

SOUTH AFRICA / JUDGMENT

**EBN Trading (Pty) Ltd v Commissioner for
Customs and Excise and Another (653/98)
[2001] ZASCA 6; [2001] 3 All SA 117 (A);
2001 (2) SA 1210 (SCA) (2 March 2001)
[2001] ZASCA 6**

COURT

Supreme Court of Appeal

BEFORE

Schutz, Melunsky, Nugent

CASE / FILE NUMBER

653/98

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CASE NO.653/98

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between EBN Trading (Pty) Ltd Appellant and The Commissioner for Customs and
Excise First Respondent The Controller of Customs and Excise, Durban Second Respondent

Before: Schutz JA, Melunsky and Nugent AJJA

Heard: 20 February 2001

Delivered: 2 March 2001 Customs Act - extended definition of “importer” - “beneficially
interested” in goods - financier - letters of credit - bills of lading - affairs arranged so that security
lay in goods - liable on plain meaning of contracts, there being no suggestion of simulation or tax
evasion or avoidance.

W P SCHUTZ

J U D G M E N T

_____.SCHUTZ JA:

[1] The essential issue is whether the appellant, EBN Trading (Pty) Ltd (“EBN”), was an “importer” in terms of the definition contained in s 1 of the Customs and Excise Act 91 of 1964 (“the Act”) in respect of goods that entered the country through Durban harbour in April 1995. EBN was certainly not an importer in the ordinary sense of the word. That role was played by a Hong Kong company, Dragon Best Investment Ltd (“Dragon”). But the respondents,

the Commissioner for Customs and Excise, and the Controller of Customs and Excise, Durban, to whom I shall refer collectively as “Customs”, rely on one of the extended meanings contained in the definition. The reason for attaching liability to EBN is presumably the impossibility of pursuing a revenue claim in a foreign court.[2] The definition reads:

“‘importer’ includes any person who, at the time of importation -

- (a) owns any goods imported;
- (b) carries the risk of any goods imported;(c) represents that or acts as if he is the importer or owner of any goods imported;(d) actually brings any goods into the Republic;
- (e) is beneficially interested in any way whatever in any goods imported; (f) acts on behalf of any person referred to in paragraph (a), (b), (c),
- (d) or (e); . . .” (emphasis supplied).

[3] EBN’s contention is that it acted as a mere financier and had no beneficial interest in the goods. Customs contends that it had such an interest in them. Broadly speaking the inter-related transactions come to this. Two traders, to whom I shall refer as “Pick ’n Pay” and “Tom Distributors” wished to import video cassette recorders (VCRs) from Daewoo Corporation (“Daewoo”), a Korean manufacturer. Dragon, the Hong Kong firm, was to procure the VCRs from Daewoo and pay for them. It would also arrange and pay for their shipping, insurance and so forth, so that they would be delivered duty paid to a warehouse in Johannesburg. Dragon was to be provided with the funds needed both to pay Daewoo and to re-imburse itself for its expenses, whilst retaining a profit. This is where EBN entered. It would provide the finance needed between the time that the goods were shipped at the Korean port of Busan until they were delivered to Pick ’n Pay and Tom Distributors. This would be done by EBN’s procuring irrevocable letters of credit, split between Dragon and Daewoo. EBN would not use its own money, but avail itself of a facility which an intermediary, Corporate Treasury Services (“CTS”), a division of Tek Corporation Ltd (“Tek”), had with Absa Bank Ltd (“Absa”). After delivery to Pick ’n Pay and Tom Distributors, the purchasers would pay EBN the agreed purchase price, from which it would meet its commitments to CTS and others and take its fee. This purchase price was to include an amount which EBN would pay to Direct Sourcing and Marketing CC (“DSM”), which would be responsible for servicing the VCRs and procuring replacements where needed, on behalf of Daewoo. Accordingly EBN would not be responsible to the traders for defects in the goods. [4] From this outline it appears that EBN is correct in saying that its role was that of a financier. But I do not think that such a broadly descriptive and imprecise term can on its own necessarily determine whether EBN was beneficially interested in the imported good. Whether it was must depend upon the results of a more exact examination of the contractual role that it filled.[5] Before undertaking that examination I should explain how the issue between EBN and Customs arose. The case of Customs is that the imported goods entered the country without customs duty being paid. The claim for duty, together with other dues, is R4 421 837,89. The manner in which duty was evaded, says Customs, is that the

