IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED I.T.O Rule 42
(4)

SIGNATURE DATE

06/09/2022

ELECTRONICALLY DELIVERED CIRCULATED BY EMAIL

CASE NO: 33784/2019

In the matter between:

ATTIEH, MARK RUSSEL **1ST APPLICANT**

SCUDERIA SOUTH AFRICA **2ND APPLICANT**

MARKET DEMAND TRADING 638 (PTY) LTD **3RD APPLICANT**

and

THE COMMISSIONER FOR SOUTH AFRICAN REVENUE SERVICES **RESPONDENT**

JUDGMENT

N V KHUMALO J

Introduction

This matter involves the application of the Customs and Excises Control Act 64 of 1996, ("the CEA") as amended, and its Regulations, plus all other related legislation, namely the Tax

Administration Act 28 of 2011 and the Value Added Tax 89 of 1991, in the importation and exportation of goods, as administered by the Commissioner for South African Revenue Services who is vested with the power to enforce compliance and in instances of contravention of the Acts or non-compliance, to exercise a discretion on the detention, forfeiture and seizure of the goods found to have been handled irregularly, in contravention of the CEA and or alternatively to impose penalties in mitigation of such seizure or forfeiture.

[1] The Applicants in this Application, are seeking relief against the Commissioner for the South African Revenue Services, the Respondent, (hereinafter also referred to as (CSARS), in the following terms:

[1.1.] That the decision of the Respondent, dated 31 July 2017 in terms of which a La Ferrari was in terms of s 88 (1) (c) of the CEA seized (**the seizure decision**), be reviewed and set aside;

[1.2] Alternatively, in the event of the seizure decision not being reviewed or set aside, that the decision dated 31 July 2017 to mitigate the seizure on certain conditions (**the mitigation of seizure decision**) be reviewed and set aside (s93).

[1.3] Coupled with setting aside of the seizure decision, alternatively the mitigation of seizure decision, that the decision to disallow the internal administrative appeal dated 28 March 2018 and to refuse the application for Alternative Dispute Resolution be reviewed and set aside.

[1.4] That the Respondent be ordered to refund the amount of R6 930 299.00 to the Applicant with interest on the prescribed rate from the date of payment thereof to the date of repayment thereof (s 93 payment);

[1.5] That the matter be referred back to the Respondent to impose a reasonable administrative penalty on the 2nd Applicant for allowing the La Ferrari to leave the bonded facility without the second Applicant being in possession of relevant clearance documentation;

[1.6] That the amount of R100 0000.00 paid to the Cape Town Office of the Respondent be deemed to be allocated towards the penalty to be imposed by the Respondent and that the 2nd Applicant will have the rights provided for in terms of s 91 of the Excises and Custom Act 91 of 1964 to make representations to mitigate the penalty so imposed.

[2] The 1st Applicant, Mr Russel Attieh, is a business man from Johannesburg and the owner of the La Ferrari with Vin/Chassis number 2FFZ6ZHB000206833 ("the La Ferrari") imported from Italy which was the subject of seizure by the Respondent.

[3] The 2nd Applicant is Scuderia South Africa ("Scuderia", previously known as Viglietti Motors), a Company duly registered in terms of the Company Laws of South Africa and based in Johannesburg. Scuderia imports Ferrari motor vehicles directly from the manufacturer in Italy as part of its business and is the only licensed distributor representative of Ferrari in South Africa.

[4] The 3rd Applicant, Market Demand Trading 638 (Pty) Ltd (Demand), is a Cape Town based Company, duly registered in terms of the Company Laws of South Africa and the in-house customs and excises clearing agent of Scuderia's imports and exports.

[5] The Commissioner for the South African Revenue Services, who is the Respondent, is cited as the administrative authority that in terms of the provisions of the South African Revenue Service Act 34 of 1997 (SARS Act), administers the Customs and Excises and the tax system services, enforcing compliance thereof (hereinafter also referred to as "CSARS" or "SARS" or Commissioner interchangeably)

[6] The primary issue in this matter is whether the Respondent exercised his discretion judiciously when the decision to seize the La Ferrari was taken and in the application of s 93 in mitigation of seizure, mainly the imposition of a penalty of R6 930 299.00, or conversely whether the Applicants' handling of the La Ferrari contravened the provisions of the CEA that justified its subjection to seizure and or the mitigation of seizure conditions imposed, especially the imposition of the R6 930 299.00 penalty, whether fair, reasonable, rational and proportional to the transgression committed.

[7] The Applicants argue that the facts or events and circumstances or alleged transgressions that led to such a decision objectively considered do not warrant the decisions of the Respondent who acted unreasonably and irrationally, also contrary to the requirements of Promotion of Administration of Justice Act 3 of 2000 (PAJA) and to the Constitutional obligations that the Respondent is expected to fulfil.

[8] The Application was heard in the ordinary Opposed Motion Court, although it deserved a special allocation as a 3rd Court Motion matter. A fact the parties should have been aware of, having indicated almost a full day hearing duration of 4-5 hours..

Factual Background

[9] The La Ferrari is a left hand drive racing car that was purchased by the 1st Applicant (or "Attieh") on 31 October 2014 at a price of R13 860 598.00', followed by a collector's item Ferrari 333 SP in 2015. The order and the purchase of both motor vehicles was structured through Scuderia. According to 1st Applicant, this was deliberate as he was, inter alia, aware that the importation of such vehicles into South Africa would require payment of steep import duties and was also not sure if he will be allowed to import the left hand drive La Ferrari into South Africa.

[10] The La Ferrari was, on arrival in South Africa, entered into a customs bonded warehouse licensed to, and operated by Scuderia. The customs import documentation accordingly reflected Scuderia as the importer and consignee (recipient) and the 3rd Applicant as the clearing agent for the La Ferrari's importation into the bonded warehouse. The payment of any duty was to be exempted for a period of two years post importation, whilst the La Ferrari remained in the bonded warehouse, in line with the provisions of s 19 (9) (a) of the CEA. During that period the importer or owner was to decide if the vehicle was to be permanently imported into South Africa (that is for home consumption), or sold or re-exported to another country. In terms of the CEA, Scuderia was vested with the ownership of the vehicle and the one accountable for the La Ferrari and therefore required to make that decision. A special dispensation/exemption for the left hand drive was also to be obtained in respect of the La Ferrari in order to register and use the vehicle in South Africa.

[11] The two- year grace period expired with no decision made with regard to the fate of the La Ferrari. Consequently, on 6 October 2016 the Respondent issued a Detention Notice on the La Ferrari's remaining in the bonded warehouse (*de facto* placing the La Ferrari under detention in the bonded warehouse) on condition that either a DP entry is passed for home consumption (usage in the Republic) or the motor vehicle has to be exported out of South Africa as per the CEA. A letter of finding on the administrative penalties was issued in the amount of R73 536.32 which was paid without any contestation. On 5 December 2016 Scuderia obtained a letter of extension of the storage period to 28 February 2017.

[12] On 9 February 2017, on receipt of Scuderia's notification that it would like to export the La Ferrari vehicle from the Republic, SARS issued a letter for a provisional penalty payment of an amount of R100 000.00, which was subsequently paid to SARS. Scuderia subsequently released the La Ferrari from the bonded warehouse on 20 February 2017, without being in possession of the required bond store customs documentation permitting such release, in contravention of the release requirement as stipulated by s 20 (4) of the CEA and Rule 20.10). An export entry to the DRC had prior thereto been passed on 16 February 2017. The La Ferrari was loaded on a Motor Via Transporter, a mode of transport that is prohibited by and in contravention of s 64D of the CEA, hired by Scuderia to transport the La Ferrari to Beit Bridge and then to Cape Town, under the stewardship of one Stratton, supposedly a clearing agent commissioned by the 1st Applicant and Scuderia's Mr Eagles to negotiate a structured dispensation for the custom duties to be paid for the importation of the La Ferrari's to South Africa. Motor Via transported the La Ferrari to Beit Bridge, from where it was exported out of the South African border post on production of clearance documents with proof of export supervision into the Zimbabwean border post.

[13] On 23 February 2017 the La Ferrari was detained by Customs officials on its way to be re-imported into South Africa en route to Cape Town (what Respondent refers to as round tripping) without any inward clearance. The declaration on the La Ferrari documentation indicated that it was meant for export to the Democratic Republic of Congo (Congo) via the Zimbabwean Beit Bridge border post, and released from the bonded warehouse for that purpose**.** The Custom officials consequently detained the La Ferrari at the state warehouse for further investigation.

[14] The SARS Customs Investigation's Tactical Interventions Unit (TIU) subsequently issued the Owners of the Motor Via truck (the transporter) and the Applicants' agent to whom the La Ferrari was entrusted on its removal from the Bonded warehouse and who was in charge of its transportation and clearance at the border post for exportation, with a provisional detention letter informing them that the truck, trailer and La Ferrari were in terms of s 88 (1) (a), read with s 87 (2) (a) of the CEA detained by the Respondent at the Beit Bridge Border gate with the intention to investigate if the imported vehicle was handled contrary to the provisions of the CEA and if so establish if it was liable for forfeiture in terms of s 87 (2) **(a)**. The Administration also warned that it was giving consideration to the conversion from a state of detention to a state of seizure as per provisions of s 88 (1) (c) of the Act. In terms of the Notice:

> [14.1] The recipients were invited to submit written representation as to why the detained vehicles should not be seized and to provide specific detailed explanation:
>
> > [14.1.1] with supporting documentation as to the procedure followed in transporting the La Ferrari;
> >
> > [14.1.2] included in the explanation, the office required dates and time from the said export and its return.

[15] A Notice of seizure was simultaneously issued confirming the detention of the La Ferrari in terms **of s 88 (1) (a) of the CEA, read with s 87 (2) (a) and 102**, its removal and caption at the State warehouse confirming its estimated custom value of R13 860 598.00. (Section 102 puts the onus on the owner/possessor to prove that no duty was payable, and that the goods were properly imported and dealt with, to allow a full rebate of duty or that no rebate payable and that the bill of entry and other custom documents existed and had been duly completed and furnished to the Respondent). Furthermore, notifying the recipient that the detained La Ferrari was thereby seized in terms of s **88 (1) (c) read with s 87** of the Act, attention being also drawn to **s 89 and 90 of the Act that stipulates that the goods may be disposed off** unless the person from whom the 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 Commissioner or the Controller in the area that he claims or intends to claim the said goods.

An ABC docket was also opened with SARS reference number: BBR 64/16/17B for further investigation.

[15.1] In terms of section 87(1), goods are considered to be liable for forfeiture if dealt with irregularly. The subsection reads:

> "Any goods imported, exported, manufactured, warehoused, removed or otherwise dealt with contrary to the provisions of this Act or in respect of which any offence under this Act has been committed (including the containers of any such goods) or any plant used contrary to the provisions of this Act in the manufacture of any goods shall be liable to forfeiture wheresoever and in possession of whomsoever found: Provided that forfeiture shall not affect liability to any other penalty or punishment which has been incurred under this Act or any other law, or entitle any person to a refund of any duty or charge paid in respect of such goods." (my emphasis)

[15.2] Section 88 (1) on seizure reads:

> (a) "An officer, magistrate or member of the police force, may detain any ship, vehicle, plant, material or goods ship vehicle, plant, material or goods at any place for the purpose of establishing whether that ship, vehicle or are liable for forfeiture under this Act.'
> (b) such ship, vehicle, plant or material or goods may be so detained where they are found or shall be removed to or stored at a place of security as determined by such officer, magistrate or member of the police force, at the cost, risk and expense of the owner, importer, exporter, manufacturer or the person in whose possession or on whose premises they are found, as the case may be.

(c) If such ship, vehicle, plant, material or goods are liable to forfeiture under this Act the Commissioner may seize that ship, vehicle, plant, material or goods. (My emphasis).

[16] On 7 March 2017, the Respondent sent **a letter of intent** to an entity called Diamond Dreams (that had sent a power of attorney purportedly acting on behalf of the exporter of the La Ferrari and Scuderia"s agent), affording Scuderia, as owner of the La Ferrari an opportunity to respond, specifically being called upon to furnish the Commissioner within 14 days, with such evidence or submissions deemed necessary in order to prove full compliance with the

provisions of the Act. They were informed that the evidence or submissions required were to include and explain where necessary the evidence or lack of evidence in the Respondent's possession and set out the evidence relied upon, fully addressing each and every aspect raised in the letter. Upon receipt of the evidence and submissions, the Respondent was going to take a decision as to whether the relevant provisions of the Act have been complied with, and advise of his decision. The intention being to establish whether the truck and goods were liable for forfeiture in terms of the Act.

[17] In its response to the Respondent's letter of intent, Diamond Dreams pointed out that on dealing with the La Ferrari's export and import, its office was advised by the driver of the MotorVia truck and the owner verbally that the truck had a mechanical problem, the gear lever was not functioning and he had to return back to Polokwane for repairs. The driver did not make a statement under oath or a written statement confessing that his boss instructed him to do the round tripping but was asked by the Custom officials to move because his truck was causing traffic. Diamond pointed out that the driver was not a permanent employee of Motor Via, but was hired only to drive the Scuderia consignment due to the urgency of it. Similarly, Motorvia's Frederick Kock had no clue as to what happened at the border and just confirmed that the consignment had to reach Beit Bridge and after supervision return immediately back to Bryanston, hence the client was furnished with different export quotations. Diamond indicated that it believed Frederick and the transporter wanted to implicate his client (Stratton/the agent) in the matter who had no clue and was not aware of the round tripping arrangement as mentioned on the outcome of the investigation. He had no intention of misleading SARS but just wanted to pay whatever is due to customs to get the La Ferrari back. The error of the driver for not informing and asking the agent he was dealing with to assist with the DP entry was also not disputed. Diamond alleged that the driver wanted to implicate the exporter to save himself from being arrested.

[18] Diamond further pointed out that it was not the intention of its client to divert consignment in order to avoid or defraud the state of Vat and duties but saw it wise to proceed to Congo. He was all the same, prepared to continue with the request of bringing back the Ferrari into South Africa. Diamond explained that the exporter requested to pass a DP entry in Cape Tow**n** but had to export the consignment due to the rejection received from SARS Cape Town. It denied that the diversion was proof enough that the exporter was aware of the round tripping except for the mechanical problem that needed fixing in Polokwane. According to

Diamond the diversion back to the country without proper documentation was due to lack of knowledge by the driver, not done intentionally and done without the owner's permission. The owner of the transporter truck had no knowledge of the transport arrangement as he utilised one of his employees to take care of the exportation of the consignment and was surprised and furious when he heard that the vehicle was detained by custom on 23 February 2017. The owner's instruction was for the vehicle to be offloaded in Congo and be registered there.

[19] Diamond admitted that the driver was in the wrong for not having the DP entry when entering the Customs Control area and requested for leniency regarding imposing the Vat and duties, alleging that the exporter was not aware of the La Ferrari's diversion from its final destination and **w**as going to make sure that he corrects where he had failed and asked for leniency and understanding. It requested the release of the truck without imposing penalties as the transporter had no idea of the process and its client, the exporter was still prepared to export the La Ferrari to the final destination. Apologising, Diamond requested leniency when the release of their client's La Ferrari is considered and that its client be dealt with in terms of s 91 of the CEA instead of the Criminal Procedure Act.

[20] On 9 March 2017 Customs Investigation TIU replied to the response received from Diamond on behalf of the exporter. It pointed out that the goods/vehicle were found not to have been declared as per s 38 (1) and (3), s 39 (1), s (40) and Rule 41 of the CEA. The driver could only produce an export bill of entry which means the vehicle was diverted from its final destination which is Congo in contravention of s 18 (13) of CEA. They were informed of the investigation and outcomes outlined in the Notice, briefly that the TIU found that:

(i) The goods were diverted from their final destination without permission in contravention of s 18 (13) of the CEA, read with penal provisions of s 80 (1) © of the CEA;

(ii) The owner/client had an intention to defraud the State in terms of duties and vat, as proven by the statement of the driver of the Transporter that he was instructed to take the vehicle to the Beit Bridge border post for inspection and thereafter he must drive the vehicle to Cape Town, proving further, that the owner had the intention to divert the goods.

(ii) (a) It was also confirmed by the Transporter Motor Via's Frederick Kock's claim that the truck was hired to transport the La Ferrari from Johannesburg to Beit Bridge Border Post and thereafter proceed to Cape Town. Kock had submitted a quotation as proof thereof. **On the other hand, the quotations submitted by the owner was altered with the intention to mislead SARS, thus failing to show good cause.**

(ii) (b) The contents of the email between the transporter and the exporter (Scuderia) during the period 15 to 20 February 2017 was alleged to be proof that the owner Scuderia requested the La Ferrari to be delivered to Beit Bridge and returned to Cape Town. There was no request to transport the La Ferrari to Congo.

(iii) The TIU then concluded that the owner which is Scuderia, had a clear intention to divert the La Ferrari to its final destination as per customs export documents. Had the Respondent not acted on this it could have cost SARS in terms of vat and duties. The action showed gross negligence. On those conclusions the TIU found that there was a clear intention to defraud SARS (the state) in terms of paying duties and vat, therefore s 87 applicable.

[21] On removal of goods in bond to be imported, Section 18 (13) that is relevant to this matter reads:

(a) (i) No person shall, without the permission of the Commissioner, divert any goods removed in bond to a destination other than the destination declared on entry for removal in bond or deliver such goods or cause such goods to be delivered in the Republic except into the control of the Controller at the place of destination.

(ii) Goods shall be deemed to have been so diverted where-

(aa) no permission to divert such goods has been granted by the Commissioner as contemplated in subparagraph (i) and the person concerned fails to produce valid proof and other information and documents for inspection to an officer or to submit such proof, information and documents to the Commissioner as required in terms of subsection (3) (b) (ii) and (iii), respectively;

(bb) any such proof is the result of fraud, misrepresentation or non-disclosure of material facts; or

(cc) such person makes a false declaration for the purpose of this section.

(iii) Where any person fails to comply with or contravenes any provision of this subsection the goods shall be liable to forfeiture in accordance with this Act.

[22] Whilst s 18A reads: on exportation of goods from customs and excise warehouse.-

(1) Notwithstanding any liability for duty incurred thereby by any person in terms of any other provision of this Act, any person who exports any goods from a customs and excise warehouse to any place outside the common customs area shall, subject to the provisions of subsection (2), be liable for the duty on all goods which he or she so exports.

