IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE:~~YES~~/**NO**
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/**NO**
(3) REVISED

DATE: **26 February 2024**

SIGNATURE:.....

Case No. 008272/22

In the matter between:

FINEQUEST ENTERPRISE (PTY) LIMITED **APPLICANT**

And

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

Coram: Millar J

Heard on: 23 January 2024

Delivered: 26 February 2024 -This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand - down is deemed to be 10H00 on 26 February 2024.

Summary: Application for review of a decision to seize a consignment of 10 million cigarettes in terms of the Customs and Excise Act 91 of 1964 and for return of goods seized – failure to make truthful declaration to customs official – when discovered alleged that goods were not imported or deemed imported as they were in transit from Botswana to Mozambique and therefore not subject to scrutiny by SARS – subsequent cancellation of order irrelevant – decision to seize the goods unimpeachable – application dismissed with costs.

ORDER

It is Ordered:

[1] The application is dismissed.

[2] The applicant is ordered to pay the defendant’s costs of suit.

JUDGMENT

MILLAR J

[1] This is an application in which the applicant (Finequest) seeks the review and setting aside of the decision of the respondent (SARS) taken in terms of the Customs and Excise Act[1] (the Act) to seize and declare forfeit goods which Finequest had sought to clear through customs while they were in transit to Mozambique. An order is also sought for the release of those goods for return to Botswana.

THE GOODS AND THEIR JOURNEY TO THE REPUBLIC

[2] The goods concerned are 1049 'Master Cases' of Remington Gold Blue cigarettes. A 'Master Case' typically contains 10 000 cigarettes packaged into packets (usually of 20) which in turn are packed in cartons. There are 500 packets in a 'Master Case'. In the present matter, the total number of cigarettes is 10,49 million.

[3] It is not in dispute that the cigarettes concerned had been manufactured in Zimbabwe. On 13 September 2021, these had been purchased from Cut Rag Processors (Pvt) Ltd in Harare for USD$ 73 500,00 and payment made for them into the nominated bank account in the United Kingdom. The goods were collected in Harare and transported by truck to the Plumtree border post on the border with Botswana some 550 km away. They cleared customs and were imported into Botswana through the Ramokgwebana border post.

[4] When they were imported into Botswana, Finequest was represented by a clearing agent – Kagra Enterprises (Pty) Ltd. According to the customs declaration, on leaving Zimbabwe and entering Botswana[2], besides the goods being uninsured, their "Country of Destination" and "Port of Destination" were

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1 91 of 1964.

2 The customs document to be completed upon entry or exit from Botswana is titled *"Single Administrative Document."* In the present case there are 2 – one for when the goods entered at Romakgwebana on 17 September 2021 and one for when the goods exited at Pioneer Gate on 25 November 2021.

reflected as Botswana and Gaborone respectively. The section for "Country of Transit" was left blank as was the section for the "Container Nos".

[5] Save for the documents demonstrating the exportation of the goods from Zimbabwe, none of the relevant customs documents issued at the Ramokgwebana border post and which would have demonstrated the basis upon which the goods were imported were placed before the court. The only document available for scrutiny was a weighbridge receipt issued for the truck conveying the goods when it was cleared through Ramokgwebana.

[6] The goods then continued their journey, another 500km to Gaborone where they were placed into a warehouse. A month and a half later Finequest sent a truck to Gaborone to collect the goods. The truck – KG 55 RD GP and its driver, Mr. Letlamma travelled from South Africa and arrived in Gaborone at the beginning of November 2021.

[7] On 10 November 2021, Mr. Letlamma collected the goods at the Gaborone Container Terminal. He was driving the truck he had entered Botswana with, and the container was on a trailer with registration number B 780 APB. According to the release note issued by the terminal, the goods were in container number TCNU9005647.

[8] None of the customs documents pertaining to the entry of the goods into Botswana refer to the container number[3] or to the placing of any customs seals on it. Indeed, the release order from the container terminal also reflects that there were no seals[4] on the container.