goods entered the country under two bills of entry containing false information. They indicated that the country of destination was Zaire, which, if true, would have meant that the goods would be re-exported without any South African duty having to be paid. Customs is possessed of allegedly forged invoices, also reflecting Zaire as the country of destination. But no direct evidence was led as to how the goods entered the country duty free. Consequently EBN has raised an alternative argument, that there is nothing to show that the goods which it delivered to the traders had not been subjected to duty. In other words the argument is that it has not been shown that the goods reflected on the false bills of entry were the same goods that were later delivered to Pick 'n Pay and Tom Distributors. Whether this argument is a sound one will be dealt with later in this judgment. There is no suggestion that EBN was a party to a fraud on Customs. Indeed, as the contractual obligation to pay duty rested on Dragon and not EBN, the latter had nothing to gain by such a fraud.[6] The dispute came before the Natal Provincial Division in a roundabout way. Acting in terms of s 114 of the Act, Customs detained other imported goods, with which EBN was connected, as security for the amounts in issue in this case. EBN brought an urgent application for the release of the detained goods, on the basis that it was not a party liable to pay the duty in respect of the VCRs destined for Pick 'n Pay and Tom Distributors, because it was not an "importer". The application was in due course referred to evidence on the sole issue, whether EBN was the "importer" of the goods imported under the two false bills of entry. After hearing very lengthy evidence Thirion J found for Customs, but granted leave to appeal to this court.[7] I turn to the details of the transactions. Before the later to be mentioned orders of 1994 were placed, Pick 'n Pay had used EBN as a financier of imported goods. Tom Distributors was introduced to EBN late in 1994 by Mr Klein of DSM, which represented Daewoo. Both traders decided to import Daewoo VCRs, using EBN as the financier, under their respective house brands, Maxam in the case of Tom Distributors and Aim in the case of Pick 'n Pay.[8] On 7 November 1994 two faxes in similar terms were sent to Dragon, as was a further similar one on 2 December 1994. The identity of the sender requires explanation. On the top left hand corner of the faxes appear the letters EBN in prominent form. In smaller letters on the right hand corner appears the name Effective Barter (Natal) (Pty) Ltd ("Effective Barter") with a Pietermaritzburg address. They were signed by Mr Porritt, who deposed to the founding affidavit, in which he described EBN and Effective Barter as associated companies. From the evidence of EBN's witness Mrs Bennett, it appears that Porritt was the managing director of both companies and that they were owned by the same foreign shareholder. Despite the possible ambiguity of the document it was common cause that the faxes were sent under the name of Effective Barter.[9] The terms proposed in these three faxes were accepted in writing by Dragon. As they go to establish the relationship of EBN and Effective Barter to Daewoo and Dragon it is necessary to set out the terms in detail. By way of example I will use the one containing the reference number 9461, which came to be applied to the Tom Distributors shipment in EBN's books. It commences:

"Further to our recent discussions, we hereby confirm our agreement to purchase and resell the [VCRs] subject to this agreement on the following terms and conditions: -

1 We shall establish a Transferable Delivered Duty Paid Letter of Credit for . . . in your favour, restricted to be transferred to Daewoo Corporation, Seoul, Korea at a value of . . . 2 . . .

3 The abovementioned Letter of Credit will be established on the following terms and conditions:
-

3.1 You will first supply to us a signed confirmed undertaking from Pick 'n Pay (sic) to purchase the [VCRs] at a price of . . . Delivered Store, in a format acceptable to us and addressed to EBN Trading (Pty) Ltd . 3.2 The goods will be insured by you for All Risks from supplier's inland warehouse to buyer's inland warehouse . . . 3.3 You will arrange for the prompt payment of all costs from FOB to delivery to the buyers including but not limited to seafreight, clearing and forwarding, duty and surcharges , insurance, VAT, warehousing, and inland transport.

