

IN THE HIGH COURT OF SOUTH AFRICA
TRANSVAAL PROVINCIAL DIVISION

Date: 16/8/2005.

CASE NO.: 23708/2005

UNREPORTABLE

In the matter between:

SAVANNA TOBACCO COMPANY (PTY) LTD

Applicant

And

THE MINISTER OF FINANCE

1ST Respondent

THE COMMISSIONER OF CUSTOMS, SARS

2ND Respondent

THE CONTROLLER OF CUSTOMS, MUSINA

3RD Respondent

JUDGMENT

WEBSTER J

The applicant seeks an order, as a matter of urgency, for the release of 2100 master cases of "Pacific Misty Cigarettes" that are held by the respondents at Beit Bridge Customs. The application is opposed.

The applicant, according to the founding affidavit, is a company duly registered and incorporated in Zimbabwe and is, La., the manufacturer of cigarettes. It sold 3 000 master cases of cigarettes to a company McCroft

Tobacco Holdings Ltd, a company with its head office in St. Peter Port Guernsey, Channel Islands. I shall refer to the latter as "McCroft". The purchased cigarettes were to be delivered in Iraq, via Turkey.

The cases were packed into three containers. Each container had 1 000 master cases (i.e. 10 million cigarettes in each container), comprising 600 master cases of Pacific Misty, 300 Pacific Blue and 100 Pacific Storm.

Three (3) trucks towing the trailers on which the containers were loaded were stopped on 13 June 2005. On 14 June, 2005 the officials of the third respondent searched each trailer in the presence of the applicant's clearing agent. According to the respondents' version which is admitted by the applicant, "*... the first rows of master cases loaded in each container contained packets bearing the diamond impression and health warning.*"

According to the applicant the cigarettes referred to above were manufactured in Zimbabwe and were in transit through South Africa. It is common cause that the cigarettes would have attracted no customs or excise levies or taxes.

It is further common cause that all boxes of cigarettes imported into South Africa must bear a stamp impression of a distinguishing mark. It is common cause that the relevant mark is a diamond impression. It is further common cause that all cigarettes sold in South Africa must contain the statutory health warning that tobacco products are a health hazard. The applicant avers in its replying affidavit that such a warning is not unique to South Africa.

Pursuant to negotiations between the parties the cigarettes that did not bear the "diamond impression" and the "health warning" were released to the applicant's clearing agent. The 2 100 master cases bearing the diamond

impression and health warning continue to be detained by the respondents. They constitute the subject matter of this application.

The 900 master cases that were released to the applicant were subsequently exported.

It is further common cause that various offers were made by the applicant to resolve the impasse regarding the 2 100 cases. These include the payment of import duties and taxes, providing an escort at its expense to ensure that the cases are conveyed to the port of export i.e. Durban and are in fact exported. The respondents will not budge.

The applicant's case is that the cigarettes were consigned and entered South Africa in transit for export and accordingly that no offence has been committed in respect of the detained goods. They aver further that in accordance with "The Treaty of the South African Development Community" that was published in the Government Gazette 21541 No. R893, and came into operation on 12 September 2000, such goods enjoy freedom of transit and the detention of the cigarettes constitutes a breach of the said treaty.

The respondents' case is that it has reason to believe that the impounded cigarettes were intended for sale in South Africa and were not to be exported. The first basis for this belief is based on the presence of the diamond impression and the health warning. They further allege that they have been investigating the smuggling of Pacific cigarettes into the country as such cigarettes are being sold in the country without having been imported lawfully. They aver that according to their intelligence network they were expecting the consignment in issue and had been primed of the deception in packaging of the boxes i.e. that the rows at the doors were of cigarettes that are legitimately for export. They aver further that there is a reasonable belief that the cigarettes may have been

manufactured locally, smuggled into Zimbabwe and brought back on the pretext of a "removal in transit" with the intention of releasing them on the local market. They aver that locally manufactured cigarettes attract "*ad valorem excise duties when released onto the domestic market ... and foreign manufactured cigarette, when imported attract ad valorem customs duties*". They refer to this as "Round Tripping".