[9] The whereabouts of the container over the next 16 days until it arrived at the Pioneer Gate border post, some 80km from Gaborone is not explained on the papers before me. It is also not explained how, notwithstanding there having been no customs seals[5] on the container when it left Gaborone, that there were

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[3] The container was brought into Botswana from Zimbabwe on a trailer with registration number N 217 162 WB.

[4] In the space provided for the seal number, the word "empty" is filled in.

[5] On the Botswana customs document.

now 3 seals and as it subsequently turned out, only 1049 'Master Cases' in it when it arrived at the Pioneer Gate border post on 25 November 2021. The only indication as to how this may have occurred is the Burs "Reporting under Customs Seal" document which shows that the truck, trailer, and container were examined at Finequest's premises in Gaborone on 25 November 2021.

[10] The party to whom the goods were to be delivered in Mozambique, was Racheio Cash and Carry Lda (Racheio) in Maputo. A purchase order addressed to Finequest dated 21 November 2021 reflected that the payment of USD$ 99 750.00 would be made *"one hundred percent payment on delivery"* although no date or time within which delivery was to take place was specified.

[11] For completeness' sake, it bears mentioning that the distance from the border post at Pioneer Gate to Maputo is 814km. This means that the goods would have travelled in total 1 942km and cleared 6 different border posts and customs offices by the time they were to have reached Maputo. There is an alternative single direct road route from Harare to Maputo which only requires clearing 2 border posts – one to exit Zimbabwe and one to enter Maputo and is only 1 130km long.

[12] There was no explanation on the papers before me for this circuitous route that the goods travelled or for the fact that when they had been exported from Zimbabwe into Botswana, there had been no declaration that they were in transit, to Mozambique or for that matter anywhere else. The customs declarations at both the Plumtree border post as well as the Ramokgwebana border post both reflect the final destination of the goods as being Gabarone. Neither Zimbabwe nor Mozambique are part of the Southern African Customs Union[6] (SACU) and so goods entering any SACU country

[13] This together with the discrepancy with regards to whether or not the container had customs seals on it when it left Gabarone together with the missing 'Master Case' and no explanation for where the container had been for 16 days en route

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[6] South Africa, Namibia, Botswana, Lesotho and Eswatini.

to the border is the factual background that presented itself when Mr. Letlamma presented himself at the Pioneer Gate border post.

EVENTS AT THE SOUTH AFRICAN BORDER

[14] It is not in issue between the parties that Mr. Letlamma was able to clear customs and passport control through Pioneer Gate into the Skilpadshek border post in South Africa. He drove the truck into the Customs Control Area (CCA).

[15] The version of Mr. Letlamma as to what transpired from this point was set out in the founding affidavit and was that:

> *"27. Mr. Letlamma parked the truck in the CCA as is the custom when transporting goods between borders. The truck is parked in the CCA while the driver walks to the border post to process the relevant documents for clearance of the truck, thereafter the truck will be driven into the relevant country.*
>
> *27.1 Mr. Letlamma walked to Skilpadshek and requested the South African Immigration officials there to print his PCR test results or that they accept the email on his phone as proof of his negative COVID status.*
>
> *27.2 The Immigration officials advised him that the email was not acceptable and that a printed test result as required. Mr Letlamma was told to go back to Botswana, have the test result printed and return to Skilpadshek with a printed result.*
>
> *27.3 The Immigration officials also indicated that the alternative was for Mr Letlamma to have a rapid COVID test performed at Pioneer's Gate and obtain that printed result.*
>
> *27.4 Mr. Letlamma walked back to Pioneer's Gate, while the truck and goods remained parked in the CCA, to enquire about the rapid COVID test. On arrival at Pioneer's Gate, the Immigration officials advised him that he could not undergo a rapid COVID test as it was*

only available to people entering Botswana as opposed to exiting Botswana.

