IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 8712/2001

In the matter between:

TREND FINANCE (PTY) LIMITED	1st Applicant
TREND GEAR (PTY) LIMITED	2nd Applicant

And

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	1st Respondent
CONTROLLER OF CUSTOMS, CAPE TOWN	2nd Respondent

JUDGMENT: 16/01/003

VAN REENEN, J:

1] The first and second applicants are associated companies with their principal places of business at 54 Old Mill Road, Ndabeni Industria and are being run by Mr Ismail Essop and his two daughters Khaironesa and

Shahieda. The second applicant is an importer of various products, including footwear. The first applicant provides finance to the second applicant as well as other importers.

2] In order to control the importation of inexpensive footwear from China, Taiwan and Vietnam the Department of Trade and Industry issued import permits in terms whereof the importation of footwear is restricted to 4000 pairs of shoes per importer.

3] When large South African retail operations such as Pep Stores and Foschini Group (Pty) Limited (Foschini Group) have determined the availability of particular stocks of footwear from a specific supplier in any of the aforementioned countries in excess of their own import facilities they conclude agreements with the second applicant in terms whereof the latter undertakes to

import such footwear at an agreed all-inclusive rate per pair after having provided it with letters of credit in respect of a particular order.

4] First- and second applicants aver that they have an arrangement with a number of permit holders entitled to import a maximum quantity of 4000 pairs of footwear from the aforementioned three countries, in terms whereof they import footwear required by the customers of second applicant. The individual permit holders have no dealings with the supplier of the footwear and the applicant in terms of "oral arrangements" with them guarantees the payment of and effects payment of the purchase price to the overseas supplier. The second applicant avers that it acquires ownership of the footwear from the permit holders in whose names the footwear is imported on importation and then effects delivery thereof to its customers. The correctness of

the applicants' construction of the relationship between them and the permit holders has been placed in issue by first- and second respondents.

5] Under ~~thirteen~~ 14 bills of entry dated 9 March 1999, 28 548 pairs of shoes at $ 3.20 per pair and 31 680 pairs of shoes at $ 2.95 per pair, alleged to have been purchased from Textrade International Exporters (Textrade) of New India House 6/F 52, Wyndham Street, Hong Kong and carried on board the "Nantai Venus" were imported into South Africa on the initiative of the second applicant (the first consignment). Despite the fact that the first applicant paid the necessary import duties and value-added tax the applicants were on 12 March 1999 advised that the first respondent refused to release the consignment. The first respondent failed to provide any reasons for such refusal. In order to procure the urgent release of

the consignment the first applicant, pursuant to an agreement with the first respondent, made a provisional additional payment of R100 000 under cover of the prescribed form which recorded that the payment was being made as a "provisional payment lodged pending outcome of investigations". After the footwear had been released the second applicant delivered them to its customer Pep Stores.

6] Under twelve bills of entry dated 11 August 1999 47 900 pairs of shoes alleged to have been purchased from Textrade at prices ranging from $ 3 to $ 4.50 per pair and carried on board the "Ever Gleamy" were imported into South Africa on the initiative of the second applicant (the second consignment) In July 1999, footwear which had been imported into South Africa and had been carried on board the "Sky River" were detained by the first respondent in terms of section

88(1)(a) of the Customs and Excise Act, No 91 of 1964 (the Act). As a result of information sought by the first respondent's Special Investigations Office (the SIO) correspondence ensued between it and the first applicant's attorneys. The goods to which the said queries related were subsequently cleared but the footwear comprising the second consignment were detained upon their arrival in Cape Town as the SIO believed that the bills of entry did not reflect the true transaction value thereof. In order to procure the release of the second consignment the first applicant, pursuant to an agreement with the first respondent on 20 August 1999, made a provisional payment of R300 000 under cover of the prescribed form which recorded that the payment was being made as "Provisional payment lodged for possible underpayment in Customs Duty and VAT". After the second consignment of

footwear had been released, the second applicant delivered them to its customer, the Foschini Group.

