



REPUBLIC OF SOUTH AFRICA

**THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA**

REPORTABLE
Case number: 39/05

In the matter between:

**THE SOUTH AFRICAN REVENUE SERVICES
(CUSTOMS & EXCISE)**

Appellant

and

**DESMONDS CLEARING AND
FORWARDING AGENTS CC**

Respondent

CORAM: **MPATI DP, STREICHER, NUGENT, CLOETE JJA and
CACHALIA AJA**

HEARD: **24 FEBRUARY 2006**

DELIVERED: **16 MARCH 2006**

Summary: Revenue – customs and excise – goods in transit – temporary storage thereof within Republic not amounting to diversion of goods to destination other than that declared on bill of entry in contravention of s 18(13) of Customs and Excise Act 91 of 1964.

Neutral citation: This judgment may be referred to as *South African Revenue Services v Desmonds Clearing and Forwarding Agents CC [2006] SCA 10 (RSA)*

JUDGMENT

MPATI DP:

[1] The respondent is a close corporation whose primary business is that of a clearing and forwarding agent and a transporter of goods in bond to countries across our borders. It renders services mainly to clients in Zambia and Zimbabwe, who import goods through South African ports.

[2] Mashbury Motors (Pvt) Ltd (Mashbury Motors), one of the respondent's clients from Harare, Zimbabwe, imported from Britain a used truck tractor (the truck) and a trailer loaded with four smaller trailers containing spares and accessories. (I shall refer to the items collectively as 'the imported goods' and to the trailers and spares and accessories as 'the trailers'.) The imported goods were landed at Durban harbour during April 2003.

[3] In terms of sections 38 and 39 of the Customs and Excise Act 91 of 1964 (the Act) an importer of goods landed at a South African port, or his agent, is required to submit to the Controller¹ a bill of entry in a prescribed form within a prescribed period after the goods have been so landed, which contains, inter alia, particulars of the goods in question and the purpose for which they are being entered. Unless the Controller allows a deferment, the duties due on the goods must be paid. Thereafter a release order is issued. If goods destined for a neighbouring country are not entered for storage in a customs and excise warehouse for later removal upon due entry for export, they may be entered for direct removal in bond (s 18). A person who enters any goods for direct removal in bond and so removes such goods, is liable for duty on them (s 18(2)). However, such liability ceases upon proof that the goods, if they were destined for a place outside the common customs area², have been taken out of that area or have been accounted for in the country of destination (s 18(3)(b)).

¹ An officer designated by the Commissioner for the South African Revenue Service to be the controller of customs and excise in respect of a particular area.

² Common customs area is defined as the combined area of the Republic and territories with governments of which customs union agreements have been concluded under s 51, ie member States of the South African Customs Union, viz the Republic of Botswana, Kingdom of Lesotho, Republic of Namibia, Republic of South Africa and the Kingdom of Swaziland.

[4] In the present case the bill of entry describes the imported goods as 'BREAK BULK CARGO' and 'RIGHT-HAND DRIVE UNIT TO BE REMOVED ON OWN WHEELS'. The purpose code 'RIT' entered on the bill of entry indicates that the imported goods were intended for 'direct removal in bond in transit to a destination outside the common customs area' (Rule 18.01 (a)(ii)(bb) of the rules promulgated under the Act, quoted in para 17 below).

[5] Section 18(13)(a) of the Act prohibits the diversion, without the permission of the Commissioner, of 'any goods removed in bond to a destination other than the destination declared on entry for removal in bond' or the delivery of such goods in the Republic 'except into the control of the department at the place of destination'. The issue in this appeal is whether the temporary storage of the trailers - which had been uncoupled from the truck - at certain premises within the country, constituted a diversion to a destination other than that declared on entry, as contemplated by the section.

[6] Section 87(1) provides, inter alia, that any goods 'imported, . . . removed or otherwise dealt with contrary to this Act . . . shall be liable to forfeiture wheresoever and in possession of whomsoever found . . . '. An officer³, magistrate or member of the police force may detain goods at any place for purposes of establishing whether such goods are liable to forfeiture (s 88(1)). In terms of rule 18A.10, read with rule 18.15, the Controller may allow any imported second-hand power driven vehicle to be removed in bond on compliance with certain requirements. One such requirement is that the bill of entry must reflect the temporary permit number issued by the licensing authority for the purpose of driving the vehicle to the customs and excise border post where it will exit the Republic. Delivery to the Controller of a copy of the bill of entry endorsed accordingly by officials of the appellant at the border will constitute proof that the goods have exited the Republic (rule 18A.10(c)(iii)).