27.5 Mr. Letlamma then walked back to Skilpadshek to advise the Immigration officials of this.

27.6 On his way back to Skilpadshek, Mr. Letlamma was approached by a South African Revenue Service Customs officials ("SARS officials") who enquired from him what was in the truck. Given that he was transporting goods there were a high risk for theft, Mr. Letlamma had been instructed to respond that there were no goods in the truck he was driving. When asked by the SARS official, Mr. Letlamma therefore responded that the truck was empty.

27.7 On being questioned about the presence of the truck in the CCA, Mr. Letlamma told the SARS official of his predicament with his COVID results. Mr. Letlamma indicated that he wanted to return to Botswana to obtain a printout of his COVID results.

27.8 The SARS official refused to allow Mr. Letlamma to exit the CCA and return to Botswana."

[16] It was at this point that Mr. Letlamma contacted Mr. Lekobe, the deponent to the founding affidavit and director of Finequest who then came to the border post. Mr. Lekobe confirms the version of Mr. Letlamma.

[17] While at the border post, Mr. Lekobe was asked by a SARS official what was in the container, and he informed him of the contents. He was then advised to clear the goods through customs so that they could be transported on to Mozambique. Mr. Lekobe, in response to this, said that he could not clear the goods at that point as he *"had been unable to obtain the assistance of a clearing agent to assist with this given the quotes provided for clearance of the goods, being R500 000.00."*

[18] The truck and the goods remained in the CCA overnight and the following day they were taken, by agreement with SARS, to a state bonded warehouse. There the truck remained. On 29 November 2021, SARS notified Finequest that the truck, trailer, and container were being detained in terms of s 88(1)(a)[7] of the Act in order to establish whether or not the truck and goods were liable for forfeiture in terms of s 87[8]. Notification was also given that a physical examination of the goods would be conducted.

[19] On 12 December 2021, the truck and goods were inspected[9] and Finequest provided documents to SARS which it said demonstrated that the goods were indeed in transit to Mozambique. Subsequently, although no evidence was provided to substantiate it, Finequest alleged that the order of Racheio had been cancelled because delivery had not occurred "*at the expected time."*

NOTICE OF INTENTION TO SEIZE THE GOODS AND SEIZURE

[20] On 19 January 2022, SARS gave notice that it intended to seize the truck, trailer and container of goods subject to representations being made by Finequest as to why they should not be. Although Finequest responded on 20 January 2022, SARS were unmoved and on 27 January 2022 gave notice that they would proceed to issue notice of seizure.

[21] A subsequent meeting was held on 14 February 2022 in consequence of which SARS indicated that it would reconsider the seizure of the truck and trailer subject to the submissions being made by their respective owners (Finequest was not the owner but had only leased the truck and trailer) and would also reconsider the submissions made by Finequest. This it seems occurred after

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

8 Section 87 is a general provision which provides that goods may be seized and forfeited in the event of an offence having been committed in terms of the Act.

9 The number of master cases was miscounted at 1028 on 12 December 2021 but a subsequent recount on 12 January 2022 was done and 1049 master cases verified.

the truck, trailer and container had apparently been stolen from the state bonded warehouse on 5 February 2022 but recovered intact and returned shortly thereafter.

[22] On 1 March 2022, SARS issued a formal notice – *"Letter of intent to seize for a container with no. PONU9005647, trailer with registration no. B780APB and a horse (truck) with registration no. KG55RDGP loaded with 1 050 master cases of Remington Gold cigarettes."* In the letter SARS informed Finequest that it had concluded that:

[22.1] That there had been no due entry of the truck, trailer and goods and there was in consequence a breach of s 38[10] read with s 83[11] of the Act and

[22.2] The goods had been dealt with irregularly as provided for in s 87(1)[12] of the Act and were for that reason liable to forfeiture.

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[10] The section which is to read together with s 39 provides that good imported into the Republic are to be cleared within 7 days of entry (subject to certain exceptions and extensions) and to thereafter in terms of s 39 for documents relating to the goods to be produced and duties paid.