3.4 You will arrange for the goods to be accurately invoiced in our name prior to delivery and copies of these invoices are to be sent to us upon issue. 3.5 You will arrange collection of all payments from the buyers on our behalf and will deposit all funds collected into an account to be nominated by us in writing.

4 In respect of our establishment of the abovementioned Letter of Credit, we shall be entitled to the following fees: -

4.1 A raising fee of 1 % calculated on the Rand value of the goods . . . , plus R20.00 per unit.

4.2 Compound interest at the ruling Standard Bank of South Africa Prime Bank Rate calculated from the date of establishment of the letter of Credit to date of receipt of funds from the buyers. . . .

5 Payments shall be effected as follows: -

5.1 Upon receipt by us of the payment by the buyers, we shall retain the following: -

(i) the Rand value of the letter of Credit

(ii) all bank charges . . .

(iv) the RSC levies payable . . . (v) the VAT payable on the invoices raised on the buyers;

5.2 The balance of the funds received by us from the buyers will be paid to you . . ." (Emphasis supplied.)

[10] The other two faxes bear the reference numbers 9444 and 9446, which later came to be associated in EBN's books with the two consignments sent to Pick 'n Pay.[11] On 12 December 1994 Tom Distributors, represented by Tandem (Pty) Ltd, placed a "buying order" on EBN for three tranches of Maxam VCRs, each of 845 units. It is with the middle tranche that this case is concerned. The order price was R 722 475, that is R 855 per unit. On 11 November 1994 Pick 'n Pay addressed a letter to EBN commencing "This letter serves to confirm that Pick 'n Pay will purchase the following AIM products on the following terms and conditions. 1690 AIM AR 418 VCR Units @ a cost price of R 1077.30 VAT inclusive".

Delivery was to be direct to Pick 'n Pay stores in April 1995. Also on 11 November 1994, Pick 'n Pay addressed an almost identically worded letter to EBN ordering "655 AIM 4 Head Multi-system AR 886 @ a cost price of R 1396.50 VAT inclusive." Delivery was due in February 1995. [12] On 7 February 1995 Absa issued an "irrevocable/transferable" letter of credit numbered

6478. It related to Tom Distributors's consignment of 845 Maxam VCRs, Model MR 87, priced at US \$ 210 each. The total value of the letter of credit was US \$ 177 450. The applicant for the letter was EBN and the beneficiary Dragon. The goods were to be supplied DDP ("duty delivered paid"), which means, among other things, that the seller (in this case Dragon) bore the risks and costs, including duties, and the costs of carriage by sea and land, until delivery at the named place of destination (in this case a Johannesburg warehouse). The letter was split, in the sense that it was transferable to Daewoo to the extent of US \$ 139 425, which was the FOB purchase price payable by Dragon to Daewoo. The contemplation was that payment would be made in stages, first to Daewoo after the goods had been shipped at Busan, and the necessary confirming documentation had been sent by air courier, presented to Absa and found to conform with the letter of credit; and later the balance to Dragon after the confirming documentation appropriate to Dragon had been found so to conform. Foremost among these documents were the bills of lading, which were to be endorsed in blank. They were documents of title which entitled only the holder to delivery of the goods consigned in terms of the bills (cf Carver Carriage by Sea Vol 2 13 ed paras 1593, 1629, Lendlease Finance (Pty) Ltd v Corporacion De Mercadeo Agricola and Others 1976 (4) 464 (A) at 492 B). There were to be three originals, and, because of the blank endorsement, the bearer of any of them would be entitled to the physical delivery of the goods. Daewoo obtained payment of its share under this letter of credit upon performing its obligations under the letter of credit, by sending its beneficiary's certificate to its office in Sandown Johannesburg, which presented it to Absa for checking and payment. Upon presentation this certificate was to be accompanied by one original bill of lading, and copies of the invoice, packing list and certificate of origin. Another of the original bills was retained by Daewoo. All of this was done in terms of the letter of credit. Upon both Absa and the confirming bank in Hong Kong being satisfied that the documents conformed to the letter of credit, Daewoo would be paid its entitlement. This could happen and did in fact happen while the goods were still on the water. The original bill of lading was then released to EBN, who would use it to obtain physical delivery of the goods.[13] Both in respect of the conditions pertaining to payment to Daewoo and Dragon, the "notify party" was stated in the bill of lading to be EBN. This meant that EBN was to be given notice evidencing the shipment of the goods and showing the container and seal numbers. The notify party is usually the importer, but not always. This term does not in itself designate the party to be notified as the one entitled to claim the goods: Tetley Marine Cargo Claims 3 ed 183, so that its use does not take the matter further. [14] Payment of the balance of the letter of credit to Dragon would occur after the execution of procedures similar to those followed in Daewoo's case. Similar confirming documents would be sent, save that Dragon's invoice would be substituted for that of Daewoo, and Dragon would also have to supply a