7] Under a bill of entry dated 13 August 1999, eight bills of entry dated 13 August 1999 and sixteen bills of entry dated 30 August 1999, 91 380 pairs of shoes alleged to have been purchased from Textrade at prices ranging from $2.80 to $ 5.50 per pair and carried on board the "Ever Gleamy" and the "Ever Growth" (the third consignment) were imported into South Africa on the initiative of the second applicant. The footwear comprising the third consignment were on 13 August 1999 detained for the same reasons as the second consignment. In order to procure the release of the third consignment the first applicant on 1 September 1999 made a provisional payment of R600 000 under cover of the prescribed form which recorded that payment was being made as: "Provisional payment

lodged for possible underpayment on customs duty and VAT". After the footwear comprising the third consignment had been released the second applicant delivered them to its customer, the Foschini Group.

8] The second respondent presumably acting on delegated authority from the first respondent, on 20 March 2001 determined that there had been an underpayment of customs duty and value-added tax in respect of the first consignment amounting to R363 371,09 and that a further amount of R732 903 had to be paid in lieu of forfeiture in terms of sections 87(1) and 88(2) (a) of the Act. No such determination has as yet been made in respect of the second and third consignments.

9] The first- and second applicants, contending that a) the second respondent's determination of 20 March

2001 falls to be set aside on appeal under section 65(6) of the Act, alternatively, to be on reviewed in terms of section 8(1)(c) of the Promotion of Administrative Justice Act, No 3 of 2000, in the event whereof the first applicant would be entitled to claim payment of the first provisional payment of R100 000; and b) that because as a reasonable period of time since the second and third provisional payments were made has elapsed and no determination of underpayment has been made, the first applicant is entitled to reclaim payment of the amounts of R300 000 and R600 000, on 9 October 2002 instituted proceedings against the first and second respondents by notice of motion out of this court in which they claim the following relief:

"1. In terms of section 65(6) of the Customs and Excise Act No 91 of 1964 ("the Act"), setting aside the determination contained in the second respondent's letter dated 29 March 2001 (annexure "T" to the founding affidavit of Ismail Essop);

2. in any event, reviewing and setting aside the said determination in terms of section 8(1)(c) of the Promotion of Administrative Justice Act No 3 of 2000, alternatively reviewing and setting aside that portion of the determination imposing a penalty of R732 903 in lieu of forfeiture;

3. directing the first respondent to pay to the first applicant:

   3.1 R100 000 together with interest thereon at the prescribed rate from 12 March 1999 to date of payment

   3.2 R300 000 together with interest thereon at the prescribed rate from 20 August 1999 to date of payment;

   3.3 R600 000 together with interest thereon at the prescribed rate from 1 September 1999 to date of payment;

4. alternatively to prayers 1 to 3 above, directing the respondents to furnish written reasons for:

   4.1 the decisions contained in the said letter of 29 March 2001;

4.2 the decision not to refund to the first applicant the amounts set out in paragraph 3 above;

5. granting the applicants further and/or alternative relief;

6. directing that the costs of this application be paid by the first respondent."

10] The first- and second respondents opposed the application and answering affidavits were filed on 3 January 2002, 10 January 2002 and 16 January 2002 respectively. First- and second applicants in turn filed their replying papers on 16 April 2002.

11] The application, which is hereinafter referred to as the main application, was enrolled for hearing on 5 November 2002.

12] The respondents on 30 October 2002 launched an application (herein referred to as the second

application), set down for hearing on the same date as the main application, in which it sought an order granting the respondents leave to file a further affidavit of Mr Gideon Daniel Schreuder (Schreuder) and an affidavit by Mr Gary Van Dyk (Van Dyk) as well as an order postponing the main application to a date to be arranged with the registrar of this court for the hearing of **viva voce** evidence to resolve the issue of what the transaction values are of the footwear listed in Kedah Company Limited (Kedah), Textrade and Oriental Enterprises (Oriental) invoices P. 5930, P 5932, P 5933, P 5936 and P 5937. The applicants opposed the granting of the relief sought in the second application but did not file any papers in opposition.

13] The applicants, in turn, brought two applications on notice to the respondents.

The first was an application to strike out the following matter in the founding affidavit of Mr Ebenhaeser Beukes (Beukes) jurat 29 October 2002 in the second application:

> "1.1 paragraph 10 and annexure "A" referred to therein, on the grounds that the said matter constitutes inadmissible hearsay and that annexure "A" is not a duly sworn affidavit;
>
> 1.2 in paragraph 12, the words "and more particularly" to the end of the paragraph"

(That application is herein referred to as the striking out application).