[11] Section 83 is a penal provision which provides:
"83 Irregular dealing with or in goods. - Any person who
(a) deals or assists in dealing with any goods contrary to the provisions of this Act or
(b) knowingly has in his possession any goods liable to forfeiture under this Act or
(c) makes or attempts to make any arrangement with a supplier, manufacturer, exporter or seller of goods imported or to be imported into or manufactured or to be manufactured in the Republic or with any agent of any such supplier, manufacturer, exporter or seller, regarding any matter to which this Act relates, with the object of defeating or evading the provisions of this Act, shall be guilty of an offence and liable on conviction to a fine not exceeding R20 000 or treble the value of the goods in respect of which such offence was committed, whichever is greater, or to imprisonment for a period not exceeding five years, or to be such fine and such imprisonment, and the goods in respect of which such offence was committed shall be liable to forfeiture."

[12] "*87 Goods irregularly dealt with liable to forfeiture*
(1) 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 liability for any unpaid duty or charge in respect of such goods."

[22.3] Finequest was given an opportunity until 10 March 2022 to make representations on why the goods should not be seized.

[23] On 10 March 2022 Finequest wrote to SARS and disputed any decision that the goods should be forfeited. The thrust of the dispute was that:

[23.1] the goods were never deemed to be imported;

[23.2] the goods were in transit through South Africa to Mozambique; and

[23.3] the goods were not liable for customs duty and for that reason there could be no basis for them to have been dealt with contrary to the provisions of the Act.

[24] It is apposite to mention that insofar as the truck and trailer are concerned, the owners of these engaged separately with SARS and these were released to them against the payment of a penalty of R 96 000.00.

[25] On 24 March 2022, SARS informed Finequest that:

"We would like to advise that in the first instance the Commissioner can only consider release of the goods upon complying with the following conditions:

- *The goods are declared and accordingly cleared within 7 days from the date of receipt of this letter, by completing the necessary clearance documents and all supporting information thereto.*

- *The Commissioner will then consider other conditions for the release not limited to payment of provisional payment for the amount that will be determined upon receipt of the declaration documents.*

- *Failure to comply with the condition in paragraph 1, the Commissioner may consider proceeding with seizure of the goods in light of the notice of intent to seize issued to your client on 8 December 2021 for the cigarettes."*

[26] On 29 March 2022 and after unsuccessfully attempting to have the goods cleared by a clearing agent, Finequest's attorney informed SARS that Racheio had cancelled the order and that the goods should now be cleared as *"return goods/cancelled entry."* This request was declined.

[27] On 4 April 2022 the goods were seized and a letter communicating the decision and the reasons for it sent to Finequest. In the letter Finequest was informed of its right to appeal the decision alternatively to approach a court for relief.

[28] On 22 October 2022 Finequest instituted the present proceedings in which it claims *inter alia* orders reviewing and setting aside the decision of SARS to seize the goods, declaring such seizure wrongful and unlawful and for the release of the goods for return to Botswana within 30 days.

THE STATUTORY FRAMEWORK

[29] Finequest argued that sections 87 and 88 of the Act properly construed provided that in terms of section 88(1)(a)[13], detention is allowed in order to establish whether goods are liable to forfeiture.[14] Section 88(1)(c)[15] of the Act deals with seizure, which is the step between detention and forfeiture. It was

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[13] The section provides *"An officer, magistrate or member of the police force may detain any ship, vehicle, plant, material or goods at any place for the purpose of establishing whether that ship, vehicle, plant, material or goods are liable to forfeiture under this Act."*

[14] *Commissioner for the South African Revenue Services v Dragon Freight and* Others 2022 JDR 1566 (SCA) at para [44].

[15] The section provides: "*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."*

argued that forfeiture is dealt with in section 87[16] of the Act[17] and that this may only occur if the goods were dealt with contrary to the Act or an offence was committed, such as a failure to declare goods or pay any duty.[18]

[30] It was argued that in order for SARS to seize the goods, there were three requirements which had to be met. Firstly, that the goods were in fact imported, secondly that consequent upon the importation there had been no compliance with the Act and thirdly that they were liable to forfeiture. Each of these was raised and disputed by Finequest on 10 March 2022.

