

SOUTH AFRICA / JUDGMENT

Commissioner for the South African Revenue Service (SARS) v Saleem (21/07) [2008] ZASCA 19; [2008] 3 All SA 104 (SCA); 2008 (3) SA 655 (SCA); 70 SATC 115 (27 March 2008)

[2008] ZASCA 19

COURT

Supreme Court of Appeal

BEFORE

Cameron, Combrinck, Snyders

CASE / FILE NUMBER

21/07

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA REPORTABLE

Case number : 21/07

In the matter between :

THE COMMISSIONER FOR THE SOUTH
AFRICAN REVENUE SERVICE (SARS) APPELLANT
and
A SALEEM RESPONDENT
CORAM : CAMERON, COMBRINCK JJA et
SNYDERS AJA
DATE : 12 MARCH 2008
DELIVERED : 27 MARCH 2008
Summary: Revenue –
customs and excise – duty of officer when seizing goods in
terms of s 88(1)(c) of Customs and Excise
Act 91 of 1964 –
when justified in absence of books of account and supporting
documents.
Neutral citation: CSARS v Saleem
(21/2007) [2008] ZASCA 19 (27 March
2008)

JUDGMENT

COMBRINCK JA/

COMBRINCK JA:

- [1] The respondent in this appeal claims to be the owner and manager of a small clothing retailer known as Payless Fashions which conducts business from a shop in Brakpan, Gauteng. During September and October 2006 officers in the employ of the appellant seized and removed some R1,2m worth of goods from these premises on the basis that they were imported goods for which no import duty had

been paid. The respondent successfully applied to the High Court, Pretoria, for an order declaring the seizure unlawful and a further

order that the goods seized be returned by a fixed date. With leave of the court a quo (van Rooyen AJ) the appellant appeals to this court against the order.

- [2] The appellant filed an answering affidavit to respondent's founding affidavit. No replying affidavit was filed and the factual allegations contained in appellant's answering affidavit stand unchallenged. Bearing this in mind and where there are factual disputes, applying the rule in *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984
- (3) SA 623 (AD), the factual background to the matter can be summarised as follows. Acting on complaints that retailers in the Brakpan area were trading in illegally imported goods officers in the employ of the appellant, Van der Merwe and Jansen, in the company of members of the Department of Home Affairs and the Metro Police attended on the respondent's shop. When enquiring who the owner was the respondent replied that he was not the owner, he did not know where the owner was, but that the owner visited the shop from time to time. Van der Merwe explained that they were there to determine whether the goods being offered for sale had been imported in accordance with the provisions of the Customs and Excise Act 91 of 1964 ('the Act'). The officers examined the goods on the floor and established that the vast majority of clothing, shoes and bags were labelled 'Made in China' and had Chinese inscriptions on them. Respondent was asked to produce the import documentation relating to the goods or invoices to prove from whom the goods were purchased. The respondent claimed that the goods were purchased from retailers or wholesalers in Chinatown (an area in Johannesburg with many Chinese traders) and Fordsburg. He offered to take Van der Merwe to his suppliers but Van der Merwe declined. All purchases respondent said were for cash. The respondent produced two or three invoices which were found by the officers to be unacceptable in that they contained no description of the goods purchased, nor did they reflect who the buyer was. Van der Merwe then served on the respondent a notice of detention of the goods which recorded that the goods would remain sealed and in detention at the shop premises. The reason for the detention was said to be for further investigation. He also recorded that the detention would