The second was an application conditional on the respondents being granted leave to file the affidavits of Schreuder and Van Dyk, in which event, the applicants sought an order:

> "1. Striking out from the affidavit of Gary van Dyk dated 22 October 1998, the following matter as constituting inadmissible hearsay and/or matter of an argumentative, speculative and irrelevant nature:

1.1 the first two sentences of paragraph 6;

1.2 the first sentence of paragraph 32;

1.3 the third sentence of paragraph 33;

1.4 the whole of paragraph of 34'

(This application is herein referred to as the conditional striking out application).

14] It is obvious that annexure "A" to the founding affidavit of Beukes in the second application is not in the form of a duly sworn affidavit and constitutes hearsay, as do the averments in paragraph 10 as well as the words "and more particularly" to the end of paragraph 12 of the said affidavit. Failing agreement as regards its admissibility and in the absence of an evidentiary basis upon which this court could exercise its discretion to admit those averments in terms of the provisions of section 3(1)(c) of the Law of Evidence Amendment Act, No 45 of 1988, they have no evidentiary value and fall

to be disregarded. Accordingly the striking out application is granted with costs.

15] The next aspect to be considered is whether the relief claimed in the second application should be granted or not. As a general rule the filing of three sets of affidavits are allowed in motion proceedings. That rule is not applied rigidly. Rule 6(5)(e) permits the filing of further affidavits in a court's discretion. A litigant seeking to file an affidavit late and out of its ordinary sequence in motion proceedings is seeking an indulgence and accordingly, there should be a full explanation showing an absence of **mala fides** or culpable remissness for the facts not having been placed before the court at an earlier stage. The court must further be satisfied that prejudice that cannot be remedied by an appropriate order of costs is absent (See: **H.J. Erasmus et al: Superior Court Practice**

B1 – 47; **Herbstein & Van Winsen: The Civil Practice of the Supreme Court of South Africa** 4th Edition at 359 – 361).

16] The reasons advanced by Beukes in the second application for the late filing of the affidavits of Schreuder and Van Dyk are that he had since December 2001 had numerous discussions with them regarding documentation relating to the transactions that are in issue in the main application and that he often called at the offices of Pep Stores between December 2001 and September 2002, but was informed by Schreuder that the documentation relating to the footwear supplied by Kedah had been placed in his firm's archives and could not be found readily. In addition, Van Dyk was overseas on a few occasions since December 2001 and was unable to assist and when he was in South Africa had other commitments.

Schreuder was unable to assist him without the assistance, input and co-operation of Van Dyk. Furthermore, the facts relating to the manner of payment by Pep Stores for the relevant consignments of footwear supplied by second applicant as well as some of the documentation attached to Van Dyk's affidavit came to the respondents' knowledge only after the answering affidavits had been filed. In particular, Pep Store's applications to Absa Bank Limited for letters of credit and the letters of credit issued by it were made available to the respondents only on 22 October 2002 during a consultation with the respondents' legal representatives, Van Dyk and Schreuder. The respondents, moreover, wished to file Van Dyk's affidavit in order to answer the allegations as regards his negotiations with Mr Essop concerning the shoes supplied by Kedah, and raised for the first time in the applicants' replying affidavit.

17] Mr Rogers SC, who represented the applicants, submitted that the explanation for the late filing of the affidavits of Van Dyk and Schreuder was unacceptable as the respondents were aware from the outset of the need to procure admissible evidence from Pep Stores and that such evidence would have been available had it been sought timeously. It was also submitted that the affidavits of Van Dyk and Schreuder in any event do not take the matter further as those affidavits, if received, proved that Pep Stores paid the applicants a price based on the prices originally quoted by Kedah to Pep Stores plus a profit margin for the applicants and did not establish that the applicants purchased the goods from Kedah, and at the prices initially quoted by Kedah to Pep Stores. It was further submitted that Van Dyk and Schreuder have not and could not refute the applicants' statement that although their price to Pep Stores was based on the prices initially provided by

Kedah to Pep Stores plus a mark-up, the applicants procured the goods at substantially lower prices. In the circumstances it was submitted that the application for leave to file the further affidavits of Van Dyk and Schreuder should be dismissed.

