/BB

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)
CASE NO: 29175/97

DATE: 07/06/2002

DELETE WHICHEVER IS NOT APPLICABLE

1. REPORTABLE: ~~YES~~/NO.
2. OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
3. REVISED.

DATE 27-6-2002 SIGNATURE

IN THE MATTER BETWEEN:

COMMISSIONER FOR CUSTOMS AND EXCISE	APLICANT
AND	
OSMAN TAYOB	1ST RESPONDENT
OSGO MANUFACTURERS AND WHOLESALERS (PTY) LTD	2ND RESPONDENT
OSGO INVESTMENTS (PTY) LTD	3RD RESPONDENT
Z TAYOB (PTY) LTD	4TH RESPONDENT
YSAF OMAR ABOO	5TH RESPONDENT
LOUIS TRICHARDT WHOLESALERS (PTY) LTD	6TH RESPONDENT
TOPS WHOLESALERS (PTY) LTD	8TH RESPONDENT
HANSONS GENERAL DEALER CC	9TH RESPONDENT
CHECKOUT CITY (PTY) LTD	10TH RESPONDENT
GAZA TRADERS (PTY) LTD	11TH RESPONDENT

JUDGMENT

VAN DER WESTHUIZEN, J

1. INTRODUCTION

The applicant claims payment of customs duties which have allegedly been evaded by the respondents, together with payment of other amounts which are allegedly due in terms of the Customs and Excise Act, Act 91 of 1964 (hereafter referred to as "the Act"). The legal relief which is being sought by the applicant is set out in its original notice of motion in twelve prayers. The notice of motion was amended and the amended prayers appear on pages 917 to 931 of the paginated papers. In prayers 1-10 different amounts of money are being claimed. The amounts are quite vast. For example, in prayer 1.1 an order is being sought that the first and second respondents, jointly and severally, must be ordered to pay the applicant an amount of more than R4 million for unpaid duties. In prayer 1.2 an order regarding interest at the rate of 15% per annum is being sought against the first and second respondents and in prayer 1.3 an order against the first and second respondents to pay to the applicant an amount of more than R2 million "being an amount equal to the value for duty purposes" is being sought. Furthermore, an order is sought declaring the first respondent to be personally responsible for the debts and liabilities of the second respondent to the applicant, such debt and liability being the amount for unpaid duties and interest thereon and the amount equal to the value for duty purposes claimed in the previous sub-paragraphs. The other prayers follow more or less this pattern with regard to the different respondents. Prayer 11 deals

with costs on the scale as between attorney and own client, alternatively costs of suit. Large sums of money, totaling several millions, are therefore in issue.

The respondents oppose the application and ask that it be dismissed with costs. The first to the fourth respondents ask, in the alternative, that the matter be referred for oral evidence to solve a factual dispute.

The papers are voluminous. The author of the applicant's founding affidavit is Mr J J Booysen, the Director of Legal Services employed at the applicant's head office in Pretoria. Booysen relies heavily on and attempts to incorporate an affidavit by Mr M M Lambrechts, a former Deputy Director in the Section Special Investigations in the office of the applicant.

The first respondent is the deponent of an answering affidavit on behalf of the first to the fourth respondents and the fifth respondent deposed an answering affidavit on behalf of the fifth to the eleventh respondents. Several other affidavits, supplementary affidavits and further supplementary affidavits have been filed. The admissibility of some of these is in dispute. In addition, a very considerable volume of documentation relating to export and import, including bills of entry and other clearance documents, have been filed. Some of these do not originate from South

Africa, but from Hong Kong and the Republic of China.

The applicant was represented by Mr J P Vorster, assisted by Mr D Marais, whereas Mr A N Goodman SC, assisted by Mr A R Bhana, represented the first to the fourth respondents, and Mr T W Beckerling SC appeared on behalf of the fifth to the eleventh respondents.

The respondents can be divided into two "groups". The first to the fourth respondents are the first group of respondents, while the second group of respondents consist of the fifth to the eleventh respondents. The second, third and fourth respondents are companies allegedly under the control of the first respondent, whereas the sixth to the eleventh respondents are companies allegedly controlled by the fifth respondent.

2. FACTS

According to the applicant, the relevant facts (briefly summarised) are more or less as follows:

The first and fifth respondents were at all material times major importers of goods

from the far east. The fifth respondent, in particular, has for many years been a major importer of clothes and fabrics from that part of the world. Early in March 1990 the applicant's office became aware of the fact that unusually large volumes of shears, hatchets, spades, shovels, rakes, axes and similar implements were apparently being imported through Durban and declared at the inland port of Johannesburg. As a result of information received, Lambrechts gave instructions that four consignments of goods be detained at Durban harbour. These goods had been cleared through customs on 7-9 March 1990. The goods in question are reflected as items no 23, 31 and 37 on page 41 of Booysen's founding affidavit and on Schedule "MNL1".

When these goods were initially cleared through customs, the goods were described as shears, shovels, axes, rakes, hatchets, etc. (items 23, 31, 32 and 37). References to the relevant bills of entry, invoices and the Schedule "MNL1" appear in the papers.

After the initial clearance of the goods, a second set of shipping documents were allegedly presented by the importers for purposes of again clearing the full containers through customs at Johannesburg. Lambrechts infers that this was done for the purpose of obtaining the release of the goods from the detention which had

been imposed. In the second set of clearance documents the goods were described as printed woven fabrics, infant's knitted socks, babies garments, men's jackets, ladies night dresses, boys t-shirts, magnetic tapes, door locks, infant's knitted hats, other knitted fabrics and polyester ribbing. References to bills of entry, invoices and annexure "MNL1" once again appear in the papers. Counsel for the applicant also made available a separate schedule in an attempt to present the information in an organized and intelligible way.

According to the applicant, the four containers in question were opened and inspected and it transpired that the contents of the second set of clearance documents were correct.

In the import documentation the importer in respect of item 23 is indicated as the eighth respondent, the importer in respect of item 31 as Kagan Wholesalers (Pty) Ltd, the importer in respect of item 32 as the sixth respondent, and the importer in respect of item 37 also as the sixth respondent. According to Lambrechts, the true significance of these attempted second clearances is that the importer's attempted second clearance disclosed a description of goods which is so dissimilar from the original clearances, that the importer's conduct amounted to an admission of fraud.

During the middle of 1990 the fifth respondent and his legal representatives met with Lambrechts and Booysen. It was put to the fifth respondent and his representatives that it was quite apparent that a fraud had been committed and the fifth respondent was invited to bring the true and proper invoices of the imported goods to Booysen. Lambrechts gained the impression that the fifth respondent was fully aware that a fraud had been perpetrated and that other true invoices did exist. In due course the fifth respondent then met again with the applicant's officers and presented a new set of invoices relating to the goods which had previously been imported by the fifth respondent and his companies. The fifth respondent explained or attempted to explain the difference between his old and his new invoices by telling the applicant's officers that there were strikes in Venda, which resulted in greater unemployment and consequently there was a much smaller demand for spades, shovels, axes etc. Therefore the fifth respondent had to change his order from spades, shovels, etc. to clothing and fabrics and such goods are reflected in the new invoices. Booysen then allegedly confronted the fifth respondent and told him that the explanation was palpably false, because at the time these goods had already been shipped and that all that was now being offered were new invoices pertaining to the same goods. Booysen suggested to the fifth respondent that he had perpetrated a fraud on the applicant. To this allegation, the fifth respondent merely remained silent, according to the applicant's version, and particularly the affidavit

of Lambrechts (on page 84-85 of the paginated papers).

As far as the first group of respondents are concerned, Lambrechts allegedly visited the first respondent at the premises of the second respondent. The first respondent claimed that he had sold the axes, shovels, shears and rakes forming the subject matter of the so-called "high sees sales" and presented Lambrechts with documents purporting to be invoices of the second respondent. The first respondent also stated that some of the goods in question were still being held in stock. The applicant's officers then did a reconciliation having regard to the invoices and stock sheets presented by the first respondent from which it transpired that there was a shortfall of almost 4 000 shears, more than 13 000 shovels, more than 4000 axes and 4 000 shears. The first respondent offered no explanation when confronted with this aspect, according to the applicant. A visit to the alleged purchaser of the imported goods also disclosed that no such purchase as had been alleged by the first respondent took place.

