185/92

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NO 622/90

FRANS FERDINAND TIEBER APPELLANT

AND

THE COMMISSIONER FOR CUSTOMS & EXCISE RESPONDENT

CORAM: CORBETT CJ, E M GROSSKOPF, KUMLEBEN,

GOLDSTONE JJA et HOWIE AJA.

DATE HEARD: 15 September 1992

DATE DELIVERED: 28 September 1992

J U D G M E N T

GOLDSTONE JA:

The appellant, Frans Ferdinand Tieber, is a citizen of Austria and a resident of the Republic. He lived in an apartment in Victory Park, Johannesburg, with his girl friend, Ms Irene Kotze ("Kotze"). During March 1989 the appellant and Kotze agreed with unnamed principals in Zimbabwe to transport on their behalf unwrought gold, foreign currency and travellers cheques ("the consignment") from Zimbabwe to Switzerland. On 9 March 1989 they took the consignment in two suitcases by motor car from Zimbabwe to Gaborone in Botswana. There, on the same day, they made reservations for airline

flights to Zurich via Jan Smuts and Frankfurt Airports. Their intention was to remain in transit at both airports. They checked in their baggage, including the consignment, from Gaborone to Zurich. They were handed the usual baggage check tags by an Air Botswana employee.

The appellant and Kotze boarded the Air Botswana flight from Gaborone to Jan Smuts Airport. Upon arrival there they were informed that the departure of their connecting flight to Frankfurt had been delayed for 12 hours. But for the delay they would have remained in the passenger transit lounge at the airport. In the circumstances they decided to spend some of the time at their home in Victory Park.

As the consignment had already been checked in for delivery to them at Zurich Airport, the appellant and Kotze decided that they would save one air fare if Kotze

alone completed the journey to Frankfurt and Zurich. In accordance with that decision, later that day the appellant took Kotze to Jan Smuts Airport where she boarded the aircraft. She took the baggage check tags with her. The appellant and Kotze were unaware that, earlier in the day, the two suitcases containing the consignment had been opened and searched by police officers at the airport and detained there.

Later that same evening, after the appellant had returned to his apartment, members of the South African Police arrived with the two suitcases. He was arrested and a charge was laid against him. However, the attorney-general declined to prosecute the appellant and the charge was formally withdrawn on 20 October 1989. It would appear that on about 31 October 1989 the respondent seized the consignment, acting in terms of the provisions of the Customs and Excise Act, 91 of 1964 ("the Act").

The foreign currency was returned by the respondent to the appellant at Jan Smuts Airport and he was allowed to take it with him on a flight to Frankfurt. The unwrought gold and the travellers cheques were not returned to the appellant. In respect of the gold, the appellant was informed by letter dated 31 October 1989 that it had been seized in terms of s 83 read with ss 87 (1) and 88(1) of the Act.

In terms of s 83 any person who, inter alia, deals or assists in dealing with any goods contrary to the provisions of the Act commits an offence and the goods in respect of which the offence is committed become liable to forfeiture.

S 87(1) expressly provides that goods imported or otherwise dealt with contrary to the provisions of the Act are liable to forfeiture "wheresoever and in possession of whomsoever found."

In turn, s 88(1)(a) provides that certain persons, including a member of the police force, may detain any goods at any place for the purpose of establishing whether they are liable to forfeiture under the Act. And, paragraph (d) of s 88(1) authorises the respondent, in his discretion, to seize any goods liable to forfeiture under the Act.

The appellant applied unsuccessfully to the Transvaal Provincial Division for an order compelling the respondent to return the gold to him. With leave of the Court a quo, the appellant has appealed to this Court for similar relief.

In support of the action taken by him the respondent submits that:

(a) the unwrought gold was imported by the appellant into the Republic;

(b) the respondent acted contrary to provisions of the Act which impose certain obligations upon persons who import goods into the Republic;

(c) alternatively, the appellant failed to declare the gold when he entered the Republic.

Before considering these propositions it will be convenient to consider a point in limine relied upon on behalf of the respondent, viz that the appellant had no locus standi in iudicio. This contention rests upon the provisions of s 89 of the Act. It is there provided as follows (omitting words presently irrelevant):

> "(1) Any ... goods which have been seized under this Act, shall be deemed to be condemned and forfeited and may be disposed of in terms of section 90 unless the person from whom such ... goods have been seized or the owner thereof or his authorized agent gives notice in writing, within one month

after the date of the seizure, to the person seizing or to the Commissioner or to the Controller in the area where the seizure was made, that he claims or intends to claim the said ... goods under the provisions of this section.