road consignment note evidencing delivery of the container to the warehouse of a firm called Excellence at Selby, Johannesburg, and a warehouse receipt evidencing receipt of the goods by Excellence. Dragon would also send the second of the three original bills of lading to Johannesburg, so that EBN would come into possession of two of the three of them. For reasons that the record does not reveal, Dragon was not paid the balance due to it under the letter of credit. Instead EBN paid Mirror Import and Export CC ("Mirror") in South African currency at a stage when the letter of credit had expired and there was no further risk of its being used for payment. According to Mrs Bennett, EBN was informed that Mirror was Dragon's agent to clear the goods. Mirror presented invoices to EBN for this and other amounts and these were paid by EBN out of the moneys received from Pick 'n Pay and Tom Distributors. [15] I have dealt so far with letter of credit 6478 intended for use in paying for the Tom Distributors consignment. A second letter of credit numbered 6477 was issued by Absa, also on 7 February 1995, for US \$ 354 900. Its details are identical to those already described in connection with no 6478, save that the goods were 1690 AIM VCRs model AR 418, sold at a price of US \$ 210 each. The FOB price payable to Daewoo was limited to US \$ 278 850. The history of this letter of credit was the same as that of the one already described. Daewoo's portion was paid to it under the letter of credit but Dragon's was paid to Mirror in South Africa, not by means of the letter of credit.[16] The goods described in this second letter of credit are the same as those in one of the two Pick 'n Pay orders. No evidence was given of a letter of credit in respect of the goods described in this the second order, for 655 AIM 4 Head Multi-system AR 886s. However, as in the case of the two transactions already described, there is a bill of lading for this third consignment. Full payment for it was made to Mirror in South Africa.[17] There were three sets of bills of lading, one set for each of the consignments. The first relates to the consignment to Tom Distributors. It is numbered SELG 5093 and dated 2 March 1995. The container number is KNLU 3049598, which is said to contain 845 Maxam VCRs model MR 87, whose final destination is Johannesburg via Durban harbour. This description matches that on the letter of credit and is consistent with the less detailed order. The "notify party" is EBN and the harbour of shipment Busan.[18] The other two bills of lading relate to the Pick 'n Pay consignments. One is numbered SELG 5104 and dated 11 March 1995. The container number is KNLU 4219317, which is said to contain 1695 cartons holding AIM VCRs model AR 418. (The disparity between the 1690 units on the order and letter of credit and the 1695 on the bill may be explained by the fact that some of the cartons are said to contain spare parts). The bill of lading indicates that the goods are to be carried from Durban to Johannesburg. Again the "notify party" is EBN and the harbour of shipment Busan.[19] The final bill of lading is numbered SELG 5105 and is dated 11 March 1995. The container is INBU 3032675, which is said to contain 655 pieces of AIM Multi system VCRs and spare parts. It indicates carriage of the goods from Durban to Johannesburg, EBN as the "notify party" and Busan as the harbour of shipment.[20] I now come to the false bills of entry. As already stated, both give the country of destination as Zaire. There is an obvious reason for this falsification, to evade payment of duty. There seems to have been no good reason to falsify information further, other than the identity of the clearing agent, given in the one