The "high seas sales" is a transaction whilst the goods were on the way to South Africa. According to both the first and fifth respondent, the goods were sold by the sixth respondent to the second respondent on the high seas.

According to Lambrechts, the first respondent also made various admissions which could be interpreted to prove that he had committed customs fraud, during discussions. At a later stage, during approximately October 1990, the first respondent brought invoices to one Prinsloo, which he alleged were the true and genuine invoices in respect of the consignments dealt with in annexure "MNL3". Three of these related to the high sees sales. Two of these new invoices were the same as the ones initially used for customs, whereas the other new invoices were different to the invoices used for customs clearance. According to Lambrechts, the presentation of the first respondent's new invoices also amounted to an admission of fraud.

According to the applicant, their investigations inside South Africa proved that a fraud had been committed. However, in order to quantify their claim as far as duties owed to the applicant are concerned, the applicant needed access to the relevant export documentation in the countries from where the goods were imported, namely the Republic of China and Hong Kong. Such documentation was obtained with considerable difficulty, to which I later again refer. However, the applicant obtained relevant export documentation filed by the exporters in the Republic of China with the customs authorities there. This documentation was compared to the import documentation presented to the applicant in respect of the goods upon importation

into the Republic of South Africa and the underpayment of duties was calculated. Export documentation presented to the authorities in Hong Kong by the exporters there was obtained by means of a letter of request issued by the High Court in South Africa. A quantification was also arrived at, as explained in one of the applicant's affidavits. The applicant furthermore obtained an affidavit from a supplier in Hong Kong, Mr Willie Yeung. The evidence of Yeung relates to consignments no 29 and 30 on annexure "MNL1" and, according to the applicant, corroborates the averments of fraud perpetrated by the fifth to the eleventh respondents. Yeung *inter alia* states that goods cleared by the sixth respondent as rakes, padlocks, spades, etc. were in fact porcelain cups and saucers (item 29) and that the goods cleared as rakes, sickles, shovels etc. were in fact padlocks, knives, can openers, nail clippers, etc. (item 30). According to Yeung, the fifth respondent instructed him to supply incorrect information on the relevant documentation.

3. THE DEFENCES

Subject to some exceptions, the respondents do not dispute the facts or offer substantially opposing versions. Therefore the facts are to some extent undisputed.

The defences put forward by the respondents are the following:

Both groups of respondents submit that there has been a misjoinder in this matter,

namely that the second group of respondents should not have been joined together with the first group of respondents.

According to the respondents, the applicant's claim has also prescribed.

Furthermore, also according to all the respondents, the applicant relies on inadmissible evidence and the applicant's founding papers do not disclose a proper cause of action.

In addition to the above, the first group of respondents submit that there is a material factual dispute which cannot be settled on the papers. This dispute specifically relates to the allegation from the side of the respondents that the dispute was indeed settled.

The second group of respondents deny that a misdescription of the goods took place, and that the applicant has adduced any proof of such misdescription.

Furthermore, the fifth respondent denies that he controlled the sixth to the eleventh respondents and that these respondents were nothing but himself in a different guise. The fifth respondent accordingly denies that this is an appropriate instance to

"pierce" or "lift the corporate veil".

4. PROCEDURAL ISSUES

A number of procedural issues were debated at the outset of the hearing. The applicant requested permission to file supplementary affidavits by Mr Booysen and Mr Van Rensburg. These affidavits were made and served a few days before the application was being heard. Counsel for both groups of respondents objected, based on the lateness of the affidavits. They also argued that some of the contents of the affidavits constituted inadmissible evidence. I ruled that the applicant was permitted to file the said supplementary affidavits, but I made no ruling as to the admissibility of otherwise or the evidential value of the contents of the affidavits. I shall return to this aspect.

Counsel for the respondents also argued that four points should be dealt with *in limine*, namely the special defence of prescription, the admissibility or inadmissibility of the affidavit of Lampbrechts which appears to have been made in other proceedings, namely an earlier *ex parte* application, the question whether a settlement between the applicant and the first group of respondents had previously been reached, and the issue of alleged misjoinder. I ruled that the special defence of prescription be argued as an *in limine* point and counsel proceeded to do so. As to

the other three issues, I ruled that these be argued together with the application as a whole. All of these points are dealt with below.

Submissions about the inadmissibility of evidence were made by both sides, related not only to allegations that evidence presented was hearsay, but also based on the allegation that some of the contents of certain affidavits amounted to irrelevant, scandalous and vexatious averments. Some striking out applications were also brought. The applicant, for example, applied that certain sections of the answering affidavits of some of the respondents be struck out. The respondents also applied for the striking out of portions of the applicant's affidavits. As stated earlier, the "main" supporting affidavit by Lambrechts was indeed put in dispute.

I decided not to formally strike out any affidavits or parts thereof, but to treat all the contents of affidavits which are being disputed with circumspection and caution. Some paragraphs have indeed been ignored by me, whereas limited evidential value has been given to others. I refer to some of these points in more detail below, when specific issues are dealt with.

5. PRESCRIPTION

According to the respondents, the applicants' claims were extinguished by

prescription, in terms of section 11(d) and section 12(1) of the Prescription Act, Act 68 of 1999. The relevant events took place mainly during 1989 and 1990. After the applicant's investigations etc., the cause of action was complete and the applicant was possessed of all the material facts by August 1994. Yet, the applicant started to introduce these proceedings only in December 1997. Therefore the applicant served the application on the respondents more than three years after the debt relied on had become due.

The applicant admits that the application was brought outside the three year period that would apply to the prescription of debts. However, the applicant relies on section 11(a)(iii) of the Prescription Act, which states as follows:

> "The period of prescription of debts shall be the following:
>
> (a) thirty years in respect of -
>
> ...
>
> (iii) any debt in respect of any taxation imposed or levied by or under any law. "

The English text of the Prescription Act was signed by the state president, but counsel for the applicant regards the Afrikaans text as useful:

> "Die Verjaringstermyne van skulde is die volgende:

(a) dertig jaar ten opsigte van –

...

(iii) 'n skuld ten opsigte van belasting opgelê of gehef by of kragtens 'n wetsbepaling."

The question is therefore whether the relevant debt in this case is one "in respect of any taxation imposed or levied by or under any law".

Counsel for the applicant referred to a number of cases, including *City Treasurer and Rates Collector, New Castle Town Council v Shaikjee and Others* 1983 (1) SA 506 (N) especially at 507F-H, *Alberts v Roodepoort Merésburg Municipality* 1921 (TPD) 133 at 136, *Port Edward Health Committee v SA Polisie Rusoord* 1975 (2) SA 720 (D) at 723 and *The Master v IL Back & Co* 1983 (1) SA 186 (A) at 1000H, and also the work by M M Loubser, *Extinctive Prescription* (1996). On page 41 the last mentioned author states the following:

"A tax, which may be so called or referred to by a similar term such as "levy" or "duty" constitutes a pecuniary charge imposed by a public authority upon persons or property for public purposes".

In the *City Treasurer and Rates Collector, New Castle Town Council* decision,

Kumleben J states at 507F-H: "The crisp question to be decided is whether such "rates" are a form of "taxation imposed or levied" within the meaning of this phrase in the said sub-section 11(a)(iii). I have no doubt that they are."

In the *Port Edward Health Committee* case, Milner J decided (at 723) that the word "tax" ordinarily does include rates, since rates are merely taxes of a particular kind. I was also referred to the *Shorter Oxford Dictionary* (3rd ed), describing "tax" as a "compulsory contribution to the support of government, levied on persons, property, income, commodities, transactions, etc. ..." (Also see the *City Treasurer and Rates Collector, New Castle Town Council* case.)

According to counsel for the applicant, it is clear from the definition of customs duty referred to in section 1 of the Act that it is a duty which is levyable in terms of Schedule 1 or 2 to the Act. Section 114(1)(a) makes it clear that the correct amount of duty for which any person is liable in respect of any goods imported and any forfeiture incurred under the Act shall constitute a debt to the state. Section 47(1) makes it clear that customs duty is payable for the benefit of the State Revenue Fund. Therefore the applicant's claim has not been extinguished by prescription.