THE REVIEW

[31] The review is brought in terms of The Promotion of Administrative Justice Act[19] (PAJA). It is not in issue between the parties that PAJA is the appropriate framework within which the decision of SARS is to be challenged.[20]

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[16] The section provides:

"*(1) 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 liability for any unpaid duty or charge in respect of such goods.*

(2) Any

(a) ship, vehicle, container or other transport equipment used in the removal or carriage of any goods liable to forfeiture under this Actor constructed, adapted, altered or fitted in any manner for the purpose of concealing goods

(b) goods conveyed, mixed, packed or found with any goods liable to forfeiture under this Act on or in any such ship, vehicle, container or other transport equipment and

(c) ship, vehicle, machine, machinery, plant, equipment or apparatus classifiable under any heading or subheading of Chapters 84 to 87and 89 of Part 1 of Schedule 1 in which goods liable to forfeiture under this Act are used as fuel or in any other manner, shall be liable to forfeiture wheresoever and in possession of whomsoever found."

[17] *Henbase 3392 (Pty) Ltd v Commissioner for the South African Revenue Service and Another* 2002 (3) SA 26 (SCA) at para [7] insofar as SARS is entitled to demand security before the release of any goods.

[18] *Commissioner for the South African Revenue Services v Saleem* 2008 (3) SA 655 at para [9].

[19] 3 of 2000.

[20] *Deacon v Controller of Customs and Excise* 1999 (2) SA 905 (SE) – decided before PAJA was enacted but established that decisions of the Commissioner are subject to review.

[32] Finequest relied on the grounds set out in s 6(2)(e)(iii)[21] and 6(2)(f)(ii)[22] of PAJA as the grounds upon which the decision of SARS to seize the goods was reviewable. It was argued by Finequest that the decision to seize the goods was *ultra vires* the Act and reviewable on the basis that absent the import or deemed import of the goods, the provisions of the Act did not apply.

[33] It was also argued that the decision taken was irrational, also premised on the argument that if the goods were never imported or deemed to be imported into the Republic and were in any event not dutiable because they were in transit, any decision to seize them was irrational.

[34] Initially SARS raised as a point *in limine* that no proper notice of the proceedings had been given in terms of s 89(2)[23] and s 96[24] of the Act. It was contended that the periods set out in the respective sections should be read disjunctively instead of conjunctively and on that basis the notice given in terms of s 89 by Finequest on 4 May 2022 of its intention to challenge the decision did not constitute compliance with s 96.

[35] The argument for Finequest was that the two ought to be read conjunctively having regard to the respective provisions but that in any event the notice had been given on Form DA96, the prescribed form and which was in any event headed "*Notice in terms of Section 96(1)(a) of the Customs & Excise Act, 1964.*" The point was not pursued with any vigour in argument by SARS[25] and it suffices to state that it was in my view without merit.

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[21] "*because irrelevant considerations were taken into account or relevant considerations were not considered."*

[22] Not rationally connected to either the purpose for which the decision was taken or the purpose of the empowering provision or the information before the administrator or the reasons given.

[23] The section provides that written notice of intention to institute any proceedings must be given to SARS and that this must be within 90 days after the seizure of the goods concerned.

[24] Which in turn affords SARS a month after receipt of the notice within which to consider its position.

[25] See *Commissioner for the South African Revenue Service and Others v Dragon Freight (Pty) Ltd and Others* 2022 JDR 1566 (SCA) at para [33].

[36] The grounds of review mirror the submissions made by Finequest on 22 March 2022 as set out in paragraph [23] above. I intend dealing with each of these in turn.

WERE THE GOODS IMPORTED?

[37] Finequest argued that since the goods were in transit and not consigned to a place within the Republic, they could not to be deemed to have been imported.