18] I have, in the exercise of my discretion, decided to grant an order in terms of prayer 1 of the second application. I have done so on the basis that the respondents were dependent upon the co-operation of the officials of a disinterested major commercial undertaking for the location of documentation pivotal to the affidavits of Van Dyk and Schreuder; that their affidavits also deal with matters raised in the applicants' replying affidavits for the first time; that a court should not allow the adjudication of the real issues in an application to be frustrated by too rigid an adherence to the rules of practice regarding the number and sequence of the

filing of affidavits (See: **Bader and Another v Weston and Another** 1967(1) SA 134 (C) at 138 D); and that the factual averments in their affidavits are relevant to the adjudication of the central issue in the main application namely the "transaction value" of the footwear imported as part of the first consignment.

19] The next aspect to be considered is whether the conditional application to strike out matter from the affidavit of Van Dyk, jurat 22 October 1998, as being hearsay and/or matter of an argumentative, speculative and irrelevant nature should be granted or not. Hearsay is in section 3(4) of the Law of Evidence Amendment Act No 45 of 1988, defined as evidence the probative value where of depends upon the credibility of any person other than the person giving such evidence. Rule 6(15) provides for the striking out from an affidavit of any matter which is scandalous,

vexatious or irrelevant and prescribes prejudice to the applicant as a requirement for the granting of such an application. The court in **Vaatz v Law Society of Namibia** 1991(3) SA 563 (Nm), at 566 C – E, held that allegations that may or may not be relevant but are so worded as to be abusive or defamatory constitute scandalous matter; that allegations that may or may not be relevant but are so worded as to convey an intention to harass or annoy, constitutes vexatious matter; and that allegations that do not apply to the matter in hand and do not contribute in one way or another to a decision of the matter, constitute irrelevant matter, and at 566 I – 567 A, said the following regarding the requirement of prejudice:

> "The phrase 'prejudice to the applicant's case' clearly does not mean that, if the offending allegations remain, the innocent party's chances of success will be reduced. It is substantially less than that. How much less depends on all the circumstances; for instance, in motion proceedings it is necessary to answer the other

party's allegations and a party does not do so at his own risk. If a party is required to deal with scandalous or irrelevant matter the main issue could be side-tracked but if such matter is left unanswered the innocent party may well be defamed. The retention of such matter would therefore be prejudicial to the innocent party."

Whilst it appears to me to be axiomatic that the averments contained in the first sentence of paragraph 6 and the third sentence of paragraph 33 of his affidavit are not based on Van Dyk's personal knowledge and are argumentative and speculative and that the averments contained in paragraph 34 constitute hearsay which, in the absence of any evidential basis for the exercise by this court of its discretion are inadmissible and should accordingly be struck out. But the second sentence of paragraph 6 and the first sentence of paragraph 32, in my view, reflect Van Dyk's personal knowledge and accordingly do not fall to be

struck out. Van Dyk as a result of his negotiations with Mr Cheng knew that Kedah stocked items of footwear that Pep Stores wished to purchase, enlisted the services of second applicant to import such items and subsequently received delivery thereof. In the circumstances the inference that second applicant or an intermediary acquired such footwear from Kedah, is inescapable.

Accordingly, the conditional striking out application succeeds in part only and the following order is made:

a) the following matter in the affidavit of Van Dyk, jurat 22 October 1998, are struck out –

   a) the first sentence of paragraph 6;

   b) the third sentence of paragraph 33; and

   c) the whole of paragraph 34.

b) the respondents are ordered to pay the costs of the conditional striking out application.

20] The next aspect to be considered is whether an order should be granted in terms of prayer 2 of the second application which seeks to have the issue regarding the transaction values of the footwear listed in Kedah, Textrade and Oriental Invoices P 5930, P 5932, P 5933, P 5936 and P 5937 referred for the leading of oral evidence in terms of the provisions of Rule 6(5)(g). The transaction values of the footwear i.e. "the price actually paid or payable for the goods when sold for export to the Republic" (section 66(1) of the Act) reflected in the invoices, that formed part of the first consignment, are pivotal to the resolution of the appeal against alternatively, the review of the determination made on 29 March 2001, as it is premised on the second respondent's view that the transaction values of

the goods declared in the bills of entry enumerated in paragraph 5 above, were less than the price actually paid in respect thereof.