Counsel on behalf of the first group of respondents argued that in this case the

applicant claims damages on the basis of alleged fraud. Therefore the debt which is at stake is not in respect of taxation imposed. I am not persuaded by this argument. The applicant does not claim damages, but unpaid duties. According to the applicant, these duties were not paid, because of fraudulent conduct on the side of the respondents. The fraud is simply the method used by the respondents to avoid having to pay the relevant duties. This does not make the amounts claimed damages based on fraud as a delict.

Counsel on behalf of the first group of respondents furthermore argued that whereas rates and taxes can indeed be regarded as taxation, "duties" are merely indirect taxation, rather than direct taxation. The "taxation" referred to in section 11(a)(iii) of the Prescription Act refers to ordinary or direct taxation. This point is also not persuasive, *inter alia* in view of the abovementioned remarks and specifically the summary of Loubser, with reference to *The Master v I L Back* at 1000H.

In view of the submissions made by counsel on behalf of both groups of respondents, I took a closer look at the exact contents and nature of the applicant's prayers. These relate to (1) unpaid duties, (2) certain amounts "being an amount equal to the value for duty purposes", and (3) interest. Whereas there can be no doubt that duties are taxation, the other two categories may warrant further

attention.

The "amount equal to the value ..." stems from section 88(2)(a)(i) of the Customs and Excise Act. The context is relevant here. Section 88 forms part of Chapter XI of the Act, under the heading "Penal Provisions". According to Section 87, goods "irregularly dealt with" are liable to forfeiture. Section 88 deals with seizure. According to section 88(1), certain government officials may detain any ship, vehicle, plant, material, or goods at any place for the purpose of establishing whether that ship or goods etc. are liable to forfeiture under this act. No person shall remove any such ship or goods from any place where it is so detained, or from a place of security determined by an official of the state. If such a ship or goods are liable to forfeiture, the Commissioner may seize that ship, vehicle, plant, material or goods.

Section 88(2)(a)(i) then states that if any goods liable to forfeiture under the Act cannot readily be found, the Commissioner may, notwithstanding anything to the contrary in this Act contained, demand from any person who imported, exported, manufactured, warehoused, removed or otherwise dealt with such goods contrary to the provisions of this Act or committed any offence under this Act rendering such goods liable to forfeiture, payment of an amount equal to the value for duty purposes

or the export value of such goods, plus any unpaid duty thereon, as the case may be.

Section 88(2)(a)(ii) deals with the calculation of the value for duty purposes.

Section 93 of the Act deals with the remission or mitigation of penalties and forfeiture, and states, *inter alia*, that the Commissioner may on good cause shown, direct that any ship, vehicle, etc or material or goods detained or seized or forfeited be delivered to the owner thereof, subject to the payment of any duty which may be payable in respect thereof and any charges which may have been incurred in connection with the detention or seizure or forfeiture, etc. The Commissioner may also mitigate or remit any penalty incurred under this Act on such conditions as he deems fit. The "payment" of an amount equal to the value for duty purposes therefore relates to goods liable to forfeiture, but which cannot be found. According to the applicant, this section applies to some of the containers in this case.

It was argued, for example by counsel on behalf of the second group of respondents, that taxation is a compulsory contribution, as indicated by the earlier reference to the Oxford Dictionary. What section 88(2) provides for is not taxation, but a penalty. In fact, the whole of chapter 11 deals with penal provisions. In terms of section 93 the Commissioner may remit, mitigate, etc. such penalties and so the Commissioner

has certain discretionary powers. Therefore it is not a compulsory contribution. It was argued that what is at stake here is not taxation, but rather a "composite creature" or a "statutory debt". Counsel on behalf of the second group of respondents presented his submissions in this regard with several references to case law, including the above mentioned *Master v I L Back & Co* case. However, this case dealt with "fees". In the present case the Act deals with duties, and section 88 prescribes certain penal provisions linked to the obligation to pay duty. There is no independent existence for the contents of section 88 (2). It is correct that the Commissioner appears to have a discretion, for example to mitigate or to remit, but this does not to my mind make the amounts payable anything less than "compulsory", in so far as this concept forms the core of the description of a "tax". To the extent that a tax is a compulsory contribution to the support of government, levied on persons, property, income, commodities, transactions, etc. according to the above mentioned dictionary description, "compulsory" does not mean that there may never be a possibility to wave, mitigate, or settle. (See for example *Namex (Edms) Bpk v Kommissaris van Binnelandse Inkomste* 1994 (2) SA 265 (A) especially at 284H-I.) It is well known that the Commissioner may sometimes settle certain claims and that settlements may even be beneficial to the state. The amounts referred to in section 88(2) are only duties which are increased, or doubled, as a punitive or preventative mechanism.

The interest, which the applicant is also claiming, emanates from section 105 of the Act. This section provides that interest shall be payable from such date and for such period as the Commissioner may determine on any outstanding amount payable in terms of the Act, other than the outstanding amount of any forfeiture payable in terms of the act and that the interest so payable shall be paid at the rate which the Commissioner may prescribe by rule, but which shall not exceed the rate of interest prescribed under Act 55 of 1975. It was argued on behalf of the respondents that the interest claimed is not taxation as such, and that the debt would therefore be extinguished after three years, in terms of the normal rules of prescription. In this regard I was specifically referred to *Sanlam v Rainbow Diamonds (Edms) Bpk en Andere* 1982 (4) SA 633 (KPA). This case deals with, *inter alia*, the relationship between a "hoofskuld" and interest, as well as with the distinction which some authorities have been attempting to draw between interest *ex mora* and interest *ex contractu*. On page 643E-G the following is stated by Grosskopf J:

"Daar is egter een verdere aspek waarna ek minstens effens meer pertinent moet verwys ... Artikel 10(2) van die Verjaringswet bepaal as volg:

'Deur verjaring van 'n hoofskuld word 'n neweskuld wat uit die hoofskuld ontstaan het, ook deur verjaring uitgewis'

Die begrip "neweskuld" word nie omskryf nie, maar dit is moontlik dat 'n

renteskuld hieronder sou resulteer. ... Indien hierdie beskouing juis sou wees (waaroor ek geen besliste mening uitspreek nie) mag dit ongeruimd voorkom dat rente saam met kapitaal verjaar, maar dat stuiting van verjaring ten opsigte van kapitaal nie ook ten opsigte van rente geld nie."

The *Santam* case seems to deal with what happens with a claim for interest if the principle debt is settled or has prescribed. The question in this case is whether the interest can prescribe, even when the principle debt does not. In this case the origin of the principle debt as well as the interest is of course the Customs and Excise Act. The interest is necessarily interest on something, or interest in respect of something. I suppose it could be described as a "neweskuld".

However, I am of the opinion that with regard to both the claim for an "amount equal to ..." and for interest, one must return to the simple grammatical meaning of the wording used in section 11(a)(iii) of the Prescription Act. According to this section the period of prescription is thirty years for "any debt in respect of any taxation imposed or levied by or under any law". The words "in respect of" clearly indicate that the relevant prescription period does not only apply to a tax in the narrowest and most direct sense of the word, but to any debt in respect of taxation. This would, to my mind, clearly include interest of the kind at stake in this particular

case, as well as the "penalty" provided for in section 88(2). Any other interpretation would be superficial, and would not correspond with the intention of the legislature as it appears from the wording of the Act.

Consequently the respondent's special plea regarding prescription must be dismissed.

6. MISJOINDER

The first respondent is alleged to be in control of the second, third and fourth respondents. Similarly, the fifth respondent is allegedly in control of the sixth to the eleventh respondents. The applicant decided to join all the respondents, or the two "groups" of respondents. According to the respondents, this amounts to a misjoinder.

Rule 10(3) of the Uniform Rules of Court states as follows:

"Several defendants may be sued in one action, either jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action."

According to Rule 6(14), Rule 10(3) applies to applications as well.