[38] In this regard, while the Act contains no definition of "import", section 10 provides:

> *"10 When goods deemed to be imported*
>
> (1) *For the purposes of this Act all goods consigned to or brought into the Republic shall be deemed to have been imported into the Republic*
>
> *(a) . . .*
>
> *(b) . . .*
>
> *(c) subject to the provisions of subsection (2), in the case of goods brought to the Republic overland, at the time when such goods entered the Republic*
>
> *(d) . . .*
>
> *(e) . . .*
>
> (2) *. . . [my underlining]*

[39] In *Commissioner of Customs and Excise v Strauss*[26] in which it was held that "*physical importation for use within the Customs Union amounts to 'import' in terms of the Act"*.[27] However, and apposite to the present matter, in *Tieber v Commissioner for Customs and Excise*[28], it was held by the Appellate Division that *"goods in transit are not imported into the Republic."*[29]

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[26] 1998 (4) SA 593 (T) at 599F.

[27] *Ibid.*

[28] 1992 (4) SA 844 (A) at 850E.

[29] *Ibid.*

[40] Accordingly, although the goods were physically brought into the Republic, since their ultimate destination was said to be Mozambique, the fact that they were in transit there, it was argued, excluded reliance by SARS on the provisions of either sections 10, 87 or 88.

[41] However, while it may be arguable that the goods were not imported into the Republic, in the sense that they were not brought here, their physical presence attracts the operation of the deeming provision in s 10.

[42] It is the physical presence of the goods and the deeming provision which place them squarely under the aegis of SARS and the operation of the Act. Regard must be had to whether or not there was compliance with s 15 read together with s 38 of the Act. It is only through proper compliance with these sections that SARS is able to make a determination in regard to whether or not the goods are imported, deemed to be imported and in either case whether there are duties to be paid.

[43] S 15(1) provides that:

> *"Any person entering or leaving the Republic shall, in such a manner as the Commissioner may determine, unreservedly declare –*
>
> *(a) at the time of such entering, all goods (including goods of another person) upon his person or in his possession . . .*
>
> *(b) . . .*
>
> *And shall furnish an officer with full particulars thereof, answer fully and truthfully all questions put to him by such officer and, if required by such officer to do so, produce and open such goods for inspection by the said officer. . ."*

[44] It is common cause that at the time that Mr. Letlamma brought the goods into the Republic, he did not comply with any of the provisions of either s 38 (making due entry of the goods), s 39 (furnishing of full particulars so that a decision can be made in regard to whether the goods are dutiable or not), s 40 (failure to

declare the true value of the goods), and s 41 (failure to provide proper documentation with regards to the goods.

[45] In the present case, it is not in dispute that Mr. Letlamma on the instructions of Mr. Lekobe deliberately misled the SARS officials at the border when he informed them that the truck was empty.

[46] It was argued by SARS that in consequence of the failure to comply with the aforementioned sections, the goods were in terms of s 40(2), were not properly entered. It was further argued by SARS that in consequence of the failure of Mr. Letlamma to tell the SARS officials the truth when first asked what was in the truck and the subsequent confirmation of this by Mr. Lekobe, rendered them both liable in terms of sections 83 and 84. These sections, besides prescribing fines or imprisonment, also provide that the goods concerned are *"liable to forfeiture".*

[47] It was also argued by Finequest that since Mr. Letlamma had parked the truck within the Customs Clearing Area that it could not be said that the goods had been physically brought into the Republic. This is in my view without any merit – on the facts it is clear that Mr. Letlamma had cleared customs and border control on the Botswana side of the border and had thus left that state. While neither he nor the truck and goods had cleared customs or border control in the Republic, upon leaving Botswana, they had entered the Republic and were subject immediately upon doing so, to its laws.[30]

WERE THE GOODS IN TRANSIT AND / OR WERE THEY LIABLE FOR DUTY?

