IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

REPORTABLE

Case No: 196/96

In the matter of:

THE COMMISSIONER FOR CUSTOMS AND EXCISE Appellant

and

CONTAINER LOGISTICS (PTY) LIMITED
Respondent

And in the matter of: Case no: 198/96

THE COMMISSIONER FOR CUSTOMS AND EXCISE Appellant

and

RENNIES GROUP LIMITED trading as RENFREIGHT
Respondent

Coram: Hefer, Vivier, Nienaber, Plewman JJA and Farlam AJA

Date of hearing: 17 May 1999

Date of delivery: 28 May 1999

Constitutional law: Jurisdiction of the Supreme Court of Appeal in terms of Item 17 of Schedule 6 to Act 108 of 1996; Interim Constitution Act 200 of 1993 - whether common law grounds for judicial review of administrative actions still exist. Customs and Excise: Commissioner's decision under s 99(2)(a)(iii) of Act 91 of 1964 - reasonable steps.

J U D G M E N T

Hefer JA

Hefer JA

[1] The provisions of S101(5) of the interim Constitution, Act 200 of 1993, effectively precluded the erstwhile Appellate Division of the Supreme Court of South Africa from adjudicating any matter relating to the interpretation, protection and enforcement of the provisions of the interim Constitution and even from determining the scope of its own jurisdiction whenever the determination required constitutional interpretation.

[2] On 4 February 1997 the Constitution of the Republic of South Africa Act 108 of 1996 superseded the interim Constitution. Under the new Constitution the Appellate Division became the Supreme Court of Appeal which has full appellate jurisdiction in constitutional matters, subject to a further appeal in such matters to the Constitutional Court, and is the highest court of appeal in other matters.

[3] The present appeals, in which identical common law and constitutional issues have been raised, were heard together and may conveniently be disposed of in a single judgment. Where it becomes necessary to distinguish between the respondents I will refer to the respondent in appeal No 196/96 as “Conlog” and to the other respondent as “Renfreight”. The appeals were noted during March 1996 (ie before the new Constitution took effect) and relate to two decisions taken by the Commissioner for Customs and Excise during December 1994 which were set aside in review proceedings in the Transvaal Provincial Division during October 1995.

[4] Pending cases are regulated by Item 17 of the Sixth Schedule to the new Constitution which provides that

> “[a]ll proceedings which were pending before a Court when the new Constitution took effect, must be disposed of as if the new Constitution had not been enacted, unless the interests of justice require otherwise.”

According to the judgment of this Court in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1998(2) SA 1115 (SCA) at 1126A-C the decision whether the interests of justice require an appeal to be disposed of is taken *ad hoc* having regard to the particular circumstances of the case. But that case was referred to the Constitutional Court and part of that Court's order is to the effect that

> "in respect of constitutional issues under the interim Constitution which may in future come before the SCA, including matters within the purview of s 24 of the interim Constitution, it is in the interests of justice for that Court to exercise the jurisdiction conferred upon it by chap 8 of the 1966 Constitution."

(See the judgment reported under the same name in 1999(1) SA 374(CC) at 415D-F.)

[5] I do not regard this part of the order as a binding direction, firstly, because that part of the judgment to which it relates is entirely *obiter* and, secondly, because the order itself amounts to no more than a statement of the Court's view of the interests of justice. I share those views, but the underlying policy considerations did not deter the legislature from depriving the Appellate Division of constitutional jurisdiction in the interim Constitution; and, as Mahomed CJ said, referring to the new Constitution in *Fedsure* at 1126A-B,

> "[i]f this is what the lawgiver had intended (ie that this Court should assume

> jurisdiction to adjudicate upon all constitutional issues irrespective of whether they arose before or after the commencement of the new Constitution) it could easily have said so. It deliberately refrained from doing so. What it directed was that pending proceedings must be disposed of as if the new Constitution had not been enacted unless, in the particular circumstances of a particular case, the interests of justice required otherwise."