At common law a court furthermore has a discretion to allow joinder on the basis of convenience. The rules of court were not intended to be exhaustive with regard to the cases in which a party may be joined and a court still has its common law power to allow joinder whenever convenience so requires. (See for example *Rabinowitz and Another NNO v Ned-Equity Insurance Co Ltd* 1980 (3) SA 415 (W) at 419E, and *Ex parte: Sudurhavid (Pty) Ltd : in re Namibia Marine Resources (Pty) Ltd v Ferina (Pty) Ltd* 1993 (2) SA 737 (Nm) at 741A-E.) According to for example the first respondent, there is commonality amongst the respondents in the first group in the relief sought against them as set out in prayers 1-3 of the notice of motion. There is also commonality amongst the respondents in the second group in the relief sought against them, as set out in prayers 4 – 9 in the notice of motion. However, there is no commonality between any of those comprising the first group of respondents and any of those comprising the second group of respondents. According to the first respondent, it is wholly inappropriate that the first group of respondents and the second group of respondents be joined in the same application. In advancing the case against the second group of respondents, the applicant relies upon statements and conduct of the fifth respondent personally and/or on behalf of

one or more of the second group of respondents. These statements are hearsay allegations and are inadmissible as against the first group of respondents, for the first group of respondents are being prejudiced by the joinder of the second group of respondents. Furthermore, all the respondents have to sit through a long hearing dealing with a range of matters not affecting them directly, but the other group of respondents.

According to the applicant, the joinder of the respondents in one action is a sensible, practical and convenient arrangement. The relevant questions of law are the same, or similar. The questions of fact which are at stake at least overlap to some extent. There is indeed commonality between the two groups of respondents and this is particularly the case with regard to the so-called "high seas sales". According to Booysen, in his affidavit for the applicant, the frauds perpetrated by the first respondent and the fifth respondent find commonality in the high seas sales. According to the documentation provided to Lambrechts by the fifth respondent's clearing agents, the goods in question had been sold by the original consignees, being the fifth respondent trading as Great North Wholesalers and the ninth, tenth and eleventh respondents, to Osgo Wholesalers (Pty) Ltd, which presumably refers to the second respondent. Both the first and fifth respondents claimed that the goods in question had been sold by the sixth respondent to the second respondent on

the high sees. While the four consignments in question had been cleared on behalf of the fifth, ninth, tenth and eleventh respondents, the first respondent alleged that these goods which had been cleared ostensibly as axes, shovels, etc. had been sold by the first or second respondent. It was the first respondent who offered to produce the genuine and true invoices in respect of the high sees sales. It was also the first respondent who provided new sets of invoices relating to three of the consignments forming part of the high sees sales. Therefore, according to the applicant, it has been demonstrated that the two groups of respondents were co-perpetrators in customs fraud relating to the high seas sales.

Furthermore, the applicant submits that the patterns of the frauds were similar. Legal entities were being used as facades. Clothes, textiles, fabrics, garments and the like (in other words goods bearing high customs duties) were imported, whilst clearing the goods upon importation as axes, shovels, shears and the like (such goods being either duty free or bearing much lower customs duties.)

Counsel on behalf of the applicant also pointed out that the common interests of the two groups of respondents are evident and illustrated by the fact that in January 1998 it was decided that the same attorney would act on behalf of all the respondents and that the respondents would utilize the services of the same counsel.

It was furthermore argued on behalf of the applicant that whatever prejudice may be involved, is more apparent than real and could be dealt with, for example by disregarding evidence perhaps given by one the one group of respondents against the other group of respondents.

I am of the view that the questions of law which are to be decided in this case are substantially the same with regard to both groups of respondents. The first obvious one is the issue of prescription, which has already been dealt with. Furthermore, the disputes about the admissibility of the important affidavit of Lambrechts, as well as various parts of the evidence, apply to both groups of respondents. The factual issues are at least to some extent overlapping or inter-woven. All in all, the convenience of joining the respondents in thus matter by far outweighs the potential for any significant prejudice. Upholding the plea of misjoinder would serve very little purpose under the circumstances.

7. DISPUTE OF FACT: SETTLEMENT

According to the first respondent, the applicant is aware or must have been aware that the first group of respondents would be raising material and *bone fide* factual disputes arising out of the settlement of this matter. The applicant, and particularly Lambrechts, was aware that the matter was settled at the end of 1995. This

settlement allegedly took place between Adv M M Hodes SC, who was known to represent the second respondent, and Lambrechts.

The first respondent alleges that after the date of the transactions forming the subject matter of this claim and during May 1990, the applicant seized certain goods belonging to the second respondent. Those goods had nothing to do with the subject matter of the investigation in respect of the transactions upon which the applicant relies in this application. The applicant did not contend that the goods that were actually seized were seized due to any offence committed in respect of those goods. However, the applicant contended that the goods referred to above were seized under the alleged under- payment of duties under transactions forming the subject matter of the investigation against the first group of respondents. Pursuant to this allegedly unlawful seizure, a summons was issued for the return of the said goods in October 1990. The applicant's representatives and the representatives of the second, third and fourth respondents began negotiations for the settlement of the matter in respect of which the summons had been issued (case no 26160/90). These negotiations culminated in the settlement of the disputes between the applicant and the first group of respondents. These negotiations included the transactions forming the subject matter of the present claim, and continued until approximately 1995.

According to the first respondent, Hodes attended at the offices of the applicant in Johannesburg, together with his instructing attorney, a meeting on an unrelated matter at the end of 1995. In the course of attending to that matter, Hodes was approached by Lambrechts in regard to the settlement of the matters in respect of the first group of respondents. Lampbrechts raised the issue of settlement of the matters with Hodes in the offices of Mr CC Burger. Hodes advised that he would have to take instructions from his instructing attorney in the matter, Mr A O Tayob. Hodes then telephoned Tayob from the offices of the applicant to obtain instructions for the settlement of the matter, as Lambrechts had proposed that the applicant retains the contents of the two containers seized and in respect of which summons under case no 26160/90 had been issued, in settlement of all claims against the first group of respondents and, more particularly, those claims which had been investigated by the applicant against the first group of respondents. According to the first respondent, Tayob telephoned him to obtain instructions as to the proposed settlement. He formed the view that the resultant legal cost, time and energy which would be required in dealing with the matter, together with the fact that the goods seized had already been in the applicant's possession for several years and had diminished in value to the second respondent and that, purely for commercial reasons, the settlement was attractive. He accordingly informed Tayob that the settlement could be accepted. Tayob telephoned Hodes at the applicant's office and

informed him of the view that the first respondent had taken. On receipt of these instructions, Hodes informed Lambrechts that the matter could be settled on the basis proposed by him, namely that the applicant would retain the contents of the two containers seized and forming the subject of the action in which the applicant had been sued as defendant under case no 26160/90. This would be in settlement of all claims against the second, third and fourth respondents. The applicant would raise no further claims against the second, third and fourth respondents. Accordingly the matter became settled at the end of December 1995, according to the first respondent. This version is supported by attorney Tayob in a sworn affidavit.

According to the founding affidavit of Booyens, on behalf of the applicant, he has no knowledge of the settlement reached between the parties as alleged by the respondents. In his capacity as Director of Legal Services of the applicant it is necessary and expected that any proposed settlement would come to his knowledge and be discussed with him. Booysens could find no indication of any settlement reached. Lambrechts could negotiate with regard to a settlement, but he was never authorized to settle a matter on behalf of the applicant. A settlement could only be reached upon the recommendation of the state attorney.

According to Booysen, he was present on 3 March 1998 at a meeting at which negotiations were conducted in an attempt to settle the present application. This meeting was held at the chambers of adv Hodes. The state attorney, Mr Van Rensburg, as well as attorney Tayob and Hodes were present. These settlement negotiations were not successful. No mention was made during this meeting of the fact that the application had allegedly already been settled in December 1995. On the contrary, the first indication received from the first to fourth respondents of the alleged settlement, is to be found in the answering affidavit. Subsequent to the settlement negotiations of March 1998, attorney Tayob of Deneys Reitz Attorneys addressed a letter to the state attorney, dated 5 March 1998. This letter deals with the fact that the papers were fairly lengthy and with an extension of time for the filing of the answering affidavit. The contents of this letter militate against any suggestion that the matter had previously been settled, according to Booysens.