(2) If no such notice is given, no legal proceedings whatever shall thereafter be instituted against ... the Commissioner or any officer, based merely upon the seizure of such ... goods.

(3) When a notice in writing has been given in terms of sub-section (1), the person giving such notice shall, within ninety days of the date of such notice, but, except with the consent of the Commissioner, not earlier than one month from the date thereof, institute proceedings in a court of competent jurisdiction for release of the said ... goods." (My emphasis).

Counsel for the respondent submitted that the gold was not seized from the appellant but either from

the police, the airport or airline authorities or Kotze. He submitted further that as the appellant was not relying upon ownership of the gold, or the authority of the owner, he had no locus standi.

When they seized the goods, the police were acting pursuant to the provisions of the Act in order to determine whether, in terms of s 88 (1)(a), they were liable to forfeiture at the instance of the respondent. To hold that the respondent thereafter seized the goods from the police is highly artificial and formalistic and does not reflect the reality of the situation. The same criticism applies to the submission that the gold was seized from the airport or airline authorities. There is no warrant for giving the relevant provisions a formalistic interpretation. In reality, the gold was seized from the appellant who, together with Kotze, arranged for it to be in transit at Jan Smuts Airport. That the respondent or his officials so regarded the

situation appears from the notice of seizure given by the Controller of Customs to the appellant, from the return by the respondent to the appellant of the foreign currency and from the respondent's acceptance of the appellant's notice under s 89.

Finally, on this preliminary point, there is the submission that the goods were seized from Kotze because she alone, in the result, was accompanying the consignment to Zurich. In the first place, the opposing affidavit lays no factual basis for the point in limine. There is no evidence to establish that the consignment was seized after it was decided that the appellant would not also travel to Zurich. If anything, the probability is the other way. The consignment was obviously taken off the Air Botswana aircraft and, more probably than not, would have been detained by the police prior to its being placed on the aircraft destined for Frankfurt. In any event it was not in issue that the appellant and

Kotze were both conveying the consignment on behalf of their undisclosed principals in Zimbabwe. When she proceeded on the journey alone she was acting on behalf of both of them. It follows that the point in limine cannot succeed.

I turn, then, to consider the merits. The first question is whether the gold was imported by the appellant into the Republic. S 1 of the Act is the definition section. A number of words and expressions are defined there; not, however, the word "import". "Importer" is defined but not in a manner which gives an indication of any particular meaning to be attributed to "import". In Beckett and Co Ltd v Union Government (Minister of Finance) 1919 TPD 6 at 8 Bristowe J pointed out that in its derivative sense an "import" means "any goods which are actually landed in the country". The question is whether it has that meaning for the purposes of the Act. In the Beckett case, for instance, the goods

concerned, although prima facie imported, were landed for the purpose of immediate re-shipment to another country and were therefore held not have been imported within the meaning of the legislation in issue there.

If one has regard to the scheme of the Act, it appears clearly that its main purpose is to ensure that customs and excise duties are paid on all goods which are brought into the Republic other than goods only in transit, ie goods which are landed in this country but destined for conveyance to another country. For that reason, one sees in s 18 that elaborate provision is made for the removal of goods in bond. Where bonded goods in fact leave the common customs area, which includes the Republic, no duties are payable: s 18(3)(b).

So, too, in s 6(1)(a) there is provision for designated places where goods may enter the Republic, inter alia, for import or for transit. Indeed, in this section it appears that the legislature expressly made a

distinction between goods imported, on the one hand, and goods in transit, on the other. It follows that the legislature intended the word "import" to have a restricted meaning, at least to the extent of not including goods in transit.

In his argument, counsel for the respondent relied on the provisions of s 10(1) of the Act for the submission that all goods brought into or landed in the Republic are deemed to be imported. S 10(1) reads as follows:

> "(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) in the case of goods consigned to a place in the Republic in a ship or aircraft, at the time when such ship or aircraft on the voyage or flight in question, first came within the control area of the port or airport

authority at that place, or at the time of the landing of such goods at the place of actual discharge thereof in the Republic if such ship or aircraft did not on that voyage or flight call at the place to which the goods were consigned or if such goods were discharged before arrival of such ship or aircraft at the place to which such goods were consigned;

(b) in the case of goods not consigned to a place in the Republic but brought thereto by and landed therein from a ship or aircraft, at the time when such goods were so landed;

(c) subject to the provisions of sub-section (2), in the case of goods brought to the Republic overland, at the time when such goods entered the Republic;

(d) in the case of goods brought to the Republic by post, at the time of importation in terms of paragraph

(a), (b) or (c) according to the means of carriage of such goods; and

(e) in the case of goods brought to the Republic in any manner not specified in this section, at the time specified in the General Notes to Schedule No. 1 or, if no such time is specified in the said General Notes in respect of the goods in question, at the time such goods are considered by the Commissioner to have entered the Republic."