This *dictum* appears in a unanimous judgment of this Court and we must follow it unless we are convinced that it is plainly wrong. Far from being so convinced, I respectfully agree with it. What accordingly has first to be decided is whether the interests of justice require the present appeals to be disposed of.

[6] In urging us to do so, counsel on both sides mentioned the fact that the judgment of the Court *a quo* was delivered more than four and a half years ago; that the hearing of the appeals was delayed at the request of this Court pending the Constitutional Court's decision in the *Fedsure* case; that huge amounts of money are at stake, and that the Commissioner and other interested parties are awaiting the outcome in order to arrange their affairs in other matters. These are weighty considerations; but what weighs with me even more, is the fact that the review proceedings were brought on constitutional as well as common law grounds. That the jurisdictional scheme under the interim Constitution was inexpedient and not apt became particularly noticeable in appeals to the Appellate Division involving both common law and constitutional issues. *Rudolph and Another v Commissioner for Inland Revenue and Others* was a typical case. It was a relatively simple matter but, because it allegedly had a constitutional dimension, the Appellate Division could only deal with it after a referral to the Constitutional Court. (Three reported judgments in that case appear in 1996(2) SA 886 (A), 1996(4) SA 552 (CC) and 1997(4) SA 391 (SCA).) This might also be the fate of the present appeals if we were to refuse to hear them at this stage. In my view the circumstances are such that the interests of justice demand that we dispose of them.

[7] Although our jurisdiction derives from a provision of the new Constitution the constitutional issues must be decided in terms of the interim Constitution. As mentioned earlier, the impugned decisions were taken during December 1994 when the interim Constitution was in force and this Court has already accepted the principle asserted by the Constitutional Court (eg in *S v Mhlungu and Others* 1995(3) SA 867 (CC) and *Du Plessis and Others v De Klerk and Another* 1996(3) SA 850 (CC)) that the lawfulness or unlawfulness of conduct is determined by the applicable law at the time it took place (see *National Media Ltd and Others v Bogoshi* 1998(4) SA 1196 (SCA) at 1218F-H).

[8] In view of the way in which administrative justice was dealt with in the interim Constitution, a problem which should perhaps be addressed first, is whether an administrative decision may still be reviewed on common law grounds. I find it convenient, however, to consider this question after an examination of the nature and merits of the respondents' complaints.

[9] The Commissioner's decisions which form the subject matter of the appeals were taken under s 99(2)(a) of the Customs and Excise Act 91 of 1964, as amended, which in effect renders agents liable for the obligations of their principals. The respondents are clearing agents and the effect of the Commissioner's decisions was to hold them liable for the unpaid customs duties and other charges in respect of goods which had been landed in Durban where they were cleared for export to Mozambique. For a proper understanding of the facts and of s 99(2)(a) itself, it is necessary to deal in some detail with the clearing process and the provisions of the Act relating to goods which are landed in South Africa for delivery at a place beyond the borders of the common customs area. The Act was amended in several respects after the events which gave rise to the review proceedings and the relevant provisions will be rendered in their erstwhile form.

[10] What is known in ordinary language as "customs clearance",

is referred to in the Act as “due entry”. Within a prescribed period after goods are imported the importer is required to make due entry thereof in the prescribed form. This is done by submitting a bill of entry containing particulars *inter alia* of the goods in question and the purpose for which they are being entered, to the Controller (an official designated by the Commissioner for a particular area). At the same time, unless the Controller allows a deferment, the duties due on the goods must be paid. If the Controller is satisfied, a release order is issued. Goods entered for home consumption are presumably released without further ado; what happens to them thereafter does not concern us. Goods destined for a neighbouring country may be entered either for removal in bond (s 18) of for storage in a customs and excise warehouse (s 18A) whence they may later be removed upon due entry for export. In either case, if they are destined for a place beyond the borders of the common customs area, there is an immediately liability to pay the duty but actual payment thereof is conditional upon it being proved to the satisfaction of the Commissioner that the goods have been duly taken out of the area. If proof is furnished within the prescribed time, the liability ceases; if not, the duty is payable on demand. Goods removed in bond or for export from a customs and excise

warehouse may not be diverted without the permission of the Commissioner to any destination other than the one declared on entry.