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[30] The Southern African Customs Union Agreement in no way intrudes upon the sovereignty of the member states or the applicability of the laws of those states. The fact that the truck was stopped in the common customs area does not mean that it was not within the territory of the Republic or that the provisions of the Act do not apply. See also *Capri Oro (Pty) Ltd and Others v Commissioner of Customs and Excise and Others* 2001 (4) SA 1212 (SCA) see para [10] that :*"[10] Assuming that no offence was committed by the second appellant in the present matter, the decision of this Court in Secretary for Customs and Excise and Another v Tiffany's Jewellers (Pty) Ltd 1975 (3) SA 578 (A) is indeed, as was submitted on behalf of the appellants, distinguishable. But the distinction does not avail the appellants if there was non-compliance with s 15(1)."*

[48] Whether or not the goods are deemed to be imported or whether they are liable for duty or not, does not absolve Finequest from the obligation to comply with s 15(1) read together with s 38 of the Act. All goods must be declared whenever they enter or leave the Republic.

[49] Liability for duty is something which is determined by SARS after the goods are physically entered and their existence and nature disclosed. The interpretation contended for by Finequest would, if accepted, render the entire machinery of the Act irrelevant – it would only require a declaration of the goods (which did not occur here – at least until after they had been detained) and that they were in transit to an address outside the Republic in order to avoid the scrutiny of SARS.

[50] On the facts in the present matter, the failure on the part of Mr. Letlamma to declare the goods together with the subsequent explanation for this seems to me to have been entirely contrived. He had declared the goods to customs in Botswana when leaving that country and it is simply not plausible that Mr. Lekobe held any genuine belief that the goods would be at risk in the CCA when he told him to make proper disclosure to Botswana customs but to lie to SARS.

[51] Mr. Lekobe was familiar with the process for the cross-border movement of goods, having brought those goods into Botswana using the services of a clearing agent.

[52] This aspect of what occurred bears the hallmarks of an attempt to smuggle the goods into the Republic. Although SARS did not detain or seize the goods for this reason, the failure of Mr. Letlamma to make a proper declaration in terms of section 15(1) certainly gave them good cause to detain the goods. On this basis alone, an offence had been committed in terms of the Act and thus both s 87 and s 88 find application.

[53] In my view such good cause could only have been strengthened by the arrival of Mr. Lekobe and the explanations he gave. That he could neither afford nor find a clearing agent given the time that the goods had spent in Finequest's possession from the time they had left the container depot in Gaborone is simply not believable.

[54] This question however was rendered moot when the purported order of Racheio was cancelled. From that point onwards, and while the goods were still in the possession of SARS, they were no longer in transit.

CONCLUSION

[55] Once Mr. Letlamma crossed into the Republic and failed to make a proper declaration of or entry of the goods, the die was cast. His entry into the Republic placed both himself and in particular the goods, under the aegis of SARS and the operation of the Act.

[56] The failure on the part of Finequest[31] to comply with the provisions of *inter alia* sections 15(1) and 38 to 40 entitled SARS to invoke the punitive provisions of the Act and to seize the goods which they did. The decision[32] to seize the goods was in accordance with the Act and for that reason, I am unable to find that it was not so taken.[33] The grounds of review predicated on sections 6(2)(e)(iii) and s 6(2)(f)(i) of PAJA are in the circumstances without merit.

[57] In consequence of the finding that there was no compliance with the provisions of the Act when the goods were entered in the Republic, the subsequent cancellation of purchase by Racheio and the change in status at that point of the goods from being in transit is irrelevant. The decision to seize the goods was predicated upon the failure to declare or properly enter them and in the

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[31] Mr. Letlamma initially and thereafter Mr. Lekobe acting on its behalf.

[32] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) at p [58].

[33] *Allbutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) at para [51].

circumstances the ground of review predicated on s 6(2)(f)(ii) of PAJA is also without merit.

COSTS

[58] The costs will follow the result.

ORDER

[59] In the circumstances, it is ordered:

[66.1] The application is dismissed.

[66.2] The applicant is ordered to pay the defendant's costs of suit.

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A MILLAR

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:	23 JANUARY 2024
JUDGMENT DELIVERED ON:	26 FEBRUARY 2024

COUNSEL FOR THE APPLICANT:	ADV. A LOUW
INSTRUCTED BY:	DOCKRAT ATTORNEYS
REFERENCE:	MR. Y DOCKRAT
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REFERENCE:	MS. P LEDWABA