THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number : 162/06
Reportable

In the matter between :

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE — APPELLANT

and

TREND FINANCE (PTY) LIMITED — FIRST RESPONDENT
TREND GEAR ENTERPRISES (PTY) LIMITED — SECOND RESPONDENT

CORAM : HOWIE P, CLOETE, HEHER, VAN HEERDEN *et* COMBRINCK JJA

HEARD : 7 MAY 2007

DELIVERED : 23 MAY 2007

Summary: Customs and Excise Act 91 of 1964: the power conferred on the Commissioner, SARS, to determine the value of imported goods for duty purposes, must be exercised within a reasonable period of time; if it is not, the right to retain goods seized or security given falls away.
Promotion of Administrative Justice Act Act 3 of 2000: The Commissioner, SARS, has a right but not a duty to determine the value of imported goods for duty purposes. Therefore if the Commissioner seizes imported goods pending an investigation into whether the goods are liable for forfeiture, he or she cannot be compelled in terms of ss 6(3) and 8(2) of PAJA to make such a determination.

Neutral citation: This judgment may be referred to as *Commissioner, SARS v Trend Finance (Pty) Ltd* [2007] SCA 59 (RSA).

CLOETE JA/

CLOETE JA

[1] This appeal concerns three consignments of shoes imported into South Africa from China. The first was destined for sale in branches of Pep Stores and the other two in branches of Foschini, both well-known clothing retailers. The purchase, importation and subsequent delivery of the shoes to Pep and Foschini were undertaken by Trend Finance (Pty) Limited and Trend Gear Enterprises (Pty) Limited, which are family enterprises run by Mr Ismail Essop with the assistance of his daughters. I shall refer to both companies simply as 'Trend'. The shoes were manufactured in mainland China. The shipper in terms of the bills of lading, under cover of which each consignment of the shoes was brought from Hong Kong to South Africa, was a Hong Kong trading house, Kedah Company Limited, controlled by a Mr Cheng.

[2] When the three consignments arrived in South Africa, the Controller of Customs, Cape Town, acting on behalf of the Commissioner for the South African Revenue Service, refused to release them. In each case the clearing agent retained by Trend made payments under cover of a completed DA70 form which is headed 'Application to Make Provisional Payment'. The reason given for the payment of R100 000 on 12 March 1999 in the case of the first consignment was 'provisional payment lodged pending outcome of investigations' and in the case of each of the second and third consignments, where amounts of R300 000 and R600 000 were paid on 20 August and 1 September 1999 respectively, the reason given was 'provisional payment lodged for possible underpayment in customs duty and VAT'. After the payments were made, the shoes were released ─ the first consignment in March 1999 and the other two in August and September the same year.

[3] It would be convenient at this stage to summarise those provisions of the Customs and Excise Act, 91 of 1964 which are relevant for present purposes. As appears from its long title, one of the purposes of the Act is to 'provide for the levying of customs and excise duties . . . and for matters incidental thereto'. The

Commissioner for the SA Revenue Service is, in terms of s 2(1), charged with the administration of the Act subject to the control of the Minister of Finance. The Controller is an officer designated by the Commissioner and includes an officer acting under the control of the Controller.

[4] Chapter II of the Act prescribes the powers of officers. An officer is authorised in terms of s 4(4)(a), without notice, to enter any premises and make such inquiry as he or she deems necessary and require any person then and there to produce any book, document or thing which such officer has reasonable cause to suspect relates to matters dealt with in the Act.[1]

[5] Chapter V deals with clearance of goods and liability for payment of duties. Every importer of goods is obliged in terms of s 38(1) to make due entry of those goods in terms of s 39. That latter section requires the person entering any imported goods for any purpose to deliver a bill of entry to the Controller in the prescribed form; to declare that the particulars contained in the bill of entry are correct; and to pay all duties due on the goods. Section 40(1) provides that no entry shall be valid unless the true value of the goods on which duty is leviable or which is required to be declared under the provisions of the Act, has been declared; a correct invoice has been produced to the Controller in the case of goods consigned to any person in the Republic; and the correct duty has been paid. Section 44(6)(c) provides that in all cases except those specifically mentioned, the liability for duty on any imported goods is that of the importer or owner of such goods (or any person who assumes such liability for any purpose under the provisions of the Act). Section 44(10) provides that any duty for which any person is liable in terms of s 44 shall be payable upon demand by the Commissioner. Section 47 provides that duty shall be paid on all imported goods in accordance with the provisions of Schedule 1.