21] I am in agreement with the submissions of the applicants' counsel that an appeal under section 65(6) of the Act may be brought by notice of motion before a single judge (Cf: **Metmak (Pty) Ltd v Commissioner of Customs and Excise** 1984(3) SA 892 (T) and that the appeal contemplated by that subsection is a wide one constituting a rehearing and determination of the merits (See: **Tikly and Others v Johannes N.O. and Others** 1963(2) SA 588 (T) at 591 G – H).

22] The applicants aver that the second applicant purchased the goods comprising the first consignment from Textrade and Oriental at the prices declared in the

bills of entry enumerated in paragraph 5 above. The respondents on the other hand aver that the second respondent paid prices higher than those declared in the said bills of entry and, the second respondent, in its determination of 29 March 2001, treats such higher prices as the transaction value. The outcome of the appeal alternatively, the review, depends on which of those two competing factual averments is correct. If the applicants' version is the correct one the second respondent's determination falls to be set aside and the provisional payment of R100 000 repaid. If not, the applicant's claim thereanent fails.

23] Where, as in the instant case, relief of a final nature is claimed on notice of motion and genuine and **bona fide** disputes of fact arise, relief may be granted only if the averments in an applicants' papers admitted by the respondent together with the facts alleged by the

respondent justify such an order (See: **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984(3) SA 623 (A) at 634 H – I). The applicants dispute the respondents' contention that as regards the transaction values of the good imported as part of the first consignment there is a genuine or **bona fide** dispute of fact. The applicants' stance is based thereon that the respondents' contentions are based on the averments of deponents who do not have personal knowledge of the transactions evidenced by the documents obtained by the respondents from Kedah and Pep Stores and which have not been proved properly. As I have come to the conclusion that there is another basis on which the discretion with which I have been embued by Rule 6(5)(g) can be exercised it is unnecessary to consider the merits of the applicants' aforementioned contention.

24] Kumleben J, as he then was, in **Moosa Bros & Sons (Pty) Ltd v Rajah** 1975(4) SA 87 (D) at 93 G – H, after a consideration of the relevant authorities, arrived at, inter alia, the following conclusions regarding the ambit of Rule 6(5)(g) in terms whereof disputed factual issues are referred to oral evidence:

> "(c) Without attempting to lay down any precise rule, which may have the effect of limiting the wide discretion implicit in this Rule, in my view oral evidence in one or other form envisaged by the Rule should be allowed if there are reasonable grounds for doubting the correctness of the allegations concerned.
>
> (d) In reaching a decision in this regard, facts peculiarly within the knowledge of an applicant, which for that reason cannot be directly contradicted or refuted by the opposite party, are to be carefully scrutinised "

Those conclusions received the imprimatur of the then Appellate Division in **Khumalo v Director-General of Co-operation and Development and Others** 1991(1) SA 158 (A) at 167 E – J.

25] In my view there are reasonable grounds for doubting the correctness of the averments made by the applicants as regards the transaction values of the footwear that formed part of the first consignment. I have come to that conclusion for the reasons that follow. Van Dyk states that he in December 1998 entered into negotiations with Mr Cheng of Kedah for the purchase of footwear which Pep Stores intended selling in South Africa. Pep Stores did not have sufficient import facilities for the quantity of shoes it wanted to buy from Kedah. For that reason he negotiated with Mr Essop of the second applicant to import such footwear utilising the import permits of various permit holders. It was agreed that Kedah would invoice second applicant directly and that all the documentation relating to the importation of the footwear would be made out to the latter. It was specifically agreed between Pep Stores and Mr Essop

that second applicant would not assume responsibility for the quality of the footwear bought from Kedah. Pep Stores would purchase the shoes from the second applicant at the rand equivalent of Kedah's dollar prices plus import duty, clearing charges, and second applicant's profit-margin which included amounts paid to the holders of permits for the use thereof. Pursuant to these negotiations Kedah telefaxed five pro forma invoices, namely P 5930, P 5932, P 5933, P 5936 to Pep Stores, for the account and risk of the second applicant, in order to enable Pep Stores to open letters of credit in favour of the second applicant. He states that Pep Stores in respect of each of the said invoices provided the applicant with letters of credit by Absa Bank Limited based on the agreed price per pair of footwear which included the rand equivalent of Kedah's dollar price per pair and that the second applicant later

delivered to Pep Stores the footwear identified in the respective invoices.