[11] During March 1992 the Commissioner demanded from each respondent payment of the duties and other charges allegedly due in respect of goods which had been diverted contrary to the provisions of ss 18 and 18A. How the demands came about emerges from what follows.

(a) It was the parctice of the Controller in Durban to accept copies of bills of entry, officially signed and stamped at the border posts, as proof that the goods reflected therein had been removed from the common customs area. This practice continued for many years without there being any suspicion that it was being abused until a customs official happened to notice an apparently irregular stamp on one of the returned documents. An investigation followed which eventually revealed that fraud had been committed on a massive scale in connection with goods cleared in Durban for export beyond the borders of the common customs area. Although it could not be determined how the fraud was perpetrated, it became clear *inter alia* that the stamps and signatures on some of the returned bills of entry were counterfeit and that the goods had

never left the common customs area. In 41 such cases the clearing had been done by Conlog and in two others by Renfreight.

(b) Every bill of entry contains the name of, and is signed by someone on behalf of the importer or exporter or remover who certifies that the particulars therein are true and correct and comply with the provisions of the Customs and Excise Act. In the 41 cases referred to, the bills were signed by a Conlog representative who described himself as the *agent for the remover* although in each one Conlog's name also appeared as *remover*. The two other bills were signed by a Renfreight representative who described himself as the agent *for the exporter* but Renfreight's name also appeared therein as *exporter.*

(c) In terms of ss 18(6) and 18A(5) no entry for removal in bond or for export from a customs and excise warehouse may be accepted from a person who has not furnished security to the satisfaction of the Commissioner. Both respondents had standing security arrangements with the Commissioner which they used, not only for their own benefit, but also to assist smaller clearing agents who could not afford such a facility. According to the uncontested evidence it was common practice for large operators to allow smaller ones to utilize their services and bond facilities at a nominal fee. In such cases the former would complete the bills on information supplied by the smaller operators, and would then handle the clearance. In all the 41 cases mentioned earlier Conlog's clearing instructions came from a company referred to in the papers as Access Freight with which Conlog used to do this

type of business. In the other two cases Renfreight's instructions came from a concern referred to in the papers as Anglo Dynamic. (There is no suggestion of the involvement of either Access Freight or Anglo Dynamic in the fraud.)

[12] After receipt of the demands the respondents' attorneys sought to persuade the Commissioner that the respondents had acted all along as agents whose liability had to be determined in terms of s 99(2)(a). Initially their attempts failed; but, after the respondents had commenced proceedings in the Durban and Coast Local Division for a declaratory order and interim relief and after he had taken legal advice, the Commissioner changed his mind and wrote to the respondents' attorneys:

> "I have come to the conclusion that the provisions of Section 99(2)(a) of the Act may be applicable, depending on whether your clients acted as agents or as principal. If your clients were agents, then on this basis they are also liable. I have accordingly resolved that I am obliged to give the matters raised in the proviso to Section 99(2)(a) consideration, accepting (without deciding) for the purposes thereof that your clients acted as agents and not as principal ...Your clients are hereby invited to make such further written representations to me as you deem desirable in this regard."

[13] Further representations followed and the Commissioner eventually notified the respondents of his decision. In both cases the reasons were the same. They appear in the following extracts from the letter which Conlog received:

> "It is customary, and is indeed practice, to accept that there exists a relationship of trust between licensed clearing agents and my Office, and I have always accepted the position to be so and have arranged the day to day administration of my Office based on such understanding. To hold otherwise would require the physical examination of every consignment of goods imported into or exported out of the Republic. This, in turn, would render the effective

administration of imports and exports quite impossible. The cost of administration would become prohibitively high and the delays caused would seriously inhibit the flow of trade. Furthermore, this Office does not possess, and was never possessed, of a large enough personnel to facilitate such extensive physical examination of all consignments.