The version of Booysen is supported by Lambrechts in an affidavit of 15 September 1998. Lambrechts retired on 31 August 1996 and went to live in Wolseley in the Western Cape. According to Lambrechts, the allegation that the matter was settled between Hodes and himself in December 1995 is untrue. It is correct that summons was issued by the respondent in another matter regarding two containers which was

seized in Johannesburg. There were negotiations between Hodes and Lambrechts regarding these two containers and the claim was later abandoned by the respondents. These are, however, not the same containers seized in Durban in the current matter. According to Lambrecths, he was never authorized to settle a matter on behalf of the applicant where duties were outstanding. It is in any event inconceivable that a claim of so many millions of Rands would be settled on the basis that the contents of two containers (consisting of clothing apparently worth much less) would be retained by the applicant. The Commissioner was not even in a position to sell clothing at that stage, since there was a moratorium on the sale of clothing. Lambrechts does not refer to a specific meeting between him and Hodes, however.

State attorney A J Janse van Rensburg also states that he has no knowledge of a settlement reached between the parties, as alleged by the respondents. Lambrechts was not authorized to settle any matter with a third party. Van Rensburg specifically points out that the conduct of the respondents and their legal representatives after December 1995 is irreconcilable with a settlement having been reached. He refers to several telephone conversations and letters after that, regarding an extension of the time period for the respondents' answering affidavit etc. Van Rensburg also mentions the meeting of 3 March 1998 at the chambers of

Hodes. Negotiations were conducted in an attempt to settle the matter, but were not successful. He furthermore also refers to the subsequent correspondence such as the letter by Tayob to the state attorney, dated 5 March 1998, as well as further correspondence.

The respondents rely on an affidavit by Mr C C Burger, who worked in various departments of the Department of Excise and Customs until his retirement in September 1996. This affidavit was deposed of very shortly before the hearing of this matter. Burger confirms that sometime during the end of 1995 he met with Hodes with regard to a matter unrelated to the present matter. This meeting took place in his office in Johannesburg. According to Burger, Lambrechts entered his office while he, Hodes and another person were engaged in discussions. Hodes and Lambrechts then discussed the matter of the "pikke en grawe". Hodes told Lambrechts that he would take instructions. Hodes then used the telephone in Burger's office to make a telephone call. Burger does not know to whom the call was made. After a further telephone discussion, Hodes informed Lambrechts that he could sell the containers on condition that the matter was settled. Hodes and Lambrechts then shook hands and Lambrechts left the office of Burger, going back to Pretoria.

My concluding impressions regarding the alleged settlement are the following: The first respondent's allegations are supported in general by his attorney, Mr Tayob. As far as the terms of the settlement are concerned, it is merely stated that the matter would be regarded as settled in exchange for the retention of the two containers by the applicant. Booysen denies any knowledge of a settlement, and strongly contends that such a settlement would not have been possible, *inter alia* because Lambrechts was not authorized to settle such matters without the knowledge of Booysen and the consent of the state attorney.

As far as the alleged meeting in Burger's office in December 1995 is concerned, the two people most directly involved in the alleged settlement were of course Lambrechts and Hodes. Lambrechts died shortly after having made his affidavit, in which he vehemently denies any settlement. The only fact that may be a cause for some concern with regard to Lambrechts' version, is the fact that he does not even refer to that particular meeting, whereas Burger confirms that a meeting did take place. An affidavit by Hodes would have been very helpful in determining this dispute. However, there is no affidavit by Hodes available. Much of the dispute on the papers is about the fact that Hodes did not make an affidavit. According to the first respondent, Hodes indicated his agreement with the respondent's version, but was not allowed to make an affidavit. This is denied by Van Rensburg. One of the

initial skirmishes that took place between the legal representatives of the applicant and the first respondent at the hearing of this matter, was about the filing of an affidavit by Van Rensburg, which was made and served very shortly before the commencement of the hearing. I referred to this issue earlier. Counsel on behalf of the first group of respondents objected against this affidavit, because it contained no explanation for its lateness. In this affidavit Van Rensburg makes one or more further statements regarding the question whether Hodes was in fact allowed to make an affidavit or not. This could presumably impact on the credibility of the first respondent. As I indicated earlier, I ruled that this affidavit may be filed. However, I decided to disregard the contents thereof completely. In fact, I am of the view that the dispute about the question whether Hodes was allowed to make an affidavit or not, is to some extent a storm in a teacup. I do not draw any inferences regarding the credibility of any of the parties. I accept for the purposes of this matter that practicing advocates do as a rule not easily depose affidavits regarding the facts of a particular case in which they are or were involved, but that it is not completely impossible to do so. The point is that there is no affidavit by Hodes available to support the first respondent's version, for whatever reason. The important support that Hodes could have given to the first respondent's version is therefore absent.

Lambrechts made his affidavit more than two years after his retirement and one day

before his death. Seeing that his state of health and his memory may not have been very well at that stage, there is no reason why he would lie under oath in order to support his former employer, the applicant.

Burger does help the first respondent somewhat in that he at least refers to a meeting and a discussion between Lambrechts and Hodes. However, Burger's contribution is not conclusive. Firstly, he did not hear exactly what was spoken between Hodes and Lambrechts. He heard them mentioning a settlement, and he saw the two men shaking hands. Secondly, even if an agreement of some kind had been reached, it would appear to be conditional.

In the absence of concrete evidence by any of the persons directly involved in the alleged settlement that there was indeed a settlement, I am of the view that the probabilities strongly militate against the first respondent's version of a settlement. The conduct of the legal representatives of the parties after December 1995 certainly does not indicate that a settlement had been reached. They kept on communicating *inter alia* about the extension of periods and the filing of further affidavits. It also sounds far-fetched that the applicant would write off millions of Rands of unpaid duties through a settlement which was never confirmed or mentioned in writing in any subsequent correspondence. The first group of respondents raised the alleged

settlement for the first time in June 1998 in their interlocutory application. Advocate Hodes would not have consulted and arranged or attended further meetings, for example in March 1998, if he were under the impression that the matter had been settled. As the probabilities are overwhelmingly against the version of the first respondent, I am of the view that there is no dispute of fact that cannot be solved on the papers. A court would be justified in rejecting the first respondent's version on the papers. (See *Plascon Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623A, especially at 635C.) Furthermore, a referral to evidence would not necessarily help to solve any dispute on this point. The two personalities central to this issue are Lambrechts and Hodes. Lambrechts is no longer alive and Hodes may still be reluctant or unwilling to give evidence under oath, for whatever professional or other reasons.

8. THE ISSUE OF ADMISSIBLE OR INADMISSIBLE EVIDENCE AND THE QUESTION WHETHER THE FOUNDING PAPERS DISCLOSE A CASE.

According to the first respondent, the applicant relies mainly on inadmissible hearsay evidence. Various portions of the founding papers ought to be struck out as these are constituting inadmissible evidence. In addition, the information obtained pursuant to the letter of request is objected to on the basis that this application was

not competent in terms of the provisions of South African law and the court granting such application did not have the power to do so. The application was, furthermore, granted in the absence of an interested party, namely the respondents, who should have been sighted. There was no basis for the application to be proceeded with *ex parte* and no case was made out. The order obtained is therefore a nullity, according to the first respondent. The first respondent furthermore contends that the respondents were unable to obtain the necessary documents for examination and consideration. In addition, the documents, particularly copies of documents obtained from outside the Republic of South Africa, have not been properly proved and are therefore inadmissible. The contents of such documents should not be taken into account.

The second group of respondents also contend that the applicant is seeking to rely on inadmissible evidence. The information obtained by the applicant pursuant to the letter of request is furthermore inadmissible in as much as the order pursuant to which it was obtained was not competent, or was erroneously granted. (See for example paragraph 13 of the fifth respondent's affidavit, on page 945 –946 of the paginated papers.)