---

[1] Since the events relevant to this appeal further powers, inter alia to detain any goods in order to determine whether the provisions of the Act or any other law have been complied with as contemplated in s 107(2)(a) of the Act, have been conferred on officers in terms of s 4(8A), inserted into the Act by s 133(b) of Act 45 of 2003.

[6] Chapter IX deals with value. Section 65(1) provides that the value for customs duty purposes of any imported goods shall, at the time of entry, be the transaction value thereof within the meaning of s 66; and that section stipulates that the transaction value is the price actually paid or payable for the goods when sold for export to the Republic (adjusted in terms of s 67). Section 65(4)(a) provides that the Commissioner may in writing determine the transaction value of any imported goods, which is required to be ascertained or may be determined as provided in s 66.[2] Section 65(6)(a) provides that an appeal against any such determination shall lie to the division of the High Court of South Africa having jurisdiction to hear appeals in the area wherein the determination was made, or the goods in question were entered for home consumption.

[7] The penal provisions of the Act are contained in chapter XI. Section 78(1) is in extremely wide terms. It provides that any person who contravenes or fails to comply with any provision of the Act shall be guilty of an offence. In addition s 83(a) provides that any person who deals with any goods contrary to the provisions of the Act shall be guilty of an offence. Apart from those (and other) criminal provisions, s 87(1) provides that goods imported contrary to the provisions of the Act are liable to forfeiture. Section 88(1)(a) provides that any officer may detain any goods at any place for the purpose of establishing whether the goods are liable to forfeiture. Section 88(2)(a) provides that if any goods liable to forfeiture cannot readily be found, the Commissioner may demand from any person who imported such goods contrary to the provisions of the Act, payment of an amount equal to the value for duty purposes of the goods plus any unpaid duty thereon. Section 93(1)(c) provides that the Commissioner may, on good cause shown by the owner thereof, direct that any goods detained or seized under the Act be delivered to such owner, subject to such conditions as the Commissioner may determine including conditions providing for the payment of an amount not exceeding the value for duty purposes of the

[2] Section 128 of Act 60 of 2001 which amended s 65(4)(a) reads 'and may be determined' not 'or may be determined'. If regard is had to s 128(a) of that Act as it appears in Government Gazette 22923 of 12 December 2001, it is clear that the word 'and' was inserted accidentally in place of the word 'or'. The Afrikaans version of the amending Act still reads 'of'.

goods plus any unpaid duty thereon.

[8] On 29 March 2001 the Controller wrote a letter to Trend in regard to the first consignment. The essential part of the letter read:

'Arising from an inspection of books and documents, under payments in Customs Duty and VAT amounting to R363 371.09 were found as reflected on the attached schedule. The schedule refers to various imports, which were incorrectly invoiced and incorrectly entered for customs duty purposes.

In view of the circumstances here prevailing, the goods were irregularly dealt with contrary to the provisions inter alia section 38(1), read with sections 39(1), 40(1), 47(1), 47A(1), 65, 66 and 67 of the Customs and Excise Act no 91 of 1964 (the Act) which constitute offences in terms of sections 83 and 84 of the Act.

As the importer/owner of the goods reflected on the attached schedule you are liable for the duty and VAT due thereon in terms of section 44(6)(c) and the duty due is hereby demanded in terms of section 44(10) of the Act.

In view of the circumstances here prevailing the goods were irregularly dealt with contrary to the provisions of the Act. The goods are therefore liable to forfeiture and seizure in terms of section 87(1) and 88 of the Act. If goods liable to forfeiture cannot readily be found the Commissioner of South African Revenue Service may demanded from the importer, payment of an amount equal to the value for duty purposes of such goods plus any unpaid duty thereon. In the circumstances an amount of R732 903.00 is demanded in lieu of forfeiture.