(2) (b) An exporter who is liable for duty as contemplated in subsection (1) must-

(i) obtain valid proof that liability has ceased as specified in paragraph (a) (i) or (ii) within the period and in compliance with such requirements as may be prescribed by rule;

(ii) keep such proof and other information and documents relating to such export as contemplated in section 101 and the rules made thereunder available for inspection by an officer; and

(iii) submit such proof and other information and documents to the Commissioner at such time and in such form and manner as the Commissioner may require;

[23] They were then informed that having considered the explanations and mitigation concerning the matter, the Respondent came to the conclusion that the vehicle is liable for forfeiture in terms of s 87 of the Act. A summary of the liability together with interest thereon (where applicable) calculated as follows:

(i) Custom duty s 39 (1) - R 8 323 267.95

(ii) Vat Capital s 7 - R3 299 789.64

(iii) Vat penalty 10% s 213 of TA - R329 978.96

Total - R11 953 036.55

[24] Demand was made for payment to be effected by 31 March 2017 at 16h00. The attention of the Applicants being brought to the provisions of s 114 of the CEA which make provision

for very serious steps to be taken whereby fiscal revenue may be collected. Also to the provisions of s 17 that makes provision for the payment of warehouse rent for the detained goods and for the release thereof only on settlement of any freight or other charges payable. Notification of the owner's rights in terms of PAJA was brought to the attention of the Owner's special attention being drawn to s 5 of PAJA and s 77D of the CEA, and the 30- day period within which the Appeal may be brought against the decision. The demand signed by SARS Enforcement.

[25] The abovementioned demand and the detention letters were in terms of s 3 (2) of the CEA on 13 March 2017 withdrawn. The Respondent, on 24 March 2017 also withdrew a seizure notice sent to Scuderia. At the time of withdrawal Diamond had already owned up and requested leniency on behalf of Scuderia as their client that the transgressions be dealt with in terms of s 91 of the CEA instead of the Criminal Procedure Act.

[26] On 31 March 2017, SARS's Beit Bridge Internal Memorandum was presented to the Respondent and on 3 April 2017 the Respondent received Diamond Dream's ostensible s 96 Notice after the Respondent had withdrawn the issued letters and notices on the detention and seizure of the vehicles.

[27] The Respondent on 24 May 2017, issued against the 3 Applicants a letter of intent (to seize) to raise an assessment and for inspection of Scuderia's bonded warehouse records which it indicated was in line with the provisions of s 3 (2) of the PAJA, appraising the Applicants of the status and prima facie findings of SARS's investigation whilst giving the Applicants an opportunity to respond thereto by 2 June 2017. The investigation was said to have found that the imported La Ferrari was dealt with irregularly as contemplated in s 87 (1) (0) of the CEA, in that the vehicle was not duly exported, having failed to comply with export conditions, which is a contravention of s 18 A (2). It was diverted without the permission of the controller, to a destination other than the destination declared on the export bill of entry, contravening the provisions of s 18A (2), s 18 A (9) and 20 (4) bis, which constitutes an offence in terms of s 80 (1) (o). The bill of entry contained false information in that neither Scuderia nor the 1st Applicant had any intention of exporting the vehicle, which constitutes an offence in terms of s 80 (1) (c), 80 (1) (m) and 84**)**. The vehicle was removed by a non- licenced remover of goods in bond in contravention of s 64D and no due entry made on return of the vehicle to South Africa. It calls on and afforded the Applicants an opportunity to respond thereto before the final

decision taken whether to seize the vehicle and of the steps that will be taken consequent to their response. In the notice the Applicants are advised of the steps that might be taken, including the intention to seize the La Ferrari as per provisions of s 88 (1) (c). Their attention was also drawn to the provisions of s 102 (4) and (5) and s 93 in case of an intended contention.

[28] A day later the Respondent sent a letter of intention to seize the La Ferrari to the Applicants. The purpose of which was stated as to appraise them of the status and prima facie findings of their investigation **(**which was that the imported goods were dealt with irregularly as contemplated in s 87 (1) (0) of the CEA, which actions constituted various offences especially in terms of s 80 (1) (o), 80 (1) (c) and 80 (1) (m)**)**, and afford the Applicants an opportunity to respond thereto before the final decision whether to seize the vehicle and of the steps that will be taken consequent to their response.

> [28.1] Section 80 identifies serious offences and their punishments, in s. Section 80 (1) (c), (m) and (o), inter alia, provides that any person that removes or assists or permits the removal of goods in contravention of any provision of this Act; or of attempting to commit or assist to commit any offence mentioned in the section or contravenes certain provisions stated under the section shall be guilty of an offence (commits an offence) and on conviction liable to a fine not exceeding R20 000 or treble the value of the goods in respect of which such offence was committed, whichever is the greater, or to imprisonment for a period not exceeding five years, or to both such fine and such imprisonment.

> [28.2] Section 84, on false documents and declarations provides that:- (1) Any person who makes a false statement in connection with any matter dealt with in this Act, or who makes use for the purposes of this Act of a declaration or document containing any such statement shall, unless he proves that he was ignorant of the falsity of such statement and that such ignorance was not due to negligence on his part, be guilty of an offence and liable on conviction to a fine not exceeding R40 000 or treble the value of the goods to which such statement, declaration or document relates, whichever is the greater, or to imprisonment for a period not exceeding ten years, or to both such fine and such imprisonment, and the goods in respect of which such false statement was made or such false declaration or document was used shall be liable to forfeiture.

[29] A response was then received from Custex Consulting on behalf of the Applicants on 12 June 2017, in which Custex furnished an explanation on the matter on behalf of the Applicants alleging, in brief, that:

[29.1] the 1st Applicant had sought the assistance of Stratton with regard to the registration of the La Ferrari as a left hand drive vehicle in South Africa and to negotiate with SARS the possibility of a reduction in the duties for the two imported vehicles. Stratton had then represented to them that SARS is amenable to charge lower import duties and preferential rates in respect of vehicles that are special collectable museum type cars. Several meetings were held between Scuderia's Mr Eagles and Stratton. 1st Applicant's stance has always been that if lower rates or the extension for the vehicles to remain in bond cannot be achieved he will rather export the vehicle. Stratton was successful in obtaining an exemption in terms of s 81 of the National Road Traffic Act 83 of 1996 that allowed the use of the left hand drive La Ferrari on our public roads, and at that point the Applicant had no reason to doubt him. Stratton had told the 1st Applicant that the South African Police Service inspected the La Ferrari at Scuderia's bonded warehouse and furnished the vehicle with a clearance certificate.

[29.2] In August /September 2016 Stratton told the 1st Applicant he will obtain an extension for the vehicles to remain in bond beyond the two- year period. He required and received additional payments from the 1st Applicant. On 17 February 2017 Stratton indicated to the 1st Applicant that he had concluded a deal with SARS and furnished the 1st Applicant with further invoices of amounts estimated to be due to SARS on both vehicles. Subsequently Stratton advised 1st Applicant that he had a deal in principle with SARS which SARS could not finalise as SARS required confirmation of the funds (for the lower duties) in the account of F1. Stratton showed the 1st Applicant invoices C1 and C2 that contained SARS estimates. Consequently 1st Applicant made a payment of R7 000 000.00 into the account of F1 whereupon Stratton advised him that the amount of R5 500 000.00 was going to be paid to SARS on behalf of Scuderia for total duties of both vehicles after the amount is received by F1 and the Applicants would be furnished with the relevant documentation as soon as the vehicles have been cleared. Stratton also informed them that SARS has requested a new re-entry stamp in relation to the La Ferrari at the Beit Bridge border post with an up to date stamp so that the La Ferrari can be moved from SARS Johannesburg to SARS Cape Town where Stratton

has negotiated the lower duties. As a result of that and of being informed that the 1st Applicant had paid all the duties owing on the vehicles to F1 who has paid the duties to SARS, Scuderia (as the legal owner) under that bona fide belief, arranged for the insurance and the transportation of the LA Ferrari through the Motorvia truck to Beit Bridge and then Cape Town for final clearing. Motorvia was paid and instructed accordingly.

[29.3] The 1st Applicant had also in the process received from Stratton a letter from SARS attaching an invoice for R100 000.00 upon which the Applicants believed to be confirmation of the arrangement Stratton had with SARS. Stratton later informed the 1st Applicant that the La Ferrari had to be verified by a Cape Town official as against its documentation and he would attempt to arrange for such verification to take place in Johannesburg in accordance with the 1st Applicant request. He indicated that he would be accompanying the La Ferrari to Beit Bridge and then to Cape Town. Scuderia's believe at the time was that the removal from the warehouse was with approval from SARS and that all necessary clearance documents to remove the Ferrari from the bonded warehouse and final duty paid, clearance of the vehicle would be furnished to them in due course. Scuderia released the La Ferrari on that basis.

[29.4] On 21 February 2017 Stratton informed the 1st Applicant that the truck transporting the La Ferrari has broken down, but that it was safely stored at SARS warehouse and that he should not be concerned. The Applicants allege to have been alerted by reports in the media on 29 March 2017 that the La Ferrari was detained on suspicion of being smuggled into South Africa. When Stratton was confronted by Scuderia he gave assurance that he would resolve the issue and that the seizure has been withdrawn. He had also issued a s 96 Notice to force SARS to resolve the issue. The Applicants realised that the funds paid to Stratton/F1 were not paid to SARS and attempted to obtain a refund of the money. Stratton confirmed that only the R100 000.00 was paid to SARS and agreed to refund the whole amount to 1st Applicant. On the attorneys' consultation with the 1st Applicant they made the 1st Applicant aware that he has been a victim of a scam and suggested that SARS be approached as soon as possible to resolve the issue. Meetings were held on 20 April and 24 May 2022, when the letter of intent was served on them. A Ferrari technician inspected the vehicle on 2

June 2017. The 1st Applicant took legal steps to recover the money he paid to F1 and could only recover an amount of R5 900 000.00.

[29.5] It is further in the letter denied that the Applicants ever issued an instruction or an arrangement that the La Ferrari be exported to the DRC or any other place, but that the understanding with Stratton was that the vehicle was going to be cleared on a duty paid basis in Cape Town. They denied having any knowledge and seeing the export entry documents for the Beit Bridge clearance that were processed in relation to the La Ferrari on 16 February 2017 and confirm that they had no intention to export the vehicle to the DRC but such processing was fraudulent and without consent. They suspected that Stratton wanted to steal the Ferrari and deliver it to someone at the DRC. Also indicated that the person who actually dealt with SARS in Cape Town was Shawn Abrahams. The driver of the Motorvia truck confirmed to Mr Ungerer from Scuderia that his instruction was to take the vehicle to Beit Bridge and then to Cape Town. It appeared in Beit Bridge two Congolese men exerted pressure on the driver to take the vehicle to Zimbabwe. The driver was worried about the instruction and faked a problem with the truck on the bridge between South Africa and Zimbabwe where he was arrested by the border police. The 1st Applicant has since then avoided further interaction with the Stratton. The Applicants were willing to assist with any investigation the Respondent wishes or is obligated to institute.

[29.6] The vehicle was removed by Scuderia as the legal owner under the *bona fide* that the vehicle cleared on the duty paid basis for home consumption, having been paid via F1 to SARS. The money paid was to clear the La Ferrari for home consumption. The driver will confirm that the vehicle was never to be cleared in Zimbabwe or anywhere else. The Applicants had no knowledge what documents were processed on coming back past Beit Bridge. Applicants also had no knowledge if the Motorvia is a licensed remover of goods in bond and again believed SARS to have approved and to had knowledge of the entity that would transport the La Ferrari. The whole bill of entry passed to export the La Ferrari was false and declaration not made or authorised by the Applicants. The 1st Applicant would ultimately want to export the vehicle but as the intention was to clear the vehicle on a duty paid basis, as such the duty and vat would then be brought to account.

[29.7] If the vehicle was dealt with irregularly it was done so without the Applicants' knowledge, consent or authority. The Applicants should therefore not be blamed or punished for unauthorised or criminal activities. In their assessment the Respondent should take into consideration that the Applicants have already suffered substantial damage and of their willingness to work with SARS to resolve the issue. The Respondent is obliged to act and deal with the Applicants fairly, reasonably, rationally and proportionally.

[29.8] The attorneys argued that claiming the duties and Vat inclusive of a Vat penalty and interest in the manner that the Respondent intended doing in the circumstances and objectively determinable facts does not constitute fair, reasonable and proportionate action as is required in terms of PAJA. Also that with benefit of hindsight the Applicants understand and appreciate the naivety of their conduct but stating that these are unique circumstances involving unique and rare vehicles**.** They therefore denied that there was any legal or factual basis to claim the duties, Vat, Vat penalties and interest, pointing out that the Applicants have an exemplary compliance history with SARS which must be taken into consideration.

[29.9] As a result they requested the La Ferrari to be released to Scuderia for the purpose of either clearing the vehicle for home consumption with the associated payments of duties and Vat that would be triggered which can be settled prior the release of the vehicle or exporting the vehicle under custom supervision. They lastly, tendered to pay the applicable statutory penalty, for the overstay.

[30] The Applicant's attorneys sent a second letter to the Respondent in response to the Notice of intention to seize, further stating therein that:

[30.1] none of the Applicants contravened or intended to contravene any of the provisions of the Act. The La Ferrari was not supposed to be cleared and exported out of the Beit Bridge border. <u>The Applicants believed that the vehicle was removed for the sole purpose of being duty cleared in Cape Town which is objectively determinable and supported by the undisputed facts.</u> The Applicants cannot be punished for the unauthorised and criminal activities of others as they have already suffered substantial damages which should be taken into account in the Respondent's assessment of the

matter. In relation to the provisions of s 88, the extra ordinary powers of detention and seizure must in the light of the Constitution and rights enshrined in it, be used sparingly and with circumspection and only in circumstances where an alternative or less invasive or an extra ordinary remedy would not suffice. They further argued that proper consideration of the relevant constitutional rights and Respondent's obligations, the facts and circumstances in the current matter do not justify the seizure of the vehicle.

[30.2] The only prudent and correct conduct for the Respondent would be to restore the status quo that was in place before the unlawful and criminal conduct of Stratton and allow the Applicants to complete the lawful procedure relating to clearance for home consumption which would have been done and completed but for the criminal actions of Stratton. All the relevant facts and circumstances do not justify any other reasonable conclusion other than that the Applicants were bona fide parties and have been unduly prejudiced because of the unlawful conduct and misrepresentations by a third party outside their control. The Respondent should use their statutory power to help the Applicants to rectify the wrongdoing inflicted upon them.

[30.3] After being furnished with copies of the Urgent Applications against Stratton the further detention of the La Ferrari was not necessary.as no amount of subsequent investigation would have changed the facts. The Applicants request was therefore for the Respondents to uplift the detention and release the vehicle to Scuderia for the purposes of either clearing the vehicle for home consumption with the associated payment of duties and Vat or exporting the vehicle under custom supervision.

[31] On 14 July 2017 Custex Consulting indicated the intention of the Applicants to proceed in terms of s 96 of the CEA and to approach the court for an interim relief for the removal of the La Ferrari back to the Scuderia Bond warehouse including a final relief in terms of which the status quo, prior to the removal of the vehicle from the bondage warehouse is restored and the applicable vat and duties brought to account.

[32] Following the receipt and consideration of the Applicants' responses and the report of the Respondent's Internal Memorandum in terms of which various options of dealing with the matter were set out, the following recommendations in relation thereto were considered where after a decision was made on 31 July 2017:

Option 1

[32.1] "to make a direction towards s 93 release, and not a straight seizure. The s 93 decision requires a payment of at least 50% of the Customs value bearing in mind TIU will still proceed to collect all duties and vat with related penalties due as outlined."

Option 2

[32.2] "The second option was to seize the vehicle and not entertain the application of s 93 on the basis that good cause was not shown. The investigation team may still need to collect all duties and vat with related penalties due."

[32.3] It was concluded by recommending Option 1 on the basis that:

[32.3.1] The La Ferrari will be released to client who will make its own logistical arrangements pertaining to transport insurance etc. and

[32.3.2] Further in relation to Option 1, the Respondent is almost guaranteed the duty and vat payments totalling R12 Million; and

[32.3.3] If the recommendation is accepted, it will only mean that another R7 Million plus will be collected by SARS.

[33] The penal provisions of s 93 read as follows:

"The Commissioner may direct that any ship, vehicle, plant, material or goods detained or seized or forfeited under this Act be delivered to the owner thereof subject to payment of any duty that might be payable in respect thereof or any charges which may have been incurred in connection with the detention or seizure or forfeiture and to such conditions (**including conditions providing for the payment of an amount equal to the value for duty purposes of such ship, vehicle or plant, material or goods, plus any unpaid duty thereon)** as he deems fit, or may mitigate or remit any penalty incurred under this Act, on such conditions as he deems fit: provided that if the owner accepts such conditions: he shall not thereafter be entitled to institute or maintain any action for damages on account of the detention seizure or forfeiture."

[34] The Respondent's Customs Investigation Tactical Intervention Unit proceeded with a Notice of seizure decision dated 31 July 2017 in which the Respondent indicated to have found that:

[34.1] The La Ferrari has been dealt with irregularly as contemplated by s 87 (1) of the Customs and Excises Act.

[34.2] The vehicle as a result seized in terms of s 88 (1) (c) of the CEA and the Applicants' attention drawn to the provisions of s 89 read with s 90 of the CEA.

[34.3] Further that, having considered representations made for the release of the La Ferrari in terms of s 93 of the CEA whereby Scuderia had indicated that it is the owner of the La Ferrari, a fact confirmed by 1st Applicant, the Respondent is as a result prepared to release the La Ferrari to Scuderia on the following conditions:

[34.3.1] Scuderia was to submit a XDP entry and effect payment of R 3 465 149. 50 in duty in terms of Schedule 1 of Part 1 of the CEA; R4 851 209.30 in terms of Schedule 1 Part 2B of the Customs Act; R3 298 822.38 VAT in terms of Value Added Tax Act 89 of 9191, interest on Vat in the amount of R56 400 08 and R329 822.23 as a Vat penalty in terms of s 39 (4) of the Vat Act read with s 213 (1) of the Tax Administration Act 28 of 2011; and

[34.3.2] On payment of a further amount in terms of s 93 (1) (c) of the CEA, that is R6 930 299.00 (the provisional payment in mitigation in lieu of forfeiture); and

[34.3.3] On payment of the state warehouse rent to be calculated in terms Rule 17 of the CEA.

[34.3.4] On production of the suitable indemnity, indemnifying the Respondent against any possible damages claim arising from the detention and release of the vehicle.

[34.4] The attention of the Applicants was brought to the provisions of **PAJA and to 77D and 77C of the CEA** read with the Rules thereto and also to the relevant Forms and provisions in the relevant legislation if the Applicant wishes to appeal any of the decisions. Finally, attention brought to the provisions of s 96 (1) which are to be complied with before any judicial proceedings can be instituted.

[35] In response, the Applicants indicated that they would like to avoid litigation in as far as the seizure is concerned however disputed the amount claimed in respect of s 93 (1) (c) of the CEA, the state warehouse rental, the vat penalty and vat interest alleging the claims to be unfair, unreasonable, irrational and disproportional to the circumstances relating to this matter. They proposed that the matter be dealt with as follows:

[35.1] The La Ferrari be released to the bonded house of Scuderia, for the purpose of clearing the vehicle for home consumption (which is usage at home).

[35.2] The applicable duties in terms of s 1 schedule 1 part 1 and 1 part 2 B of the CEA, VAT, VAT interest and penalty in terms of the VAT Act 89 of 1991 read with Tax Administration Act 28 of 2011 be brought to account.

[35.3] An Appropriate indemnity be furnished to SARS indemnifying the Commissioner against any possible damages claims arising from the detention and release of the vehicle, and in return, any state warehouse rental must be waived by the state.

[35.4] The Applicants put up security in respect of the amount of R6 930 299 that Respondent is claiming in terms of s 93 (1) of the CEA by depositing into the trust account of VFV Attorneys pending the final outcome of the internal dispute resolution proceedings, review application to the High Court or any appeal. VFV to provide an irrevocable undertaking to make payment of such amount determined to be due to SARS on the finalisation of the dispute.

[36] The proposal was made on the basis that the vehicle be released and the dispute between the parties be limited by agreement to the Vat penalty, Vat interest and the s 93 (1) (c) amount.

The Applicants were to proceed with the internal administrative appeal only on those limited issues.

[37] The Applicants' Attorney subsequently on 29 August 2017, indicated that they are in possession of an amount of R18 981 702 in their trust account of which R12 001 403.00 is to be paid to the Respondent comprising of the estimated rental at the state warehouse of R50 000, VAT, VAT interest and, Vat penalty. The balance of R6 930 299 was to be retained in VTV Attorneys trust account as security pending the outcome of the dispute relating to the seizure and the mitigation of seizure amount claimed (the Dispute). They were going to proceed and lodge a **DA 51 Notice** in respect of the Dispute, which appeal they forthwith proceeded with, demanding the release of the La Ferrari, to be removed to Scuderia until it is cleared for home consumption and the renewal of the left hand drive dispensation. Also requesting the shortening of the applicable s 96 time frames. The Respondent declined the offer persisting with the conditions imposed for the release of the vehicle demanding compliance thereto as in s 77G.

[38] The Applicants proceeded with the Internal Administrative Appeal in terms of s 77A-H of the CEA on 12 September 2017, filed by Custex Consulting. Notwithstanding the Applicants having served their DA 51 Notice, the Applicants yielded and complied with the Respondent's condition for the release of the La Ferrari (mitigation of seizure), however, notwithstanding their prior stance to try and avoid litigation on seizure per se, they reserved their right not only to challenge the conditions imposed in mitigation of seizure but included the decision for seizure, The La Ferrari was, as a result of Applicants' compliance with the imposed conditions, released on 18 September 2017.

[39] In their internal appeal the Applicants' contestation of the seizure decision and the conditions imposed for the mitigation of seizure were on the basis that the Commissioner in making seizure decision and imposing such conditions failed to exercise his discretion judicially. They continued to allege that there was no legal or factual basis for the seizure decision and the conditions imposed were unreasonable, irrational, unfair and disproportional from the perspective of their circumstances. Their circumstances (on seizure) being that they were duped by Stratton, the agent from a company called F1 Freight Management who was working with SARS officials under the disguise that he was assisting them to get a reduction on the duty payable on the Ferraris. 1st Applicant alleged to have as a result paid Stratton more than R8 000 000.00 to pay for the custom duties and VAT. The Applicants again distanced

themselves from the export entry that was issued on the release of the La Ferreira from the Bond warehouse, the export clearance documents that were submitted at the Beit Bridge border that carried the name of the 1st Applicant and from the round tripping as alleged by the Respondent. They alleged that the round tripping was arranged with the advise that Stratton received from officials of the Respondent who required fresh exit and entry stamps, which had to be obtained at Beit Bridge for the La Ferrari to be finally cleared.

[40] The Applicants further alleged that their bona fide believe in Stratton was justified as he had previously assisted them in obtaining permission for the driving of the La Ferrari in South Africa even though it is a left hand drive. As a result, they let Stratton remove the La Ferrari from the bond warehouse because they believed he had made all the required payments for the vehicle to be released (the duties payable) and that the documents were forthcoming. They however admitted that the release of the vehicle from the bonded house prior to being in possession of the required documentation and its removal was wrong, and indicated not to have any problem in paying the penalty. However, they protested that such penalty should be mitigated by their *bona fide* belief that the required documents were forthcoming due to the payment made to Stratton. They submitted that an amount of R20 000 as penalty would be reasonable under the circumstances; which was in reference to s 80 of the CEA.

[41] The Applicants also alleged not to have been contacted on detention of the vehicle until 7 April 2017 when Custex Consulting made enquiries on their behalf regarding the detention and the release of the La Ferrari so as to be removed to the Scuderia Bond warehouse, raising a concern on the charging of the La Ferrari batteries and its functionality. After various meetings they held the Respondent persisted with a requirement that prior to the release of the La Ferrari it be indemnified against any possible damages claim arising from the detention and release of the La Ferrari, and compliance with the punitive conditions imposed to mitigate seizure.

[42] The Applicants opposed the imposition of the conditions as being not reasonable, fair, rational or proportional to the facts/circumstances prevailing. According to them it was crucial to the Commissioner's decision to seize the La Ferrari, that it be considered that the Applicants were *bona fide* in their conduct, trusting Stratton, since he was successful in obtaining an exemption in terms of s 81 of the National Road Traffic Act 91 of 1963 that would allow the La Ferrari to be driven on the South African Roads even though it is a left hand drive vehicle.

He also presented the 1st Applicant with invoices from SARS confirming a deal he had allegedly clinched with SARS for payment of the duties whereupon he was paid by the 1st Applicant an amount of nearly R8 Million Rands. Stratton was then allowed to remove the La Ferrari from the bonded warehouse in the believe that he had paid the duties to effect clearance on both vehicles. The Applicants were not aware of the intention to export the La Ferrari to the Democratic Republic of Congo.

[43] The Applicants argued that despite these facts CSARS proceeded to seize the La Ferrari, ignoring even concerns raised in relation to the safety and the charging of the batteries. They complained that not only did the Commissioner ignore the facts/circumstances of this case, he also required indemnity as a condition for the removal of the La Ferrari. However, even when Respondent was furnished with the indemnity, the vehicle was still not released. The conditions that the Respondent imposed in mitigation of the seizure were therefore very punitive and met under protest in order to mitigate any further damages and procure the release of the La Ferrari.

Constitutional challenge

[44] The exercise of the Commissioner's discretion in this instance was also challenged by the Applicants on allegations that he has not considered the circumstances in which the vehicle was detained alternatively did not afford that evidence the necessary evidentiary weight in order to duly and properly exercise the discretion or in making his decision on seizure**,** with allegation that the decision was unreasonable and contrary to the constitutional obligations that also requires the administrator to exercise his discretion judicially with due consideration of all relevant facts, so as to be fair, reasonable and rational.

[45] They argued that the use of the word "may" in s 88 (1) in relation to the decision to seize the forfeited goods and in s 93 in relation to the decision on mitigation of seizure indicates that the discretion of the Commissioner must be exercised judicially in terms of his Constitutional obligations as an organ of state and the common law meaning of due cognisance of the relevant facts to arrive at a fair, reasonable and rational decision.

[46] They furthermore argued that the purpose of detention as provided for in s 88 (1) (a) is to establish if goods are liable for forfeiture under this Act and that the right to retain the goods for that purpose only endures for a period of time, reasonable for the investigation envisaged by the Act, not longer. Once the purpose for deprivation is achieved, there will be no sufficient reason justifying a continued deprivation such would accordingly be arbitrary as meant by s 25 of the Constitution which prohibits the arbitrary deprivation of property, other than in terms of a law of general application. (It is noted that at the time of the internal appeal the La Ferrari was not yet released and penalties raised in mitigation of the rental payable).

[47] They further argued that seizure by its very nature being very intrusive should be used sparingly in the Constitutional dispensation also it being trite that powers to seize and forfeit should be interpreted restrictively and should only be exercised in cases of extreme abuse and where the fiscus has been severely prejudiced. Consequently, not every contravention of the CEA will justify forfeiture or seizure, only once it has been objectively and reasonably concluded that the contravention justifies the harshest punishment and there are no mitigating circumstances, will the decision to seize be justifiable in the context of Constitutional obligations and common law principles. Furthermore, only once it has been established that seizure is the only reasonable and rational course of conduct does the question of mitigation of seizure and reasonable conditions to mitigate seizure come into consideration. In brief, according to the Applicants, objectively considering the present circumstances there was no reason or basis to exercise the discretion to use the powers to deprive the Applicants of the La Ferrari and the decision militates against and infringes the Constitutional principles. In these circumstances the detention of the La Ferrari already safeguarded it and placed it under the control of SARS.

[48] Applicants also argued that although the export entry documents were unauthorised and issued with intention to steal the La Ferrari, according to them they would still suffice for removal of the vehicle from the bonded facility. The export of the La Ferrari was therefore not in contravention of the CEA. Further argued that there was no reason to require that the removal of the vehicle be a licensed remover, whilst on the other hand stating that, that aspect should be penalised separately. Also alleging to have noted that after detention the investigation revealed that the removal of the vehicle from the Republic was not authorised by them, they argued that it is within that context the discretion to seize the La Ferrari had to be exercised and of the fact that the detention foiled an attempt to steal the La Ferrari. They argued that

seizure was not the proper sanction. It is the Applicant's further argument that in relation to the mitigation of seizure, the objects of the CEA would have been achieved by the imposition of a penalty in respect of the removal of the La Ferrari without Scuderia being in possession of the relevant clearance documentation which they argue is the only transgression committed albeit mitigated by the *bona fide* belief that the duty and Vat had already been paid.

[49] In addition they further in their appeal, challenge SARS decision to claim an amount of R6 930 299.00 in terms of s 93 (1) ©, alleging that it penalises the innocent victim (the de facto owner of the La Ferrari). The vehicle was detained and once the duty and vat had been paid there is no prejudice or potential prejudice to SARS. They argued that imposing the mitigation amount is not directed at the transgressors. The taxpayer is being punished in circumstances where they clearly had no intention of contravening the provisions of the CEA and have already suffered substantial damages.

[50] Also on the penalty amount, they complained that the high value of the La Ferrari does not increase or decrease or change the actual risk of prejudice or the factual circumstances yet the high value of the vehicle is used as the only basis to claim a substantial amount to mitigate seizure. They argued that on the basis that justification (which is denied) for the seizure decision exist, it is evident that SARS was correctly swayed by the circumstances of the matter to mitigate seizure. However, the conditions imposed in the circumstances are not reconcilable with a judicial exercise of a discretion, alleging it to be very harsh, unreasonable and irrational in the extreme and called for the conditions to mitigate seizure to be withdrawn. They argue that considered objectively 'punishment does not fit the crime," and the factual position does not justify the disputed decisions. Further that only reasonable conditions of mitigation requiring payment of reasonable state warehouse rent and penalties in respect of removal and overstay should be imposed.

[51] In relation to PAJA, the Applicants alleged that the Respondent failed to comply with the following provisions:

(a) Section 6 (2) (e) (iii), in that relevant considerations not considered;

(b) Section 6 (2) (f) (ii), in that the action itself not relatively connected to:-

(i) the purpose for which it was taken, the purpose being to ensure compliance with CEA whereas the decision taken is not based on the substantive compliance of the

taxpayers with the CEA but rather on a strict formalistic approach which denies the purposive approach as required by the Constitution. (and to punish/prevent non-compliance)

(ii) the purpose of the empowering position;

(iii) the information available to SARS officials (which indicate that the Applicants acted bona fide all the time)

(iv) the Constitutional obligations of SARS as an organ of state

(c) Section 6 (2) (h), alleging that the exercise of the power or the performance of the function authorised by the empowering provision in pursuance of the administrative function for which it was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.

(d) Section 6 (2) (i), it is unconstitutional and unlawful in that it does not adhere to Constitutional obligations, amongst others, requiring SARS to be transparent and breaches the principles of legality unlawfully depriving the Applicants of its properties being the money and the La Ferrari.

[52] In the Internal Administrative Appeal outcome dated 28 March 2018, the appeal was dismissed. The Operations Appeal Committee ("OAC) that considered the appeal upheld the seizure decision and the conditions thereto on the basis of s 87, 88 and 89. The Committee had taken into account all the submissions by the Applicants, specially the circumstances pertaining to the removal of the La Ferrari from Scuderia Bonded warehouse, Stratton's involvement and the allegation that he had persuaded SARS to reduce duties for which invoices were allegedly issued and SARS's requirement allegedly conveyed to Stratton regarding a new entry import stamp in order for the La Ferrari to be assessed in Cape town which requirement allegedly led to the Applicants' belief that the removal was with SARS' approval as per agreement with Stratton. Also the allegation that at the time all the duties as per invoices allegedly issued by SARS were paid, and final duty clearance documents together with the necessary clearance documents for the removal of the La Ferrari from the bonded warehouse were going to be furnished to them in due course. Allegations that they did not see the export entry passed on 16 February 2017. Even their denial that there was an arrangement or instruction that the vehicle be imported to the DRC and allegation that the processing of the export documentation was fraudulent and without their consent. Their allegation to have been innocent victims, as a

result that if found that the La Ferrari was dealt with irregularly it was done without their knowledge, authority or consent. Their further complain in that regard, that the claiming of the duty and VAT, inclusive of a VAT penalty and VAT interest in the manner that the Respondent intended doing, considering the circumstances and objectively determinable facts, did not constitute fair and reasonable, rational and proportionate action as is required by PAJA.

[53] The Appeal Committee also took into account the Applicant's view that based on all these alleged facts, the vehicle should be released for the purpose of home consumption, with the associated payment of duties and vat triggered to be paid prior the release, or export the vehicle under Custom supervision. The Applicants finally alleged that the only reasonable state warehouse rent that should be payable was up to 7 April 2017 or alternatively the unreasonable mitigation of seizure conditions should be withdrawn and replaced with suitable conditions such as payment of reasonable penalties in respect of the actual transgressions duly taking the mitigating circumstances into consideration.

[54] The Appeal Committee came to a conclusion duly taking into consideration these allegations and submissions, and the legislation applicable to road vehicle's import, removal, conveyance, its storage in the bonded warehouse and its clearance for home consumption or export, that there was no good cause shown or case made to substantiate the allegation that there was no legal basis for the seizure decision and that the mitigation of seizure conditions unfair, reasonable, rational, unreasonable and disproportionate.

[55] In relation to the payment of VAT penalty and interest, the Committee referred the Applicants to s 13 (2) (b) of the Value Added Tax Act 89 of 1991 (VAT Act) which provides for the calculation of VAT payable in terms of s 13 (6) read with Chapter 15 of the Tax Administration Act 28 of 2011 (TA Act) whereby a 10% penalty is imposed on VAT payable. Also the fact that under s 39 (4) of the VAT Act, compulsory VAT (at the applicable rate)) interest is also payable from the first day of the month immediately succeeding the month of entry for home consumption.

[55.1] Further to remittance of interest that is applicable in terms of s 187 (6) and (7) of the TA Act limited to the following circumstances: -

[55.1.1] A natural or human made disaster;

[55.1.2] A civil disturbance or disruption in services; or

[55.1.3] serious illness

concluding that the Applicants did not meet the criteria for remittance.

[56] The committee also found that Scuderia failed to keep proper records as required in terms of rule 19.05 in terms of the CEA in relation to the removal of the La Ferrari. It allowed the removal of the vehicle without making due clearance in terms of s 20 (4) read with rule 20.10 of the CEA. Consequently, the liability of Scuderia had not ceased in terms of s 19(7) of the CEA as it has not proved that the vehicle had been duly cleared in terms of s 20 (4) of the CEA and also failed to verify that the submitted documents were legitimate which the Committee regarded as serious contraventions committed by Scuderia.

[56.1] Section 20 (4) prohibits goods which have been stored or manufactured in a customs and excise warehouse to be taken or delivered from such warehouse except in accordance with the rules and upon due entry for any of the following purposes-

(a) home consumption and payment of any duty due thereon;
(b) re-warehousing in another customs and excise warehouse or removal in bond as provided in section 18
(c) export from customs and excise warehouse

[57] Furthermore the Committee found that Scuderia in failing to ensure that a licensed remover removed the La Ferrari from its bonded warehouse, failed to take due care as stipulated in Rule 18.15 (b) (i) (aa) of the CEA.

[58] Consequently, on the aforesaid basis, considered together with the purported export and bringing the said vehicle into South Africa without due clearance at Beit Bridge, the La Ferrari was in the Committee's view indeed dealt with contrary to the provisions of the CEA and thus became liable to forfeiture in terms of s 87 (1) of the CEA. Furthermore, based on the circumstances of this case, their view was that the seizure was valid in terms s 88 (1) of the CEA. The La Ferrari could therefore only be released in terms of s 93 (1) of the CEA to the

legitimate owner which they regarded at the time to be Scuderia, being of the view that amongst which has been already stated, the above conditions imposed by the case officer in terms of releasing the La Ferrari to Scuderia in terms of s 93 of the CEA was justifiable, reasonable and rational (sensible/coherent).

[59] The Committee's decision was therefore that the seizure decision by the case officer remains legitimate and in full force and effect. The conditions set out in the mitigation decision dated 31 July 2017 remains, with both Scuderia and 1st Applicant liable for compliance therewith, that is payment of the duty and vat amounts payable and the applicable penalties.

In this Application

[60] The Applicants continue in this Application to seek a review and setting aside of the 31 July 2017 seizure decision, relying on the same allegations that there is no factual or legal basis for the decision to seize, considering the whole circumstances if objectively viewed and in the context of the Constitutional obligations and PAJA. Furthermore, that the conditions imposed in mitigation of seizure were unjustified, unreasonable, irrational and disproportionate, failing to conform to the provision of PAJA.

[61] The whole same circumstances and factual allegations relied upon relates to the involvement of Stratton whom 1st Applicant and Mr Eagles, a director from Scuderia, allege was introduced to them presenting himself as an owner of F1 Freight Management (Pty) Ltd (F1) who could arrange for the La Ferrari's left hand drive dispensation and whereafter as capable of negotiating a better customs duty rate with SARS to import both vehicles into South Africa as special collector's vehicle.

[62] The Applicants persist with the allegations of having been duped by Stratton using F1, working in cohorts and with the assistance of SARS officials, had a fraudulent scam to ultimately steal the La Ferrari and scam money from the Applicants. Whilst they believed in Stratton being able to negotiate a structured dispensation (exemption or special consideration) in respect of the Customs duties to be timeously arranged and paid for to clear the vehicles for import into South Africa, and also, as the two-year period was running out, to negotiate an extension with SARS for the said vehicles to remain in bond beyond the normal period of two (2) years. Mainly, that Stratton would timeously arrange for the vehicles to be cleared for home

consumption in South Africa. Seeing that he was successful in obtaining a left hand drive exemption on 1 June 2015, they were therefore confident that he was going to be able to assist.

[63] Further, Stratton was paid substantial amounts in the believe that the money was being used to pay the Customs duties structured by SARS and related charges. During February 2017 Stratton informed the Applicant that he had indeed concluded a deal with SARS and issued further invoices to 1st Applicant reflecting that further amounts due, with the SARS estimates in respect of both vehicles. Subsequently also informed 1st Applicant that F1 had a deal in principle with SARS but could not finalise same as SARS required confirmation of the funds in the account of F1. He consequently made payment to F1 in excess of R7 Million.

[64] According to the Applicants, Stratton also undertook to furnish them with the relevant documentation as soon as the vehicles had been cleared. He informed the Applicants that SARS requires the La Ferrari to be exported and imported in order to have a recent importation date to facilitate the structured customs duties arrangement. Further that an export re-entry would be easily achieved at the Beit Bridge Border post. The re-importation would facilitate the vehicle to be removed from the jurisdiction of SARS Johannesburg to the jurisdiction of Cape Town where he has negotiated the Custom duties that he had already paid to F1.

[65] The Applicants say they had no reason to doubt Stratton at that stage, so accordingly Scuderia arranged the insurance and transportation of the La Ferrari through a Motorvia truck to be taken to Cape Town via Beit Bridge for the final Custom Clearance of the La Ferrari in Cape Town. They say it was based on Stratton's representations, that all duties in respect of both vehicles had been paid to SARS by F1 Stratton as 1st Applicant had made full payment to F1. In that process they received a letter purportedly from SARS Cape Town requiring payment of an amount of R100 000.00. Upon receipt of an invoice the 1st Applicant says he paid the amount R100 000.00 to F1 in the believe that this was confirmation of the arrangement Stratton had negotiated with SARS and that the amount served as provisional payment to SARS.

[66] On 20 February 2017 when Stratton arrived at Scuderia warehouse to oversee the loading of the La Ferrari and indicated that he would be accompanying the vehicle to Beit Bridge, their understanding and belief was that the removal was done with the approval of SARS as per the agreement Stratton had with SARS and that all the necessary clearance documentation to remove the La Ferrari from the bonded warehouse and the final duty paid,

clearance of the vehicle would be furnished to them in due course. They believed that fresh exits and entry stamps for the La Ferrari had to be obtained at the Beit Bridge border post in order for the vehicle to be ultimately custom cleared for home consumption in Cape Town. It was on this basis that the La Ferrari was released from Scudera warehouse without processing customs clearance documentation as would normally be processed.

[67] They only became aware through the media that the La Ferrari has been detained by SARS when Stratton had informed them that the truck transporting the La Ferrari had broken down and the La Ferrari safely stored at SARS warehouse there being no need for concern. When Stratton was confronted, he assured the Applicants that he would resolve the situation. Stratton, in the meantime alleged to have issued an ostensible section 96 Notice to SARS to force SARS to resolve the issue within a few days.

[68] The 1st Applicant repeats same allegations that it was only after the Applicants approached their attorneys that they were made aware that he was a victim of a scam perpetrated by F1 as there is no provision in the Custom Excises Act (CEA) for the alleged agreement regarding the duties payable on vehicles imported into South Africa and realised that the funds paid to F1 were not paid to SARS. Stratton only then confirmed that he only made payment of R100 000 to SARS and undertook to refund the balance of the Funds that 1st Applicant paid to F1. The 1st Applicant nevertheless sued F1 for the refund and only recovered to date an amount of R5 Million Rand on urgent legal proceedings. It was according to him then evident that the 1st Applicant was caught in a scam and the vehicle would have been lost, if the La Ferrari had entered into Zimbabwe.

[69] Applicants allege that during the internal dispute process SARS neither confirmed or denied receipt of the payment of R100 000.00, which in the event that SARS indeed received the amount, it should be allocated in respect of the administrative penalty to be imposed on Scudera, for allowing the removal of the La Ferrari from the bonded warehouse without being in possession of the required customs document. According to him Stratton subsequently informed him that the La Ferrari had to be verified by the Cape Town SARS official, as against its documentation and that his attempt to arrange for such verification to take place in Johannesburg has failed hence the need for the La Ferrari to be moved to Cape Town which would enable the official to arrange final customs clearance in respect of both vehicles which

were to be submitted by close of business on 27 February 2017, failing which the vehicle was to be seized.

[70] The Applicants emphasise that there was never any instruction or arrangement that the La Ferrari would be exported to the DRC or anywhere else but an understanding with Stratton that the La Ferrari would be cleared on a duty paid basis in Cape Town, although the processing of such documentation was then fraudulent and done without their consent. 1st Applicant says he as a result laid criminal proceedings against Stratten and F1 on 10 June 2017 at the Sandton Police Station. It later transpired that the person who dealt with SARS in Cape Town is a Mr Shaun Abrahams of Exponential Freight. They also had a discussion with Smith from Motorvia who confirmed to them that his instruction was to take the La Ferrari to Beit Bridge then to Cape Town. At Beit Bridge two Congolese men exerted pressure on Smith to take the car into Zimbabwe. Smith was concerned as those were not his instructions and he has done numerous cross border crossings and that was not the normal crossing. He consequently faked a problem with the truck on the bridge attracting the Border police who arrested him on suspicion that he was trying to smuggle the vehicle into South Africa. Through the actions of Smith the La Ferrari was never exported and his awareness foiled the attempt to steal the La Ferrari.

[71] The Applicants allege that SARS was informed from the outset that the Applicant was a victim of a fraudulent scheme and the sequence of events recorded in the correspondence to the Respondent/or its attorneys. Further that the La Ferrari was released from the bond facility on the bona fide albeit incorrect belief that it was in agreement with and on instructions by SARS and for the sole purpose to have the La Ferreira cleared on a duty paid basis for home consumption in Cape Town and also under the bona fide impression that the duties have been paid via F1 to SARS that the documents to confirm that would be finalised shortly. No entries were thus passed at the bond store. It was also independently confirmed by Smith that the La Ferrari was never supposed to be cleared into Zimbabwe or anywhere else and although apparently without their knowledge and authority it was taken past the Beit bridge border gate, it never reached Zimbabwe and the driver was going to return to South Africa.

[72] Another aspect that was immediately and repeatedly raised with the Respondent was the irreparable damage that could be caused by failure to charge the batteries. This resulted in costs to replace the specific damage amounting to R181 000.00. Their representatives also attended several meetings with SARS in an attempt to secure the removal of the La Ferrari to

a place of safety to the bonded facility of Scuderia and even providing an indemnity to the Respondent to move the La Ferrari to a place of safety, the La Ferreira still remained in the Motorvia Truck in the Beit Bridge area until 19 September 2017. They were consequently forced to pay rental in respect of the Motorvia Truck to that date. **T**hey never received notification of the detention of the La Ferrari until on or about 24 May 2017 when they formally received the notice of the Respondent's intention to hold Applicants liable for the duties, and to seize the La Ferrari in terms of s 87 (1) of the ECA. The Applicants formally responded to the Notice on 1 June 2017.

[73] The Respondent notified the Applicants on 31 July 2017 of the decision to seize the La Ferrari in terms of s 88 (1) of the CEA and of the decision to mitigate seizure in terms of which the La Ferrari would be released on certain conditions which were not limited to payment in respect of duties, VAT, VAT penalties and VAT interest; state warehouse rent and of an amount of R6 930 299.00 in terms of s 93 (1) (c) of the CEA (the mitigation of seizure amount); plus furnishing an indemnity against any possible damages claims arising from the detention and release of the La Ferrari. The Applicants allege that the Respondent refused requests to export the La Ferrari and 1st Applicant consequently had no option but to pay the duties on the La Ferrari. Furthermore, on 18 September 2017, 1st Applicant effected payment of an amount of R6 903 299.00 and furnished the indemnity required by the Respondent albeit under protest with full reservation of his rights. He also paid the state warehouse rent and the La Ferrari was subsequently released and cleared for home consumption. They thereafter lodged an internal administrative appeal against the seizure decision and the mitigation of seizure decision on 12 September 2017, and received the Respondent's decision in terms of which the internal appeal was disallowed on 28 March 2018. Their subsequent application on 15 May 2018 for the matter to be referred to Alternative Dispute Resolution was refused on 25 May 2018 on the basis that the matter was not suitable for Alternative Dispute Resolution.

On the seizure decision

[74] The Applicant alleges that:

> [74.1] The Respondent seized the vehicle on the basis that it has been dealt with contrary to the provisions of the CEA and consequently the Respondent empowered to seize it. When objectively viewed the only contravention was that the La Ferrari was

allowed to be removed from the bonded warehouse without Scuderia being in possession of customs documentation approving the removal, which was readily admitted and explained to the Respondent.

[74.2] This was a unique and isolated incident and they all believed at the time that customs duty in case of the La Ferrari had already been paid and that the removal was on instructions of and approval of SARS. Scuderia removed the La Ferrari from its bonded facility under these false pretences. Even though there was never an intention to export the vehicle and the attempt to export it was a breach of an agreement by F1, exporting it per se would be one of the legitimate means of dealing with the vehicle.

[74.3] The Applicants allege not to have seen to date the documentation under cover of which it was attempted to export the La Ferrari. They further argue that although unauthorised there would not have been any reason to avoid presenting these documents to SARS to enable the export and also if vehicle exported, there would not have been any prejudice to the fiscus. The La Ferrari would not have gone into home consumption. In any event Scuderia would at all times have remained liable to account for the La Ferrari and bring the duty to account or export the vehicle. The Respondent was fully informed of the facts and the circumstances, shortly after taking control of the vehicle.

[74.4] They had at all times, *bona fide* believed that the provisions of the CEA had been and are being complied with. The Respondent had no reason not to believe the Applicants allegation that they were the victims of a well-orchestrated scam.

[74.5] Seizure is a drastic step and an invasive action. The power to exercise such an action should be exercised with caution and only extreme circumstances would warrant the exercise of the power to seize property. The risk of prejudice to the fiscus was minimal as Scudera all the time remained obligated to account for the La Ferrari and unless the vehicle was exported he had to bring the duties to account irrespective of what happened to it. In paying the monies to Stratton to pay for the duties Applicant says he demonstrated that he wanted to comply with the provisions of CEA and that such compliance could be easily achieved.

[74.6] Objectively considered, the prevailing circumstances did not warrant the seizure of the vehicle. The Respondent abused his powers in terms of the CEA in exercising his discretion to seize the vehicle, acting unreasonably and irrationally.

[74.7] A nominal administrative penalty against Scuderia would also have been accepted by the Applicants. Seizure as implemented by the Respondent is not in line with the constitutional obligations of the Respondent and submit that the seizure decision should be reviewed and set aside. (Constitutional obligation of the Respondent is to see to it that the provisions of the Act are complied with, discourage and cab the evasion of payment of duties, taxes and interest in full).

[74.8] Setting aside the seizure decision will result in the mitigation decision being regarded as *pro non scripto* as there would be no seizure to mitigate, as a result the Respondent should be ordered to repay the amount of R6 930 299.00 with interest from the date of payment to the Respondent, to the date of repayment thereof

The Mitigation decision

[75] In case the court determines that the Respondent was justified in making the seizure decision, the Applicants submit that:

[75.1] the discretion to mitigate seizure should be judicially exercised in that it must be objectively ascertainable that exercising the discretion against the Applicants is in the circumstances reasonable, fair and rational.

[75.2] imposing effectively as a penalty an amount of R6 930 299.00 is shockingly inappropriate in the circumstances. He was effectively disowned of his property and thereafter asked a stip price for its return resulting in the breach of the rationality principle.

[75.3] The rational and reasonable decision would have been to impose an administrative penalty on Scuderia for releasing the La Ferrari without having the relevant customs documentation in its possession. The Respondent acted unlawfully

and ultra vires the provisions of the CEA and the spirit and principles of the Constitution when the Respondent refused to allow the vehicles to be exported**.**

[75.4] He humbly submits that the mitigation of seizure decision stands to be reviewed and set aside and the Respondent should be ordered to repay the amount of R6 930 299.00 with interest from the date he paid it to the date of repayment thereof.

State warehouse rent

[76] Applicants point out that they were required to pay rent in the mount of R47 940.00 for the period from 21 February 2017 to 19 September 2017 being the date the La Ferrari was released. By 12 June 2017 the Respondent had all the information and was aware of all the circumstances and therefore the rational decision was to release the Laferrari to Scuderia, alternatively to keep the vehicle under detention at Scuderia. The Respondent acted irrationally and unreasonable in retaining the La Ferrari in the state warehouse after that date and should only have charged rent for the state warehouse up to 12 June 2017 and not the date of release. He therefore submits that the decision to claim warehouse rent for the full period should be reviewed and set aside and the matter be referred back to the Respondent to adjust the state warehouse rent to only account for the period 21 February 2017 to 12 June 2017 and to refund the balance to the Applicants.

Grounds for review based on the legality principle

[77] The Applicants submit that the decision to seize the La Ferrari and conditions imposed to mitigate the seizure are subject to judicial review, reiterating the following reasons:

[77.1] The conduct is in breach with **the legality principle** enshrined in the Constitution and consequently unlawful.

[77.2] The Respondent failed to apply his mind to the matter, alternatively failed to apply his mind, considering the prevailing facts and circumstances, more especially the Respondent failed to consider the documentation in its possession, the fact that they were the victims of a well- orchestrated scam and had already suffered a loss. Also that he had already demonstrated his commitment to comply with the CEA by making

payment of a substantial amount to F1 Stratton to pay duties; They provided full cooperation to SARS and SARS did not unearth any evidence or information to gainsay their version of the events and finally there was minimal risk of prejudice to the fiscus.

[77.3] The amount claimed in respect of mitigation of seizure is neither proportional or rational to the facts or circumstances which gave rise to the mitigation of seizure decision.

Further grounds of review based on PAJA

[78] Furthermore, the Applicants argue that the decisions to seize or mitigate seizure also stands to be reviewed or set aside if due consideration is given to the following provisions of PAJA;

[78.1] The action to seize and mitigate seizure was taken for an undisclosed ulterior purpose or motive because

[78.1.1] irrelevant considerations were taken into account in that Respondent viewed the unlawful attempt to export the LaFerrari as an attempt by the Applicants to contravene the CEA and avoid compliance with the CEA whilst this was not the case and finding that the Applicants committed a serious transgression and offence.

[78.1.2] Relevant considerations were not considered in that the Respondent failed to accept and appreciate the impact and consequences of the scam the Applicants fell victim to; and arbitrarily and capriciously in that there is no connection between the seizure and mitigation decision and the common cause and undisputed facts (s 6 (2) (e))

[78.1.3] <u>The action itself is not rationally connected to the purpose for which it was taken to ensure compliance with the CEA,</u> the Respondent's Constitutional Obligations and the purposive approach as required by the Constitution.

[78.1.4] The purpose of the empowering act as in section 47A and s 107 merely bestows certain powers on the Respondent and does not provide for offences in respect of contraventions of the CEA and the information before the Respondent.

[78.3] The exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of the administrative function for which it was purportedly taken is so unreasonable that no reasonable person could have so exercised the power or performed the function in that it ignores the information at hand and considers irrelevant information as necessary, see Section 6 (2) (h),.

[78.4] It constitutes a material error in fact and law which is contrary to the empowering provision in terms of which it was taken and amount claimed in respect of the forfeiture is completely disproportionate to any administrative transgression by the Appellants.

[78.5] Section 6 (2) (i) - the decisions are otherwise unconstitutional or unlawful in that the Respondent failed to adher to his Constitutional obligations requiring the Respondent to be transparent and it breaches the principle of legality and essentially unlawfully deprives the Applicant of property.

[79] The Applicants argue that collectively these grounds confirm that the mitigation of seizure decision together with the disputed decisions stand to be reviewed and set aside as the Respondent did not act in a manner that is lawful, reasonable and procedurally fair and that the seizure decision and the mitigation of seizure decision are irrational and unreasonable and should be reviewed and set aside.

Supplementary Affidavit

[80] In the Supplementary Affidavit filed after receipt of the record, the Applicants confirm their account of the events prior the detention and seizure of the La Ferrari to be common cause facts. They accuse the Respondent of, failure to investigate the matter or the involvement of the other parties like Stratton and F1, disregarding their involvement, failing to use SARS' extensive powers to obtain information and documentation from the key parties,

notwithstanding the overwhelming evidence. The only reasonable inference to be made is that SARS accepted the Plaintiff's version of events and did not deem it necessary to investigate the matter.

[81] The Applicants further allege that SARS ignored the factual status and instead was influenced by the high value of the La Ferrari, 1st Applicant's personal financial position and purely on the basis of creating revenue to the fiscus in imposing the exorbitant penalty of R6 930 299.00 for the release of the La Ferrari, notwithstanding the duties having already been paid.

[82] Furthermore, they state that objectively considered, the facts reveal that:

[82.1] 1st Applicant always had the intention to pay the duties and paid substantial amounts to F1 believing that the money was being paid to SARS.

[82.2] Stratton and F1 had a meeting with SARS in November 2016 at which meeting they were already informed that the duties in respect of the La Ferrari cannot be reduced and other avenues must be explored such as trade remedies under the auspices of ITAC. This being confirmation of the scheme Stratton perpetrated knowing fully well that the reduction of the statutory import duties applicable to the La Ferrari was not possible, yet continued with the ruse that he concluded an Agreement with SARS regarding the duties payable.

[82.3] the only reasonable conclusion to be made from the objective facts is that not only was the 1st Applicant conned by Stratton to pay substantial amounts to F1, but Stratton also devised a scheme to get the La Ferrari to Beit Bridge so as to steal the vehicle by means of unauthorised export to Congo, as confirmed by unauthorised export documents processed at Beit Bridge and presence of foreigners that placed pressure on the driver to take the vehicle to Zimbabwe. This confirms that the return of the vehicle to SA was a fortuitous event that spoilt Stratton's plans. There was no attempt to smuggle the vehicle into the country and no basis for SARS to come to that conclusion. The La Ferrari was not supposed to leave the country but objectively viewed as far as they are concerned they had paid all the duties.

[82.4] in view of these objectively determinable facts, confirmed by the fact that SARS has no evidence or information to the contrary, it means SARS had no factual or legal basis to seize the La Ferrari or alternatively claim the substantive mitigation of seizure amount. SARS's conduct was unlawful for it effectively disowned the 1st Applicant of his property and required him to pay a substantial amount as penalty in circumstances where he is a victim.

[83] Although deeply embarrassed by their naivety in falling for the scam, the Applicants argue that it does not justify depriving the 1st Applicant of his property and then requiring him to pay a substantial amount for the return of his vehicle/property. The objectively determinable factors indicate that they were in no manner complicit in any wrongdoing which is confirmed by the internal memorandum with certain recommendations from the senior manager customs investigations dated 21 July 2017.

[84] The Applicants point out that the mitigation of seizure decision preceded the seizure decision with only a few days which according to them is clear that SARS has never considered the validity of the decision to seize the vehicle. On the issue of mitigation of seizure, they allege the following to be apparent from the internal memorandum, that;

[84.1] SARS could not prove 1st Applicant or Scaderia's direct involvement in the attempted alleged diversion of the La Ferrari. The authenticity of the criminal proceedings instituted by the Applicants against F1 and Stratton were confirmed by the SARS investigating team.

[84.2] The investigating team confirmed that they were not able to link the Applicants to any fraudulent activity, all fingers pointing at F1 and Stratton. The team also confirmed 1st Applicant's payment of R5,5 Million Rands on the bona fide believe that this amount represented the duty and the vat payable to SARS. (The TIU noted the allegations made in that regard and allegation of recovery of the amounts paid).

[84.3] The team noted that TIU would further investigate Stratton and all his dealings with Customs relating to the La Ferrari and other vehicles and will then consult with criminal investigations.

[84.4] The team concluded that:

[84.4.1] Scuderia permitted the removal of the La Ferrari without being in possession of a proper book of entry that complied with s 20 (4) of the CEA and that the full duties and vat became due and payable at that point.

[84.4.2] The La Ferrari was dealt with irregularly under the Act and therefore liable to forfeiture and;

[84.4.3] The total liability in respect of the vehicle totals R12 001 463.31

[84.4.4.] The team provided the two options for consideration. The first option which is the one that was chosen by the Respondent was to make a direction towards a s 93 release, not a direct seizure in terms of which payment was required. Section 93 requires the payment of at least 50% of the Custom value bearing in mind that the TIU will still proceed to collect all dues and vat with related penalties.

[84.5] The team recommended option 1 on the basis that the La Ferrari will be released to client who will make its own logistical arrangement pertaining to transport and insurance and SARS would not be at risk of another s 96 Application. Option 1 almost guarantees the duty and Vat payment of R12 Million and if the recommendation is accepted it will only mean another R7 Million + would be collected by SARS.

[84.6] SARS can still pursue criminal charges against Stratton and the proceedings initiated by the Applicants would be valuable to SARS in its criminal case against Stratton.

[85] The Applicant argues that it is disconcerting that SARS clearly concluded that there was no justification to seize the vehicle and came to the conclusion that a penalty paid by him of R7 Million in addition to the duties, vat, vat interest payable would be reasonable notwithstanding the finding of the internal memorandum to the effect that:

[85.1] There was no evidence to suggest that Scuderia and him are involved in the attempted diversion of the La Ferrari. All the evidence pointed to F1 and Stratton and the investigation team were not able to link any evidence of fraudulent activity by him and Scuderia.

[85.2] Although Scuderia did not have the documentation at hand when the vehicle was removed from the bond it is confirmed that 1st Applicant paid substantial amounts to F1 for purposes of duty and had no reason not to believe that the duty had not been paid to SARS and that the removal had been sanctioned and authorised by SARS.

[85.3] Although 1st Applicant did not authorise it, export documentation were in place. 1st Applicant never intended the vehicle to leave the country. What was seen initially as smuggling the vehicle into the country was not.

[85.4] From the proper reading of the internal memorandum it seems the only adverse finding against the Respondents was that when Scuderia allowed the release of the La Ferrari it was not in possession of the required Custom duty documentation. Although this is contrary to the norm, they have not been referred to any specific provision in the CEA that requires a bonded facility to be in possession of the duty documentation at the removal of the goods. He and Scuderia believed that the duties had already been paid and the confirmation documentation forthcoming shortly. He is advised that the conduct of Scunderia would normally attract an administrative penalty and the Applicants accept that it should be imposed but not a justification for the drastic measure to seize the vehicle and subsequently levy a penalty against him for R7 Million in addition to the duties and vat confirming that he had always intended to comply with the law and paid the duties and vat on the car.

[85.5] It was accepted that Stratton was a fraudster who perpetrated a scam against the Applicants. When the record is considered it is evident that SARS accepted the explanation proffered by Motorvia and the driver of the truck that transported the La Ferrari and the transcript of the interview that clearly supports the version of the Applicants.

[85.6] Based on the above the only reasonable inference to be drawn is that SARS irrationally and unreasonable seized the vehicle and imposed the mitigation of seizure amount purely to extract and extortionate payment to the fiscus to which it was not entitled. They argue that there is no rational between the factual findings mentioned and the SARS decision to impose a penalty of close to R7 Million as a condition for the release of the LaFerrari.

[85.7] Objectively there was no rational justification for the drastic measure to seize the vehicle even if it is found that SARS was justified to do so, there is no rational or factual basis to support the exorbitant penalty imposed as a condition for the release of the motor vehicle particularly in the light that the Applicant did not participate in any irregular conduct but were victims of a scam.

[85.8] He further argues that it is not clear how SARS arrived at the conclusion that a penalty of 50% of the value of the vehicle is reasonable. The only reasonable conclusion to be made is that SARS regarded the unfortunate events as an opportunity to secure a substantial amount to it and argue that the facts and circumstances do not support such a decision which is clearly irrational and unreasonable.

[85.9] The Respondent or SARS did not take into account the R100 000 payment to it during February 2017.

[85.10] They state that it is apparent that SARS was tracking the La Ferrari since its arrival in the country and the SARS officials played along herewith to give an illusion of legitimacy to Stratton's ruse or Stratton went as far as to falsify SARS documentation, in that regard referring to the SARS letter dated 24 March 2017, confirming that the seizure of the car has been withdrawn.

[85.11] Also apparent from the record that the decision taken in respect of the internal administrative appeal merely rubberstamped the seizure and mitigation of seizure decisions and no proper consideration was given to the matter, with no record of meetings and deliberations, it fortifies the impression. On request of further records, their attorneys were furnished with handwritten notes ostensibly taken down during the deliberations of the appeal committee. The notes are not complete or entirely

comprehensible, the general gist of it indicates that the committee's stance to the effect that good cause was not shown and on that basis to have justified the seizure and the mitigation of seizure decisions. He respectively submits that such a conclusion is not supported by the facts and allude to what he has already stated in that regard.

[85.12] He accordingly submits that the seizure decision, alternatively mitigation of seizure decisions stands to be reviewed and set aside and the Respondent should be ordered to repay the amount of R6 930 299.00 with interest from the day he paid it to the day of repayment thereof.

Respondent's Answering Affidavit

[86] The Respondent's Answering Affidavit was deposed to by a member in the Technical Interventions Unit (TIU) of the Customs Investigative Division of the Western Cape as the body that investigated the matter. He firstly pointed out that Mr Ungerer a director of the 3rd Applicant, Market Demand, is also a director as well as a clearing agent for Scuderia, the 2nd Applicant. Ungerer represented Scuderia in the internal administrative appeal even though in this Application he is only cited as the 3rd Applicant's representative. He points out that Scuderia operates a licensed bonded warehouse in which vehicles are stored with the deferment of payment of duties, whilst Demand is the in house clearing agent and as such together very experienced in customs procedures regulating the importation of vehicles, the payment of duties as well as the warehousing of the vehicles with deferment of payment of duties in terms of the CEA.

[87] The Respondent therefore argues that Applicants' Application has no merit and that if the Respondent committed any error it was in Applicants' favour. The Respondent was at all times generous in exercising its discretion when it directed that the vehicle be delivered to Scuderia and imposing a condition for payment of an amount of less than the value for duty purposes, to wit 50% of such value.

[88] The Respondent confirms that upon importation, the La Ferrari was entered for storage into the Scuderia warehouse and therefore no duty was paid, the maximum period permissible for storage being two (2) year. The Respondent accepts that Scuderia imported the vehicle at the behest of the 1st Applicant, who then purchased the vehicle from Scuderia, and in terms of

the purchase and sale agreement ownership remained at all material times with Scuderia. Ownership was only to pass when the full purchase price and the duties were paid.

[89] The Respondent indicates that it periodically inspected and reviewed Scuderia's warehouse. It confirms the issuing of a **detention Notice b**y 6 October 2016 near the La Ferrari's two- year anniversary of importation and bondage, and notifying Scuderia to either export the vehicle or bring the duties and vat to account by 31 October 2016. Subsequent thereto that a Mr Stratton and Sean Adriaans from F1 approached the deponent with a request for a reduction in duties. They were told that this is not a matter that the deponent can entertain but that the procedure of determining tariffs and reduction to the rate of duties was best addressed through the Department of Trade and Industry (DTI) and in particular the International Trade Administrative Commission (ITAC).

[90] On 5 December 2016, the Respondent, through its Alberton Office granted the Applicants an extension to permit the continued storage of the vehicle at Scuderia warehouse to 27 February 2017. The Respondent understood that whatever approaches that appears to have been made to the DTI, appeared not to have been successful and the Respondent was advised that Scuderia was going to export the vehicle. Accordingly, a provisional payment of R100 000 00 was agreed and paid on the basis that the money will be repaid/refunded upon proof of export within 14 days. This was recorded in a letter dated 9 February 2017. With knowledge of the letter and its contents the Applicants paid the R100 000.00.

[91] On 15 February 2017, Scuderia accordingly hired Motor Via to transport the La Ferrari to Beit Bridge and from there to Cape Town. On 16 February 2017 Exponential Freight Services passed a bill of entry for export, declaring the vehicle was to be exported to the 1st Applicant in the DRC. On 17 February 2017, the 1st Applicant paid Stratton R7 Million Rand that was supposedly to be paid to SARS in respect of lower duties for the La Ferrari and another vehicle that has been stored at Scuderia. Over R4 Million was in respect of the other vehicle.

[92] On or about 20 February 2017, Scuderia permitted the Ferrari to be taken out of its storage and on their version without passing a bill of entry for the removal thereof. On the evening of 22 February 2017 the vehicle was driven through Beit Bridge border post towards Zimbabwe on the basis of the export bill of entry which represented to the Respondent that the vehicle was en route to the DRC whilst the instructions given to the driver was to make a u-

turn on the Bridge and come back to the South African border post without passing through to the Zimbabwean Border Post. The vehicle was taken through the South African Border Post under a false pretence that it was being exported when the entire exercise was to divert the vehicle and to create an impression and a documentary paper trail that the vehicle was exported when the intention was to keep it in South Africa and never truly export it.

[93] Before an attempt was made to return and make a u turn back through the Border gate of South Africa, the vehicle was intercepted and detained by the officials of the Respondent that was prior to an import declaration to the officials, so it could not be made out what was the precise nature of the import declaration, however it is likely they would have been false, either as to the nature of the goods or probably a gross under stating of the value of the vehicle to obtain clearance on a lower amount of the duties and vat. On 31 July 2017 after receiving representations from Scuderia, the vehicle was seized. A decision was made thereafter to exercise a discretion and return the vehicle to Scuderia as the owner, on a number of conditions, one of which was payment of an amount equivalent to 50% of the value for duty purposes. A subsequent internal administrative appeal was refused.

[94] The Respondent argues that although the Applicants suggests a plan to steal the vehicle and to deliver it in the Congo, there is no factual basis for that theory. Also although the entry port documents indicated that it was to be exported to the DRC, this was created mainly to make a representation to the Respondent, as in fact Motorvia was hired to take the vehicle to Beit Bridge and from there to Cape Town. The driver was instructed by Stratton to make a u –turn back to South Africa. Made to reflect that it was genuinely exported from South Africa and returned through the border post back to South Africa.

[95] In relation to allegations of an attempt to steal the La Ferrari the Respondent notes that the vehicle is not one that can be stolen with impunity and be possessed anonymously, being a limited edition of its kind and comprised of highly advanced technology which required specialist skills and training to maintain and repair. Also that the Applicants impressed upon the Respondent the need for the advanced specialist technology during the period of detention. The vehicle required the services of a specialised technician also to ensure that its battery component is charged otherwise it would result in damage of approximately R1 Million Rand. Should Stratton have stolen the vehicle he would not have been able to have it repaired or serviced without that coming to the attention or knowledge of Ferrari in Italy. It could not be

stolen or concealed or sold without being very easily traced. Even the driving of the vehicle on the public road would have attracted attention, that is unavoidable.

[96] According to the Respondent the Applicants' problem is that they have kept the vehicle for the maximum permissible time at the warehouse and they had to have it exported otherwise the full duty thereon had to be paid which is what the Applicants did not want to pay. The tariffs on the duty payable on the vehicle were never changed and the first schedule to the Act never amended to permit lower tariffs or duties. The export would have resolved the immediate problem of the vehicle requiring to be exported which would give the Appellants documents to acquit the warehouse entry and bring an end to the attention it had attracted. The subsequent import of the vehicle would have required documents evidencing its value. It is most likely it was the intention of Stratton that the vehicle was imported. This would be done on false documentation understating the value of the vehicle resulting in much lower duties being paid. Lower duties in any case amounting to several Million Rands on a new Ferrari would not have aroused any suspicion in ordinary circumstances as for regular production vehicles which retailed in South Africa duty between R4 Million and R6 Million was paid at the time.

[97] The Respondent further points out in its Answering Affidavit that Appellants deny any knowledge of the Bill of entry passed for the export of the vehicle to the Congo. With reference to s 20 (4) of the Customs and Excises Act the Respondent argues that however in none of the representations the Applicants made did they explain their intention when the vehicle was released from the warehouse and placed in possession of Stratton and Motorvia. The section prohibits goods that are stored in Customs and Excises warehouse from being taken or delivered from such warehouse except in accordance with the Rules and upon due entry for one of three purposes:

[97.1] Home consumption and payment of any duty thereof;

[97.2] re-warehousing in another Customs and Excises warehouse or removal in bond;

[97.3] Export from the warehouse.

[98] The absence of a Bill of entry and absence of an explanation of a no entry having been passed must be compared and contrasted with the different versions given by the Applicants of their understanding of how the vehicle was to be dealt with after being taken from Scuderia's warehouse, drawing attention to the following:

[98.1] The Applicants' contention that there was never an instruction or arrangement that the vehicle was to be exported to the DRC or any other place, a contention that was made and persisted with in the internal administrative appeal.

[98.2] The Applicants' allegation that on 17 February 2017 Stratton advised the 1st Applicant that the Respondent had requested a new re- entry stamp for the vehicle so that the vehicle would exit and re-enter South Africa at Beit Bridge with a new stamp of entry.

[98.1] The only way the exit stamp could have been obtained in respect of the vehicle by taking it to Beit Bridge would be to physically take it through the border post with paperwork (including an export bill of entry) representing to the Respondent that the vehicle was being exported to a destination beyond the Republic.

[98.2] From the above statement it indicates that the Applicants were aware that the vehicle was to be taken out of the border of South Africa to simulate a genuine export and that it was to be returned to South Africa as if it was being imported at the time of its return. It is also clear that this was to be undertaken at the Beit Bridge border post as it as a cheaper alternative to flying the vehicle to a foreign destination. What in fact happened at the border post is what Stratton had told the Applicants would be done and Motorvia paid to do.

[99 Respondent **allege that it is quite clear that the export of the vehicle would acquit the Applicants of the liability arising from keeping the vehicle at the Customs warehouse beyond the maximum permitted time period. It is also quite clear that the re-import or fresh import stamp was to be in circumstances were the information relating to that importation would be declared differently from what was declared on the original import bill of entry at the end of October 2014 in order to achieve a different duty liability**

outcome. This different information would most likely have related to the value of the vehicle.

[100] The statement made by the Applicants during the internal administrative appeal are inexplicably contradictory to the statement made in the Founding Affidavit by the 1st Applicant which is that the Applicants were under the believe that the custom and duties had been paid prior to the vehicle being removed to affect clearance. They on the other hand believed that the clearance would be made in Cape Town (notwithstanding having done a detour to Beit Bridge.

[101] With regard to the duties allegedly believed to have been paid, the Respondents point out that on 11 April 2017, the 1st Applicant launched an urgent Application against F1, Stratton's company, to interdict withdrawals against the bank account on which the 1st Applicant paid the money asked for by Stratton and to disclose to the extent that the money was no longer in the account, to which accounts such has been transferred. In support of the Application the 1st Applicant gave a narrative of the events two months after they have happened. The payments by the Applicant were made on Friday 17 February 2017 under the representation that Stratton had a deal and that the purpose of the payment was to enable Stratton to show the Respondent the funds in his account for the Respondent to sanction the deal. On Monday 20 February 2017, the vehicle was removed from the warehouse. No mention is made that there was a representation by Stratton in between that period that the duties were to be paid to the Respondent or in fact had been so paid. The version in this narrative being that the payments were made to show that Stratton has the funds not that he was required to pay those funds at that time prior to clearance to the Respondent. At the end of March 2017, the 1st Applicant asked Stratton to refund the money which he undertook to redeposit as soon as the vehicle was cleared. Therefore, the 1st Applicant could not have been under the impression that these monies were paid to the Respondent.

[102] Furthermore, Respondent noted that there is no explanation rather than the confession of naivety how the Applicants understood Stratton had managed to achieve a saving on taxes on duties and Vat. The Duty and Vat liability can only be reduced by a fraudulent misrepresentation as to the value or the nature of the goods being imported. The 2nd and 3rd Applicant were both very experienced in custom procedures and were both fully aware that the determination of liability for duties is made with reference to applicable tariff heading which

determines the applicable rate of duty and customs value. In the ordinary cause, unless there is some contravention of the Act, this determination is done according to the bill of entry and at the time when the goods are entered for home consumption.

[103] The Respondent reckons the Applicants were not as naïve as they claim to be as on their own version Stratton apparently achieved a feat which the 2nd and 3rd Applicant being experienced in the importation and Customs procedures, particularly in the specialised importation of the Ferrari motor vehicles, could not themselves achieved. It is not conceivable that with their knowledge they could not have asked Stratton to explain what he had done that they could not, in terms which they could understand that would assist them in future. The most reasonable and probable inference to be drawn is that the Applicants were aware that Stratton had undertaken to deal irregularly with the vehicle by making false representations to deceive the Respondent. The Applicants were happy to entrust this task to Stratton and distance themselves from what they knew or at least suspected to be dishonest.

[104] The Respondent points out that:

[104.1] The vehicles were irregularly dealt with by the Applicants, and in particular, Scuderia who was the owner and in whose warehouse the vehicle was stored where it was released without a bill of entry contrary to the provisions **of s 20 (4) of the Act**.

[104.2] The vehicle was also irregularly dealt with when it was taken through the Beit Bridge border post on the false declaration that it was being exported from the Republic and further when the vehicle was brought back to the Beit Bridge border post with the intention of representing that it was being imported into the Republic**.**

[104.3] From the moment that the vehicle was taken from Scuderia warehouse the full duty and Vat was payable thereon. By reason of the vehicle having been dealt with irregularly, the vehicle was liable to forfeiture under the Act and as such the decision to seize is unimpeachable.

[104.4] The decision to disallow the internal administrative appeal is and was similarly unimpeachable. The nature of the dispute is as such that it is unsuitable for

the procedures of alternative dispute resolution. A case was not made in the founding or Supplementary Affidavit as to why it is not so.

[104.5] In relation to the relief sought that the matter is to be referred back to the Respondent to impose a reasonable administrative penalty, the Applicants have not set up any basis for why they say a penalty, reasonably or otherwise, ought to be imposed. The money only refundable on proof that there was due compliance.

[104.6] In relation to the R100 000 the terms under which it was paid was very clear. The money was refundable on the proof that the vehicle had been duly exported prior the intended time permitted for the vehicle to remain in Scuderia warehouse.

[105] The Respondent states that, it will be argued that upon reflection the discretion exercised in terms of s 93 (1) © of the Act to direct the return of the vehicle to the Scuderia on conditions, including the payment of an amount equal to only 50% of the value of the vehicle for duty purposes was very generous and a lenient decision on the part of the Respondent.

[106] The Respondent then prays for an order dismissing the Application with costs including costs of two Counsels.

Applicants' reply

[107] In reply the Applicants reiterated its stance as articulated in the Founding Affidavit, particularly regarding its position with regard to Stratton and their alleged belief in him when he advised them that he was negotiating with SARS on the issue of reducing the duties, and had reached an agreement. Further that the additional documentation furnished by Stratton contributed to the Applicants impression in that regard and fortification of their trust in him, Specifically annexures "AA3" and "AA4" of the Answering Affidavit which are the invoices on the due duties to be paid.

[108] They denied having been aware of the export declaration that indicated that vehicles to be exported to the DRC. They alleged to have had no sight of that export bill of entry. However, allege that the same bill of entry was correctly processed through the Respondent's systems albeit without authority from the Applicants, alleging that a valid entry was therefore

passed to remove the vehicle from the bonded warehouse of Scuderia to the Beit Bridge border post**.** The Applicants state that it was their understanding that simultaneous with the export bill of entry, a re-import bill of lading would be processed, therefore with no need for the La Ferrari to leave South Africa at all**.** Which they again realised it was Stratton's plan to get the vehicle to the border, export it without it coming back.

[109] The Applicants also refuted that the scheme was to re-import the vehicle at a lower value on the basis that it is contradicted by the fact that the export documents reflect a value of R13 860 598.00 so it would be difficult to indicate why on an immediate re-import a value lower than the export value would have been declared and accepted. It says looking at the facts objectively, a lot of monies were paid to Stratton and therefore had no reason not to believe that the monies were already paid to SARS since Stratton informed them that monies can be paid directly to SARS to maintain the perception that the whole process is sanctioned by SARS.

[110] They also highlighted that no declaration was made to re-import the vehicle and argue that the Respondent's conduct reflect that the export entry was treated for the ruse/deception it was. 1st Applicant argues that there is no reason not to accept their version of events. On the Respondent's version the vehicle could have been kept in the bonded facility until 28 February 2017.

[111] The Applicant argues that objectively considered the Respondent was not prejudiced because the Respondent was presented with export document that the vehicle would be exported through the Beit Border post and it was indeed duly exported there. If none of the events that happened thereafter occurred, the Respondent would have had no further interest in the matter. Once it was evident that the La Ferrari exported, any potential customs duties and vat liabilities would have ceased. Further non- of the suspected theories as outlined by the Respondent were considered in arriving at its decisions and therefore clear that Respondent accepted that the Applicants were a victim of a scam. Also that its decision was based on the findings of the internal SARS investigation team and no minutes in respect of the Customs and Excises High value decisions Committee Meetings of 27 July 2018 were included in the decision record.

[112] In response to the allegations that the 2nd and 3rd Applicants are supposedly experts, the Applicants allege that they have never professed to be customs experts especially relating to

special dispensation and rebates and to have in fact accepted their folly in falling for the Stratton's scheme who at the time appeared to be legitimate based on prior dealings with him, representations and documentation presented to them. In respect of the 333SP there was indeed a dispensation as the vehicle was more than 20 years old and were deceptively advised that there was similar dispensation in respect of the La Ferrari as a collector's item.

[113] In response to the allegations that the Applicants failed to explain the release of the La Ferrari from the bondage house without a bill of entry, the Applicants say that there was indeed a valid although unauthorised bill of entry processed and the Respondent had failed to refer to a statutory provision that requires Scuderia to have the entry on site when releasing the vehicle in accordance with such entry.

[114] The Applicants deny that they have put contradictory versions but allege that on a balance of probabilities there can be no doubt about the bona fides of the Applicants and their version of events.

[115] The Applicants argue that the Respondent now ex post facto tries to justify the decision of 31 July 2017 by highlighting insignificant inconsistencies which does not bolster the decision and the unsubstantiated assertions that the Applicants could not have believed that the Funds have been paid to SARS are apart from being speculative and argumentative in nature but denied. (questioning the probability of Applicants' allegations which seems on a balance of probabilities not to be so far-fetched cannot be insignificant).

[116] The Respondents have alleged that upon reflection it had come up with different speculative theories and reasons to question the bona fides of the Applicants which are after the fact and were not considered by the Respondent when it came to a decision and are actually in contradiction with the factual findings of the internal SARS investigative team on which the decision was clearly based and the objective facts and circumstances which should have informed the decision. It maintains that the decision of the Respondent is subject to review for the reasons that the Applicants have alluded to.

[117] The Applicants again point out that they have readily conceded that Scuderia was not in possession of the necessary documents that would authorise the release of the La Ferrari from the bonded facility at the time it was released and have accepted that failure to do so

would subject Scuderia to a penalty although to date has failed to indicate the statutory provision that determines such a failure to be a contravention. The Applicants subsequently learnt that such export documentation were processed and in possession of the Respondent at the time when the vehicle was released from the bonded house, although they were processed without the knowledge or authority of the Applicants it nonetheless remained valid export documents which authorises the removal of the La Ferrari from the bonded facility to be exported at Beit Bridge which actually occurred.

[118] The Applicants allege that the Respondent has failed to deal with the length that Stratton went to maintain the subterfuge when providing confirmation from SARS that seizure has been withdrawn and a s 96 Notice was served on SARS.

[119] Finally, the Applicants therefore submit that the Respondent failed to exercise the discretion properly in terms of PAJA having regard to the prevailing circumstances at the time, which ultimately led to the decision by the Respondent. The decision must therefore be set aside as per the Notice of Motion.

Internal Administrative Appeal

[120] The Applicants' appeal that what was before the Operational Appeal Committee was based on the premise that there was no legal basis to seize the La Ferrari, alternatively that some of the conditions imposed in mitigation of seizure were unreasonable and irrational. The Committee found seizure decision to be legitimate and the conditions as set out in the mitigation decision of 31 July 2017 regarded by the Committee as reasonable, justifiable and rationale in the circumstances and to remain in full force and effect, inter alia, that:

> [120.1] Scuderia had to submit a completed XDP entry and effect payment of R3 465 149.50 in duty in terms of Schedule no 1 part 1 of the CEA R4 851 209.50 in terms of schedule no 1 PART 2 B of the Customs and Excises Act, Vat in terms of the Value Added Tax; interest on Vat in the amount of R56 400.08 and R329 822.23 as a Vat penalty in terms of s 39 (4) of the VAT Act, read with s 213 (10 of the TA Act; and

[120.2] Payment of an amount of R6 930 299.00 in terms of s 93 (1) (c) of the CEA; and

[120.3]On payment of the State warehouse rent to be calculated in terms of Rule 17 of the CEA; and

[120.4] On production of a suitable indemnity, indemnifying the Commissioner against any possible damages arising from the detention and release of the LaFerrari; Both Scuderia and the 1st Applicant were found to be liable for the duty and VAT in terms of s 19 (6) (7) and (8) read with s 44 (6) (c) of the CEA as well as the sections of the VAT Act and the TA Act which remain due and payable.

Issues to be decided

[1211 Issues to be decided are:

[121.1] Whether the decision as per s 87, 88, 89 and 93 (1) © of the Customs and Excises Control Act, was unjustified, unreasonable, irrational and therefore reviewable and to be set aside in that the Respondent's Custom Officials had no valid reason (legal or factual) for seizure /forfeiture of the vehicle at the time the discretion to do so was exercised.

[121.2] Whether the mitigation of seizure decision upon which the specified conditions and penalties were imposed, that is the VAT penalties, s 93 (1) penalty which is 50% of the value of the La Ferrari was unreasonable and irrational and disproportionate (being too harsh for the purpose for which they were imposed).

[121.3] Whether on consideration of the disclosures made by the Applicants in the Founding and Supplementary Affidavit, good cause shown for the direction for the return of the La Ferrari to the Applicants without the conditions imposed in mitigation of seizure or lesser penalty imposed.

General Overview of the Legal framework

[122] The importation and exportation of goods is a highly regulated sphere that is governed by the following legislation, the Customs and Excises Control Act 64 of 1996, as amended, its Regulations, the Tax Administration Act and the Value Added Tax administered by the Commissioner for SARS. The latter not only oversees compliance and or enforcement but is also sanctioned with the power of detention, forfeiture and seizure of goods found to have been handled in contravention of the CEA and of a discretion where justified, to impose penalties in mitigation of seizure. Constitutionality and PAJA.

[123] Public authorities who are granted powers in terms of legislation have to apply the law to the facts of the matter at hand. When the statute is drafted in a form that subject to certain preconditions, a power is granted to a public authority, the preconditions laid down in the statute are regarded as jurisdictional facts (which can be of either a procedural or a substantive nature); see J R de Ville's Judicial Review of Administrative Action in South Africa 3.2.3.1 p156.

[124] Corbett in *South African Defence and Aid Fund v Minister of Justice* 1967 (1) SA 31 (C) described the jurisdictional fact as "a necessary prerequisite to the exercise of a statutory power." Further noting at 34H that "in other words, if the jurisdictional facts do not exist, the power may not be exercised and any purported exercise of the power would be invalid". As a result, a court on review in a case where the preconditions have not been complied with, has the power to interfere with the findings of the public authority as it is considered part of the court's inherent power to ensure that the public authority stays within the bounds of its powers as conferred by parliament.

[125] A jurisdictional fact is therefore a fact the existence of which the legislature contemplates as a prerequisite to the exercise of a statutory power. A Minister, public official or tribunal which has been given a power to confer or take away rights or otherwise to act if a certain condition has been fulfilled, or a certain circumstance exists, must be prepared to justify its actions if challenged, by showing that the event had taken place or that the condition has been fulfilled or that the circumstance in fact existed prior to its exercise of the power; see Rose

Innes *Judicial Review* 100. According to Corbett J, there are two categories of a jurisdictional fact.

[125.1] Firstly, the jurisdictional act may consist of a fact or a state of affairs which, objectively speaking must have existed before the statutory power can be validly exercised. In such a case a court will be able to establish for itself whether that fact existed when the body exercised its powers. If the court finds that the fact did not exist, it may declare that the purported exercise of the power invalid as per its mentioned inherent power to ensure that the bounds of authority are not exceeded; see *Lennon Limited and Another v Hoechst Aktiergesellschaft* 1981 (1) SA 1066 (A) 1075F-1076E.

[125.2] Secondly the Statute itself can entrust a person or body exercising the power with exclusive functioning of determining whether in its opinion the prerequisite fact or state of affairs existed prior to the exercise of the power. In that event the jurisdictional fact is not whether the prescribed fact or state of affairs existed in an objective sense, but whether subjectively speaking, the person or body exercising the power had decided that it did. In that event the court will not be able to determine whether the fact or state of affairs existed.in an objective sense. A court will interfere and declare the exercise of the power invalid on the ground of non- observance of the jurisdictional fact only where it is shown that the functionary in deciding that the prerequisite fact or state of affairs existed acted mala fide or with an ulterior motive or failed to apply its mind to the matter.

[126] It is also important to note that there are two enquiries when it comes to the exercise of a discretion subject to certain preconditions: The first is whether the conditions prescribed were present the second is whether the discretion was properly exercised. From case law it appears that in case of both enquiries

[126.1]On powers from statutory provisions drafted in a way that requires consideration of facts which are not made a precondition to the exercise of the power, those are not regarded as jurisdictional facts. The public authority may be empowered before it finds a person guilty to weigh the evidence and decide whether the evidence is such to convict the person concerned in terms of the rules. The facts to be found and evaluated in such instance is said sometimes to fall within the jurisdiction of the public

authority. The test or approach of the courts on review on such facts is as that is applied with regard to the second category of jurisdictional facts is as categorised by Corbett J I in SADF and Aid Fund case which is also whether the public authority in question applied its mind to the matter (having regard to the specific evidence at hand); see *Greyling & Erasmus Pty Ltd v Johannesburg Local Road Transportation Board* 1982 (4) SA 427 (A) 448H.

[126.2] On purely judicial decisions, a court in review proceedings can nullify a finding of a public authority regarding the facts (within jurisdiction) where uncontroverted evidence which has a bearing on the matter was ignored by the decision maker, where there is no evidence to support the finding, also where there is no evidence which reasonably supports the conclusion arrived at. In the latter the court asking whether on the evidence, a reasonable person would have come to the same conclusion as the body in question did. This test for reasonableness has however been restricted to decisions which can be classified of being of a purely judicial nature; see *Sentrachem Ltd v John N.O and Others* 1989 10 ILJ 249 (W) 254C-257B.

[127] Simply put, public authorities granted powers in terms of legislation have to apply the law to the facts of the matter at hand. Within the rule of law the state, organs of state, such as the officer acting in the place of the Commissioner is required to apply his mind properly to the jurisdictional facts of which he must be convinced exists, before seizure; see *South African Defence and Aid Fund v Minister of Justice* 1967 1 SA 31 (C) 34G-H. As a result, if the jurisdictional fact does not exist, the power may not be exercised and any purported exercise of the power would be invalid. ‘

[128] The seizure of goods is a serious matter that impacts upon the fundamental human right of private ownership of property and the dignity derived therefrom. A discretion to be exercised as per the empowering act, has got to be performed in conformity with the requirements of the Constitution thereby bound to also comply with PAJA in that the decisions the officials make must be reasonable and rationally in line with the purpose for which the discretionary power was given. Therefore, the discretionary powers must be used within the law in that the decision can only be taken for reasons allowed by law and not for other reasons. The arguments raised by the parties in respect of the application of this aspect of the law in this matter is consequently valid; see **Section 6 (2)(e)(I) - (vi)**.

[129] Furthermore, administrative action must be reasonable and rational in that the action taken must make sense given the information that is available to the person who makes the decision to take the action. Briefly, this means that when the administrator is using discretion, they can only take relevant factors into account. If relevant factors are not considered, or irrelevant factors taken into account, then the decision is not taken for good reason. In such a case, a court can review the decision; **see s** 6 (2) (f) and (h). However, a decision based on relevant and correct facts is by and large sustainable under law. The onus is upon the Applicant to prove that the decision was based on irrelevant factors and as alleged that the conditions imposed disproportionate to the transgression committed.

Legal framework on detention, forfeiture and seizure

[130] In relation to detention, forfeiture and seizure of the La Ferrari the following regulations and sections of the CEA are in this matter of significant importance.

> [130.1] Section 88 (1) (a) that authorises an officer, magistrate or member of the police force to 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. The goods, inter alia, may be so detained where they are found or shall be removed to and stored at a place of security determined by such officer, magistrate or member of the police force, at the cost, risk and expense of the owner, importer, exporter, manufacturer or the person in whose possession or on whose premises they are found, as the case may be.

[131] Goods are in terms of the CEA's s 87 liable for forfeiture if irregularly dealt with. According to the section, goods would have been irregularly dealt with if exported, imported, manufactured, warehoused or removed or otherwise dealt with contrary to the provisions of the CEA or in respect of which any offence under this Act has been committed (including the containers of any such goods) or any plant used contrary to the provisions of this Act in the manufacturing of any goods. They shall be liable to forfeiture wheresover, and in possession of whosoever found and provided that forfeiture will not affect liability to any other penalty or punishment which has been incurred under this Act or any other law, or liability for any unpaid duty or charge in respect of such goods**.**

[132] On detention under s 88 (1) (a) there must have been a reasonable suspicion that the goods might on later examination be found to have been dealt with irregularly hence subject to forfeiture under s 87, upon which it becomes the obligation of the person on whom the goods were found or its owner, importer or exporter or manufacturer on enquiry to give a satisfactorily explanation or to produce documentation that will satisfactorily prove the contrary; See *CSARS v Saleem (21/2007) [2008] ZASCA 19 (27 March 2008)* and also s 102 (1) (4) and (5). In relation to goods bought into the country without declaring them, the suspicion on reasonable grounds required of an officer at the time of seizure must therefore be that:

(a) the goods found are imported goods;

(b) they have been imported without compliance with the provisions of the Act;

(c) they are liable to forfeiture.

[133] In terms of Section 88 (1) (d) any goods that are liable for forfeiture under CEA may be seized by the Commissioner.

[134] Section 102 (4) provides that;

> " if in any prosecution under this Act or in any dispute in which the state, the Minister or Commissioner or any Officer is a party, the question arises whether the proper duty has been paid, whether any goods or plant have been lawfully used or imported, exported, manufactured, removed or otherwise dealt with or in, or any books, accounts, documents, forms or invoices required by the rule to be completed and kept, exist or have been duly completed and kept or has been furnished to any officer, it shall be presumed that such duty has not been paid or that such goods or plant has not been lawfully used, imported, exported or manufactured, removed or otherwise dealt with or in or that such books, accounts, documents, forms or invoices do not exist or have not been duly completed and kept or have not been so furnished, as the case may be, unless the contrary is proved.

[135] On a scenario under s 102 (4) the obligation is placed on any person selling or dealing or found in possession of imported goods on request by an officer to produce proof that such

goods lawfully used, imported or exported or removed or dealt with as to the person from whom the goods were obtained or if he is the importer or owner of the goods the place where the duty due thereof was paid, the date of payment and the particulars of the entry for home consumption, etc.

Analysis

[136] In *casu*, the La Ferrari was found in the Motorvia Transporter being transported with the intention to import it back into the country without any inward clearance documents or import entry after its purported legitimate export out of the country. The declaration on the La Ferrari documentation indicated that it was meant for export to the Democratic Republic of Congo (Congo) via the Zimbabwean Beit Bridge border post, and released from its bonded warehouse or detention for that purpose. The attempt to re-import (re-enter) the La Ferrari back to the Republic without the necessary documentation and contrary to the purpose for which it was indicated to have been released on its export entry (diverting it from the intended destination) was sufficient for the Custom officials to raise a suspicion or believe that the La Ferrari was about to be illegally imported and probably to have been illegally released from the bonded warehouse, where it was *de facto* detained and therefore subject to detention and possibly liable for forfeiture and seizure: see s 18 (13).

[137] The custom officials detained the La Ferrari and the Transporter for the purpose of investigation when they could not get satisfactory answers in their enquiry from the Transporter on the situation of the La Ferrari which according to the documentation was to be exported to the DRC. However, it was confirmed that the Transporter was indeed booked to transport the La Ferrari from Johannesburg to Beit Bridge and from where it was to transport the La Ferrari to Cape Town that being sufficient grounds to raise suspicion or believe that on further examination the La Ferrari might be found to have been dealt with irregularly and thereby liable for forfeiture: see s 18 (13) (a) (i) and (iii), upon which seizure is sanctioned.

[138] As already indicated, the detention at the state warehouse for further investigation being justified, an opportunity was granted to the importer or owner or possessor at the time to provide or furnish the Respondent's officials with the necessary documentation and answers to the apparent irregular handling of the La Ferrari. The Customs Investigation's Tactical Interventions Unit (TIU) issued the owner of the Transporter and exporter (the Applicants'

agent) to whom the La Ferrari was entrusted on its removal from the bonded warehouse and who was in charge of its transportation and clearance at the border post for exportation, with a provisional detention letter informing them that the Transporter and La Ferrari were in terms of s 88 (1) (a), read with s 87 (2) (a) of the CEA detained at the Beit Bridge Border gate by the Respondent with the intention to investigate if the imported vehicle has been handled contrary to the provisions of the CEA. If so, establish if it was liable for forfeiture in terms of s 87(2) (a), with a warning that it was giving consideration to the conversion from a state of detention to a state of seizure as per provisions of s 88 (1) (c) of the Act. The TIU called upon the recipients of the Notices to submit written representation, with supporting documentation as to cause why the detained vehicles should not be seized and to provide certain specific explanation relating to the La Ferrari's transportation dates and time. The officials followed the legitimate and correct process in fulfilling their enforcement duties by affording the recipients an opportunity to be heard; see *Saleem*, albeit that the notices where thereafter withdrawn;

[139] It is trite that once the La Ferrari was detained after its apparent suspicious and irregular handling, the true facts and circumstances of its removal from the bonded warehouse and the sham attempt to divert it from the stated destination and re-import it back into -the Republic) had to be established and considered in order to determine if forfeiture and seizure as provided for in the provisions of s 88 (1) (c) of the CEA was warranted. Also to take into consideration the provisions of s 102 (4) and (5), that were incorporated into the Notices that were subsequently sent to the Applicants calling upon them to show good cause why forfeiture and seizure was not justifiable.

Removal from warehouse (Due entry and Payment of Duty)

[140] According to Rule 19.05 the licensee of a Customs and Excises warehouse is required to keep at the warehouse in a safe place accessible to the Controller, a record in a form approved by the Controller of all receipts into or removals from the warehouse of all goods not exempted from entry in terms of s 20 (3) with such particulars as it will make it possible for all such receipts and deliveries or removals to be readily identified with the goods warehoused and with clear references to the relevant bills of entry passed in connection therewith."

[141] In terms of s 19 (9) (a) of the CEA, except with the permission of the Commissioner, which shall only be granted in circumstances which he on good cause shown considers to be reasonable and subject to such conditions as he may impose in each case, no imported goods entered for storage or excisable or fuel levy goods manufactured in a customs and excise warehouse, excluding spirits or wine in the process of maturation or maceration, shall be retained in any customs and excise warehouse for a period of more than two years from the time the imported goods were first entered for storage.

[142] Consequently, goods after landing, are permitted to be removed to a bonded warehouse where they may remain under the control and supervision of Customs authority for the stipulated time period without payment of duty or incurring any interest liability, which duty is then collected and paid at the time of clearance from the warehouse.

[143] In terms of s 19 (6) the licensee of a customs and excise warehouse shall, subject to the provisions of subsection (7), be liable for the duty on all goods stored or manufactured in such warehouse from the time of receipt into such warehouse of such goods or the time of manufacture in such warehouse of such goods, as the case may be in addition to any liability for duty incurred by any person under any other provision of this Act. Subsection 7 provides subject to the provisions of subsection (8), for cessation of any liability for duty in terms of subsection (6) on proof by the licensee that the goods in question have been duly entered in terms of section 20 (4) and have been delivered or exported in terms of such entry.

[144] It is important to note that goods that are stored in bond or warehouse remain under the control and supervision of the Customs authority. Upon entry of such goods into a bonded warehouse, the importer and warehouse proprietor incur liability under a bond. Even if they are not owned by Customs, the goods held in there remain strictly under the control of Customs. Hence the fact that officials from the Respondent monitored the storage in bond of the La Ferrari at the Scuderia warehouse (a complaint of the Applicants) should not impute any impropriety but confirmation of the Respondent fulfilling its obligations.

[145] Section 20 (4) prohibits the taking or delivery from the warehouse except in accordance with the rules upon due entry for removal for any one of the three purposes. Firstly, for home consumption, this must immediately be followed by the payment of any duty thereon. Secondly, for the purposes of re-warehousing in another custom and excises warehouse or

removal in bond as provided for in s 18 of the CEA, which regulates the transport of goods to another place within or outside the common customs area. Thirdly, for purposes of exporting goods from the Custom and Excises warehouse. A release without a bill of entry therefore prohibited.

[146] At the same time s 20 (4) bis prohibits the diversion, without the written permission of the Controller, of any goods entered for removal from or delivery to a customs and excise warehouse, except goods entered for payment of the duty due thereon, to a destination other than the destination declared on entry of such goods or deliver or cause such goods to be delivered in the Republic except in accordance with the provisions of this Act.

[147] The Commissioner may otherwise in terms of s 38 (4) (a) by rule permit any excisable goods or fuel levy goods and any class or kind of imported goods, which he may specify by rule, to be removed from a customs and excise warehouse on the issuing by the owner of such goods of a prescribed certificate or an invoice or other document prescribed or approved by the Commissioner, and the payment of duty on such goods at a time and in a manner specified by rule, and such certificate, invoice or other document, shall for the purposes of section 20 (4), and subject to the provisions of section 39 (2A), be deemed to be a due entry from the time of removal of those goods from the customs and excise warehouse.

[148] In addition to that, it is stipulated in the provision of Rule 20.10 on Warehoused Goods Removal Regulations, that goods can only be removed from the bonded warehouse on payment of the duties and Vat and any penalties applicable, if removal is after the expiry of the two-year period. However, within the warehousing period, the goods may be exported without the payment of duty. If withdrawn for consumption, duty needs to be paid at a rate applicable to goods in the condition the cargo is in at the time of removal.

[149] In that instance, no goods may be removed from the bonded warehouse without proper clearance (without a bill of entry) and payment of duties and vat having taken place, where applicable; s 19 (6). In addition, s 18A (4) prohibits goods to be exported, until they have been entered for export; and are to be exported by a licensed remover in bond as contemplated in section 64D. This then answers to the Applicants' contention that alludes to there being no law that requires the licensee to have the bill of entry at the time of release of the goods from the bonded warehouse.

[150] At the time of the removal of the La Ferrari, its permitted period of retention at the bonded warehouse had expired and the extension granted was also about to expire. Whilst it remained in detention, the duty payable was due for payment. The Respondent had prior thereto brought it to the attention of Scuderia and 1st Applicant through its clearing agent that the owner or consignee will have to make a choice as to how it is to deal with the La Ferrari and called upon the payment of the duties. The Applicants' Scuderia then indicated its intention to export the La Ferrari. A provisional penalty payment in the amount of R100 000.00 was as a result issued by the Respondent, due to the La Ferrari being under detention, a status quo confirmed in the letter dated 9 February 2022. The provisional payment is for duty and vat applicable to goods exported by road and refundable when export is proved. The Respondent put a time frame of 14 days for a refund or liquidation. The La Ferrari was never exported

[151] It is common cause between the parties as admitted by the Applicants that subsequent to the provisional penal payment, Scuderia facilitated the La Ferrari's release from the bonded warehouse and transportation by Motorvia without passing the necessary DP entry, therefore without indicating the purpose for the removal/release of the La Ferrari, also without payment of the Duty and Vat due, contrary to the conditions stipulated in s 20 (4), and Regulations and s 18, thus rendering the La Ferrari liable for forfeiture and probable seizure unless good cause shown by the Applicants. than the destination declared on entry for removal in bond

[152] In respect of the Duty and Vat due, the Applicants, in explanation alleged that due to having on 17 February 2017 paid over to F1 the amounts that were indicated by Stratton to be the duty payable, the Applicants believed at the time of release of the La Ferrari that F1 or Stratton had paid the money over to SARS. However, there was no confirmation or proof of such payment tendered by Stratton or F1. Stratton had, as they allege, apparently told them that the money was to be paid to F1 so that F1 can show or actually satisfy SARS that the funds are in the F1 account. It is therefore fanciful of the Applicants to allege that Scuderia believed the money to have been already paid to SARS at the time of removal.

[153] The Respondent pointed out the fact that the invoices upon which the amount was paid by the Applicant was issued by F1, contrary to allegation by 1st Applicant that the invoices were those of SARS confirming a deal clinched with SARS on the payment of the duties. A valid point by the Respondent as, on the provisional penalty payment agreed upon to be payable pending proof of export, the Respondent noted the amount in its communication dated 9

February 2017 and confirmed it to be based on Scuderia's indication of its wish to export the La Ferrari. The duty invoices that are alleged were subsequently presented by F1 are not from SARS nor was there proof proffered of a written communication regarding the amounts directed either to F1 or to any of the Applicants. It therefore cannot be said that the 1st Applicant or any of the Applicants had a bona fide belief that the invoices had anything to do with SARS or that the duty due for the La Ferrari was already paid on Scuderia's release of the La Ferrari. The 1st Applicant in contradiction had actually stated that he intended an assessment on home consumption to take place in Cape Town. The evidence presented to the Respondent's officials did not vindicate Scuderia's conduct.

[154] Furthermore, the money was only paid to F1 on Friday 17 February 2017, as indicated by the Applicants, with Stratton promising that as soon as he had cleared the vehicles he will furnish the Applicants with the documents. There is neither an allegation that Scuderia or any of the Applicants was furnished with the documents, nor given a verbal assurance that payment had been made at the time when Scuderia released the La Ferrari to Motorvia on that following Monday the 20th February 2022. The Respondent officials were therefore correct not to put any weight on any of the excuses proffered by the Applicants when seizure and or forfeiture was being considered. The Respondent's officials conduct correctly found to be faultless.

[155] It is noted that the instance the TIU took over, the entry of the La Ferrari in the bonded warehouse was kept under its radar and it had investigated the La Ferrari issues. The TIU as a result, had information regarding the previous attempts already made to try to get CSARS to agree to a lesser dispensation. The La Ferrari was already placed under detention on condition that either a DP entry is passed or it is exported. At the time only the amount that was paid in lieu of an undertaking to export the La Ferrari during the extended grace period of its storage at the bonded warehouse endured. The release under those circumstances done without a DP entry for removal indicating declared destination or proper clearance or payment of the statutory prescribed duties and vat in contravention of the CEA, extents to irregular dealing with the La Ferrari.

[156] Although the Applicants conceded to being guilty of both transgressions they only reluctantly agreed to being lightly penalised for failure to pass a DP entry. They argued that failure to pay duties should be neutralised by the unsubstantiated allegations of having been duped into believing that payment has been made. In *Vincent and Pullar Ltd v Commissioner*

for Customs and Excise 1956 (1) SA 51(N) and (at 587 in fine) as expressly referred and approved by the court in Tiffany that :

> '... [T]he only ground upon which the Court could declare a seizure as invalid, would be if it were made illegally. The Court has no discretion in regard to the question as to whether or not the breach of the Customs regulations was one which was so serious as to justify a seizure and forfeiture. The discretion on those questions is clearly vested in the Commissioner under sec. 143'.

[157] The Applicants also attempted to legitimise Scuderia's conduct by alleging that even though the La Ferrari was believed to have been released from bond at the warehouse without proper clearance, an export bill of entry was passed on 16 February 2017 which was valid for the purpose of such release upon which no duty or vat was payable. However, the Applicants had already denied being aware or consenting to the export bill of entry or to have released the La Ferrari for the purpose of being exported (even though that is contradicted by the letter of 9 February 2022 which was never challenged, and the R100 000.00 paid in lieu of a possible delayed export). According to their other version the La Ferrari was released by Scuderia for home consumption believing at the time that the duty and Vat due were settled, whilst incongruously also alleging that final assessment was to be done in Cape Town. Both statements inconsistent with the issuing of an export entry. The Applicants therefore, on one hand distance themselves from the export bill of entry to escape liability and on the other rely on it to legitimise Scuderia's negligent conduct and contravention of the CEA or to plead for lesser accountability. With these convoluted facts the attempt was correctly rejected.

[158] In addition, the Applicants' response to the existence of an export bill of entry is also inconsistent with Scuderia's conduct. The Applicants admit that by 14 February 2017 Scuderia was making arrangement with Motorvia Transporter for transportation of the La Ferrari to Cape Town via Beit Bridge, which is before the export entry was issued on 16 February 2017 and Applicants supposedly advised of the alleged deal and instruction by SARS. It is not comprehensible as to how Scuderia would (without the information from Stratton) have started making arrangement to book Motorvia to transport the La Ferrari to Beit Bridge, prior to hearing of the alleged deal and instructions by SARS to get an export and an import stamp at Beit Bridge, whilst also not being aware of the export entry. There is no clarification of how Scuderia envisaged the La Ferrari's clearance exiting the South African Customs and re-entering for the purpose of being transported to Cape Town without the relevant entries.

Scuderia and the 3rd Applicant are indeed not novices in handling imports and exports and would clearly have been aware of the intended illegal and irregular dealing with the La Ferrari at Beit Bridge. Scuderia confirms to have arranged for the La Ferrari's transportation to Beit Bridge with no intention to have an export entry issued thus advertently facilitating the irregular handling of the La Ferrari.

[159] Taking into account Scuderia's mentioned conduct the Respondent was as a result correct to insinuate that the Applicants conduct cannot be held to have been oblivious to what happened or was going to happen at the Beit Bridge border. Instead it is apparent that the Applicants were prepared to go along with Stratton's unconventional plan which was to facilitate the circumvention of paying the normal duties payable for home consumption with a re- export entry of the La Ferrari.

Mode of transport

[160] Furthermore, the Applicants have tried to circumvent accountability for Scuderia's use of Motorvia Transporter as a mode of removal and transportation of the La Ferrari from the bonded warehouse, which is obviously prohibited by the CEA. In terms of s 18 (1) (f) any goods entered for removal in bond may, except if exempted by rule, when carried by road, only be transported by a licensed remover of goods in bond contemplated in section 64D, whether or not the goods are wholly or partly transported by road. In terms of s 18A (4) Goods shall not be exported in terms of the section until they have been entered for export and unless removed for export by a licensed remover in bond as contemplated in section 64D that reads:

> "no person, except if exempted 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)."

[161] Scuderia, in trying to exonerate the Applicants from being liable for failure to adher to the law as a consignee and owner, again pleads ignorance alleging to have not known if Motorvia was a regulated licensed remover. However, that is inexcusable of Scuderia, as importation and exportation of vehicles is part of its business, especially Ferraris. Moreover, as an owner of a bonded warehouse, Scuderia should and would expectedly be familiar,

knowledgeable and have the necessary experience in relation to the application of the CEA and the concomitant Rules, for handling, warehousing, removal and transportation of imports and exports. The Applicants did not indicate the basis of Scuderia's alleged ignorance therefore the allegation specious and does not mitigate the liability resultant from the transgression.

[162] The Applicants further contradict themselves by alleging that they thought the Respondent approved the use of Motorvia as the remover and transporter without indicating what formulated that thought. There are no facts alleged that could have created such an impression. There is therefore no good cause shown for the Applicants to can be excused from liability for contravention of the CEA in that regard.

The La Ferrari at the Beit Bridge Border

[163] In relation to the transportation of the La Ferrari to Beit bridge, the Applicants alleged that Stratton told them on 16 February 2022 that SARS appreciated that if they could not offer a lower rate, the vehicles had to be re-exported as per Custom regulations. On 17 February 2017 Stratton told them that SARS requested a new re-entry stamp (import) so that the vehicle would exit and re-enter South Africa at Beit Bridge with an up to date stamp, indicating that this was achievable at the Beit Bridge border. Considering that they allege to have not been aware of the export entry, Scuderia's apparent failure to indicate the purpose for releasing the La Ferrari from bond, the Applicants lack of explanation to the Respondent's officials how they envisioned that happening or if as owner, consignee and clearing agent they did enquire from Stratton how that was to be done indicates their cohesion with Stratton. The 2nd and 3rd Respondent were involved and experienced in the business thus aware of their accountability in the handling of the La Ferrari, and would not have let the vehicle be transported to the border gate without knowing how it was going to be dealt with there, especially when the circumstances were obviously suspect. Taking into consideration Scuderia's further strange arrangement for the transportation of the La Ferrari to Beit Bridge whilst destined for Cape Town, and ignoring the questionable circumstances to which the vehicle was being released, it is evident that the Applicants were on a balance of probabilities aware of Stratton's dubious intentions and in cohorts. Nevertheless, not being aware did not exonerate the La Ferrari from forfeiture.

[164] Besides, according to the Applicants, they opted for home consumption and by the 17th February 2022 paid SARS the duties owed. These allegations render the Beit Bridge rendition unnecessary and the purpose thereof become even more dubious. It exposes the incoherency between what the Applicants allege they intended to do and what they actually did with the La Ferrari. In this instance in order to escape liability for the diversion of the La Ferrari at the Beit Bridge border and avoid the strict conditions being imposed if mitigation of seizure contemplated, they also allege that assessment was going to be done in Cape Town, despite the earlier allegation that duties were already paid. As a result, the Applicants allegation of naivety, so as to be excused from accountability, even though not interrogated by the Officials, was correctly questioned by the Respondent taking into consideration the inconsistencies and incoherencies in the Applicants conduct and allegations.

[165] Moreover, the Applicants had by 9 February 2017 already conveyed their intention to export the detained La Ferrari (confirmed by SARS in a letter specifying a part penalty amount to be paid in the meantime). Scuderia then on 14 February 2017 commenced to arrange for the removal and transportation of the La Ferrari by the unlicensed Motorvia to Beit Bridge, to be returned to Cape Town by turning around after clearance for export entry, in contravention of s 18 (13) of the CEA. The issuing of the export entry could therefore not have been a surprise to the Applicants. They actually allege that they expected that the export entry bill would have been issued however with a re-import bill of laden and surprised that it was not. The 2nd and 3rd Applicant are indeed not as naïve as they would want the court and the Respondent to believe they were. It is rather convenient for them to take a fall for failure to issue the bill of entry declaring destination so as to keep its option of commitment to anyone of them open. The failure was purposively so as not to pay the duty amount in accordance with the applicable tariff, prior the removal. At the same time, they did not want to commit to the dubious and senseless round tripping which they allege the purpose of which was to ultimately get the assessment to be done in Cape Town. Scuderia or the Applicants cannot as a result claim to have been ignorant (notwithstanding the Committe's finding) when it in fact initiated the irregular process of getting the La Ferrari to Beit Bridge for a simulated export and import.

[166] The alleged assessment for home consumption was supposed to have been done prior the release of the La Ferrari from the bonded warehouse, a fact the Applicants are aware of, hence their initial allegations to have paid the relevant duties prior removal. The La Ferrari did not have to be exported and re-imported unless for the purpose of tempering with the payment

of duties. Scuderia started to arrange for the transportation of the La Ferrari to Beit Bridge (the instruction to turn around was confirmed by the Transporter) prior to being informed on 17 February 2017 of the Beit Bridge plan allegedly hatched by SARS and also allegedly without knowledge of the export entry issued on 16 February 2017. In view of failure to give a plausible explanation for such coincidences or the reasons for having done so, the Respondent's officials were correct in not finding the alleged naivety to be a good cause shown for not finding the La Ferrari liable for seizure. These facts actually confirm that Scuderia on a balance of probability not only knew or suspected that fraudulent or unconventional means were to be used as pointed out by the Respondent but aided such use.

[167] In an attempt to further exonerate themselves from accountability for what happened at Beit Bridge, the Applicants allege in their Affidavit that they had expected that the export bill of entry, would be processed simultaneously with a re-import bill of lading to South Africa, therefore with no need for the La Ferreira to physically leave South Africa. Such alleged expectation makes senseless Scuderia's booking of Motorvia to transport the La Ferrari to Beit Bridge, and Applicants' denial of being aware of the export bill of entry baffling. They could not have been influenced by something they were not aware of and for which they deny accountability. The reason proffered is as it is with Applicants' other excuses, indefensible.

Seizure of the La Ferrari

[168] The finding therefore of the Respondent's officials as confirmed by the Committee that the La Ferrari was irregularly dealt with in contravention of the Act under circumstances where seizure is sanctioned by the Act, specifically when the provisions of s 18 (13), 18 (1) (a) (i) and (iii), 18A (9) and 20 (4) and 64D are considered, is unassailable. The Respondent was obliged to exercise its discretion as per prescripts of the law and in the instance justified to find the La Ferrari to be subject to seizure considering the facts and circumstances of this matter. The decision was fair, reasonable and rational and in line with the policy objectives, that is to deter and discourage avoidance of compliance with the CEA and make sure that the state is not deprived/ hindered from collecting the applicable duties and taxes.

[169] The 1st Applicant as of the time of acquiring the La Ferrari, had no intention to pay full duties payable for importing the La Ferrari which led him into employing F1's Stratton as his agent, who, together with the aid of the Applicants using strategies that contravened the provisions of the CEA endeavoured to avoid due payment of the duty and the vat payable in terms of the applicable tariff. The La Ferrari was in the process dealt with irregularly, in contravention of the CEA, rendering it liable to forfeiture and seizure.

[170] The Applicants argument that after detention, the investigation revealed that the removal of the vehicle from the Republic was not authorised by them is of no assistance on the seizure decision. It is the irregular or mishandling of the La Ferrari that is crucial to the determination of whether it is to be subject or liable to forfeiture or seizure, not the identity of the transgressor? The relevant facts that were considered were, the release of the La Ferrari from the bonded warehouse without the required release documents or DP entry and payment of duties upon which liability had not ceased in terms of s 19(7) of the CEA, the mode of removal and transportation of the La Ferrari that was in contravention of the CEA, plus the Transporter's confirmation that he was instructed to turn around at Beit Bridge or without an indication of how the circuitous entries of the La Ferrari were going to be achieved without an export or import bill of entry issued and the ultimate diversion from its seemingly only legitimate declared destination to the DRC of which the return thereof resulted in the prohibited diversion. It is within that context the discretion whether or not La Ferrari liable to forfeiture and thereby seizure had to be exercised.

[171] As it was confirmed in the *Secretary for Customs and Excise and Another v Tiffany's Jewellers Pty (Ltd)* 1975(3) SA 578(A) at 587G-*in fine:*

> "it is significant that such lack of concern or knowledge does not apply to the goods. These remain liable to forfeiture. The wording in sec. 87(1) indicates that the goods become liable to forfeiture, wherever they may be, if the prohibited or irregular acts have been committed, no matter who commits them, whereas in the other sections it is the act of the individual who commits the offence in relation to particular goods which causes those goods to be liable to forfeiture. This means that under sec. 87(1) ... it matters not whether the owner exported or attempted to export the goods in contravention of the law. No doubt, if circumstances exist which show that the true

> owner is innocent, eg where a thief seeks to export stolen goods, the Secretary [now the Commissioner] will exercise his discretion in terms of sec. 93. Hence, for the purposes of this case, even assuming Tiffany's [the owner of the goods, which comprised diamonds] was in no way party to the wrongful conduct of Favarolo [who committed an offence under the Act in respect of the diamonds], the diamonds were liable to forfeiture.'

[172] Consequently, on the mentioned facts, considered together with the import and purported export, back into South Africa without due clearance at Beit Bridge, having placed it under the control of Stratton allegedly without knowing Stratton's ultimate intention with the vehicle, hence the diversion, the La Ferrari was, as in the Committee's view, indeed dealt with contrary to the provisions of the CEA and became liable to forfeiture in terms of s 87 (1) of the CEA. Furthermore, the circumstances of this case justifies the Respondent's view that the seizure decision was taken judiciously based on reasonable grounds and under the circumstances valid in terms s 88 (1) of the CEA. The action of the owner will only determine if the seizure should be mitigated and the conditions to be imposed. The apparent irregular or mishandling of the La Ferrari and its liability to forfeiture and seizure cannot be denied.

[173] In the *Tiffany's Jewellers* case this Court (at 587B-C) quoted the following passage in *Vincent and Pullar Ltd v Commissioner for Customs and Excise* 1956 (1) SA 51(N) and (at 587 in fine) expressly approved it:

> '... [T]he only ground upon which the Court could declare a seizure as invalid, would be if it were made illegally. The Court has no discretion in regard to the question as to whether or not the breach of the Customs regulations was one which was so serious as to justify a seizure and forfeiture. The discretion on those questions is clearly vested in the Commissioner under sec. 143'.

Mitigation of seizure

[174] The Commissioner is vested with the discretion of invoking the provisions of s 93, by directing on a good cause shown by the owner thereof, that any goods detained or seized or forfeited under CEA be delivered to such owner subject to the payment of any payable duties that may be payable in respect thereof, of any charges that may have been incurred in connection with the detention or seizure or forfeiture thereof; and such other conditions as the Commissioner may determine including conditions providing for payment of an amount not

exceeding the value for duty purposes of such goods plus any unpaid duty thereon. The Commissioner being vested with a further discretion to exercise on good cause shown, mitigate or remit any penalty incurred under the CEA on such conditions as the Commissioner may determine.

[175] The La Ferrari was, therefore, on consideration of the facts that prevailed to establish if good cause shown, as required in terms of s 93 (1) of the CEA, released to the legitimate owner. On representation made by Scuderia that it is the owner, and confirmed by the 1st Applicant, the Respondent found Scuderia to be the *de facto* owner and that good cause shown for the La Ferrari to be released from **detention** to Scuderia on condition all the liabilities set out in s 93, including duties payable are sorted out. The Respondent was also of the view that, amongst what has been already stated above, the conditions imposed by the case officer in terms of s 93, for the release of the La Ferrari to Scuderia that include the payment of the amount of R6 663 299.00 which the Applicants are claiming to be unjustifiable, unreasonable, irrational and disproportionate to the transgression, acceptable.

Recovery of Duty on Bonded Goods

[176] Customs Officers may demand from the owner of bonded goods the full amount of duty chargeable on such goods, along with all penalties, rent, interest and other charges payable in the following cases:

(a) Where any warehoused goods are removed in contravention of the CEA;

(b) Where such goods have not been removed from a warehouse at the expiry of the period permitted under section 61;

(c) Where any warehoused goods have been taken under s 64 as samples without payment of duty; and

(d) Where any bonded goods have not been cleared for home consumption or exportation or are not duly accounted for to the satisfaction of the Customs.

In case the owner fails to pay the amount as demanded above, Customs may detain and sell, after notice to the owner, such sufficient portion of the bonded goods as may be selected.

[177] It is the allegation of the Respondent which is indeed so, that the La Ferrari was removed from the warehouse in contravention of the CEA and was neither cleared for home consumption or exportation, even though there is a controversy around the export entry, the fact that the La Ferrari could not be duly accounted for to the satisfaction of the Customs officials being also a major issue, the full amount of duty chargeable on such goods, along with all penalties, rent, interest and other charges were thereby payable. Furthermore, the CEA on the obligation to pay the amount demanded by the CSARS provides on s 77G that: -

> "Notwithstanding anything to the contrary contained in this Act, the obligation to pay to the Commissioner and right of the Commissioner to receive and recover any amount demanded in terms of any provision of this Act, shall not, unless the Commissioner so directs, be suspended pending finalisation of any procedure contemplated in this Chapter or pending a decision by court. [s 77G inserted by s. 147 (1) of Act No. 45 of 2003 and substituted by s. 16 of Act No. 36 of 2002]."

[178] The further argument by the Applicants that in relation to the mitigation of seizure, the objects of the CEA would have been achieved by the imposition of a penalty for Scuderia's removal of the La Ferrari without being in possession of duty entry, which they argue is the only transgression committed albeit mitigated by the *bona fide* belief that the duty and Vat had already been paid, has no merit. I have already indicated the lack of bona fides in alleging the existence of such a belief. The Applicants were well aware that no assessment for home consumption had taken place and therefore no payment could be made. The allegations therefore far-fetched. The transgression for the undocumented release is actually aggravated by, inter alia, the fact that duty and Vat had also not been paid and the La Ferrari could not be duly accounted for. Furthermore, s 18 (4) provides that, if

(a) liability has not ceased as contemplated in subsection (3) (a); or

(b) the goods have been diverted or deemed to have been diverted as contemplated in subsection (13), such person shall, except if payment has been made as contemplated in subsection (3) (b) (iv), upon demand pay-

(i) the duty and value-added tax due in terms of the Value-Added Tax Act, 1991 (Act No. 89 of 1991), as if the goods were entered for home consumption on the date of entry for removal in bond;

(ii) any amount that may be due in terms of section 88 (2); and

(iii) any interest due in terms of section 105: Provided that such payment shall not indemnify a person against any fine or penalty provided for in this Act.

[179] The Applicants contest that notwithstanding the payment made as aforementioned they were still liable for the penalty in mitigation of seizure assessed at R6 930 299.00 which is 50% of the value of the La Ferrari for duty purposes being the amount imposed by the Respondent for the return of the vehicle. The Applicants allege that the decision was unreasonable and contrary to the constitutional obligations that also requires the Respondent and his officials to exercise his discretion judicially with due consideration of all relevant facts, so as to be fair**,** reasonable and rational. In addition, they further challenge the CSARS decision alleging that it penalises the innocent victim (the de facto owner of the La Ferrari). The vehicle was detained and once the duty and vat had been paid there is no prejudice or potential prejudice to SARS. They argued that imposing the mitigation amount is not directed at the transgressors. The taxpayer is being punished in circumstances where they clearly had no intention of contravening the provisions of the CEA and have already suffered substantial damages.

[180] After finding that there was good cause shown for mitigating the seizure of the La Ferrari, the Respondent decided to return the La Ferrari, instead of depriving the owner the property through forfeiture and to impose a penalty since the Applicants were very much implicated in conduct contravening the provisions of the CEA that resulted in the irregular handling of the La Ferrari. The Applicants had acted recklessly by entrusting the handling of the duty clearance process to Stratton without questioning or insisting on accountability. Scuderia (whom both Scuderia and the 1st Applicant had confirmed was the owner) was responsible for the release of the La Ferrari from the bonded warehouse without the required DP entry and payment of the duties, its removal and transportation to Beit Bridge on an unlicensed remover, and the reckless handover to Stratton which conduct resulted in the La Ferrari not being able to be accounted for and irregularly handled. The Applicant's allegation

that the owner was not the transgressor and therefore wrongly punished by the imposition of the penalty is incorrect. The decision to mitigate the seizure was appropriate and the imposition of the penalty in line with the purpose of the statutory provisions of the CEA.

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[181] They argued that on the basis that justification for the seizure decision exist (which is denied), it is evident that SARS was correctly swayed by the circumstances of the matter to mitigate seizure. However, the conditions imposed in the circumstances are not reconcilable with a judicial exercise of a discretion, alleging it to be very harsh, unreasonable and irrational in the extreme and called for the condition to be withdrawn. They complain on the penalty amount, that the high value of the La Ferrari does not increase or decrease or change the actual risk of prejudice or the factual circumstances yet it is used as the only basis to claim a substantial amount to mitigate seizure. The 1st Applicant's special financial circumstances are also cited to have the basis upon which the amount has been decided, arguing that considered objectively 'punishment does not fit the crime. Further, that only reasonable conditions of mitigation requiring payment of reasonable state warehouse rent and penalties in respect of removal and overstay should be imposed.

[182] It is not correct that only the value of the La Ferrari was used as the basis for determining the penalty amount. Other factors were also considered, specifically the proportionality of the amount to the transgressions attributable to the Applicants, the correlate subject of seizure that was being mitigated and the provisions of the CEA, that allows a condition for payment of an amount not exceeding the value for duty purposes of such goods plus any unpaid duty thereon. Accordingly, the decision to impose the penalty of an amount that is 50% of the value of the duty payable on the La Ferrari more sound and sensible than subjecting the La Ferrari to forfeiture. The penalty was therefore reasonable. I therefore find the conditions imposed reconcilable with the judicious exercise of a discretion.

[183] The amount is also very much reconcilable with the circumstances of this case and in line with the purpose of the applicable Act, which is chiefly to cab non-compliance. Scuderia was found to have failed to keep proper records as required in terms of rule 19.05 of the CEA in relation to the storage and removal of the La Ferrari from its bonded warehouse. Also that in failing to ensure that a licensed remover removed the La Ferrari from its bonded warehouse, Scuderia failed to take due care as stipulated in Rule 18.15 (b) (i) (aa) of the CEA. The purpose for which the La Ferrari was being released was not declared and the duties owed not paid. For

that reason, the subsequent allegation by Scuderia that it was released for home consumption contentious. Lastly, the deceptive handling of the La Ferrari at the Beit Bridge Border gate was in apparent contravention of s 18 (13) CEA and the other related legislation applicable. The Respondent, had to see to it that the provisions of the Act are complied with, and well within its rights to impose an administrative penalty on Scuderia for the failure to adhere to this requirement which is in line with its Constitutional obligation. To discourage and cab the evasion of payment of duties, taxes and interest in full. That is the basis upon which the decision was taken.

[184] The Applicants are also claiming back the provisional payment in the amount of R100 000.000 that it made to the Respondent. The condition of the payment of the PP in question was that it was to be liquidated in the client's favour on PP production of export documentation whereupon liability would have ceased, which the Applicants failed to do, therefore there is no basis to reclaim the amount. Section 18A reads: on exportation of goods from customs and excise warehouse.-

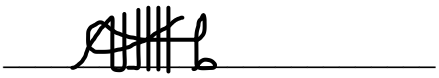
> (1) Notwithstanding any liability for duty incurred thereby by any person in terms of any other provision of this Act, any person who exports any goods from a customs and excise warehouse to any place outside the common customs area shall, subject to the provisions of subsection (2), be liable for the duty on all goods which he or she so exports.
>
> (2) (b) An exporter who is liable for duty as contemplated in subsection (1) must-
> (i) obtain valid proof that liability has ceased as specified in paragraph (a) (i) or (ii) within the period and in compliance with such requirements as may be prescribed by rule;
> (ii) keep such proof and other information and documents relating to such export as contemplated in section 101 and the rules made thereunder available for inspection by an officer; and
> (iii) submit such proof and other information and documents to the Commissioner at such time and in such form and manner as the Commissioner may require;

[185] The Applicants have failed to make a case for any of the relief sought in its Application, that is the reviewing and setting aside of the seizure decision and or the decision to mitigate the seizure together with the conditions imposed.

[186] Under the circumstances the following order is made:

1. The Application is dismissed.

2. The Applicants to pay the costs of the Respondent inclusive of costs of two Counsels.



N.V. Khumalo
Judge of the High Court
Gauteng Division, Pretoria

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