The submission was that this sub-section is concerned not only with the time when goods are deemed to have been imported into the Republic but that it also provides that all goods brought into the Republic are deemed to have been imported. In my judgment such a construction is unjustified and incorrect. My reasons are the following:

1. Such a construction is contrary to the scheme and purpose of the Act, to which I

have already referred. In particular, duty is not payable on all goods landed in the Republic. They are payable only in respect of goods imported into the Republic.

2. Such a construction would lead to impractical and even absurd results. Two examples will suffice:

(a) The words "shall be deemed" in the introductory passage of the sub-section apply both to goods consigned to and goods brought into the Republic. It would necessarily follow, on the respondent's construction, that goods consigned to the Republic would be deemed to have been imported into the Republic. Thus, for example, goods consigned from Europe would be deemed to have been imported into the Republic even before they physically arrived in this country and even, in the event of a mishap, if they never did arrive here. It is true that they would be deemed to have arrived at the relevant date specified in the sub-section. Non constat that they would

be deemed to have been imported when consigned. Such a situation could not have been contemplated by the legislature.

(b) As was conceded by the respondent's counsel, the provisions of s 38 of the Act, which require an importer to make due entry of imported goods, would oblige all goods in transit to be declared even by passengers who do not leave a transit area and, indeed, even if they do not disembark from an aircraft which lands only for refuelling. Again, such an absurd and impractical effect could not have been intended by the legislature.

In my opinion, therefore, goods in transit are not imported into the Republic. The appellant did not import the gold and he could not have contravened any provision of the Act relating to the import of goods into

the Republic. Consequently, the respondent was not entitled to seize the gold on that account.

The only other provision of the Act relied on by the respondent was s 15(1). At the relevant time, prior to amendment by s 12 of Act 59 of 1990, it was there provided that:

> "(1) Any person entering or leaving the Republic shall, in such manner as the Commissioner may determine, unreservedly declare all goods in his possession which he brought with him into the Republic or proposes taking with him beyond the borders of the Republic, 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, and shall pay the duty assessed by such officer to the Controller."

The submission is that when the appellant left the transit area he was "in possession" of the gold and was obliged to declare it. Again, I do not agree. The only purposes of declaring goods are:

(a) to enable the customs officer to determine whether duty is payable; and

(b) to prevent prohibited or restricted goods being brought into the country.

Goods in transit do not fall into either of those two categories. No purpose would be served in declaring goods in the hold of an aircraft or ship which are not to be brought into the Republic. An indication that s 15 (1) does not apply to such goods is also to be found in the provision there for a customs officer to require the person declaring the goods to produce and open them for inspection. In the usual situation such a requirement would be impossible to fulfil in respect of goods in transit and not in the physical possession of the

traveller. It follows that the provisions of s 15(1) do not apply to goods which remain in a transit area.

The result is that the respondent has not been able to justify his seizure of the gold. It follows that the order in favour of the respondent made by the Court a quo must be reversed. If the gold were delivered to the appellant personally in the Republic he would, on the known facts, immediately be in contravention of the provisions of s 143(3) of the Mining Rights Act, 20 of 1967, viz. by being in possession of unwrought gold. That is a serious offence and a court should not make an order which would have that consequence: cf Scoop Industries (Pty) Ltd v Langlaagte Estate and G. M. Company Ltd (In Vol Liq) 1948(1) SA 91 (W) at 102. When this difficulty was put to the appellant's counsel he undertook to submit an amended form of order which in the event of the appeal being upheld would avoid the commission by appellant of any offence in the Republic.

He has done so without any objection from the respondent's counsel to the grant of an amended order.

The appeal is upheld with costs, including the costs of two counsel. The order of the Court a quo is set aside and there is substituted therefor the following order:

1. The goods, being six packages marked 1 to 6, sealed with police seal number 1385 and containing unwrought gold with a total mass of 38,115 kilograms, are forthwith to be returned by the respondent to the appellant or his duly authorised agent in the following manner at the cost of the respondent:

   (a) By having the goods, in the name of the appellant or his agent, placed as passenger baggage bound for Zurich, Switzerland, on an aircraft at Jan Smuts Airport;

(b) By handing the appellant or his agent the baggage receipts.

2. The respondent is ordered to pay the costs of the application, including the costs of two counsel.

R J GOLDSTONE
JUDGE OF APPEAL

CORBETT CJ)
E M GROSSKOPF JA)
KUMLEBEN JA) CONCUR
HOWIE AJA)