64/55.

G.P.-S.12136—1952-3—2,000. U.D.J. 219.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Appellate Provincial Division).
Provinsiale Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

Shewan Tomes & Co. Ltd. Appellant,

versus

Commissioner for Customs & Excise. Respondent.

Appellant's Attorney / Prokureur vir Appellant [illegible]
Respondent's Attorney / Prokureur vir Respondent [illegible]

Appellant's Advocate / Advokaat vir Appellant
Respondent's Advocate / Advokaat vir Respondent

Set down for hearing on / Op die rol geplaas vir verhoor op Friday, 10th June, 1955.

[illegible]

C.H.V.

[illegible]
for Registrar
23.7.55.

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

SHEWAN TOMES AND COMPANY LIMITED Appellant

and

COMMISSIONER OF CUSTOMS & EXCISE Respondent

Coram:-Schreiner A.C.J.,v.d.Heever,Hoexter,Fagan et Steyn,JJ.A.

Heard: 23rd. August, 1955. Delivered: 30 - 8 - 1955

J U D G M E N T

SCHREINER A.C.J.:- The appellant, a Hong Kong company, sued the respondent in the Natal Provincial Division for £9027. 11. 5, being damages arising out of the allegedly unlawful seizure on the 20th February 1953 and sale on the 10th October 1953 of certain fire-crackers imported in October 1952 by the appellant through the Port of Durban. The respondent on the 18th October 1954 filed a plea alleging (a) that the importation was illegal as having been made without an import permit, in breach of Government Notice 2948 of the 19th November 1951, which was issued under War Measure 146 of 1942, as amended, (b) that the goods were

liable/.....

liable to forfeiture under section 132 of Act 35 of 1944, which I shall call "the Act", as having been imported in contravention of a law (i.e. Government Notice 2948) other than a law relating to customs, (c) that the goods were seized under section 143 of the Act, which permits the seizure of goods liable to forfeiture under any law relating to customs, (d) that, having been seized, the goods, in terms of section 144(1) of the Act, were deemed to be condemned and became subject to disposal in terms of section 147 of the Act, in the absence of a notice of claim given within one month after the date of the seizure, and (e) that, no such notice having been given, the appellant was barred under section 144(2) of the Act from bringing any legal proceedings whatever based merely on upon the seizure of the goods.

To this plea the appellant filed certain exceptions two of which were upheld and others dismissed. One of those dismissed was to the whole plea, and in order to understand its nature it must further be recorded, (a) that on the 31st August 1953 the Natal Provincial Division held, in the case of Vincent and Pullar v. Commissioner of Customs (1954(2) S.A. 33), that section 132 of the Act was a law other

than/.....

than a law relating to customs, and (b) that on the 14th October 1953 there was promulgated Act 36 of 1953, section 1(1) of which amended the definition section of the Act by adding -

" 'law relating to customs' includes any provision of "this Act ",

and section 1(2) of which reads -

"(2) Subsection (1) shall be deemed to have come into "operation on the 5th day of June 1944," the date of commencement of the Act.

The exception in question, which was overruled by the court below, is in the following terms :-

"The Plaintiff excepts to the whole of Plea as being bad "in law and insufficient in law to sustain the defence "in that Annexure 'B'," a notice claiming the goods, "having been admittedly written and received within one "month of the promulgation of Act No. 36 of 1953, "the Defendant had no right to dispose of the goods un- "less and until they were condemned or declared forfeited "by the Court, or, alternatively, until the conclusion "of legal proceedings brought against him by the Plain- "tiff or the lapse of ninety days of the date of the "notice under Section 144(1) without the institution of "such legal proceedings during that period."

In/.....

In brief, the appellant's case was that the Vincent and Pullar decision was correct and that, despite the form of the provisions of section 1 of Act 36 of 1953, the notice of claim, which under section 144 (1) has to be given within one month after the date of the seizure, on pain of barring under section 144(2), could effectively be given within one month after the coming into force of Act 36 of 1953, as had in fact been done.