As far as the documents from outside South Africa are concerned, the fifth

respondent states that the authenticity of these documents has not been proved and that the documents do not constitute proof of the correctness of the facts allegedly recorded therein. At best for the applicant, the applicant has established that the documents from the Republic of China and Hong Kong contain certain descriptions of goods that do not correspond with the description in the documents provided to the applicant. (See for example paragraph 10 of the fifth respondent's answering affidavit, on page 942 onwards.)

Not all of the above points were pursued during argument. At the hearing of the matter, it appeared that the respondents objections regarding the admissibility of the documentary evidence mainly revolve around the affidavit of Lambrechts which was allegedly made in previous proceedings, the hearsay allegations in Lambrechts' affidavit, the authenticity of the overseas documents, and the submission that the contents of the overseas documents prove nothing. As stated earlier, the respondents do not substantially dispute the facts alleged by the applicant, but relies on the submission that a case is not made out on the founding papers. In his written heads of argument, counsel for the second group of respondents specifically submits that an applicant is required to set out not only assertions of fact, but also the evidence and where appropriate, the grounds and facts rendering such evidence admissible. He referred to *Hyperchemicals International (Pty) Ltd and Another v May Baker*

Agrichem (Pty) Ltd and Another 1992 SA 89 (W) at 92E to 93A and *International Executive Communications Limited t/a Institute for International Research v Turley and Another* 1996 (3) SA 1043 (W) at 1050G-H. According to counsel, the applicant has failed to establish the prerequisites for admissibility of the documents sought to be relied upon.

I first deal with the submission that the affidavit of Lambrechts was made in or for the purpose of previous proceedings. This affidavit was made in case no 3942/93 and was attached as annexure "JJB1" to the affidavit of Booysen in case no 3942/93. In paragraph 18 on page 25 of his founding affidavit in the present application, Booysen refers to this affidavit of Lambrechts. The whole of the contents in the application in case no 3942/93 is attached to Booysen's affidavit in the present application, as annexure "A".

Lambrechts' affidavit was signed on 21 September 1992. After retiring from the service of the applicant, he died on 16 September 1998 (a day after signing his earlier mentioned affidavit regarding the alleged settlement.) A death certificate was handed in by counsel on behalf of the applicant.

As stated by Booysen in his founding affidavit, the manner in which the fraud was

perpetrated and discovered and a description of the investigation concluded by officers of the applicant were fully dealt with by Lambrechts in his affidavit. Lambrechts states that the facts contained in the affidavit are true and correct and fall within his personal knowledge. He also states that he was in charge of the Section Special Investigations and personally conducted the investigations in this matter. The affidavit of Lambrechts is crucial as far as the applicant's case is concerned.

The proceedings for which Lambrechts' affidavit was originally made, namely case no 3942/93, was the abovementioned application which was heard in 1993, in which the applicant sought from the Supreme Court, Transvaal Provincial Division, to issue a letter of request to the Supreme Court of Hong Kong, alternatively to the competent judicial authority of Hong Kong, requesting assistance with regard to litigation to be instituted in the Supreme Court of South Africa, and the relief ancillary to the issuing of the letter of request. The letter of request was granted and the Supreme Court of Hong Kong responded. The letter of request appears as annexure "A" to that application on page 53 and onwards of the paginated papers. The relevant documents are described in schedule "A" on page 56 onwards and are mainly export declarations regarding the different consignments. The application for the letter of request was brought for the purpose of obtaining documentation which

would enable the applicant to bring the application now before me to court.

According to the respondents, this affidavit by Lambrecht is not admissible, because it was made in previous proceedings. Lambrecht was still alive when the founding papers for the present application were drafted and he could have made an affidavit to confirm the contents of the affidavit in the previous proceedings.

According to authorities such as Hoffmann and Zeffertt in their *South African Law of Evidence* (4th ed) on page 152, and Schmidt and Rademeyer in *Bewysreg* (4th ed) on page 273 to 274, the testimony of a witness in earlier judicial proceedings is at common law admissible at a subsequent trial, provided that the proceedings are between the same parties or their privies, the issues are substantially the same, the witness is not available to be called because he is dead, insane, ill, etc and the opposing party had a full opportunity to cross-examine him. (See the case law quoted by these authors, including *Lensveldt and Co v John Swift* 1920 (WLD) 112.)

The witness is clearly not available, due to his death. The issues relate to the same events and action by the applicant, although the purpose of the previous application was specifically to obtain the letter of request, whereas the legal relief being sought

in the present application is the payment of money. The purpose of the previous application was indeed to obtain more evidence to be used in the present application.

It was argued on behalf of the respondents that the parties were not the same, because there were in fact no parties in the previous proceedings, seeing that the application for the letter of request was brought on an *ex parte* basis. Furthermore, the issue of the respondents having had the opportunity to test or rebut the evidence must be examined.

In my view one has to take account of the underlying reasons regarding justice and fairness in applying the above mentioned criteria. All authorities allow for the admission of evidence given in previous proceedings, in cases where the relevant witness is unavailable, for example because of death. It is correct, as argued on behalf of the respondents, that Lambrechts could have been asked to make an affidavit to confirm his previous affidavit. However, it was not done and death does not always announce its arrival timeously. As previously stated, it would appear that he indeed deposed another affidavit very shortly before his death. The investigations and preparation for legal proceedings in this matter were stretched out over very long periods of time. If the problem would have been solved simply by a

one or two paragraph affidavit from the side of Lambrechts confirming what he had said, it could appear to be quite formalistic.

The concerns about the admission of evidence given in so-called previous proceedings, and the limited scope allowed for the admission of such evidence, appears to be related, first and foremost, to the opportunity to test the evidence. The authorities referred to mainly deal with the question whether evidence previously given and recorded can be included into the record of later proceedings. On the assumption that evidence was given orally at a trial, that there was an opportunity for cross-examination and that all the relevant questions and answers were recorded, such evidence is admissible in subsequent proceedings, provided that the parties are the same, of course. Obviously, if one or more other parties are involved in the subsequent proceedings, such parties may wish to ask different questions to the witness to test the evidence. This situation appears to be quite different in the case of applications, based on sworn affidavits. There is no opportunity for cross examination in any event. A respondent has the right to answer to the statements contained in founding papers, and an applicant has the right to file replying papers. Further responses could even be filed under certain circumstances. The dynamics of the live presentation of oral evidence, with cross-examination, are not present in application proceedings. In this matter nothing prevented the respondents from

answering to the allegations made by Lambrechts. The respondents chose not to do so.

The question can also be asked whether the application for the letter of request does indeed amount to different or previous proceedings. It would appear that it was a previous, or perhaps rather a preliminary, step in the same proceedings. The applicant was preparing the present application against the respondents and needed to obtain documentation. In order to do so, a court had to be approached for a letter of request. It would therefore appear to be a preparatory step in the same proceedings. Argument was presented by counsel as to whether the application for the letter of request could be regarded as "interlocutory" proceedings. This may or may not be an appropriate description, but I do not think that this term is necessarily decisive. The proceedings constituted a preparatory step in the same proceedings, or at least the same set of proceedings. The ultimate purpose was the same. The application was brought *ex parte* and the respondents therefore did not have the opportunity to answer in that particular application. The point raised by the respondents in the answering affidavits that the court order obtained was invalid, was not pursued at the hearing of this matter, as I stated earlier. I am of the opinion that the application for the letter of request cannot be regarded as different or previous proceedings in the sense that this concept is normally understood as far as

the criteria for the admission of evidence are concerned.

It was argued by counsel on behalf of the first group of respondents that the respondents would be jeopardised by the admission of the affidavit by Lambrechts, because Lambrects may have wished to say more if he had the opportunity to make an affidavit specifically for this application. Additional statements by him could have favoured the respondents. I have considered this submission, but it would appear that the last mentioned possibility is very far-fetched. This possibility would always exist as far as the admission of evidence given in previous proceedings is concerned, even if all the earlier stated criteria are met. When a witness gets a second opportunity to give evidence about the same set of facts, it is human and perhaps inevitable to attempt to add to or improve one's evidence, perhaps especially in view of some discomfort which may have been caused by cross-examination. Oral evidence given in previous proceedings is indeed admissible, provided that there was an opportunity for cross-examination, etc. The fact that a witness may wish to add something every time when he or she gets an opportunity to give evidence, and that such additions may add a perspective which could theoretically favour an opposing party, is not relevant.