bill as J Mayanah of Allied Marine Freight CC and in the other as P Singh of Durban Clearing. These persons and entities were unknown to EBN or to the witnesses who gave evidence for Customs. The bill of entry relevant to the Tom Distributors's consignment is numbered 1120 and gives the bill of lading number as SELG 5093, the container number as KNLU 3049598 and the contents as 845 cartons. The second is numbered 1211 and gives the bills of lading numbers as SELG 5104-5, the container numbers as KNLU 4210317 and INBU 3032675 and the contents as 1695 and 655 cartons respectively. The various numbers and descriptions accord with those on the bills of lading. According to the customs stamps on these bills of entry the goods were cleared during April 1995.[21] The subsequent history of the goods is this. They arrived at the Excellence warehouse in Johannesburg, whence they were delivered by that firm to Tom Distributors and to various branches of Pick 'n Pay. EBN issued invoices to these firms and was paid by them. In fact everybody seems to have been happy, except Customs, when it uncovered the fraud.[22] I turn to the main issue - whether Customs has proved that EBN was an "importer" of the goods. Finding support for this statement in the evidence of many witnesses, the refrain of the argument advanced on behalf of EBN is that its role was that of a "mere financier." We were asked to disregard the details of the various transactions and view EBN's position broadly, so as to arrive at the "true nature and substance of the transaction" into which EBN entered (see *CIR v Conhage (Pty) Ltd (formerly Tycon (Pty) Ltd)* 1999 (4) SA 1149 (SCA) at 1155 H-I). That that should be our aim I fully agree. But before doing so I would point out that the question does not arise in the form that it usually does in a revenue case. The usual question (as in *Conhage's* case) is whether a transaction evolved in order to avoid the incidence of tax is genuinely what it is held out to be, or whether the true transaction is one that does attract tax because it is not what it is held out to be. In the case before us attempted evasion or avoidance of a tax is not to be suspected. The various agreements envisaged that customs duty would be paid, by Dragon, not by EBN. So one does not look at EBN's contracts with a quizzical eye, but acceptively, expecting them to express the intention which their plain words assert. So it may be that it is the very innocence of the documents that proclaims against EBN. This does not mean that the true nature of the transactions does not have to be determined, but it does mean that a wary interpretation is inappropriate.

- [23] When the contracts are so interpreted the question is not, as I have indicated already, whether EBN acted as a financier, but whether it was beneficially interested in the goods in terms of para (e) of the definition of "importer". When this question is adverted to, one finds at the outset the three faxes sent by Effective Barter to Dragon in November and December 1994. In these Effective Barter unequivocally offered to "purchase and resell" the goods. Dragon accepted that offer. Next, para 3.1 made orders conditional upon Dragon's obtaining from Pick 'n Pay and Tom Distributors undertakings "to purchase" the goods. These undertakings had to be addressed not to Effective Barter but to EBN. It is clear from the evidence of various witnesses that Porritt was not prepared to proceed with the financing without the provision of these undertakings. When effect was given to this condition in November and December 1994, Tom Distributors sent a "buying order" to