The authority principally relied upon by the appellant's counsel was Curtis v. Johannesburg Municipality (1906 T.S. 308). Curtis in July 1905 began an action against the municipality in respect of an accident which took place in January 1904. In August 1904 an ordinance was passed which inter alia provided that "All actions against the council" of Johannesburg "shall "be brought within six months of the time when the "causes of such actions arose." On appeal the majority of the court (INNES C.J. and MASON J.) held that the action was prescribed because it was not commenced within six months after the promulgation of the ordinance. SMITH J. dissented, holding that the prescription period was not applicable to actions the cause of which arose

before/.....

before the ordinance came into operation. The judgments contain interesting and important remarks upon the canon of interpretation that in the absence of clear language the legislature must be presumed not to have intended to bring about injustice by taking away vested rights or producing prejudicial effects retrospectively. The majority of the court held that, despite the clear language of the section, equitable considerations and common law authority required that the period of prescription should be taken to have commenced to run, not from the date when the cause of action arose, but from the date of the promulgation of the ordinance. The case was used by counsel to support the contention that, despite the apparently clear language of section 1 of Act 36 of 1953, the one month within which the goods have to be claimed under section 144 (1) must be taken to run, not from the date of seizure, but from the date of the promulgation of Act 36 of 1953. For otherwise, it was pointed out, the unjust result would follow that, assuming Vincent and Pullar's case to have been correctly decided, a person would lose the right to have the issue tried, whether or not condemnation automatically followed upon the seizure of his goods because he had failed to give notice at a time when, as

Vincent/.....

Vincent and Pullar decided, such a notice would have been unnecessary and irrelevant.

The difference between a case like Curtis's and the present one is brought out by the following remarks of BUCKLEY L.J. in West v. Gwynne (1911 2 Ch. 1 at page 11) :- "During the argument the words " 'retrospective' and 'retroactive' have been repeatedly "used, and the question has been stated to be whether "section 3 of the Conveyancing Act, 1892,is retrospective. "To my mind the word 'retrospective' is inappropriate, "and the question is not whether the section is retro- "spective. Retrospective operation is one matter. Inter- "ference with existing rights is another. If an Act "provides that as at a past date the law shall be taken to "have been that which it was not, that Act I understand "to be retrospective. That is not this case. The "question is whether a certain provision as to the con- "tents of leases is addressed to the case of all leases "or only of some, namely, leases executed after the pas- "sing of the Act. The question is as to the ambit and "scope of the Act and not as to the date as from which "the new law, as enacted by the Act, is to be taken to "have been the law." Curtis's case was of the same

type/.....

type as West v. Gwynne, while the present case is one of true retrospectivity in the strict sense used by BUCKLY L.J. Where one is dealing with a case of true retrospectivity it will generally, I apprehend, be more difficult to draw inferences as to the legislature's presumed intention not to produce injustice, since ex hypothesi the legislature is creating a situation in which the conduct of persons is affected by rules that did not exist at the time of the conduct.

However that may be, true retrospectivity is no doubt for present purposes to be dealt with on the same general lines as interference with existing rights, and where there is real room for doubt as to the meaning of a provision, the interpretation producing the less harsh results should be favoured. But here the meaning of the section is perfectly clear. Counsel rightly conceded that, if the definition clause had from the commencement of the Act included what appears in section 1(1) of Act 36 of 1953, he would have had no argument to advance. But subsection (2) can only mean that whenever the question becomes material the courts must treat the Act as having from its inception contained the addition to its definition section contained in subsection (1). Subsection (2)

is not capable of being interpreted as meaning that subsection (1) is to be deemed only for certain purposes or qualifiedly to have come into operation on the 5th June 1944.

For these reasons it is unnecessary to consider the correctness or otherwise of the Vincent and Pullar decision. The appeal is dismissed with costs.

O.D. Schreiner
29.8.55

Van den Heever, J.A.)
Hoexter, J.A.)
Fagan, J.A.) Concur.
Steyn, J.A.)