Perhaps it could also be argued that Booysen incorporates the evidence of

Lambrechts by reference, but I do not find it necessary to investigate this possibility. Other submissions in favour of the admission of the affidavit by Lambrecths were made by counsel on behalf of the applicant, with reference to statutory provisions and case law. I do not deal with these submissions now.

In view of the above mentioned, I am of the opinion that the affidavit by Lambrechts is admissible in this application, in spite of the fact that it was specifically made for the application for a letter of request.

As to the respondent's submission that large portions of the documentary evidence put forward by the applicant are inadmissible because they amount to hearsay, counsel for the applicant argued that the first question is whether the evidence is indeed hearsay and submitted that it is not. In so far as some of it may be regarded as hearsay evidence, counsel for the applicant relied on section 3 of the Law of Evidence Amendment Act of 1988 which states that subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence, unless the court is of the opinion that such evidence should be admitted in the interest of justice, having regard to, *inter alia*, the nature of the proceedings, the nature of the evidence, the purpose for which the evidence is tendered, the probative value of the evidence, etc and any other factor which should in the opinion of the court be taken into account.

(See in this regard *E G Metadad v MEC Insurance* Co 1992 (1) SA 594 (WLD), especially on page 498. Also see *Hewan v Kourie NO and Another* 1993 (3) SA 233 (T) especially at 241D.) It was submitted by counsel on behalf of the applicant that, in applying section 3(1)(c) of the Law of Evidence Amendment Act , and particularly subsection (vii) mentioning any other factor which should in the opinion of the court be taken into account, note must be taken of the fact that in motion proceedings where cross-examination does in any event not apply, hearsay evidence could be allowed more readily.

According to the respondents, several parts of Lambrechts affidavit ought to be struck out because of the inadmissibility of the contents thereof.

I do not attempt to summarise the contents of the affidavit, which appears on page 69 and onwards of the paginated papers. As stated earlier, Lambrechts mentions that the facts fall within his personal knowledge and that he personally conducted the relevant investigations. Submissions were made on behalf of the respondents to the effect that Lambrecths' statements cannot serve to prove their own truthfulness, but I do not quite understand the reasoning behind these arguments. In my view, there can be little wrong with Lambrechts' submissions that he conducted the investigation and knows about the facts personally.

I have decided to ignore some parts of Lambrechts' affidavit though. For example, in paragraph 4 he mentions a "tip-off". I do not take the contents of this paragraph into account. Furthermore, I treat those portions of the affidavit where Lambrechts expresses an opinion or a conclusion with caution. For example, on page 73 in paragraph 10 he expresses the view that "(t)he true significance" of certain events is that the importer's conduct amounted to an admission of fraud. As far as I am concerned, the question is not whether it is the conclusion of Lambrechts that the true significance of the relevant conduct is something or the other, but whether the facts stated by Lambrecths, of which he has personal knowledge, and which are not disputed by the respondents, mean something, such as indicating an admission of fraud on the side of the relevant respondents. More or less the same applies to Lambrechts' statement in paragraph 16.2 of this affidavit (on page 83) that during a certain consultation he "was left with the clear impression that Joe Aboo was fully aware that a fraud had been perpetrated ...". One again, the question is not what the impression of Lambrechts was, but what the real significance of the relevant conduct or other facts may be.

In paragraph 17.3 (on page 84) Lambrecths mentions that the fifth respondent offered a certain explanation and Lambrechts then states what was allegedly said by the fifth respondent. The contents of this paragraph may well be hearsay as far as

the truth or otherwise regarding the relevant events is concerned. It is, however, not hearsay evidence as far as Lambrechts' statement that the fifth respondent in fact said certain things is concerned. Lambrects' states what the fifth respondent said, as a fact, according to his personal knowledge. In so far as this statement by Lambrecths is not disputed, it can be accepted as a fact and the relevant question would once again be which inferences could reasonably be drawn from the fact. According to the applicant, the respondent's conduct amounts to an admission of fraud. This may or may not be so, and the submission is to be considered by the court. The same applies to Lambrechts' statements as to the behaviour of the fifth respondent, for example in paragraph 17.3 where Lambrecths mentions that the fifth respondent "merely remained silent" in response to an allegation made to him.

The respondent specifically wanted references in Lambrechts affidavit to certain documentation to be struck out. For example, for as far as paragraph 23.1 of his affidavit is concerned, the respondents submitted that references to documents from line eleven onwards should be struck out. It was argued by counsel on behalf of the applicant that these also amount to admissions. The documents at stake were supplied by the respondents and Lambrechts merely describes it. Section 102 of the Act provides that in any proceedings under the Act, any statement in any record, letter or other document, kept, retained, received or dispatched by or on behalf of

any person to the effect that any goods of a particular price, value or quantity has been imported, shall be admissible in evidence against him as an admission that he has at that time imported goods of that price, value or quantity. I agree with this submission. In view thereof, the issue raised by counsel on behalf of the second group of respondents, namely that there is a confusion between the authenticity of the documentation and the proof of the contents, is not particularly relevant. The documents were supplied by the respondents, as stated. As far as I understand the answering papers from the side of the respondents, the authenticity of these documents is not their primary concern, but the fact that the contents amount to hearsay and should as such be inadmissible.

Therefore, I have decided not to formally strike out any particular portions of Lambrecths' affidavit. However, I keep in mind the relative evidential weight and value, or lack of it, of portions of the affidavit, and I ignore certain aspects. I am of the view that the evidence which I have decided to take into account does not amount to hearsay, but to the extent that it may be regarded as hearsay, it is in the interest of justice to be admitted, in view of the earlier mentioned contents of section 3 of the Law of Evidence Amendment Act of 1988.

The export documentation obtained from Hong Kong and the Republic of China was

heavily disputed by counsel on behalf of the respondents. To reach and explain a final conclusion about the authenticity and value of these documents, is cumbersome and not uncomplicated. Some of the documentation was originally drafted in Chinese and had to be translated. Legal formalities and proceedings in these countries, which are not necessarily the same as in South Africa, also play a role.

According to the applicant (as stated earlier), the significance of these documents is not to prove the fraud allegedly committed by the respondents. The documentation obtained in South Africa, together with the respondents conduct, provides sufficient proof of the commission of a massive fraud. In order to quantify the amounts which are at stake, the applicant had to obtain the foreign documentation. Much of the falsely cleared goods had already been sold off by the importers. Therefore the applicant had to obtain evidence regarding the proper description of the goods from the suppliers in Hong Kong and the Republic of China, or from the relevant Departments of Customs and Excise. The calculation of the underpayment of duties could be done by comparing the foreign export documentation with the documentation provided to the applicant in South Africa. In other words, the foreign documentation does not serve to prove the central issue, but the quantum. In so far as the nature of the foreign documentation is such as to perhaps provide further proof of the alleged fraud, it is not conclusive against the respondents. There

is also further evidence which tends to support this documentation (for example the affidavit by Yeung, earlier referred to). At least as far as the quantification of the applicant's claim is concerned, the documentation has, *prima facie*, substantial probative value.

According to the applicant, the suppliers in Hong Kong and the Republic of China were unhelpful and generally not prepared to give affidavits to the applicant. What the applicant did manage to get hold of, is the earlier mentioned affidavit by Yeung, a supplier (which appears on page 563 onwards of the paginated papers). According to Yeung, the fifth respondent instructed him to provide false information. The statements in Yeung's affidavit are not disputed by the fifth respondent, or any other respondent.

The Commissioner for Customs and Excise of the Republic of China was indeed helpful and made export declarations and export permits available to the applicant. As far as Hong Kong is concerned the export documentation presented by exporters to the Hong Kong authorities was obtained by means of the letter of request issued by the South African court.

The relevant calculations resulting in the applicant's quantification of its claim, is

explained by state attorney Van Rensburg in his affidavit. I do not go into the detail of this aspect.