Clearing agents licences are issued annually in terms of the provisions of the Act. Every such agent, including Conlog, must annually submit a form styled: 'Application for licensing as a clearing agent in terms of Section 64B(2) of the Customs and Excise Act, 1964.' Such application forms are duly completed signed and delivered to the relevant Controller. Paragraph 8.1 of the application form, inter alia, provides as follows:

> 'The applicant undertakes to institute adequate administrative measures to ensure that -
>
> (a) the contents of all documentation submitted to the office are duly verified;'

Conlog has signed such applications every year. This office expects that clearing agents will honour their undertakings...

Having carefully considered the representations made by and on behalf of Conlog and the content of the papers before Court referred to hereinbefore, I have not been satisfied that Conlog took all reasonable steps to prevent the non-fulfilment contemplated in section 99(2)(a) of the Act.

In this regard I paid particular attention to the facts and allegations set out at pages 16 to 20 of Conlog's representations dated 13 July 1994. It struck me as particularly significant that Conlog made no reference to the relationship of trust that exists between my Office on the one hand and clearing and forwarding agents on the other hand. Conlog has failed to convince me that any effort was made by it to ensure that the particulars on the Bills of Entry were indeed correct. In particular Conlog did not endeavour to ascertain whether the purported consignees of the goods in the declared country of destination even existed, or were in truth the consignees, or even received the goods. No proof or evidence of any steps taken by Conlog in this regard was submitted for my consideration. Nor did Conlog attempt to prove that payment for the goods had been made and were received in the RSA. The body of evidence before me, taken as a whole, suggests that Conlog has instituted no or inadequate administrative measures to ensure that the contents of all documentation submitted to Customs are duly verified."

[14] The respondents' case is essentially that the Commissioner did not properly apply his mind to the question which he had to decide. In order to consider the validity of their contention it is necessary to deal briefly with s 99(2)(a). It reads as follows:

"An agent appointed by any importer, exporter, manufacturer, licensee, remover of goods in bond ... shall be liable for the fulfilment, in respect of the matter in question, of all obligations, including the payment of duty and charges, imposed

on such importer, exporter ... remover of goods in bond ... by this Act and to any penalties ... which may be incurred in respect of that matter: Provided that such agent ... shall cease to be so liable if he proves to the satisfaction of the Commissioner that -

(i) he was not a party to the non-fulfilment by any such importer, exporter ... remover of goods in bond or other principal, of any such obligation;

(ii) when he became aware of such non-fulfilment, he notified the Controller thereof as soon as practicable; and

(iii) all reasonable steps were taken by him to prevent such non-fulfilment."

[15] Of the three requirements of the proviso only the third is relevant because the Commissioner accepted that the other two had been met. The words "such non-fulfilment" in par (iii) plainly refers back to the non-fulfilment of a principal's obligation mentioned in the main part of the provision and in par (i). Although the section renders an agent generally liable for all his principal's obligations in terms of the Act, it is clear that the proviso relates in any given case only to the unfulfilled obligation in that case. It follows that the question in the enquiry under par (iii) must in every case be whether the agent has taken all reasonable steps to prevent the non-fulfilment of the particular obligation which the principal has not fulfilled.

There was some debate in this Court on the question whether an exporter or remover is legally obliged under ss 18 and 18A to take the goods in question out of the common customs area. Obviously, his liability to pay the duty is not extinguished if he fails

to do so, but it does not necessarily follow that he has a positive obligation to remove the goods for which his agent may be liable under s 99(2)(a). The Court *a quo* found that neither s 18 nor s 18A creates such an obligation, but on the view that I take of the matter, it is not necessary to decide whether this is correct. It must be stressed, however, that the Commissioner's case was presented to this Court on the basis that the respondents are liable for their principals' obligation to remove the goods from the common customs area. What the Commissioner accordingly had to decide was whether they had taken all reasonable steps to prevent the diversion of the goods.