Some of the reasons for the above-mentioned suspicions are that:

- (i) the "Certificate of Marine Insurance", excludes theft and hijacking - in the respondents' experience, it is said, diversion and round-tripping often involve "arranged hijackings" *en route* to the port of export in South Africa. The hijacked goods thereafter find their way into the domestic market. The respondent claim that eight such incidents where goods brought into South Africa via Beit Bridge in transit to Durban during 2005, were allegedly hijacked *en route* to Durban;
- (ii) there was no armed escort visible at Beit Bridge as alleged in applicant's documents;
- (iii) many documents pre-date the letters of intent and only became available after 17 June 2005;
- (iv) all documents forwarded by the purchaser's agent are facsimiles with no signature by the authors thereof;
- (v) according to various documents the consignment was to be discharged in Mersin (Istanbul, Turkey) yet destined for Iraq;
- (vi) according to "Image Freight and Logistics" the company transporting the cigarettes the three containers were to be exported " ... to the USA" (Annexure IE10.20);
- (vii) "Cargo Services" advised the third respondent that the cigarettes were " ... originally consigned for Britten (sic)" (Annexure IE11);
- (viii) the explanation given by McCroft as to how the diamond impression came to be on a consignment intended for export is not acceptable. This

explanation in an unsigned letter from McCroft (Annexure "L" to the founding affidavit) reads: *"Savanna Tobacco has done an investigation and we have been advised that the stamp that marks the boxes was de-commissioned at the beginning of manufacture by taking the belt off the stamping arm. However; it seems like someone put the belt back into position, we assume they were thinking they were doing the right thing. This is the reason the diamond marking has appeared on the 2100 master cartons.*

Savanna Tobacco have been requested to give a report, in writing, . as to why the diamond marking was put on the boxes during manufacture and is herewith accompanying this letter'~

- (ix) when the 900 master cases without the diamond impression were released, the parties agreed that two officials would be notified on the arrival of these cases in Durban prior to their export. The applicant failed to honour this agreement.
- (x) during the course of its investigation, the respondents' anti-smuggling team discovered on 30 June 2005 that Pacific-branded cigarettes were on display at Super Spar at Boksburg. The cigarette boxes did not bear the diamond impression as they were supposed to or the health warning. They were being sold for R4.95 a packet as opposed to R12.00 to R16.00 at the normal price. The packets had a ribbon with the words *"Not for sale in the R.5.A."*~ No invoice or credit note for the purchase or otherwise could be produced by Spar. Further, the cigarettes manufactured by the applicant destined for Zimbabwe diverted to South Africa are alleged to have been traded illegally in Cape Town and Johannesburg.

Mr. Snyman who appeared for the applicant submitted that the respondents bore the onus to prove that the goods were not in transit. He submitted that the goods were in transit and the respondents conduct was

unlawful and violated La., the provisions of the SADEC TREATY. He submitted that the containers had been properly sealed and that the offer by McCroft to pay the import customs, or alternatively the insurance cover in the respondents' favour was adequate to protect the interests of the respondents. He submitted further that the respondents' conduct could result in serious diplomatic consequence for this country.

Mr. Stais who appeared for the respondents submitted that the cigarettes had been properly detained. He submitted that the goods had not been seized and that the respondents were legally entitled to detain the cigarettes pending investigations.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are to be founded in sections in the Customs and Excise Act No. 91 of 1964 (the Act). These are set out below for convenience:

's.35A. Special provisions regarding cigarettes and cigarette tobacco. -

- (1) *The Commissioner may prescribe by rule-*
 - (a)
 - (b) *distinguishing marks or numbers in addition to the stamp impression referred to in subsection (2) which must or must not appear on containers of cigarette tobacco removed from the customs and excise warehouse for home consumption or for export.*
 - (c)
- (2) *No licensee may remove any cigarettes or allow any cigarettes to be removed from a customs and excise warehouse unless -*
 - (a) *if removed for home consumption, a stamp impression determined by the Commissioner has been made on their containers; or*
 - (b) *if removed for export such stamp impression does not appear on the containers; and*

(c)

s.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.*

(2) Any -

(a) *ship, vehicle, container or other transport equipment used in the removal or carriage of any goods liable to forfeiture under this Act or 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 87 and 89 of Part 1 of Schedule No. 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

s.88. Seizure.-

(1) (a) *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.*

(b)

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

(d) *The Commissioner may seize any other ship, vehicle, plant, material or goods liable to forfeiture under this Act*

s.107. **Expenses of landing, examination, weighing, analysis, etc.**

(1) ...