26] There were two transactions between Pep Stores and second applicant. The first transaction related to the footwear identified in pro forma Kedah Invoices P 5932 and P 5936 and the second transaction to the footwear identified in Kedah Invoices P 5930, P 5933 and P 5937. Pro forma Kedah invoice P 5932 dated 17 December 1998, relates to 21 114 pairs youths' suede lace-up casual sport shoes with two-tone colour TPR outsoles at $ 4.45 per pair whilst the transaction value per pair reflected in invoice number P 5932 dated 5 February 1998 and provided by Oriental to the second applicant was $ 2.79. Pro forma Kedah invoice P 5936 dated 17 December 1998, relates to 28 548 pairs of mens' suede lace-up casual shoes with TPR/Crepe outsoles at $ 5 per pair whilst the transaction value per

pair reflected in the relevant bills of entry based on invoice number P 5936 dated 10 February 1998 and provided by Textrade to the second applicant was $ 3. Pro forma Kedah invoice P 5930 dated 16 December 1998 relates to 8 136 pairs of mens' suede lace-up casual shoes with TPR/crepe outsoles at $ 5 per pair whilst the price per pair reflected in invoice number P 5930 dated 5 February 1998 and provided by Oriental to the second applicant was $ 2.85. Pro forma Kedah Invoice P 5933 dated 25 January 1999, relates to 21 114 pairs of youths suede lace-up casual sport shoes with two-tone colour TPR outsoles at $ 4.45 whilst the price per pair reflected in invoice number P 5933 dated 25 February 1998, and provided by Textrade to the second applicant was $ 3.20. Pro forma Kedah invoice P 5937 dated 17 December 1998, relates to 31 680 pairs of youths suede lace-up casual shoes with TPR/crepe outsoles at $4.45 per pair whilst the

transaction per pair reflected in the relevant bills of entry based on invoice number P 5937 dated 10 February 1998, provided by Textrade to the second applicant was $ 2.95.

28] The first consignment consisted of the footwear identified in pro forma Kedha invoices P 5936 and P 5937. The footwear identified in pro forma Kedah invoices P 5930 and P 5932 and P 5933 did not form part of any of the three consignments that form the subject-matter of the main application. It, however, is common cause that they were imported through the second applicant and delivered by it to Pep Stores

29] As the letters of credit provided by Absa Bank Limited at the request of Pep Stores contained a term that invoices must contain the Pep Stores' order number, the indent number, the quantity and value of the

merchandise and a description thereof and, the invoices provided by the second applicant in fact complied (See: Annexure GVD 24 in the second application), it is fair to assume that the footwear supplied by the second applicant to Pep Stores were the same as those that were reflected in pro forma Kedah invoices P 5930, P 5932, P 5933, P 5936 and P 5937.

30] If the transaction values of the footwear in the first consignment are the prices actually paid by the second applicant to the entities reflected in the bills of entry as the suppliers thereof namely, Textrade and Oriental (who both operate from the same address) they must have acquired the footwear from Kedah at prices even lower than the transaction values reflected in the bills of entry as they would otherwise not have made any profit. It in my view is ~~highly improbable~~ doubtful that Kedah, knowing

that Pep Stores (with whom it had a business relationship for longer than 20 years) had shown an interest in buying the footwear reflected in the aforementioned pro forma Kedah invoices at the prices stated therein through the second applicant and, in respect of which negotiations had reached a stage so advanced that Kedah had faxed pro forma invoices to Pep Stores so as to enable it to arrange for the issuing of letters of credit on the strength of the information contained therein, would within weeks, and without referring to Pep Stores, sell the same footwear to Textrade or Oriental or another entity at substantially lower prices. Suspicions are further fuelled by the fact that, other than the invoices generated by Textrade and Oriental, not a single document supporting the existence of an armslength relationship between them and the second applicant has been provided. Even payment was made to G Assanmal & Co (HK) Ltd

(also operating from the same address as Textrade and Oriental) by means of telegraphic transfers and not to Textrade and Oriental. Furthermore, a written request dated 1 February 2001 by the first respondent to the second applicant to provide it with the original contract and purchase orders between it and the supplier of the goods in invoice P 5937 did not yield any response.