Dragon and Pick 'n Pay undertook to Dragon to "purchase". So far the documents consistently indicate that Effective Barter would purchase the goods from Dragon and that EBN would sell them to Pick 'n Pay and Tom Distributors. What exactly the relationship between Effective Barter and EBN was to be is not clear. Nor does it matter. The fact that a party has not bought or even does not own goods does not in our law disentitle him from selling them. *Vacua possessio* has to given and that was done. But the truth is no doubt, that in selling to the two traders EBN was acting as the agent of Effective Barter. That fact would not in itself deprive it of a beneficial interest in the goods, if other circumstances vested such an interest in it. In this connection it is important that it was EBN and not Effective Barter that assumed liability to Tek to provide the funds necessary to re-imburse Absa after payment under the letters of credit.[24] What contractual arrangements did EBN make to cover itself against this and other exposures? EBN was to receive possession of one of the original bills of lading upon Daewoo being paid its FOB price, and EBN was to be notified of the arrival of the goods. The bill of lading was a document of title which entitled EBN to receive possession of the goods. After that it would deliver to the two traders and receive the price from them. This money could be utilised to settle its indebtedness for the letters of credit and other amounts, such as payments to Mirror and Excellence. The main payment that EBN was to make (the payment to Daewoo) was not to be made against receipt of the purchase price from the traders. It was to be made before such receipt. The evidence of Absa's Rebuzzi is clear that the amount payable to Daewoo might be paid while the goods were still on the water and that is what happened. If the goods should for some reason not have been delivered in South Africa, EBN would not have had the means to obtain payment from the traders, and may even have been liable to them in damages. No wonder that Mrs Bennett was driven to concede that receipt of the goods not only relieved EBN of the burden of collecting money in Hong Kong, but also served as security for its being re-imbursed its outlays. EBN thus had a lively interest in the goods. Was it a "beneficial interest" in the sense of the definition? The meaning of the word "beneficial" is given by the SOED as "Of benefit", and the relevant meanings of "benefit" are "Advantage, profit, . . . pecuniary profit". In my opinion EBN's interest in the goods was both advantageous and profitable to it. This conclusion I reach without having to refer to the succeeding words in the definition "in any way whatever". They merely serve to fortify my conclusion.[25] And if it be suggested that the beneficial interest in the goods lay with Effective Barter as purchaser and not with EBN, who was a mere agent for that firm, then paragraph (f) of the definition of importer would render EBN in any event liable as an agent of one beneficially interested in the goods. Many cases were referred to which have considered the meaning of the phrase "beneficial interest" in a variety of contexts and jurisdictions. I do not think any purpose would be served by my following or not following them, approving or not approving them, or distinguishing them. The meaning of the crucial phrase is clear enough. So is its application to the facts.[26] I have not set out all the details of the evidence, of which, in my opinion, there was much too much. In particular I do not think it necessary to detail Mrs Bennett's evidence. Her insistence that EBN was a "mere financier" in the face of the facts did not impress Thirion J. Nor has it impressed me.[27] I would add that what EBN's argument

amounts to is that there was in reality no purchase of goods by Effective Brokers or sale by EBN. This is a direct contradiction of the documents in which the parties chose to record their agreement, and the onus to prove EBN's version of the agreement (an ethereal financier untrammelled by methods of obtaining security) rested on it: *Vasco Dry Cleaners v Twycross* 1979(1) SA 603 (A) at 615 H - 616 A. There is no acceptable evidence that could discharge the onus.[28] Accordingly, on the main point I conclude that EBN was the "importer" of the goods.[29] That leaves EBN's contention that Customs has not proved that duty was not paid on the goods, or in other words, that the goods which came in under the false bills of entry were the same as those which were delivered to the two traders. In the first place, it must be pointed out that under s 102(4) of the Act the onus to prove that duty has been paid rests on the importer. No attempt was made by EBN to prove this fact. There should have been no difficulty in doing so, as the argument is postulated on the premise that the goods delivered to the traders were in no way connected with the false bills of entry, but were cleared in a regular way.[30] But in any event, even if the onus did rest on Customs, I think that there is a clear probability that the goods were the same, as was held by Thirion J. I have pointed out already that although the guilty clearing agent had a motive to falsify the country of destination and his own particulars, there was no apparent reason for falsifying the rest of the bill. Indeed the contrary. The closer the match between the bills of entry and the bills of lading and containers the more likely was the fraud to succeed. Moreover, EBN's argument postulates that containers filled with the same numbers of the same things that the two traders had ordered arrived at Durban on about the appointed day. This seems highly unlikely. It is much more likely that the three containers, numbered as the bills of entry reflected, were filled with the goods destined to meet the orders of the two traders. Accordingly I consider that there is no merit in EBN's second argument.

[31] The appeal is dismissed with costs, such costs to include the costs consequent on the employment of two counsel.

JUDGE OF APPEAL CONCUR MELUNSKY AJANUGENT AJA

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