The dispute about the authenticity of the foreign documentation especially relates to the fact that photo copies were made available, instead of originals. The applicant relies on, *inter alia*, section 34(2) and 34(4) of the Civil Proceedings Evidence Act of 1965. According to section 34(2) a court may in any civil proceedings, having regard to all the circumstances of the case, if it is satisfied that undue delay or expense would otherwise be caused, admit a statement, notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or the material part thereof proved to be a true copy. Section 35 is also relevant. I do not analyse the contents of these clauses in detail, but am of the view that I could and should exercise my discretion in terms of s 34(2) to admit the documentary evidence obtained from the Republic of China and Hong Kong. I do so, *inter alia* because undue delay and expense would otherwise be caused. The only alternative to this evidence would appear to be evidence taken on commission. The actual exporters would then have to be subpoenaed, but they are understandably less than keen to cooperate, according to the applicant.

I do not go into the detail of the documentation presented to me, and submissions made by counsel on behalf of the parties, regarding the certification of authenticity of the documents, the translations, etc. I have considered the submissions carefully.

It would appear that the documentary evidence on which the applicant's case is based in this matter is not necessarily ideal. On the other hand, evidence seldom is, especially when the result could be an order for the payment of a very large sum of money.

In considering the admissibility and value of the documentary evidence, I have considered what I regard as the reasons behind the rules of the Law of Evidence. Court proceedings, and the presentation of evidence, are not a game. Furthermore, formalities should not be elevated to a sacred status. The world in which we live are complex, but technologically advanced. Transactions between people in different countries, with different languages, procedures, and legal systems take place all the time. The aim of legal proceedings is to find the truth and to arrive at a conclusion which is as just and fair as possible under the circumstances. Therefore the legislature has, for example, deemed it fit to formulate exceptions to the general rule against the admission of hearsay evidence. Naturally one has to be aware of possible pitfalls, of course. I have followed an approach which could perhaps be

described as somewhat robust, but which is in my view in accordance with the relevant legal requirements, as well as with the interests of justice. In a matter of this nature one necessarily has to look at the evidence as a whole, in other words at the relevant affidavits, together with other documentation, and also the behaviour of the parties. I believe that this approach is the correct one under the circumstances, *inter alia* because of the intricate and problematic nature of this case. Numerous differences between the different countries, and systems of law and administration, complicate matters. The respondents elected not to dispute the allegations made by the applicant, but to rely on what often appears to me to be highly technical and formalistic points. All in all, I am of the view that the applicant has taken all reasonable steps to obtain the necessary evidence, to ensure the authenticity thereof and to make it available to the Court and to the respondents. Therefore I am of the view that in general the documentary evidence ought to be admitted and taken into account, although I once again ignore certain portions of it, for example the explanation by one or more of the deponents on behalf of the applicant on exactly how things work in China, of which they do not necessarily have first hand knowledge.

It would appear that even if the documents from China and Hong Kong - or some of these - were not to be admitted, the applicant would still have a case, although the

quantum would be effected. In this regard schedules and calculations prepared by counsel on behalf of the applicant were made available, containing some revised figures. In view of my general conclusion regarding the documentation, I do not deal with these revised figures.

9. THE SUBMISSION THAT THERE WAS A MISDESCRIPTION OF THE GOODS IMPORTED BY THE SECOND GROUP OF RESPONDENTS.

The fifth respondent denies that the goods imported by the second group of respondents are described correctly by the applicant. However, this denial appears to be quite bald, vague and sketchy, particularly in view of the fifth respondent's failure to deal with the allegations made on behalf of the applicant that the fifth respondent provided a second set of invoices in respect of the goods imported by the second group of respondents, as well as the allegations contained in the affidavit of Yeung. Consequently, there does not appear to be any merit in this submission from the side of the fifth respondent.

10. THE "CORPORATE VEIL" ISSUE

Some of the prayers seek to hold the first respondent personally liable for the second to the fourth respondents, and the fifth respondent for the sixth to the eleventh

respondents. The fifth respondent denies that he controlled the sixth to the eleventh respondents. (No such denial seems to be forthcoming from out of the side of the first respondent.)

Section 103 of the Act provides that in the event of the incurring of any liability under the Act by any company or closed corporation, any persons having the management of any premises or businesses or in connection with which such liability was incurred, shall be liable in respect of any liability so incurred.

It was argued on behalf of the second group of respondents that section 103 is perhaps unconstitutional, at least as far as civil proceedings are concerned, but this submission was not pursued. I was not asked to find that section 103 is unconstitutional.

According to the applicant, the fifth respondent was also the importer of the goods in question, as defined in the Act. The fifth respondent used the sixth to the eleventh respondents to import the goods in a fraudulent manner and therefore the court is entitled to "pierce the corporate veil" in respect of these respondents. According to especially Booysens' affidavit, all decisions pertaining to the importation and clearing of goods and the subsequent dealings therewith, regarding

the sixth to the eleventh respondents, were made by the fifth respondent. The fifth respondent at all material times personally exercised control over the importation and clearance of the goods and subsequent dealings therewith as effectively and completely as if they belonged to him personally. These corporate entities were nothing but the fifth respondent in a different guise. Therefore it is submitted by the applicant that the court would be justified in disregarding the separate legal personality of the relevant companies in order to fix liability onto the fifth respondent, even though the fraudulent evasion may ostensibly be the acts of companies.

According to the fifth respondent, he was one of six directors of the sixth respondent and held only 25% of the issued shares in that company. He was one of two directors of the eighth respondent. He was not a member of the eighth respondent. He was one of two directors of the tenth respondent and held 25% of the issued shares in that company. He was one of three directors in the eleventh respondent, of which he was not a member. He concedes that the above companies have the same auditors and the same registered address, but this does not justify the conclusion contended for by the applicant.

On the other hand, a number of telling facts are relevant. In April 1999 the fifth

respondent had available, at the sixth respondent's premises in Louis Trichardt, all the relevant import documentation relating to items regarding the sixth and eighth respondents. The fifth respondent also promised to make those files which were not available at that stage available to the applicant as soon as possible and did in fact make some available. According to Lambrechts, the files and documents received from the fifth respondent were sent in one big bundle and no distinction was drawn between the various businesses and companies under which the fifth respondent conducted his business. It was also the fifth respondent who negotiated with the applicant's representatives in 1999 in connection with the release of the containers which had been imported by the sixth respondent and the eighth respondent. According to Yeung, the order to purchase certain goods was placed telephonically by the fifth respondent on behalf of sixth respondent.

There cannot be much doubt that the fifth respondent would not only qualify as an importer of the goods imported by the second group of respondents, but that he managed and controlled the sixth to the eleventh respondents, as well as the relevant premises. Whether or not it is appropriate to use the term "to pierce the corporate veil" in this regard, is irrelevant. Section 3 of the Act, referred to above, seems to be applicable in any event.

11. CONCLUSION

In my view the applicant has put together a case based on what it describes as a massive fraud to the value of millions of rands. The respondents elected not to answer on the merits, meeting the factual allegations made by the applicant, but to raise a number of relatively technical defences, such as misjoinder, and to allege that no case has been made out at all on the founding documentation, because the evidence is inadmissible, *inter alia* because of its hearsay nature. In my view, the founding papers do substantiate the applicant's case, especially in view of the absence of an answer on the merits from the side of the respondents.

As far as the quantum is concerned, I do not regard it as necessary to analyse the applicant's calculations regarding their quantification of the claim in detail. The calculations were based on two sets of South African invoices, and on the documentation from the Republic of China and Hong Kong. The applicant admits to the difficulty as far as the accurate quantification is concerned. Therefore the applicant amended its notice of motion, to which I referred earlier. The respondents do not dispute the calculation or the amounts.

Costs must necessarily follow the result. There is no question that this case merits the services of two advocates. I am not going to grant costs on an attorney and own

client scale, as asked for by the applicant, because I am not of the view that such an order would be justified under the circumstances.

Therefore -

1. I make an order in terms of prayer 1, 2, 3, 4, 5, 5A, 6, 7, 8, 9 and 10 (in other words prayers 1 to 10) of the amended notice of motion dated 27 August 1998; and

2. I furthermore order that the first to the eleventh respondents pay the costs of suit, including the costs of two counsel, the one paying the other to be absolved.

J. VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT