

DELETE WHICHEVER IS NOT APPLICABLE
 (1) REPORTABLE: YES/NO.
 (2) OF INTEREST TO OTHER JUDGES: YES/NO.
 (3) REVISED. ✓
 21. October 2003
 DATE SIGNATURE

Reportable

**IN THE HIGH COURT OF SOUTH AFRICA
 (TRANSVAAL PROVINCIAL DIVISION)**

CASE NO. 19300/03

DATE OF JUDGMENT : 26 September 2003

In the matter between:

STERLING AUTO DISTRIBUTORS CC Applicant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES First Respondent

THE COMMISSIONER FOR CUSTOMS AND EXCISE Second Respondent

JUDGMENT

PATEL J :

[1] This is a case of importation of *suspected* counterfeit goods. Lord Nicholls of Birkenhead in *R v Johnstone* UKH [2003] 3 All ER 884 (HL) para. [28] at 887g noted:

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“Counterfeit goods and pirated goods are big business. They account for between 5% and 7% of world trade.... Counterfeit goods comprise cheap imitations of authentic articles, as with ‘Rolex’ watches. Pirated goods comprise illicit copies of the authentic article which are not sold under the trade mark of the authentic article.”

Counterfeit goods either in the form of imitation or cloning are considered as part of an international organised crime. The Counterfeit Goods Act 37 of 1997 is a measure to enable owners of intellectual property rights to act against the counterfeiting of their products. It also provides for a systematic enforcement mechanism to attain this objective.¹ The Act brings South Africa into compliance with the provisions of the *Agreement on Trade – Related Aspects of Intellectual Property Rights* (TRIPS). It is doubtful whether all imitation goods are protected goods or only those imitations of branded goods. Unbranded imitations may not necessarily be regarded as counterfeit goods. It may be critically important to determine whether the items are branded or unbranded imitations of authentic products since it is a notorious fact that in many Far Eastern countries the manufacturing of unbranded imitations is a lawfully legitimate and viable industry and not necessarily part of globally organised crime. *A bona fide*

¹ Generally see: R Songea, ‘A brief discussion on counterfeit goods and the Counterfeit Act 37 of 1997’, *Codicillus XXXXI*, No. 1, 45-52; Owen H Dean, ‘The Counterfeit Goods Act 37 of 1997’ (1998) 10 *SA Merc LJ* 33-57; O H Dean, *Handbook on South African Copyright Law*, Chapter 17, 1-121/149.

and an undiscerning importer may be an innocent importer of what may later appear to be suspected counterfeit goods. The intellectual property right owner has the facility to guard against the importation of counterfeit goods into the country. To this extent the government comes to the assistance of intellectual property right owners to seize and detain suspected counterfeit goods entering the country. However, seizure and detention of such goods must be lawful.

[2] In this application, a close corporation, Sterling Auto Distributors is the applicant. It is seeking an order declaring that a consignment of automobile parts detained and seized by the respondents, the Commissioner for the South African Revenue Services (SARS) and the Commissioner for Customs and Excise, is unlawfully detained and seized in terms of the provisions of the Customs and Excise Act 91 of 1964 (C&EA) read with Counterfeit Goods Act 37 of 1997 (CGA). It also seeks an order directing the respondent to release the goods to the applicant.

[3] The background of this application is that on 28 May 2003, a high cube container, marked EMCU 9096150, arrived by ship from Taiwan at Durban harbour. The Bill of Entry for the consignment was accompanied by an invoice. The consignment consists of

788 cartons containing 3 139 pieces and 15 sets of motor vehicle parts and accessories. The customs value of the consignment is R120 629,00. The container was initially detained by M Ogle, an import assessment officer for Customs and Excise. Presently the container is stored at Green Africa Container Depot. It is the warehouse chosen by the applicant's agent, SA Mercantile Corporation (Pty) Ltd. The container was opened on 4 June, but because of its size and number of items contained in it, it was not possible to unpack it and only certain samples were extracted. These were headlamps and front grills. They were taken by St. John Pitt, a forensic specialist in counterfeit goods, for verification so as to whether they are in fact counterfeit goods² or not. On 6 June, Ebrahim Bharath, a customs officer, contacted Pitt to ascertain whether he received any confirmation from Adams & Adams, a firm of attorneys representing both BMW and Mercedes

² Under section 1 "counterfeit goods" meant goods that are the result of counterfeiting, and includes any means used for purposes of counterfeiting. And "counterfeiting" "(a) means, without the authority of the owner of any intellectual property right subsisting in the Republic in respect of protected goods, the manufacturing, producing or making, whether in the Republic or elsewhere, of any goods whereby those protected goods are imitated in such manner and to such a degree that those other goods are substantially identical copies of the protected goods; (b) means, without the authority of the owner of any intellectual property right subsisting in the Republic in respect of protected goods, manufacturing, producing or making, or applying to goods, whether in the Republic or elsewhere, the subject matter of that intellectual property right, or a colourable imitation thereof so that the other goods are calculated to be confused with or to be taken as being the protected goods of the said owner or any goods manufactured, produced or made under his or her licence; or (c) where, by a notice under section 15 of the Merchandise Marks Act, 1941 (Act No. 17 of 1941), the use of a particular mark in relation to goods, except such use by a person specified in the notice, has been prohibited, means, without the authority of the specified person, making or applying that mark to goods, whether in the Republic or elsewhere."

Benz and whether the samples were sent for verification. St. Pitt informed Bharath that he did not receive any confirmation.

- [4] Subsequently, on 17 June, St. Pitt informed Bharath that the samples were confirmed to be counterfeit. The following day the latter received from Adams & Adams two affidavits, one deposed to by David John Richardson, the brand protection manager of Daimler-Chrysler South Africa, and the other by Christopher Hastings Joy, the business development manager of BMW South Africa (Pty) Limited. Adams & Adams, on behalf of both their clients, informed SARS that their clients would indemnify SARS and its officers against any liability that may be incurred pursuant to the detention, in terms of the C&EA and/or seizure and detention in terms of the CGA and any other action with or delivery of the goods in terms of legislation, including but not limited to the CGA and C&EA, where such detention, seizure or other act were performed at their clients' request. An undertaking was also given by Adams & Adams, on behalf of their clients, to SARS that any expenses that may be incurred by the latter pursuant to the seizure and/or detention of the goods and to pay and arrange for the removal of such goods to a place of storage, and to pay any storage costs, including state warehouse rent as determined by SARS and to arrange for and

pay for the destruction of goods if so required where such expenses were incurred as a result of the request by them.

- [5] On that day Bharath informed Dylan Naiker of the applicant's clearing agent that he received the necessary confirmation and the container needed to be re-examined in order to make an inventory and take samples of all the items contained in it. This re-examination was held at the Green Africa Container Depot on 19 June. Harilall of the applicant's clearing agent was also present. Sharmalan Arumagam, the manager of the depot indicated that it was not possible to unpack the container since its warehouse facilities were not adequate to unpack a high cube container and also because of the fragile nature of the goods as well as the flimsy nature of their packaging. Bharath consulted his quality assessor, Jack Kraft who advised that the applicant's clearing agent should be asked to move the container to the New Pier State Warehouse where it could be unpacked under custom control. The container was not transferred to the state warehouse and an inventory was not taken of the goods in the container. It is presently stored at the Green Africa Container Depot and remains at the depot. On 9 July, Bharath referred the investigation to the Anti-Smuggling Team.

[6] It is against this background that on 14 July 2003 the applicant launched an urgent application for an order in the following terms:

1. that in terms of Rule 6(12) of the Uniform Rules of Court the forms and services as provided for in the Uniform Rules be dispensed with including the provisions of Rule 6(13) of the Uniform Rules of Court;
2. to the extent necessary that the usual forms of service be dispensed with and that service upon the First and Second Respondents by the Applicant's attorney's messengers be sanctioned as constituting proper service in light of the urgency of this matter;
3. that it be and is hereby declared that the consignment of motor vehicle parts contained in container number EMCU 9096150 is not being lawfully or properly retained in terms of the provisions of the Customs and Excise Act No. 91 of 1964 and/or the Counterfeit Goods Act No. 37 of 1997;
4. that the First and/or Second Respondents be and are hereby directed to release the goods to the applicant forthwith;
5. that the First and/or Second Respondents pay the costs of this application;
6. such further or alternative relief as this Honourable Court may deem fit."

[7] On the same day, application papers were served on the respondents. The matter was placed on the roll for hearing at

14:00 on Friday 18 July 2003, when it was postponed *sine die* and costs were reserved. Subsequently, on 6 September, the application came before me in the urgent court on the basis that it has some degree of urgency under the tag of being semi-urgent.

[8] The applicant contended that the container is stored at Green Africa Container Depot. It is not a counterfeit goods depot³ as defined in the CGA. The respondents' seizure and detention, without removal it to a counterfeit goods depot, compels the applicant to pay daily storage charges. Mr Wheeldon, for the applicant, argued that in terms of the provisions of the CGA, storage fees for counterfeit goods are for the account of the complainant. Therefore the container should be moved to the counterfeit goods depot. In the absence of such a removal, each day of seizure and detention of the container by the respondents, causes financial loss to the applicant. The storage fees that the applicant has to pay outweighs the value of the goods. Consequently, it diminishes its potential profits. It causes not only financial loss but also erodes its goodwill since it is unable to

³ Under section "counterfeit goods depot" means a place designated under section 23 to be a counterfeit goods depot, and includes any place deemed by section 7(1)(c) to be a counterfeit goods depot." (Section 23 provides: "(1) The Minister, by notice in the *Gazette*, may from time to time designate any place defined in the notice to be a counterfeit goods depot for the purposes of this Act, and may in a like manner amend or withdraw such a notice at any time. (2) The Minister must in respect of counterfeit goods depot appoint any fit and proper person as the person in charge of the counterfeit goods depot."

fulfil the orders for motor vehicle parts placed by its customers. It was submitted that no award of damages can ameliorate the diminution of its goodwill when its clients and potential customers gain the impression that it cannot make good on its promises to fulfil their orders.

[9] On behalf of the respondents, Ms Khatri argued that the matter is not urgent because the costs of the storage are for the importer pending the return of the goods by customs officials. She submitted, without citing any authorities, that it is a term implicitly consented to by an importer when goods enter the Republic and this is sanctioned by section 107(1)(a) and (2)(a) of the Customs and Excise Act. There is no merit in this submission. In terms of sub-section (1)(a) all handling of and dealing with goods for the purposes of C&EA must be performed by or at the expense and risk of the importer or owner of the goods, or whoever has control of the goods. This is a peremptory provision and it appears that the handling for the purpose of the C&EA must be performed by the persons concerned.⁴ More pertinently subsection 2(a) provides:

⁴ H C Cronje, *Customs and Excise Service*, 12-26.

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

[10] This provision is also peremptory and when detaining goods for examination the Commissioner is giving effect to this statutory injunction, which may also be for the purposes of ascertaining whether the goods are liable to forfeiture.⁵ These provisions are purely for the purposes of customs and excise and cannot be invoked for purposes of the GCA.

[11] However, despite the respondents' tentative resistance this matter certainly qualifies as having some degree of urgency. The applicant is and will suffer prejudice if it is to wait for a hearing in the ordinary course because of the actual or potential

⁵ Cronje, *ibid*, 12-27. See: sections 87 and 88 of the C&EA which provides for goods liable to forfeiture and seizure.

loss to its commercial interest.⁶ It justifies the invocation of Rule 6(12) of the Uniform Rules of the High Court. Thus, I allowed the matter to proceed in the urgent court.

[12] Now, turning to the merits of the matter, in the answering affidavit, purportedly deposed to on behalf of the respondents, Ebrahim Bharath describes himself as a "customs officer" as well as a "customs official" in terms of the C&EA and alleges that he is "an inspector" in terms of the CGA. This allegation is denied by the applicant. The allegation on Bharath's part that he is an inspector is insufficient. It is trite that he who alleges must prove that allegation. There is no proof before the Court that Bharath is indeed an inspector either by appointment in terms of section 22(2)(a) or designation by virtue of section 22(3).⁷ In section 1 an "inspector" is defined to mean "any person who under or by

⁶ See: *Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W) at 566G; *Bandé Investments (Pty) Ltd v Registrar of Deeds and Others* 2001 (2) SA 203 at 213E-F.

⁷ Section 22 reads: "Minister's power to appoint or designate inspectors – (1) The Minister may appoint any fit and proper person as an inspector for the purposes of this Act. (2)(a) the Minister, by notice in the *Gazette*, may designate any specified class or category of persons to be inspectors for the purposes of this Act. (b) The Minister, in a like manner, may amend or withdraw such a notice at any time. (3) The Minister or any official acting under the authority of the Minister, must issue to each of the inspectors contemplated in this section a certificate in the prescribed form stating that the person in whose name it has been issued has been appointed or designated an inspector (as the case may be) in terms of or by virtue of this Act."

virtue of section 22 has been appointed as or designated to be an inspector for the purpose of this Act, as will as –

(a) ...

(k) *the Commissioner for Customs and Excise and any official contemplated in section 15(9), in performing their functions in the circumstances contemplated in section 15(4);”.*

[13] Section 15(9) provides that for the purposes of section 15, “*customs authorities*” are the South African Revenue Service in its division: Customs and Excise and the members of which are commissioners and those officials who are “*officers*” within the contemplation of the definition of an “*officer*” in section 1(1) of the C&EA. Such an “*officer*” is defined to mean “*a person employed on any duty relating to customs and excise by order or with the concurrence of the Commissioner, whether such order has been given or such concurrence has been expressed before or after the performance of the said duty.*”

[14] It is apparent that Bharath is a person employed by SARS on duties relating to customs and excise, but there is no evidence

that he is an inspector either by appointment or designation to perform those functions in the circumstances contemplated in section 15(4) of the CGA. This sub-section provides that when an application is made by the owner of an intellectual property right to the Commissioner and when such an application has been granted, all goods which are stipulated goods, or are suspected on reasonable grounds to be stipulated goods, imported into, or entering the country during the period specified by the Commissioner may be seized and detained by the customs authorities under the C&EA, as varied by the CGA.⁸ In general terms, in carrying on their functions, customs authorities will act *mutatis mutandis* as though they are inspectors exercising their powers on their own initiative.⁹ Section 15(7) categorically states:

⁸ Section 15(4) reads: "When an application made in terms of subsection (1) has been granted and notice thereof given in terms of subsection (5), all goods that are counterfeit goods of the type with reference to which that application was made (hereafter called the stipulated goods), or suspected on reasonable grounds to be stipulated goods, and imported into or entering the Republic from time to time during the period determined by the Commissioner (which may be shorter than the period applied for), may be seized and detained by the customs authorities in performing their functions under the Customs and Excise Act, 1964 (Act No. 91 of 1964), subject to the provisions of subsections (6) and (7) of this section."

⁹ Section 15(6) provides: "For the purposes of acting under subsection (4) in relation to goods that are stipulated goods or suspected on reasonable ground to be stipulated goods – (a) any member of the customs authorities will act *mutatis mutandis* as if he or she were an inspector who, in connection with counterfeit goods or alleged or suspected counterfeit goods, were exercising the powers contemplated in section 4(1) on own initiative in terms of section 3(4). (b) the following provisions of this Act will apply *mutatis mutandis* in relation to any member of the customs authorities, namely – (i) the provisions in accordance with or subject to which the powers contemplated in section 4(1) may be exercised by an inspector so acting on own initiative; (ii) the provisions by which any other power or any right, function, duty, obligation, exemption,

"The customs authorities will not be obliged to act in terms of subsection (4) unless the owner of the intellectual property right, the subject matter of which is alleged to be featured or borne by or incorporated or embodied in or to have been applied to stipulated goods, furnishes to the Commissioner security in the manner and amount that the Commissioner may be incurred pursuant to the seizure and detention of goods or anything done in relation to goods when acting or purportedly acting under the section and to cover any expenses that may be incurred in effecting the seizure and detention of the goods."

[15] There is no evidence that the owner or owners of the alleged intellectual property right or rights invoked the provisions of section 15(4) by making the necessary applications to the second respondent. Ms Khatri was at pains to persuade me that in the case of counterfeit goods nothing more is done until the confirmation arrives in the form of affidavits which are then treated as an application by the complainant in terms of section 15(4). However, a facility that is afforded to an owner of an intellectual property right to enter into an arrangement with the second respondent in terms of which she or he must restrict the importation of goods which are suspected counterfeit goods.

indemnity or liability is conferred or imposed on an inspector so acting. However, the Minister, at the request of the Minister of Finance acting on the recommendation of the Commissioner, may by notice in the *Gazette* exempt the members of the customs authorities from any of the provisions made applicable by this paragraph if satisfied that there are suitable and appropriate alternative arrangements made by or under the Customs and Excise Act, 1964, that cover the purpose of the provision from which exemption is sought."

There is no evidence before the Court that both Daimler-Chrysler and BMW availed themselves of this facility. Therefore, it is not possible for them, as it will become apparent later, to invoke the provisions of section 15 through the proverbial back door because section 15(7) is a bar until the intellectual property right holder furnishes security to the Commissioner. Further, section 15(4) must be read with section 3(4) and 4(1) of the CGA. Section 3(4) provides that an inspector who suspects that an act of dealing in counterfeit goods has taken place, is taking place, or is likely to take place, can on his own accord take appropriate steps in terms of section 4(1), provided that the requirements of that section are met. Owen Dean noted:¹⁰

"A person with an interest in protected goods (including the attorney, agent, or representative of such a person), whether as the owner or licensee of an intellectual property right, or as an importer, exporter, or distributor of protected goods, has locus standi to lodge a complaint in respect of counterfeit goods. A complainant in respect of counterfeit goods can lay a complaint of dealing in counterfeit goods with an inspector. Such complaint may refer to the activities of an individual or of persons generally, or to a multiplicity of acts. The complaint must allege that an act of dealing in counterfeit goods has been, is being, or is likely to be committed; such allegation must be based on a reasonable suspicion. The complainant must furnish information and particulars to the satisfaction of the inspector to the effect that the alleged counterfeit goods are prima facie counterfeit goods. He can do so by showing the inspector a specimen of the genuine

¹⁰ Owen H Dean, "The Counterfeit Goods Act 37 of 1997" (1998) 10 SA Merc LJ 33 at 36-37.

protected goods (if they exist) and the counterfeit goods. If it is not reasonably possible to produce a specimen of the counterfeit goods, he can furnish sufficient information and particulars from which the essential physical and other distinctive features, elements, and characteristics of the alleged counterfeit goods may be ascertained. Also, the complainant must furnish sufficient information and particulars as to the subsistence and extent of the relevant intellectual property right and his title to or interest in that right.

An inspector who is reasonably satisfied that the person laying the complaint prima facie qualifies as a complainant, that the intellectual property right in question prima facie subsists, and that the goods claimed to be protected goods are prima facie protected goods, is entitled to take various steps if the suspicions of the complainant appear to be reasonable in the circumstances. An inspector who suspects that an act of dealing in counterfeit goods has taken place, is taking place, or is likely to take place, can of his own accord also take these steps, provided that the above requirements are met."

[16] For present purposes, section 4(1) reads:

"4. Inspector's powers in relation to counterfeit goods -

- (1) *If, pursuant to any complaint laid with an inspector or on the strength of any other information at his or her disposal, the inspector has reasonable grounds to suspect that an offence contemplated in section 2(2) has been or is being committed or is likely to be committed, or*

to believe that an act of dealing in counterfeit goods has taken or is taking place or is likely to take place; he or she has the power, in accordance with paragraphs (a) to (f) of section 5(1) -

(a) to enter upon or enter any place, premises or vehicle in order to inspect any relevant goods and seize any suspected counterfeit goods, and may seize any suspected counterfeit goods found and cause them to be detained in accordance with this Act, and, where applicable, remove the suspected counterfeit goods for the purposes of detention;

(b) to collect or obtain evidence relating to the suspected counterfeit goods or the relevant act of dealing in counterfeit goods;

(c) to conduct at, on or in such place, premises or vehicle whatever search may be reasonably necessary for the purposes of paragraph (a) or (b) (including the search of a person); and

(d) to take whatever steps may be reasonably necessary in order to terminate the relevant act of dealing in counterfeit goods

(2) Subject to section 5(2), the powers conferred on an inspector by subsection (1) may be exercised only on the authority of a warrant issued under section 6, and may be exercised wherever the suspected act of dealing in counterfeit goods has taken or is taking place or is likely to take place or is suspected on reasonable grounds to have taken place or to be taking place."

[17] And section 5(1)(c) provides:

5. Extent of Inspector's powers in relation to counterfeit goods -

(1) An inspector acting on the authority of and in accordance with a warrant issued under section 6, may at any reasonable time -

(a) ...

(b) ...

(c) *seize and detain, and, where applicable, remove for detention, all the goods in question found at, on or in such place, premises or vehicle;*

(d) ...

(e) ...

(f) ...

[18] Where an inspector acts without a warrant then any steps taken by him will cease to have any legal effect unless he or she applies to a magistrate or a judge of the High Court for confirmation of the action taken, either formally or *pendente lite* within 10 court days of the day on which those acts were performed.¹¹ Section 5(4)(a) provides that if the judicial officer does not confirm the acts performed by the inspector then the latter must return any goods seized forthwith and make good any damage caused. *For eman J in Alvernia Benita Lee : In re P &*

¹¹ Section 5(4)(a).

O Nedlloyd Ltd (unreported judgment, South Eastern Cape

Local Division case Nos. 1201 & 1202/02) indicated:

"Section 5(4)(a) of the Act invalidated the legal effect of steps purportedly taken in terms of the Act if not judicially confirmed."

[19] The constraints, directions and procedures regarding the manner in which a search must be conducted are applicable to an inspector acting in terms of a warrant apply *mutatis mutandis* to an inspector acting on his or her own accord.¹² An inspector

¹² Section 5(5), and in this regard the relevant parts of section 6 are as follows: "(5) An inspector executing a warrant in terms of this section must immediately before commencing with the execution thereof - (a) identify himself or herself to the person in control of the place, premises or vehicle to be entered upon or entered, if that person is present, and hand to that person a copy of the warrant, or, if that person is not present, affix a copy of the warrant to a prominent spot at, on or to the place, premises or vehicle; (b) furnish that person at his or her request with particulars regarding the inspector's authority to execute such a warrant: For that purpose an inspector may be requested to produce the certificate issued in respect of him or her under section 22(3). (6) An inspector who on the authority of a warrant issued in terms of subsection (1) may enter upon or enter, and search, any place, premises or vehicle and search any person thereat, thereon or therein, may use such force as may be reasonably necessary to overcome any resistance to the entry and search. (7) An inspector may enter upon or enter, and search, any place, premises or vehicle, and may search any person thereat, thereon or therein, only if he or she audibly has first demanded access thereto and has notified the purpose of the entry, unless the inspector on reasonable grounds is of the opinion that any goods, document, article or item may be destroyed or be lost if access is first demanded and that purpose notified. (8) If, during the execution of a warrant in terms of this section, a person claims that any goods, document, article or item found at, on or in the place, premises or vehicle in question contains privileged information and refuses the inspection or removal thereof, the inspector executing the warrant, if of the opinion that the goods, document, article or item may be relevant to and necessary for the investigation of any complaint or any alleged or suspected act of dealing in counterfeit goods, must request the registrar of the High Court having jurisdiction, or that registrar's deputy, to seize and remove such goods, document, article or item for safe custody until the court has made a ruling on the question whether or not the information in question is privileged. (9) In undertaking any search for and inspection and seizure of suspected counterfeit goods

when acting without a warrant is required to identify himself or herself when exercising the powers of seizure, removal, detention and collecting evidence.¹³ For that purpose an Inspector may be requested to produce the certificate issued, in respect of him or her under section 22(3).¹⁴

[20] Bharath in deposing to the answering affidavit purported to do so on behalf of the two respondents, but they, as organs of the State, had the temerity not to take this Court into their confidence to even depose to a confirmatory affidavit that Bharath was in fact duly authorised to depose to the answering affidavit. Goldstone J in *Gerhardt v State President and Others* 1989 (2) SA 499 (TPD) at 504G indicated:

"Clearly one person cannot make an affidavit on behalf of another and Mr Hattingh, who appears on behalf of the three respondents, concedes correctly that I can only take into account those portions of the second respondent's affidavit in which he refers to matters within his own knowledge. Insofar as he imputes intentions or anything else to the State President, it is clearly hearsay and inadmissible."

an inspector may be assisted by the complainant (if any) or any other knowledgeable person in identifying goods as suspected counterfeit goods."

¹³ Section 6(5) [quoted under footnote 12 above].

¹⁴ Quoted under footnote 7 above.

[21] In the instant case, *first*, except for Bharath's mere *ipse dixit*, there is no evidence that he is in fact an inspector within the contemplation of the CGA. The "Examination Report", namely annexure "F" to the answering affidavit, only indicates: "Examining Officer/s: Ebrahim, There is no proof whatsoever that the deponent to the respondents' answering affidavit is indeed an inspector. The least Bharath could have done is to have annexed a certified copy of the certificate issued in respect of him under section 22(3) as documentary evidence, which is the best evidence, that he is in fact an inspector. *Secondly*, there is no evidence that any persons or entities, namely Daimler-Chrysler South Africa (Pty)Ltd, BMW South Africa (Pty) Ltd including their attorneys Adams & Adams or any other owner or licensee of an intellectual property right or rights laid a complaint or for that matter Daimler-Chrysler and BMW, as owners of intellectual property rights, applied to the second respondent to seize and detain all goods which are reasonably suspected to be counterfeit goods.¹⁵ There were no objective facts before Bharath on 28 May when he seized and detained the consignment of goods as being counterfeit goods. The criterion

¹⁵ 'reasonable grounds to suspect' in section 4(1) and 'suspected on reasonable grounds' in section 15(4) entail a question of objective fact that the goods are suspected to be counterfeit goods. See: *Watson v Commissioner of Customs and Excise* 1960 (3) SA 212 (N) at 217-218.

of reasonableness is not subjective, but objective in the sense that it is subject to independent scrutiny.¹⁶ *Thirdly, assuming that Bharath is an inspector with the requisite powers in relation to counterfeit goods and having had reasonable grounds to suspect that an offence contemplated in section 2(2)(f) has been or is being committed, that is that counterfeit goods were or are being imported and assuming that he exercised his functions on 28 May 2003 in seizing and detaining the consignment of goods to collect or obtain evidence relating to the consignment of suspected counterfeit goods without a warrant and there is no explanation why a warrant was not obtained in terms of section 6. Then by virtue of section 5(4)(a) read with section 5(2) it was incumbent upon him to have applied for confirmation by a judicial officer, having jurisdiction in the area where the acts were performed, within 10 court days of that day, when he seized and detained the goods. There is neither any evidence nor an explanation that Bharath sought any such confirmation from a magistrate within the magisterial district of Durban or a judge of the High Court of the Durban and Coastal Local Division. Froneman J in *Alvernia Benita Lee, supra*, said:*

¹⁶ De Smith *et al*, *Judicial Review of Administrative Action*, 5th ed., 305.

"It is unlikely that the wrongful seizure of goods will be challenged if the goods are in fact counterfeit goods but that very fact may be a powerful temptation to state officials to ride roughshod over the principle of legality upon which our constitutional order is based. My concern is thus for the continued accountability of such officials, not the protection of counterfeiters."

[22] Since there is no evidence that Bharath was in fact an inspector either by appointment or designation under section 22(2)(a) or (3). Therefore, he was not empowered in law to seize and detain the consignment of goods imported by the applicant. When he seized and detained the goods there was no complainant who had an interest in the goods whether as owner or licensee of any intellectual property right in respect of goods imported by the applicant. In the absence of cogent evidence Bharath acted *ultra vires* the provisions of the CGA in seizing and detaining the applicant's consignment of goods.

[23] Once again assuming that Bharath is an inspector and upon having seized and detained the goods he has not complied with the duties set out in section 7. For present purposes, the relevant sub-sections of section 7 are:

7. Duties of inspector following seizure of goods -

(1) *An inspector who, in exercising his or her powers in terms of section 4(1), has seized suspected counterfeit goods must -*

(a) ...

(b) *furnish one of the originals of the inventory to the person from whom the goods were seized and another to the complainant (if any) within 72 hours after the seizure.*

(c) *as soon as possible remove the goods, if transportable, to a counterfeit goods depot for safe storage, or, if not capable of being removed or transported, declare the goods to have been seized, and seal off or seal and lock up those goods or place them under guard at the place where they were found, and thereupon that place will be deemed to be a counterfeit goods depot; and*

(cc) ...

(2) In any notice in terms of subsection (1)(d) that is issued—

(a) to the complainant, the complainant must be notified of his or her right by virtue of section 9(1)(a) to lay a criminal charge, not later than three days after the date of the notice, against the person from whom those goods were seized (thereafter called the suspect);

(b) to a person qualifying to be a complainant, as contemplated in paragraph (d)(ii)(bb) of subsection (1), the inspector must invite that person (hereafter called the prospective complainant) to lay a complaint with him or her, and lay with the South African Police Service a criminal charge, not later than three days after the date of the notice, against the suspect for having performed an act of dealing in counterfeit goods that is an offence in terms of section 2(2).

(3) ...

(4) (a) *Any person prejudiced by a seizure of goods in terms of section 4(1), may at any time apply to the court on notice of motion for a determination that the goods are not counterfeit goods and for an order that they be returned to him or her.*

(b) ...

(c) ..."

[24] In paragraph 8.1 of the answering affidavit Bharath under oath states that the container was stopped and detained by Ogle, an import assessment officer for Customs and Excise. This *initial* detention, according to Bharath, was sanctioned by sections 88(1)(e) and 113A(1) of the C&EA read with section 4(1) of the CGA. But, then at paragraph 26 Bharath states that at all times he, himself, acted in terms of sections 88(1)(a), 106, 107 and 113A(1) of the C&EA as well as section 4(1) of the Counterfeit Goods Act. I am of the view that:

- Section 88(1)(a) of the C&EA provides for the seizure of goods that are liable to forfeiture under the C&EA.¹⁷
- Section 106 provides for the taking of samples, *inter alia*, on entry of imported goods and section 107 provides that all handling of and dealing with goods for the purposes of the C&EA must be performed, *inter alia*, at the expense of the importer.¹⁸ The underlying rationale for these sections is to determine duty leviable in respect of any goods comprising a single consignment. Bharath by a memorandum of 13 June 2003, namely annexure "G" to the founding affidavit, requested the applicant's clearing agents to pay the provisional amount of R24 000,00. Subsequently, he and his Import Team refused to accept the provisional payment without giving any reasons for the refusal. Usually provisional payment is requested by Customs and Excise as security to cover any additional import duty if it should be determined that insufficient duty had been paid. It is apparent that Bharath was acting as a *customs officer* and not as an *inspector*. Therefore, the legitimate inference is that he was acting in terms of the

¹⁷ See footnote [5] above.

¹⁸ See para. [8] above.

Customs and Excise Act. Gubby J in *Mackeson v Minister of Information, Immigration and Tourism and Another* 1980 (1) SA747 [ZR] at 750H-751C/D said:

"Despite the outward appearance of validity, I have no difficulty in accepting the proposition that it is open to me to examine the purpose behind the exercise of the discretionary power to detain, in order to determine whether it has been misused. It is well established that interference by a Court is justified where a power granted for a specific purpose has been used to achieve another and different purpose; so, too, where there is a pretence to exercise the power for its intended purpose, when in reality it is exercised for another and different purpose. In the words of Davis AJA in the leading decision of *Van Eck NO and Van Rensburg NO v Etna Stores* 1947 (2) SA 984 (A) at 997, 998:

'To pretend to use a power for the purpose for which alone it was given, yet in fact to use it for another, is an abuse of that power and amounts to *mala fides*.'

And:

'For to profess to make use of a power which has been given by statute for one purpose only, while in fact using it for a different purpose, is to act *in fraudem legis* ... Such a use is a mere *simulatio* or pretext.'

See also *Broadway Mansions (Pty) Ltd v Pretoria City Council* 1955 (1) SA 517 (a) AT 522b; *Mustapha and Another v Receiver of Revenue, Lichtenburg, and Others* 1958 (3) SA 343 (A) at 348H-349A; *Minister of Justice and Law and Order and Attorney-General v Musarurwa and Others and Nkomo and Others* 1964 (4) SA 208 (Second Respondent, A) at 214B-F; *Minister van die SA Polisie en 'n Andere v Kraatz en 'n Ander* 1973 (3) SA 490 (a) AT 507H."

[25] When Ogle initially detained the goods and subsequently Bharath seized and detained the goods in terms of section 88(1)(a) then that detention and seizure were not in connection with counterfeit goods. If the samples were taken in terms of section 106 then they were not taken in connection with the view to ascertain whether they were counterfeit goods.

[26] Section 113A(1)(a) gives an officer a discretion to detain any goods to ascertain whether such goods are counterfeit goods as contemplated in the CGA. For present purposes the pertinent provisions read:

**113A Powers and duties of officers in connection
with counterfeit goods**

(1) An officer may -

**(a) detain any goods to ascertain whether
such goods are counterfeit goods as
contemplated in the Counterfeit Goods
Act, 1997 (Act No. 37 of 1997); or**

(b) notwithstanding anything to the contrary contained in the said Act, while acting as an inspector as defined in that Act -

(i) seize and detain any goods when requested to do so in accordance with the provisions of section 15 of the said Act whether or not such goods are under customs control.

(ii) seize and detain any goods in accordance with the provisions of the said Act where such officer has reasonable cause to believe that such goods are prima facie counterfeit goods as defined in that Act while such goods are under customs control; or

(iii) ...

(2) An officer -

(a) may refuse to detain any goods as contemplated in subsection (1)(b)(i) in circumstances where the request to do so does not conform with the requirements of the said Act; and

(b) shall not seize or detain any counterfeit goods where the Commissioner is not indemnified against claims of any nature which may result from such seizure and detention.

(3) Subject to section 43(6), no goods seized or detained by an officer acting as an inspector as contemplated in the Counterfeit Goods Act, 1997, may be stored in a state warehouse except where such goods are detained or seized for purposes of this Act.

(4) ...

(5) ...

(a) ...

(b) ...

(c) ..."

[27] Assuming that Bharath is an inspector and had reasonable grounds to cause to believe that such goods are *prima facie* counterfeit goods whilst they were under customs control, then as an inspector she could neither seize nor detain the goods in the absence of indemnity against any claim. When the goods were initially detained there were no complainants as contemplated by the CGA nor were there any complaints when the goods were seized and detained by Bharath. By virtue of section 113A(2)(b) an inspector is precluded from seizing and detaining counterfeit goods unless the second respondent is indemnified. The indemnity only arrived from Adams & Adams three weeks after the purported verification by Richardson and Joy.

[28] Mr Wheeldon contended on behalf of the applicant that if the goods were seized and detained in terms of the CGA then Bharath purported to act as an inspector and was obliged to provide the applicant with a full inventory identifying and

categorising the goods and to have conveyed the container to a counterfeit goods depot in terms of section 7(1)(b). This he did not do. The applicant did not receive any notice in terms of section 7(1)(d), concomitantly the applicant was unable to ascertain the reasons for the seizure and detention of the goods. In rebuttal Ms Khatri, for the respondents, submitted without advancing any argument that section 7 is not applicable. It is rather disquieting that Bharath acted with total impunity in not complying with the provisions of section. There was merit in the applicant's contention that the goods were not stopped for general customs purposes, since all the value were properly declared, but for an ulterior purpose namely anti-competitive actions. The consignment contained automobile parts that would fit Mercedes Benz or BMW vehicles. It was submitted that Bharath was not entitled to use the provisions of the C&EA as a means of delivering to Adams & Adams the samples of suspected counterfeit goods without compliance with the provisions of the CGA. According to Bharath, he acted in terms of section 4(1) of the CGA. He did so unlawfully because there is no evidence that he acted pursuant to a complaint laid with an inspector or on the strength of any other information at his disposal. If there was such information then he should have explained what was the nature and source of such information which he failed to do.

[29] According to Bharath, in paragraph 28, two of the sample items in the container were "already" confirmed to be counterfeit and that he had reasonable grounds to detain the entire container pending determination on all the items but at that juncture Ogle had already detained the goods. That initial detention by Ogle was not unlawful.¹⁹ However, it was Bharath who seized and detained the goods by then and on his version the two samples extracted from the container were "already" confirmed to be counterfeit goods. Mr Wheeldon rightly submitted that the detention and seizure of the goods infringed the applicant's constitutional right under section 25(1) of the Constitution, Act 108 of 1996. The subsection provides:

"No law may permit arbitrary deprivation of property."

This constitutional provision was considered, albeit in the context of another statutory provision, in *Janse van Rensburg N.O. en 'n Ander* 1999 (2) BCLR 204 (7), Van Dijkhorst J, at 221E-F held:

¹⁹ See: *Henbase 3392 (Pty) Ltd v Commissioner, South African Revenue Services, and Another* 2002 (2) SA 180 (T) at 191B - B/C; D/E-E/F. This decision was confirmed by the Supreme Court of Appeal in *Henbase 3392 (Pty) Ltd v Commissioner, South African Revenue Services, and Another* 2002 (3) SA 26 (SCA).

"Artikel 25(1) van die Grondwet verbeid arbitrêre ontneming van eiendom mag slegs ontnem word krytens algemeen geldende regsvoorskrif. Die bepaling omvat ook geld en roerende goed soos blyk uit artikel 25(4)(b) van die Grondwet. Met die gees van die bepaling kom artikel 8(5)(a) van die Wet [op Skadelike Sakepraktye 71 van 1988] dus ook in botsing, al sou dit miskien in die lig van *Harksen v Lane N.O. and Others* 1998 (1) SA 300 (CC) streng gesproke nie onteining neerkom nie."

And Van Zyl J in *Director of Public Prosecutions : Cape of Good Hope v Bathgate* 2000 (2) BCLR 151 (C) para. [82] at 173F-G held that the seizure of possession under the Proceeds of Crime Act 76 of 1993 -

"... may also constitute arbitrary deprivation of property in terms of section 25(1) of the Constitution.²⁰

These *dicta* suggest that the requirement that no law may permit arbitrary deprivation of property involves at least an element of procedural fairness. Thus, following upon the initial detention by Ogle, which was lawful, the subsequent seizure and detention of the goods by Bharath deprived the applicant of its property on the strength of partisan affidavits which were not disclosed to the applicant until they appeared as annexures to the respondents' affidavit. This is not only a flagrant breach of the provisions of the

²⁰ See also: *Metcash Trading Ltd v Commissioner for South African Revenue Services* 2000 (3) BCLR 318 (W) at 322-3 that sections 36(1), 40(2) and 40(5) of the Value Added Tax Act 89 of 1991 do not permit arbitrary deprivation of property.

law under which he claims to purportedly derive his power, but also a fundamental infringement of the most basic tenets of the common law and precepts by the Constitution²¹ The respondents and their functionaries are certainly not above the law. They owe a legal duty to members of the public, such as the applicant, to act fairly. When they deploy their discretionary powers they must surely be cognisant that they are subject to the requirements of good management. They are duty bound to promote and maintain a high standard of professional ethics, by being impartial and fair, to act without any bias or partiality, to demonstrate transparency by providing accurate information²² and to ensure that there are no victims or favourites.²³ The respondents in particular are required to act in a highly principled way and are subject to a stricter duty of fairness.²⁴ They must not act in a highhanded fashion.

[30] Bharath relies upon the affidavits of David John Richardson, the brand protection manager of Daimler-Chrysler, and Christopher

²¹ Section 33(1) provides that 'everyone has the right to administrative action that is lawful, reasonable and procedurally fair.'

²² See section 195(1)(a), (b), (d), (e) and (g) of the Constitution.

²³ See: *Mpande Foodliner CC v Commission for the South African Revenue Service and Others* 2000 (4) SA 1048 (T) para. [49] at 1067H-1068A.

²⁴ *R v Inland Revenue Commissioner, ex parte Unilever plc and Related Application* [1996] STC 681 (CA) at 695f; *F & I Services Ltd v Customs and Excise Commissioners* [2002] STC 364 (QE) at 337.

Hastings Jay, the business development manager of BMW, as verification that the goods are counterfeit goods.

[31] According to Richardson that on 6 June 2003 he was sent a digital image of a part to fit a Mercedes Benz vehicle which had been suspected by Pitt. The photographs showed the packaging of a head lamp bearing a label C-Class. C-Class is a registered trade mark, in terms of the Trade Marks Act 194 of 1993, in the name of Daimler-Chrysler AG of Germany. He examined the photographs and noticed that this part was not in an original Mercedes Benz packaging. Richardson states that he was advised without indicating by whom, where and when he was so advised that the part itself did not bear any original trade mark or part number. It was for this reason that he was satisfied that this was not a genuine Mercedes Benz part. He concludes that after carefully examining the photographs and as a result of his personal and professional experience, together with the advice of Daimler-Chrysler intellectual property attorney, he was of the opinion that the parts which Pitt inspected from the container are counterfeit. What is rather astonishing is that Richardson who purported to verify that the product is counterfeit did not examine it himself and simply based his opinion on digital photographs and on hearsay information that the part is counterfeit. In order

to form an opinion he relied on the advice of Daimler-Chrysler's intellectual property attorney. He neither identifies the attorney nor is there a confirmatory affidavit from that attorney or for that matter Pitt. There is no explanation tendered for what particular reason the attorney was not named nor why confirmatory affidavits were not procured.²⁵

[32] Likewise, Christopher Hasting Joy, the business development manager of BMW, also on 6 June inspected a digital photograph of parts to fit BMW vehicles. According to him one Maritz advised him that the grill frame unit is clearly not an original BMW part. It did not appear in original BMW packaging. Upon inspection Maritz noticed significant differences in this part compared to the original BMW part and confirmed that it is not manufactured from tools used by authorised BMW manufacturers. According to Joy that "BM" is a trade mark since it is well-known amongst members of the public and he is advised that it qualifies for protection in terms of the provisions of the Trade Marks Act of 1993. However, he indicated that a confirmatory affidavit by Maritz would be filed as soon as possible but such an affidavit was not delivered even at the time of hearing. In the final paragraph, Joy also reached the same

²⁵ The failure to disclose the source of information constitutes an irregularity. See: *Brighton Furnishers v Viljoen* 1947 (1) SA 39 (GW).

opinion as Richardson that the part is a counterfeit. His opinion is also based on hearsay and is subject to the same criticism as that of Richardson's affidavit.

[33] The affidavits of both Richardson and Joy are substantially hearsay.²⁶ They do not prove that the parts are counterfeit goods. It is common cause that Adams & Adams are the attorneys of both Daimler-Chrysler South Africa (Pty) Ltd and BMW South Africa (Pty) Ltd. There was no affidavit from Adams & Adams to confirm the assertions of both Richardson and Joy. To form the opinion the two deponents relied on the advice of their attorneys and that of St. Pitt to conclude that the parts portrayed on the digital photographs are counterfeit goods. What is critically startling is that Bharath, in opposing the application on behalf of the respondents, relies on pure hearsay and as such the affidavits of both Richardson and Joy are susceptible to be inadmissible. On a careful scrutiny their respective depositions do not establish that the items are in fact counterfeit goods. Even if Pitt and Bharath had reasonable grounds for suspecting that the goods are counterfeit and assuming that Richardson's and Joy's affidavits are admissible, then the mere fact that the

²⁶ Subject to the provisions of the Law of Evidence Amendment Act 45 of 1988, as a general rule hearsay is not permitted in affidavits: Van Winsen *et al*, *the Civil Practice of the Supreme Court of South Africa*, 4th ed., 368.

importation of the consignment in question is suspected to be counterfeit goods, does not *per se* taint the goods as being such in the absence of proof of infringement of intellectual property rights.

[34] There can be no counterfeiting in terms of the CGA where there is no underlying "intellectual property right" or a prohibited mark. Majid J in *The GAP Inc. and Others v A M Moolla Group Ltd and Others* (unreported judgment, 16 July 2003, Durban and Coastal Local Division case No.1334/2003) said:

"(e) Hence, if the word 'infringe' in its ordinary usage has a wider meaning than its meaning in terms of the TMA [Trade Marks Act] or the Copyright Act that meaning should be attributed to the word 'infringed' in the proviso to the definition of the word 'counterfeiting' ...".

[35] mere presence of a registered trade mark on a product or packaging does not render it an "infringement", since there are a range of statutory and common law defences. It is not the trade mark itself, as such, which is protected. The purpose of trade mark law was expressed in *James Burroughs Limited v Sigh of the Beefeater, Inc.* 540F 2d 266 (1976) as follows:

"A 'trademark' is not that which is infringed. What is infringed is the right of the public to be free of confusion and the synonymous right of a trademark owner to control his product's reputation."

[36] Mr Khatri was at pains in attempting to persuade me that the letters "BM" were distinctive of BMW. There is no cogent evidence to this effect save for the *ipse dixit* of Joy. There is no evidence that the letters are registered trade marks. Although "C-Class" is a registered trade mark of Daimler-Chrysler AG of Germany and it appeared only on the packaging of a head lamp but that does not establish that the head lamp was a counterfeit item since it did not bear any trade mark or number. The Court of Justice of the European Communities in *Philips Electronics NV v Remington Consumer Products Ltd* Case C-299/29 [2002] All ER (EC) 634 at 649 held:

"... the essential function of a trade mark is to guarantee the identity of the origin of the marked product to the consumer or the end user by enabling him, without any possibility of confusion, to distinguish the product or service from others which have another origin, and for a trade mark to fulfil its essential role in the system of undisturbed competition which the [EC Treaty] seeks to establish, it must offer a guarantee that all goods or services bearing it have originated under the control of a single undertaking which is responsible for their quality ...".

And in order to fulfil this function a trade mark must be distinctive. Thus, Lord Walker in *R v Johnstone*, *supra*, para. [64] at 902b/c aptly remarked:

"Distinctiveness is in this context to be contrasted with descriptiveness."

The designation "C-Class" on the packaging and "BM" are descriptive and unconnected with the question of trade mark use. It is essentially a question of fact. Ultimately the burden of proving that fact on a balance of probability rests on the respondents and as such they have not discharged that *onus* that there has been an infringement of trade mark.

[37] In the final analysis, I am of the considered opinion that:

- It was Ogle and not Bharath who initially detained the goods. That detention was not unlawful.
- Bharath purporting to be an inspector was not empowered to seize and detain the consignment of goods imported by the applicant in terms of the provisions of the Customs and Excise Act and the Counterfeit Goods Act. He acted *ultra vires* the latter Act and for an ulterior purpose.

- If Bharath had reasonable cause to believe that the goods are *prima facie* counterfeit goods whilst they were under customs control then he could not seize and detain the goods in the absence of indemnity against any claim. When the goods were first detained there was neither a complaint nor an indemnity. The indemnity was secured later accompanied by purported verification. The verification was based on hearsay and tantamounted to inadmissible evidence.
- When Bharath seized and detained the goods, he did so without a warrant and failed to procure confirmation from a magistrate or judge within the stipulated time period of 10 court days, that was from 28 May on which day he acted without a warrant. Consequently, section 5(4)(a) invalidated the legal effect of steps purportedly taken in terms of the CGA.
- Bharath failed to comply with the provisions of section 7(1)(b), (c), (d)(i) and (ii)(bb) of the CGA.

[38] Under the circumstances, the appropriate remedy is contained in section 10(1)(b) of the CGA which provides that without

derogating from the powers of the court in any civil or criminal proceedings relating to counterfeit goods, such a court may order that the goods be released to any person specified in the order.

[39] Before I conclude, it is necessary to interpose to express the Court's disquiet that the respondents have demonstrated utter disdain for the rules and practice of court in not delivering confirmatory and verifying affidavits from the two respondents themselves as well as from M Ogle, St. John Pitt and Jaco Kraft. Nor did the respondents procure affidavits from Manie Maritz and the intellectual property attorney referred to in the affidavits of both Richardson and Joy. It is incumbent upon the respondents as organs of state to have deference to the principles and procedures of the court process in the civil justice system. They are not above the law. If they come to Court without adhering to the Court rules and practices, and in defiance of principles and procedures they do so at their peril.

[40] Having said that, neither Daimler-Chrysler nor BMW invoked the provisions of section 15 of CGA. Neither of them intervened in those proceedings to protect their respective intellectual property rights in the face of the importation of the allegedly suspected counterfeit goods by the applicant. I conclude that Bharath acted

unlawfully in seizing and detaining the goods contained in the container EMCU9096150 and their continued seizure and detention under the circumstances is a perpetuation of that unlawfulness. Further, since there is no evidence in the form or written notice as required by section 7(1)(d) read with section 7(2)(a) and (b) to the complainant or to a prospective complainant to lay a complaint with the inspector and with the South African Police Services a criminal charge, not later than three days after the notice (that notice ought to have been issued on or about 4 June 2003) against the applicant for allegedly dealing in counterfeit goods. Therefore, by virtue of section 10(1)(b) the consignment of goods should be released to the applicant forthwith. Accordingly, the following order is made:

1. That the applicant's non-compliance with the Rules of Court is condoned since this matter is one of urgency.
2. That it is declared that the consignment of motor vehicle parts contained in container number EMCU9090150 was stopped and detained by M Ogle on 28 May 2003 in terms of the provisions of the Customs and Excise Act 91 of 1964 and/or Counterfeit Goods Act 37 of 1997; and subsequently

seized and detained by Ebrahim Bharath on or about 4 June 2003 in terms of Act 37 of 1997 are unlawful.

3. That the first and second respondents are directed to forthwith release the consignment of goods, referred to in paragraph 2 above, to the applicant.
4. That the first and second respondents are ordered to pay, jointly and severally, the costs of this application, including the costs of the postponement on 18 July 2003.



E M PATEL
Judge of the High Court

For the applicant : Mr R B R Wheeldon of
Webber Wentzel Bowens
Johannesburg

For the respondents : Ms T Khatri instructed by the
State Attorney