be lifted once 'supporting documents (commercial invoices, MAWB, packing lists, etc)' were received. Van der Merwe said that the purpose of the detention was to afford the owner an opportunity of proving that the goods had been lawfully imported. Van der Merwe advised the respondent that he would afford him and the owner three days till Tuesday 3 October 2006 to produce the necessary documents. At the instance of the respondent the further meeting was brought forward to Monday 2 October. On that date the respondent introduced Van der Merwe to a Mr Chen who he said was the owner of the shop. Chen, according to Van der Merwe, had been present in the shop on 29 September when he interviewed respondent. Chen handed in some ten invoices which suffered from the same shortcomings as the three previously tendered – in particular they did not reflect Payless Fashions as the purchaser, nor did they contain a description of the goods purchased. Van der Merwe stated that there was a huge amount of stock – he estimated the value to be R1,2m, which he eventually removed with a 8 ton truck. When asked for proof of ownership of the business, Chen supplied Van der Merwe with a VAT number and an income tax number. Van der Merwe subsequently found the VAT number to refer to a Mr G Char and the income tax number to a Mr Py Lu. Van der Merwe advised Chen that the goods were subject to forfeiture and that he would be returning to remove them.

[3] On 3 October the following notice was served on Chen:

'Mr Daoyuan Chen

RE: Seizure of goods in terms of section 88(1)(c)

On the 29th of September 2006 your goods in the abovementioned shop was detained in terms of Sect 88(1)(a) of the Customs Act, Act 91 of 1964 as amended.

This was in order to determine if all duties due to the importation of the goods was brought to the account of the state. The production of the invoices or import documents was required under Sect 101, and Sect 102 of the Customs Act, Act 91 of 1964.

The invoices produced to this office by you did not contain the necessary information in order to determine that the invoices are for the goods in your shop as it did not specify the goods, Supplier name, and Supplier address. The goods are therefore deemed not to be declared upon importation.

The goods detained at your premises on the 29th of September are liable to forfeiture under the Act and will be seized in terms of Sect 88(1)(c) of Act 91 of 1964.

I however want to bring it under your attention that you may follow the mitigation process in terms of Sect 89 and Sect 93 of the Customs Act, Act 91 of 1964.

I trust that the above will be in order, and that you will understand the importance of the matter.'

On 5 October Van der Merwe seized and removed all the goods which had indications on them that they had been imported from China, leaving behind the stock not so marked. The respondent thereafter on 9 October launched the present application for return of the goods.

[4] The learned judge in the court below correctly approached the matter of the detention and seizure of the goods in the light of the fundamental rights enshrined in the Constitution. The enquiry, he said, in determining the powers of an official acting in terms of the provisions of the Act, in particular s 88(1)(a) was whether he had a reasonable suspicion that the goods after later examination might be liable to forfeiture. He examined the facts and concluded that Van der Merwe had a suspicion that the goods were illegally imported but in the circumstances this suspicion or belief was not reasonable. The mere fact that the goods bore labels indicating they were made in China was, said the judge, insufficient to justify the inference that they were imported. Further investigation should have been made. When the respondent offered to take the officers to his suppliers, they should have complied. By refusing to go, so the judge reasoned, they made it practically impossible for him to produce proof as to the persons from whom the goods were obtained. To require the respondent to have brought the sellers to Van der Merwe was held to be ‘ . . . an unreasonable and impractical approach’. The ratio of the decision is in the following paragraph:

‘[18] The seizing of goods is a serious matter which impacts upon both privacy and dignity. Within a rule of law state, organs of state, such as the officer acting in the place of the Commissioner, should apply his mind properly to the jurisdictional facts, of which he must be convinced, before seizing. To simply base the decision to seize on the absence of supporting documentation was not justified. Of course, the first leg of s 102 could be satisfied by providing proof by way of invoices. But that is

not what s 102 necessarily requires: the applicant could have produced proof in another manner eg by taking the officer to the persons from whom he had bought the goods. There is no absolute requirement of documentation here. There was, accordingly, a substantial omission; an omission to consider a factual circumstance which the applicant said existed and could exonerate him. Had van der Merwe or a member of his staff accompanied the applicant and it amounted to a wild goose chase, the officer could at least have said that he had seriously attempted to consider the full range of relevant facts in terms of s 102.’

He concluded by finding that at the heart of the error by Van der Merwe lay his omission to enquire properly so as to come to a rational decision. He therefore granted the following order:

- ‘1. The seizing of the goods from the applicant’s premises at shop 7, Brakpan Plaza, Voortrekker Road is declared to have been unlawful
2. The Commissioner must, at its own costs, restore into applicant’s possession at the said shop the goods listed in Schedule A on or before Friday 27 October at 16:00
3. Second Respondent must pay the costs of the applicant.’

- [5] At the commencement of the appeal, the attorney acting for the respondent applied for the appeal to be struck from the roll for non-compliance with Rule 49(3) of the Uniform Rules of Court. The notice of appeal, he argued, did not set out what was required to be contained in it by that Rule. As pointed out by counsel for the appellant, it is Rule 7(3) of the Rules of this court which is applicable. The notice of appeal complies with Rule 7(3). The point in limine is therefore dismissed.
- [6] There were two procedural points relating to notice to be given to the appellant and locus standi of the respondent raised in the court below and in the appellant's heads of argument. Counsel for the appellant, however, indicated at the commencement of his argument that these points were not being pursued. Nothing further need therefore be said about them. The true issue here, so counsel submitted, is not one of interpretation of the Act, but whether on the facts before the court it was correct in finding that Van der Merwe's belief that the goods were being illegally imported and therefore subject to detention and seizure was not reasonable. Counsel argued that on the uncontroverted evidence of Van der Merwe he had every reason to believe on reasonable grounds that the goods were imported and that they had been imported in contravention of the provisions of the Act.
- [7] The seizure of the goods by Van der Merwe was an administrative act which had to be exercised in conformity with the requirements of the Constitution as spelt out in the Promotion of Administrative Justice Act 3 of 2000. (See *CSARS v Trend Finance (Pty) Ltd* 2007 (6) SA 117 (SCA) par 25.) The constitutionality of the extent of the powers the Act gives to an official in the employ of the appellant was not challenged by the respondent. The sole issue therefore, as advanced by appellant's counsel, is the reasonableness of Van der Merwe's suspicion that the goods were imported goods and that further investigation would establish that they were subject to forfeiture.
- [8] The goods were detained and sealed by by the Act Van der Merwe in terms of s 88(1)(a) read with s 4(4)(a) and 4(12) of the Act. The sections read respectively as follows:
- '88(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.'
- (4)(4)(a) An officer may, for the purposes of this Act-
- (i) without previous notice, at any time enter any premises whatsoever and make such examination and enquiry as he deems necessary;
- (ii) while he is on the premises or at any other time require from any person the production then and there, or at a time and place fixed by the officer, of any book, document or thing which by this Act is required to be kept or exhibited or which relates to or which he has reasonable cause to suspect of relating to matters dealt with in this Act and which is or has been on the premises or in the possession or custody or under the control of any such person or his employee;

(iii) at any time and at any place require from any person who has or is believed to have the possession or custody or control of any book, document or thing relating to any matter dealt with in this Act, the production thereof then and there, or at a time and place fixed by the officer.

(iv)’

‘(4)(12) An officer may lock up, seal, mark, fasten or otherwise secure any warehouse, store, room, cabin, place, vessel, appliance, utensil, fitting, vehicle or goods if he has reason to believe that any contravention under this Act has been or is likely to be committed in respect thereof or in connection therewith.’

The goods were seized by Van der Merwe in terms of s 88(1)(c):

‘(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.’

[9] Goods are liable to forfeiture in terms of s 87(1) if they have been dealt with contrary to the provisions of the Act or

in respect of which an offence under the Act has been committed – in short, goods brought into the country without declaring them and paying the necessary custom duty. The suspicion on reasonable grounds required of an officer such as Van der Merwe at the time of seizure must therefore be that:

- (a) the goods found are imported goods;
- (b) they have been imported without compliance with the provisions of the Act;
- (c) they are liable to forfeiture.

[10] In policing the Act the appellant’s hand is strengthened by the provisions of s 101 and 102(1). The former provides that any person carrying on any business in the Republic must keep books, accounts and documents relating to his transactions which he shall on demand produce. The latter places an obligation on any person selling or dealing in imported goods to produce on request

by an officer proof as to the person from whom the goods were obtained or if he is the importer or owner of the goods the place

where the duty due therefor was paid, the date of payment and the particulars of the entry for home consumption, etc.

[11] When examining Van der Merwe’s conduct there is one important factor which it appears was overlooked by the judge a quo. That is that neither the respondent nor Chen at any stage contended that the goods were not imported. The respondent does not allege in his founding affidavit that the goods were not imported. Van der Merwe in his affidavit made allegations such as the following:

‘A few invoices tendered did not in any way explain the huge stock and the imported stock were for all intents and purposes not traceable to any other importer than Mr Chen. I submit there can be no doubt that Mr Chen as the alleged owner had a beneficial interest in the said stock during the importation thereof.’

And:

‘The seized goods were clearly being imported into the Republic and Mr Chen cannot furnish proof of the legal importation of such goods. Even if he alleges that he has not imported the said goods, but has bought it lawfully from a local distributor, he must be in a position to furnish invoices to trace the goods to the original importer of the goods.’

These allegations stand unchallenged. The conclusion by the judge in the following passage is thus unfounded:

‘Finally, the officer should have investigated whether the goods were indeed imported goods. For all he knew the goods were manufactured in South Africa in spite of the ‘Made in China’ tags and the Chinese inscription on the goods. My impression is that the officer focussed only on one aspect, the insufficiency of invoices.’

[12] When considering whether Van der Merwe had reasonable grounds for seizing the goods there are a number of factors which are material. First, there is the fact that the goods were marked as being made in China and bore Chinese inscriptions coupled with the fact that neither the respondent nor Chen contended that they were locally made. Second, the inability of the respondent and Chen to produce any books or documents recording where and from whom they had been purchased. Third, the suspicious conduct of the

respondent and Chen at the first encounter when in Chen’s presence the respondent said he did not know where the owner was and when Van der Merwe returned in October he introduced Chen as the owner. Four, Chen giving false VAT and tax numbers. Five, despite telling Van der Merwe he had bought the goods in Chinatown and Fordsburg, he, having been given three days to do so, produced no documents in the form of invoices or duplicate receipts from his suppliers. Faced with imminent seizure and forfeiture of the goods, one would have expected of an honest trader that he would have obtained copies of all relevant documents from his suppliers together with particulars of the person or persons from whom he had purchased them with their contact details. The respondent and Chen did nothing other than producing a few invoices which were singularly lacking in particularity. In passing it may be noted that the respondent filed no supporting affidavits by his suppliers to confirm the alleged sales in support of his application.

[13] I therefore take issue with the judge in the court below that Van der Merwe had to do more by way of investigation than wait for documentary proof from respondent in order to establish that the goods were illegally imported. I also cannot agree that there was an obligation on Van der Merwe to accompany respondent to his suppliers. As stated earlier, respondent was under a statutory duty to maintain books of account and documents to reflect from whom the goods were purchased. These provisions, I suggest, were introduced

in the Act for the very purpose of facilitating the policing of the importation of goods into the country. The respondent's

inability to produce any such documents together with the suspicious conduct recorded above, were in my view sufficient grounds for Van der Merwe to reasonably conclude that the goods were liable to forfeiture. He was therefore entitled to seize them.

[14] It follows that the appeal must succeed. The case is an important one for appellant dealing as it does with the conduct and duties of his officials and I consider therefore that the costs of two counsel are warranted. I wish to stress that I have consciously not attempted to lay down set guidelines for future conduct of appellant's officials when exercising their powers under the Act. The facts and circumstances of each detention and seizure are different. As stated herein before the powers, like any other administrative powers, must be exercised fairly and reasonably in accordance with the purpose and spirit of the Constitution and with due regard to the rights of the individual.

[15] The following order shall issue:

- (1) The appeal is upheld with costs, such costs include the costs consequent upon the employment of two counsel.
- (2) The order of the court below is set aside and there is substituted the following:

'The application is dismissed with costs.'

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P C COMBRINCK

JUDGE OF APPEAL

Concur:

CAMERON JA

SNYDERS AJA

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