The total sum to be remitted to this office is as follows:

. . .

Underpayment of Customs Duty	R219 780.90
Underpayment VAT	R143 590.19
Total underpayment of duty	R363 371.09
Forfeiture in terms of section 88(2)(a)	R732 903.00.'

The total sum claimed amounted to R1 096 274,09. No similar letter was sent in respect of the second and third consignments and the amounts of R300 000 and R600 000 provisionally paid in respect of those consignments have not been repaid by the Commissioner.

[9] In terms of a notice of motion dated 9 October 2001 the Trend companies, as applicants, commenced motion proceedings in the Cape Town High Court against the Commissioner for the South African Revenue Service as the first respondent and the Controller of Customs, Cape Town, as the second respondent. The main relief

sought by Trend was the following:

1. In terms of s 65(6) of the Act, an order setting aside the determination contained in the Controller's letter dated 29 March 2001.

2. An order reviewing and setting aside the penalty of R732 903 (which the Commissioner later reduced to R695 508) imposed in terms of s 88(2)(a) in lieu of forfeiture.

3. An order directing the Commissioner to repay to Trend:

3.1 R100 000 (ie the provisional payment made in respect of the first consignment) together with interest thereon at the prescribed rate from 12 March 1999 to date of payment;

3.2 R300 000 (ie the provisional payment made in respect of the second consignment) together with interest thereon at the prescribed rate from 20 August 1999 to date of payment; and

3.3 R600 000 (ie the provisional payment made in respect of the third consignment) together with interest thereon at the prescribed rate from 1 September 1999 to date of payment.

[10] In respect of the first consignment, therefore, Trend sought to have the penalty of R695 508 set aside. It also appealed in terms of s 65(4)(a) read with s 65(6) of the Act against the determination made by the Commissioner in respect of that consignment. The basis of the appeal was that the true transaction values had been declared in the Bills of Entry, being the amounts paid by Trend to its supplier, Textrade (another Hong Kong trading house who it alleged had obtained the shoes from Kedah), whereas the Commissioner had calculated the true transaction values on the basis of higher prices contained in pro forma invoices which Kedah had sent to Pep. The court *a quo* (Van Reenen J) referred to evidence two disputes, namely:

(1) from which entity Trend purchased the shoes comprising the first consignment; and

(2) the transaction value of such shoes.

[11] The court *a quo* ultimately found in favour of the Commissioner on both issues

referred to evidence. It nevertheless set aside the penalty of R695 508 imposed in lieu of forfeiture in terms of s 88(2)(a) of the Act. (The reason it did so is not relevant as the Commissioner has not sought to appeal against that part of the order.) The relief sought in para 1 of the notice of motion (the appeal against the determination by the Commissioner) was refused, as was para 3.1 in terms of which repayment of the R100 000 provisionally paid a security in respect of the first consignment, was claimed. Trend contended in this court that the court *a quo* should have determined the issues referred to evidence in its favour, and it accordingly sought to set aside the whole of the Commissioner's determination in the letter of 29 May 2001 relating to the first consignment. It also sought repayment of the R100 000 provisionally paid in respect of that consignment. These contentions form the subject matter of Trend's cross-appeal.

[12] The court *a quo* granted the relief sought in paras 3.2 and 3.3 of the notice of motion and ordered the Commissioner to repay the amounts of R300 000 and R600 000 paid to the Commissioner as security in respect of the second and third consignments together with interest, but subject to the Commissioner's right of set-off. The Commissioner appealed to this court against that order. Both the appeal and the cross-appeal are with the leave of the court *a quo*.

[13] I shall deal first with Trend's cross-appeal which concerns the first consignment. It was correctly conceded on behalf of Trend that in terms of s 102(4) of the Act, it bore the onus of proving that the proper duty had been paid. The relevant part of the section reads:

'If . . . in any dispute in which . . . the Commissioner is a party, the question arises whether the proper duty has been paid . . . it shall be presumed that such duty has not been paid . . . unless the contrary is proved.'

[14] At the hearing Essop testified that he had been approached by Pep towards the end of 1998. Pep informed him that it had sourced shoes, manufactured in China, from Kedah in Hong Kong. Pep wanted to bring consignments of those shoes into South Africa. It was unable to do so itself because the Department of Trade and

Industry regulated importation of shoes from China by permits and Pep did not itself have enough permits. Trend however had access to a number of small entities that did have such permits. Trend and Pep entered into an agreement in terms of which Trend would purchase the shoes from Kedah, transport the shoes to South Africa, clear them through customs and deliver them to a Pep warehouse in the Cape. None of this evidence is contentious. What was contentious was the evidence of Essop and his daughters that Trend had retained the services of a Mr Wan of Textrade to negotiate with Kedah for the purchase of the shoes comprising the first consignment; and that Trend had paid a third party, Assanmal (another Hong Kong entity), as directed by Textrade, US $3,20 per pair and US $2.95 per pair respectively for the men's and youths' size shoes. The Essops had no personal knowledge of what had transpired between Wan, Assanmal and Kedah. Trend delivered no affidavit by Wan and he was not called to give evidence.

[15] The Commissioner's case was that the alleged transaction with Wan/Textrade was fictitious and that the documents produced in support of it were false. The Commissioner pointed to pro forma invoices sent by Kedah to Pep dated 16 and 17 December 1998 which reflected that Kedah would supply men's shoes at US $5 and youths' shoes at US $4.45 per pair. The prices referred to in those pro forma invoices were proved in evidence by Mr Atkins, who was employed at the time by Pep as the senior buyer for male footwear and who in that capacity personally negotiated the prices with Cheng of Kedah towards the end of 1998 in Hong Kong. As I have said, the learned judge in the court below found in favour of the Commissioner on both points referred to evidence ie he found that Trend had purchased the shoes from Kedah (and not Wan of Textrade) and that the transaction value of the shoes was US $5 and 4.45, not US $3.20 and 2.95.

[16] In coming to this conclusion, the learned judge had regard to an affidavit obtained by officials of SARS from Cheng in Hong Kong, and documents annexed thereto, which he admitted in evidence (despite opposition from Trend) in terms of the provisions of s 34 of the Civil Proceedings Evidence Act, 25 of 1965. In the

affidavit Cheng averred that Trend had, through letters of credit arranged by its own agent, Assanmal, paid Kedah the amount per pair of shoes agreed upon with Atkins of Pep; that he had negotiated directly with Essop; and that he had never had any communication with Wan or anyone else from Textrade. On appeal, counsel representing Trend submitted that Cheng's affidavit had been wrongly admitted and that the learned judge *a quo* had in addition misdirected himself on the facts. It seems to me, however, that the conclusion reached by the court *a quo* is amply justified even if the affidavit by Cheng is left out of account.

[17] Kedah (represented by Cheng) and Pep (represented by Atkins) had reached a firm agreement as to the price at which Kedah would supply shoes to Pep. That price was achieved only after negotiations which spanned several days. Atkins's target prices, communicated to Cheng, were originally US $4.70 for the men's shoes and 4.20 for the youths' shoes. Cheng countered with prices of US $5.20 and 4.65. The prices were ultimately agreed at US $5 and 4.25, after Cheng had had a spirited telephone conversation with a person he told Atkins was a representative of the factory in mainland China that was going to manufacture the shoes and sell them to Kedah. Having achieved these prices after thorough negotiation, the question arises: Why would Cheng subsequently have agreed substantially lower prices of US $3.20 and 2.95 with Wan of Textrade, or anyone else on behalf of Trend?

[18] Essop suggested two reasons. First, he said that according to Pep, Kedah had on hand about 1.3 million pairs of surplus or excess stock which it had been struggling to sell for a year or eighteen months. Essop's daughter Khaironesa supported this explanation. She said:

'Kedah, at that point, was sitting with the shoes, they wanted to get rid of them.'