[16] A striking feature of the reasons for the decision is the emphasis on the respondents' undertakings to institute adequate administrative measures. I pause to say that, in the letter to the respondents' attorneys inviting them to make representations for purposes of s 99(2)(a), the Commissioner listed the documents which he would take into consideration. The respondents' license applications did not appear in the list; but, after he had received the representations, the Commissioner sent copies of the applications to the respondents' attorneys and informed them that he intended taking the contents thereof into account as well. His sudden

interest in these documents is explained by the particular significance which he attached to the relationship of trust and by the concluding sentence of the quotation in par [13] which leave the reader in no doubt that the Commissioner simply held the respondents to their undertakings. Such an approach was plainly wrong. What he had to decide, was not whether the respondents had complied with their undertakings, but whether they had taken all reasonable steps to prevent the diversion of the goods. I say this because the enquiry under par (iii) is directed at the reasonableness of an agent's conduct and the mere fact that he has not complied with an undertaking to take adequate measures to ensure the accuracy of documents submitted to the Controller can obviously not be conclusive.

[17] Moreover, reasonableness in the context of par (iii) must be determined, as the reasonableness of conduct has to be determined in many other fields of the law, by an objective standard. Since the conduct of a member of the clearing and forwarding industry was under consideration, the Commissioner had to take account of the customary functions of clearing agents. Apart from the respondents' own allegations about the customs of the industry, there is a supporting affidavit by Mr AJ Cowell before us. According to Mr Cowell (who has been active in clearing and forwarding for forty nine years), a clearing agent's function is "to pass the necessary documentation in respect of clearing goods"; what is expected of him, is a verification of documents from documents, that is to say, the contents of documents submitted to the Controller must accord with the contents of documents in the agent's possession; in all transactions the agent "relies on the honesty and integrity of those persons supplying the information

needed to prepare and submit the necessary documentation"; for various reasons, it is unreasonable and contrary to the general methods accepted world wide to expect of an agent to make enquiries in other countries to verify the existence and identity of the consignor and consignee; and the Commissioner has never in the past required such enquiries to be made. This was admittedly said in an affidavit attached to the respondents' replying affidavits but the Commissioner did not seek leave to reply nor did he apply to have the affidavit struck out. The allegations stand uncontradicted and are supported by s 64B(2) of the Act which provides that

> "[t]he Commissioner may, subject to such conditions as he may in each case impose, license any person applying therefor and approved by him, as a clearing agent ***for making entry of or delivering a bill of entry relating to, goods on behalf of an importer or exporter of goods, as the case may be.***"
>
> (Emphasis added.)

No mention is made of any obligation apart from making entry and delivering a bill of entry. The Commissioner was aware of the customary procedures in the industry: he is an experienced customs official himself and what the respondents claimed to be the functions of clearing agents was brought to his attention in the correspondence before he took the decision. The fact that he did not even mention this aspect of the matter in the reasons for his decision strengthens the impression that he concerned himself with the respondents' undertakings and with very little else.

[18] There is another consideration which he did not mention and must be taken to have overlooked. The Commissioner has wide powers under ss 18(7) and 18A(6) of the Act to control exports by prescribing whatever terms he may wish, and the Controller is

entitled under s 39(1)(c) to demand

> "invoices as prescribed ... a copy of the confirmation of sale or other contract of purchase of sale, importer's written clearing instructions ... and such other documents relating to such goods as [he] may require in each case"

and in addition may require the person making an entry to

> "answer all such questions relating to such goods as may be put to him by the Controller ..."

But these powers were never exercised. The impression is irresistible that the insistence on the positive verification by active enquiry of the particulars in bills of entry stemmed from the benefit of hindsight. In the letters to the respondents the Commissioner speaks of the practice of accepting the returned bills of entry as proof that goods had left the common customs area, as "the time honoured practice of this office, dating back to long before I had become the incumbent thereof". "These acquittal documents", he says, "were accepted on the same basis of trust as the bills of entry had previously been accepted." What he did not say, is that clearing agents were in precisely the same position and relied as heavily on the honesty of their customers as he did on theirs. The fact of the matter is simply that for many years no-one in the industry or in the Commissioner's office suspected that the practice was open to abuse and that there might be a need for additional measures. Therefore: how can it possibly be said that the

respondents relied *unreasonably* on the integrity of the system? Neither the Commissioner nor the Controller foresaw that the system could fail; and if seasoned customs officials like these did not foresee it, why should clearing agents have done so? There is no answer to these questions in the Commissioner's reasons, nor, for that matter in his opposing affidavit.

[19] For these reasons it is clear to me that the Commissioner did not apply his mind properly to the question before him. Had there not been constitutional complications the appeals would have been relatively simple because there could have been no doubt that a common law review should succeed (cf *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988(3) SA 132 (A) at 152A-D). But, as mentioned earlier, there may be a question about the availability of common law grounds for review in view of the way in which the interim Constitution dealt with administrative justice. Counsel were agreed that the common law on the subject was not abolished but, because the question is important, I shall deal with it.

[20] In the *Fedsure* case the Constitutional Court only dealt with the interplay between the interim Constitution and the common law relating to administrative action in the context of the jurisdiction of the Appellate Division. As explained in paras [101] and [102] of the judgment of the plurality every administrative action has to be consistent with s 24 of the interim Constitution, that is to say it has to be lawful and procedurally fair. However, I agree with the view which Professors Du Plessis and Corder expressed in *Understanding South Africa's Transitional Bill of Rights* at 170 that "s 24 does not purport to constitutionalize judicial review in its fulness."

Judicial review under the Constitution and under the common law are different concepts. In the field of administrative law constitutional review is concerned with the constitutional legality of administrative action, the question in each case being whether it is or is not consistent with the Constitution, and the only criterion being the Constitution itself. Judicial review under the common

law is essentially also concerned with the legality of administrative action but the question in each case is whether the action under consideration is in accordance with the behests of the empowering statute and the requirements of natural justice. The enquiry in this regard is not governed by a single criterion. The grounds for review which the courts have developed over the years can never be regarded as a *numerus clausus* for the simple reason that administrative law is not static. As new notions develop and take root, so must new measures be devised to control the exercise of administrative functions. In South Africa this is particularly true in view of the requirement of s 35(3) of the interim Constitution that any law be interpreted, and that the common law be applied and developed, with due regard to the spirit, purport and objects of the Bill of Rights.

I cannot imagine that the intention was to do away with this type of review. No doubt administrative action which is not in accordance with the behests of the empowering legislation, is unlawful and therefore unconstitutional, and action which does not meet the requirements of natural justice is procedurally unfair and therefore equally unconstitutional. But, although it is difficult to conceive of a case where the question of *legality* cannot ultimately be reduced to a question of *constitutionality,* it does not follow that the common law grounds for review have ceased to exist. What is lawful and procedurally fair within the purview of s 24 is for the courts to decide and I have little doubt that, to the extent that there is no inconsistency with the Constitution, the common law grounds for review were intended to remain intact. There is no indication in the interim Constitution of an intention to bring about a situation in which, once a court finds that administrative action was not in accordance with the empowering legislation or the requirements of natural justice, interference is only permissible on constitutional grounds. On the contrary, s 35(3) is a strong indication that it was the intention, not to abolish any branch of the common law, but to leave it to the courts to bring it into conformity with the spirit, purport and objects of the Bill of Rights. S 33(3) which proclaims that the entrenchment of rights shall not be construed as denying the existence of any other rights conferred by common law which are not inconsistent with the Bill of Rights, points the same way.

[21] In the present case I have found that the Commissioner did not apply his mind properly to the question before him. At common

law such a finding provides sufficient reason to set the decision aside and I find it unnecessary to consider whether it also falls foul of s 24 of the interim Constitution. I also find it unnecessary to deal with the Court *a quo*'s judgment. Although I have followed a different route, I am of the view that the conclusion that the decision had to be rescinded, was correct.

[22] It is necessary to record in conclusion that we condoned the Commissioner's failure to file the record in terms of the Rule at the hearing of the appeal, and that we ordered him to pay the costs occasioned by the application for condonation.

The appeals are according dismissed with costs

including the costs of two counsel.

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HEFER JA

CONCURRED: Vivier JA
Nienaber JA
Plewman JA
Farlam AJA