(2) (a) *Subject to the provisions of this Act, the Commissioner shall not, except on such conditions, including conditions relating to security, as may be determined by him, allow goods to pass from his control until the provisions of the Act or any law relating to the importation or exportation or transit carriage through the Republic of goods, have been complied with in respect of such goods, and the State of the Commissioner or any officer shall in no case be liable in respect of any claim arising out of the detention of goods pending the decision of the Commissioner or for the costs of such detention. "*

The applicant, in its affidavits, uses the words "detain", "seized" or "seizure" interchangeably. The word detain is defined in The Concise Oxford Dictionary, as " ... *keep in confinement,· with-held; keep waiting'*~ The word detention is defined as " ... *detaining; being detained; arrest,· confinement,· compulsory delay'*~ Dealing with the terms detention and seizure as contained in section 88 of the Act, Van Der Westhuizen J stated in Henbase 3392 v Commissioner, SARS, and Another 2002(2) SA 180 (TPD) at 191 D to E: "Detention and seizure or forfeiture, for example in terms of s.87 of the Act, are very different steps as far as the conduct of the respondent is concerned Whereas it can easily be understood that for example the audi alterem part em principle mayor has to be applicable to seizure and forfeiture, the same is not necessarily true regarding mere detention. In terms of sections 87 and 88, detention is the very first step which takes place in order to set in motion a

process of establishing whether forfeiture should follow'~ I agree wholly with this exposition.

The respondents have made it abundantly clear that their action is not a seizure or forfeiture but a preliminary "with-holding" pending their investigations. They have further invited the applicant to explain about the cigarettes that bear the diamond impression. I am satisfied that they have not "seized" the cigarettes as contemplated in sections 87 and 88.

Mr. Snyman emphasized the fact that the goods, having been in transit had not been "imported". My understanding of his submission is that being goods-in-transit the respondents did not have the *locus standi* nor power to detain the cigarettes.

He may have been obliquely referring to the following statement by Goldstone J.A. in *Tieber v Commissioner of Customs and Excise* 1992(4) SA844 at 850 1 - 851 A:

*" ... 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 brought into the Republic. An indication that s.15(1) (of Act 59 of 1990) 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 fulfill in respect of goods in transit and not in the physical possession of the traveller". (The underlining is mine). The facts *in casu* are substantially identical to those in the Tieber case - *supra*.*

There are several issues that stick out like the proverbial sore-thumb, in this matter. The respondents acted in consequence of information concerning the illicit smuggling of cigarettes from Zimbabwe. That information concerned

the applicant directly. The documents presented by the applicant were suspicious, in most cases bearing no significance and viewed in totality contradictory and suspect. There were specific instances of trucks with cigarettes for export being "hijacked". The Certificate of Marine Insurance (Annexure "H") is strange in various important respects. It was tendered and is referred to as being for the benefit and security of "Control of Customs and Excise at Beit Bridge". The document is unsigned. The date on it corresponds with the date when the trucks with the containers were detained. The document is ambiguous and if it means anything at all it limits insurance benefits to "FCD, theft following and hijack", whatever that might mean. In my view the document was correctly rejected by the respondent.

In addition to the above there is no explanation forthcoming from the applicant on a crucial issue, namely the presence of the diamond impression and health hazard warning. In the unsigned letter McCroft state that the applicant's explanation of these features "*... is herewith accompanying this letter*"~ No such letter was annexed to the papers and no explanation has been made by the applicant. This, to my mind, is devastating to the applicant. I am satisfied that whatever onus the respondents bear has been discharged.

I revert to the quotation by Goldstone J.A. in the Tieber case. In my view the underlined words in the quotation indicate that the learned judge did not intend and in fact did not lay down an immutable legal principle. In the Tieber case the goods were definitely in transit. It is my considered view that the export of the cigarettes was not *bona fide* but an attempt to smuggle the cigarettes into this country. Not only has the applicant failed to explain why the detained cigarettes bore the marks that clearly and unequivocally prove that the cigarettes were destined for this country but has likewise failed to explain why the cigarettes eligible for export were packed at the door of each container. The inference that the intention was to deceive a causal inspection into believing

that all the cigarettes in each container were for export is irresistible. This was clearly a case of simulated "export". That being so, the cigarettes were not "in transit". The respondents were entitled to detain the goods whilst conducting investigations. In this regard sections 88(1)(a) and 107(2) of the Act authorize such detention.

I have dealt with this matter on the basis of economic urgency. Strictly speaking no case for urgency was made out at all.

The application is dismissed with costs

G. Webster

**G. WEBSTER
JUDGE IN THE HIGH COURT**

Date of hearing	21 July 2005
Counsel for the Applicant	Adv. Snyman
Instructing Attorneys	Peter Sapire Attorneys Johannesburg
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