forfeiture. The respondents have to proceed with seizure and forfeiture or the finalization of section 91 process. Section 88(1)(a) does not allow detention for the

purposes of security, as it seems to be the case in this case. The goods must have by now been released or dealt with in terms of section 91. In the circumstances, I am not satisfied that the respondents have on their papers justified the further detention of the goods in question. As a consequence, the respondents` continued detention of the goods in question is unlawful.

ORDER

[64] In the result I make the following order:

(a) Application for the relief sought in prayers 2(a) (b) and (c) of the Notice of Motion is dismissed with costs, and such costs to include the costs of senior counsel;

(b) The continued detention of the goods by the first and sixth respondents is hereby declared unlawful;

(c) The respondents are directed to release the goods referred to in prayer 3 of the Notice of motion forthwith for onward transmission out of the Republic of South Africa;

(d) Such release and subsequent handling or dealing with the aforesaid goods shall be in accordance with the provisions of the Act.

(e) The respondents are ordered to pay the costs with regard to prayer 3 of the Notice of motion jointly and severally, the one paying the other to be absolved.

Judgment reserved on:	25 February 2016
Judgment handed down on:	5 April 2016
Counsel for the applicant:	Adv Maharaj
Instructed by:	Abdul Shaikjee Attorneys
	Ref: Mr Shaikjee/C289
Counsel for the respondent:	Adv Pammenter SC/ Adv Ngqanda
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	Ref: S Padayachee/hj/MAT480