31] In view of the aforegoing I have reasonable doubts about the correctness of the averments made by the applicants as regards the identity of the suppliers and the transaction values as reflected in the bills of entry in respect of the first consignment and that it is an issue that should, in the exercise of my discretion, be referred to oral evidence.

32] Respondents' counsel Advocate Vorster SC, in his reformulated version of the issues to be referred to oral

limits the enquiry to the transaction values of the footwear in the Kedah Textrade and Oriental invoices P 5930, P 5932 , P 5933, P 5936 and P 5937. If it is accepted invoices P 5936 and P 5937 relate to the first consignment and that invoices P 5930, P 5932 and P 5933 do not relate to any of the first-, second- or the third consignments the transaction values reflected in the bills of entry relating to the second and third consignments are not encompassed in the issues to be referred for oral evidence. That that should be the case is consonant therewith that the respondents acknowledge that the investigation into the second- and third consignments which relate to the footwear supplied to the Foschini Group has not been completed as yet. Although Beukes states that the transaction values reflected in the bills of entry in respect of the second- and third consignments are lower that the unit prices in US dollars used by the Foschini Group and the

second applicant in their negotiations, the averments regarding the contents of their negotiations not only constitute hearsay but are so vague that, in any event, it cannot be said that genuine disputes of fact exist thereanent.

33] In view of the aforegoing the respondents are entitled to an order in terms of prayers 2, 3, 4, 5, 6, 7, 8 and 9 of the Notice of Motion in the second application. As for the reasons set out in paragraph 28 above any enquiry into invoices other than invoices P 5936 and P 5937 would be irrelevant, the relief sought in prayer 3 is restricted thereto.

34] Accordingly an order is made in the following terms:

1. The main application is postponed to a date to be arranged with the Registrar for the hearing of **viva voce** evidence.

2. The issues to be resolved at such hearing are:

   2.1 from which entity the second applicant purchased the footwear ~~supplied by Kedah Company Limited, Hong Kong~~, listed in Kedah invoices P 5936 and P 5937;

   2.2 the transaction value of the shoes referred to in the said invoices.

3. The evidence to be adduced at the aforesaid hearing shall be that of any witnesses whom the parties or either of them may elect to call, subject however to what is provided below.

4. Save in the case of any persons who have already deposed to affidavits in these proceedings, neither party shall be entitled to call any person as a witness unless:

4.1 it has served on the other party, at least 10 days before the date appointed for the hearing, a statement by such person wherein the evidence to be given in chief by such person is set out; or

4.2 the Court, at the hearing, permits such person to be called despite the fact that no such statement has been so served in respect of his or her evidence.

5. Either party may subpoena any person to give evidence at the hearing, whether such person has consented to furnish a statement or not.

6. The fact that a party has served a statement or has subpoenaed a witness, shall not oblige such party to call the witness concerned.

7. Within 30 days of the making of this order, each of the parties shall make discovery on oath, of all

documents relating to the issues referred to above, which documents are, or have at any time been, in possession or under control of such party.

8. Such discovery shall be made in accordance with Rule 35 of the Uniform Rules of Court and the provisions of that Rule with regard to the inspection and production of documents discovered shall be operative.

9. The costs of the hearing of this application for the referral of the matter to oral evidence, are to be determined by the Court which hears the postponed application.

35] For the sake of clarity it is recorded that all the remaining issues in the main application stand over for determination once the issues that have been referred for oral evidence have been adjudicated upon.

36] As it has not featured as an issue I have assumed that the reference in some of the documents to Trend Gear Enterprises (Pty) Ltd is a reference to the second applicant.

D. VAN REENEN