Essop testified that the excess stock was reflected in a schedule sent to him by Pep which reflected the style numbers Pep required and Kedah's dollar price which Pep was prepared to pay. Included in the schedule were the men's and youths' shoes which formed part of the first consignment and which were reflected at US $4.70 and 4.25 respectively. All of this evidence was conclusively refuted by the evidence of

Atkins. Atkins had personally, at the end of 1998 ─ ie shortly before Pep contacted Essop ─ negotiated with Cheng the design and price of the very shoes that comprised the first consignment. They were a new line for Pep produced exclusively for Pep and they bore Pep's registered trademark 'New Yorker'. They were indeed reflected in the schedule sent to Essop which he produced in evidence; but that schedule, according to Atkins, reflected the shoes in respect of which Pep did not have import permits and the prices on the schedule were Pep's target prices, not the prices Atkins ultimately agreed with Cheng. The shoes reflected in the schedule were therefore, according to Atkins, not surplus stock, nor was it possible that Kedah had been trying to sell them for over a year or more. The reason Pep approached Trend, said Atkins, was not to secure a job lot of cheap shoes for sale in South Africa as Essop suggested, but in order to transport the shoes, once they had been manufactured, from Hong Kong to South Africa under permits to which Trend had access and Pep did not. Atkins said categorically that it was 'impossible' for the shoes in the first consignment to have been surplus stock and he was not challenged on this in cross-examination.

[19] The second reason advanced by Essop as to why Kedah may have been prepared to drop its prices, was this. Essop and both his daughters emphasised that at the time Pep wanted to bring the shoes to South Africa, import permits were a scarce and valuable commodity. This evidence was confirmed by Atkins. The suggestion was therefore that, although Cheng of Kedah had agreed the shoe prices with Atkins, the shoes still had to be imported into South Africa ─ and that placed the party negotiating on behalf of Trend, Wan of Textrade, in a strong position to negotiate with Cheng because, whatever price had been agreed between Pep and Kedah, the shoes could simply not be imported into South Africa without permits. The first problem with this explanation is that there is no evidence whatever to suggest that Wan did negotiate with Cheng on this basis. The second problem is that the explanation is highly improbable. Kedah had, after careful negotiation, agreed a firm price with Atkins of Pep. There was never at any stage a suggestion that the supply of shoes by Kedah to Pep was dependent upon permits being obtained. The

price agreed upon between Cheng and Atkins was FOB Hong Kong. Kedah's responsibility therefore ceased when it delivered the shoes to the ship. Had someone such as Wan of Textrade attempted to negotiate a lower price with Kedah because of a shortage of permits, the probabilities are overwhelming that Cheng would have contacted Pep, both to complain about an attempt to renegotiate the price and to question the basis upon which this was being attempted. And Pep, in turn, would have required an explanation from Essop as to why Trend's agent was attempting to renegotiate the price which it had negotiated with Cheng, which Essop's own evidence established had been communicated to him and which Pep required Essop to take into account in fixing Trend's price to Pep for purchasing, importing and delivering the shoes to Pep. None of this happened.

[20] Counsel representing Trend emphasised that the number of shoes imported in the first consignment (60 228) was not significant when regard is had to the total number of shoes Kedah had agreed to supply to Pep for 1999 (some 40 million); and counsel also emphasised that the price at which Kedah purchased the goods from the factory in mainland China was not known. But none of this explains why Cheng would have been prepared to reduce his profit at all (the difference between the price agreed with Atkins of Pep and the price Trend contends must have been negotiated by Textrade amounts to nearly US $100 000) or to submit to a questionable business practice consisting in an attempt to renegotiate an agreed price ─ especially when the basis on which the supposed negotiation took place (shortage of permits) was not his concern.

[21] Then there is the expert evidence of Atkins. Atkins was an extremely experienced shoe buyer. He had been employed by Pep for 19 years in its factory producing footwear and a further 21 years as senior buyer for all male footwear. The function of a buyer, in his own words, was to 'acquire the right product at the right price at the right time' and he went all over the world, as he put it, to 'ferret out or look for . . . markets or areas that produced cheap footwear'. In the middle of the negotiations he held with Cheng towards the end of 1998, he attended a product fair

at Guangzhou for the primary purpose of ensuring that the estimated prices he had given Cheng, which were slightly less than the prices later agreed upon, were realistic. Atkins expressed the opinion in his evidence in chief that it was 'impossible' for Trend to have paid the prices it said it paid to Textrade. In cross-examination he said:

'As far as I am concerned the prices quoted [ie those which Trend said it paid to Textrade] as I said earlier on, were totally and completely improbable, whether out of China, whether out of India, whether out of Pakistan. And the exposure that we got in the middle trip to go to China, to . . . look at prices of styles or leather casuals or whatever [at the trade fair in Guangzhou], we never, ever came close to those prices. They [the Guangzhou prices] were far above the prices that we [ie Pep] eventually paid.'

Atkins made a positive impression on the court *a quo*. His evidence, born of considerable experience worldwide and based in particular on the price of shoes in mainland China at about the time Wan of Textrade would (according to Essop) have been negotiating with Cheng of Kedah, was not called into question and there is no reason why it should not be accepted.

[22] There is a feature of the case which favours Trend's version. The SARS investigators have not, despite the wide powers conferred in them by s 4(4)(a) of the Act, been able to show that Trend paid anything more for the shoes than the amounts reflected in the Textrade invoices, and this despite the fact that they knew Trend's contentions and had access to Trend's records and directly to its bank for a number of years before evidence was heard in the court below. Essop and his two daughters explained in detail how the documents sent to them by Textrade were used to clear the shoes through customs and to make payment through Trend's bank to the beneficiary designated by Textrade, and denied that there had been any further payment. Had the SARS inspectors been able to show the contrary, the case against Trend would have been proved conclusively. But not even the criminal law requires conclusive proof.

[23] I bear in mind that a finding in favour of the Commissioner of necessity involves finding that Trend attempted to defraud the fiscus, that false documents had

been produced and that Essop and his daughters committed perjury; and that illegal conduct is inherently unlikely. I am nevertheless of the view that this notwithstanding, the probabilities constituted by the absence of any reason why Kedah should drop the prices it had agreed with Pep and the expert evidence of Atkins that the prices contended for by Trend are impossibly low, together with the fact that Essop did not favourably impress the court *a quo* as a witness, tilt the scales in favour of the Commissioner. I accordingly conclude that Trend did not discharge the onus on it and that its cross-appeal against the assessment by the Commissioner of the transaction value of the first consignment should be dismissed.

[24] I turn to consider the appeal lodged by the Commissioner against the order of the court *a quo* that the amounts of R300 000 and R600 000 paid as security for the possible underpayment of customs duty and VAT in respect of the second and third consignments, should be refunded. The court *a quo* found that there was an agreement between the representatives of the Commissioner and the representatives of Trend that, if the amounts concerned were paid, the shoes would be released; and that it was a tacit term of that agreement that if a determination in respect of Trend's liability for underpayment were not made within a reasonable time, the amounts would be refunded. With respect, I cannot agree with this analysis of the legal position.

[25] The Commissioner acted in terms of s 93(1)(c) of the Act[3] by releasing the second and third consignments subject to the condition that payments of R300 000 and R600 000 be lodged.[4] In so doing, the Commissioner acted from a position of authority and implemented the legislation which conferred on him the power to impose conditions should he direct that goods detained or seized be delivered to

---

[3] '93(1) The Commissioner may on good cause shown by the owner thereof, direct that any . . . goods seized . . . under this Act be delivered to such owner, subject to ─

. . .

(c) such conditions as the Commissioner may determine, including conditions providing for the payment of an amount not exceeding the value for duty purposes of such . . . goods plus any unpaid duty thereon.'

[4] It is not necessary to consider whether the Commissioner could also have acted in terms of s 107(2)(a) of the Act.

their owner. The Commissioner was an organ of State as defined in s 239 of the Constitution because he was a 'functionary . . . exercising a public power . . . in terms of any legislation' and he performed an administrative action, as defined in s 1 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), the relevant part of which reads:

'"Administrative action" means any decision taken, or failure to take a decision, by . . . an organ or State, when . . . exercising a public power . . . which adversely affects the rights of any person and which has a direct, external legal effect . . .'.

There may have been a contractual element in the exercise by the Commissioner of his statutory powers (in as much as Trend was free to accept or reject the condition imposed) but that does not derogate from the fact that the Commissioner performed an administrative action.[5]

[26] Counsel representing the Commissioner submitted that the proper order would be one directing the Commissioner to determine the transaction value of the goods forming part of the second and third consignments, as he did in the case of the first consignment. Counsel relied on that part of the definition of 'administrative action' in PAJA which includes any failure to take a decision, and on the provisions of ss 6(2)(g) and (3) and 8(2)(a) of PAJA. Those sections provide:

'6(2) A court . . . has the power to judicially review an administrative action if ─

. . .

(g) the action concerned consists of a failure to take a decision.

. . .

(3) If any person relies on the ground of review referred to in subsection (2)(g), he or she may in respect of a failure to take a decision, where ─

(a)(i) an administrator has a duty to take a decision;

(ii) there is no law that prescribes a period within which the administrator is required to take that decision; and

(iii) the administrator has failed to take that decision,

institute proceedings in a court . . . for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision'; or

'(b)(i) an administrator has a duty to take a decision;

---

[5] cf *Logbro Properties CC v Bedderson NO* 2003 (2) SA 460 (SCA) para 9; *Bullock NO v Provincial Government, North West Province* 2004 (5) SA 262 (SCA) paras 11 and 12.

(ii) a law prescribes a period within which the administrator is required to take that decision; and

(iii) the administrator has failed to take that decision before the expiration of that period,

institute proceedings in a court . . . for judicial review of the failure to take the decision within that period on the ground that the administrator has a duty to take the decision notwithstanding the expiration of that period.

8(2) The court . . . in proceedings for judicial review in terms of s 6(3), may grant any order that is just and equitable, including orders ─

(a) directing the taking of the decision'.

[27] The argument put forward on behalf of the Commissioner is misconceived. There is no duty on the Commissioner to make a decision as contemplated in s 6(3) of PAJA whether under subsection (a) or (b), both of which (in para (i)) require the existence of a duty for them to operate. It happens every day that goods are imported and no determination by the Commissioner in terms of s 65(4)(a) as to their transaction value is made ─ as was said by the Constitutional Court in the *FNB* case:[6] 'the Act is premised on a system of self-action and self-assessment'. Nor does a seizure in terms of s 88(1)(a) oblige the Commissioner to make a determination. He has a right, but no duty, to do so. The sections of PAJA relied on by counsel representing the Commissioner are therefore not applicable.

[28] Counsel representing the Commissioner conceded that if the Commissioner wished in terms of s 65(4)(a) to make a determination of the transaction value of goods detained in terms of s 88(1)(a), he would have to act within a reasonable time; and further conceded that a reasonable time has elapsed. Both concessions were well made. So far as the latter concession of fact is concerned, years have elapsed since the goods were seized and there has still been no determination despite the full co-operation of Trend in granting access to its books and despite the wide powers enjoyed by officers under s 4(4) of the Act. The goods forming part of the second and third consignment were seized in about August 1999. The payments to secure their release were made on 20 August and 1 September 1999 respectively.

---

[6] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service*; *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 15.

The notice of motion commencing the proceedings in the court below was dated 9 October 2001 ─ more than two years later.

[29] So far as the concession of law is concerned, it was common cause that the goods were detained in terms of s 88(1)(a) of the Act. In terms of the words of that section, such detention is 'for the purpose of establishing whether . . . goods are liable to forfeiture under this Act'. A limitation must be read into that section to the effect that the right to detain goods only endures for a period of time reasonable for the investigation which the section contemplates to be made, but no longer. There is no sufficient reason for the continued deprivation of the property once the purpose for the deprivation (to investigate whether the property is liable for forfeiture under the Act) is no longer justified, and the continued deprivation would accordingly be arbitrary as meant by s 25 of the Constitution: see the *FNB* case.[7] The Commissioner's right to retain provisional payments made pursuant to a condition for the release of the goods imposed by him in terms of s 93(1)(c), must be subject to the same limitation. I therefore conclude that once a reasonable period of time for the necessary investigation has elapsed, the Commissioner has no further right to retain either the goods or provisional payments made to secure their release.

[30] The order sought by counsel representing the Commissioner would direct the Commissioner to make a determination which he is not obliged to make and which would be incompetent because the time within which it could have been made has expired. In view of the conclusion that the Commissioner no longer has the right to retain the provisional payments made in respect of the second and third consignments, the order by the court *a quo* directing the Commissioner to repay them must stand and the appeal by the Commissioner must fail.

[31] The court *a quo* ordered the Commissioner to pay all of Trend's costs incurred in that court. The Commissioner appealed against that order as well. Counsel representing Trend correctly conceded that (save for the costs of the day on 5

[7] *ibid* para 100.

November 2002) such an order was not justified insofar as it included the costs in connection with the application for, and hearing of, oral evidence. The issues referred to evidence were determined in favour of the Commissioner and Trend therefore failed on a severable issue: see *Letraset Ltd v Helios Ltd (2)*;[8] *Fripp v Gibbon and Co*.[9] The Commissioner's counsel did not contest liability for the costs of the day on 5 November 2002 but there was a dispute in regard to the costs of the first day on which oral evidence was heard, ie 17 May 2004, and of the following day, 18 May 2004. Although some evidence was heard on 18 May, the rest of those two days was taken up by an application for condonation made by the Commissioner for late discovery. Those costs should be awarded to Trend but the remainder of the costs against Trend. The taxing master must make an appropriate apportionment. Otherwise, Trend was substantially successful: the penalty of R695 508 imposed by the Commissioner in lieu of forfeiture in respect of the first consignment was set aside and the Commissioner was ordered to repay the amounts of R300 000 and R600 000 paid by Trend as security for the release of the second and third consignments. Trend failed in respect of the determination amounting to R363 371,09 in respect of the first consignment, but it had to come to court to obtain the relief it did.

[32] The Commissioner has been partially successful in the appeal. The costs of the referral to oral evidence are likely to be substantial. Liability for those costs (save to the extent set out above) was conceded by Trend's counsel in his heads of argument; but the fact remains that the Commissioner had to come to this court to have the order of the court *a quo* amended. Trend, on the other hand, was also partially successful in this part of the appeal in that not all of the costs of the referral to oral evidence will be awarded to the Commissioner. As presently advised, it seems to me that an order directing Trend to pay half the costs of the appeal would be fair. We have not had the benefit of argument from counsel so a provisional order will be made in respect of the costs of the appeal. So far as the cross-appeal is

[8] 1972 (3) SA 605 (A) at 608B-D.
[9] 1913 AD 354 at 358.

concerned, the court *a quo* was incorrect in the reasons it gave for the order directing the Commissioner to repay the amounts paid in respect of the second and third consignments but the order remains unaffected. Costs should accordingly follow the result. The complexity of the issues, both factual and legal, warranted the employment of two counsel by the Commissioner.

[33] The following order is made:

1. The appeal succeeds to the extent that the costs order made by the court *a quo* is set aside and the following order is substituted in its place:

'(i) Subject to (ii) below, the applicants are ordered to pay the costs incurred in connection with the hearing of oral evidence including the costs of two counsel save for the costs of the day of 5 November 2002, which are to be paid by the first respondent.

(ii) The costs incurred on 17 and 18 May 2004 are to be apportioned between the parties as determined by the taxing master. The costs awarded to the first respondent shall include the costs of two counsel.

(iii) Save as set out above, the first respondent is ordered to pay the applicants' costs.'

2. Save as aforesaid, the appeal is dismissed.

3(1) The first and second respondents are provisionally ordered to pay half of the appellant's costs of appeal, including the costs of two counsel.

(2) Either party may, on or before 14 June 2007, submit written argument to the Registrar of this court in regard to the provisional order made in (1), in which event the other party shall be entitled to reply on or before 29 June 2007. If no written argument is forthcoming the provisional order made in (1) shall become final.

4. The cross-appeal is dismissed, with costs, including the costs of two counsel.

Concur: Howie P
Heher JA
Van Heerden JA
Combrinck JA

_____
T D CLOETE
JUDGE OF APPEAL