[7] The declared destination of the imported goods was Harare, Zimbabwe, and as indicated on the bill of entry the unit was to be removed 'on own wheels'. The trailers were

³ Defined as a person employed on any duty relating to customs and excise by order or with concurrence of the Commissioner.

to be hauled by the truck, and to facilitate this the respondent applied for, and obtained, a temporary permit from the licensing authority. A cross-border permit was also issued in favour of the respondent - on 12 May 2003 - for the conveyance of the trailers through the Beit Bridge border post between the Republic and Zimbabwe, 'to points situated within Zimbabwe'. On 13 May 2003, and as required under rule 18A.10(a)(iv), an officer⁴ examined the imported goods and the temporary permit. He approved the temporary permit and issued a certificate on which appears the endorsement 'Export may proceed'.

[8] It is not in dispute that on 27 May 2003 Mr Gregory Mark Munisami, an official of the appellant, received information from a fellow official that a number of imported vehicles 'which had been imported to South Africa for purposes of being exported outside the common customs area' were parked on the premises of Sensation Transport in Springfield Park, Durban. Upon visiting Sensation Transport on 27 May 2003 Munisami and his two colleagues discovered that the trailers were also parked there. They established, through enquiries, that the trailers were under the control of one Kevin Mudaly, the owner of a business known as Truck and Car Repairs. He, in turn, advised them that he was carrying out mechanical repairs to the trailers so as to obtain a certificate of roadworthiness from the testing centre in Pinetown, whereafter the trailers would be removed to Zimbabwe. Subsequent enquiries from Mr Desmond Pillay (of the respondent) revealed that the truck had already been exported to Zimbabwe. Mr Pillay undertook to provide the appellant with the requisite proof of export.

[9] It is common cause that on 28 May 2003 the appellant issued a detention notice in respect of the trailers in terms of s 88(1)(a), read with s 87 of the Act, for purposes of establishing whether they were liable to forfeiture. On 4 June 2003 the appellant wrote to the respondent advising that a contravention of s 18(13) of the Act had been noted, and also levying a penalty (s 91(1)(a)(iii)) of R40 838 and a 'forfeiture amount' (s 93) equal to the penalty. A letter from the respondent's attorneys dated 9 June 2003 giving an explanation as to why the truck had left the trailers behind did not serve to persuade the appellant to move from its stance, which was that the trailers had been diverted without the permission of the Commissioner. In a letter dated 12 June 2003 the appellant told the

⁴ See footnote 2.

respondent's attorneys that the respondent 'should have sought the necessary permission from the Commissioner to divert the goods as soon as they realized that same could not be avoided'. Consequently, the respondent instituted motion proceedings in the Durban High Court for an order declaring that the temporary storage of the trailers at the premises of Sensation Transport was not a diversion as contemplated by s 18(13) of the Act, and directing the appellant to release and hand over the trailers to the respondent. The court *a quo* (Hugo J) granted the order sought. The appellant now appeals against that order with leave of the court below.

[10] In its founding papers the respondent alleges that shortly after the truck had been examined by an official of the appellant (as referred to in para 7 above) and after it had left the appellant's premises it encountered difficulties; that the gearbox showed signs of mechanical failure and it became evident to the respondent's employees that the truck would not be able to haul the trailers all the way to Zimbabwe; that it required repairs, and that the trailers were accordingly hauled to, and left, at the premises of Sensation Transport 'where they awaited the repairs of the truck [prior to being moved to their] final destination'.

[11] These allegations stand undisputed. The only averment made on behalf of the appellant in the answering affidavit is that no permission had been granted to the respondent to effect repairs to the truck and that 'such conduct is in contravention of section 18A(10)(b)(ii) and thereby constituted a "diversion" in terms of section 18(13) of the Act'. The reference to s 18A(10)(b)(ii) was obviously intended to be a reference to rule 18A.10(b)(ii). But that subrule merely provides that a vehicle, in respect of which no temporary permit has been issued for driving it to the customs and excise border post where it will exit the Republic, must be transported by a licensed remover of goods in bond.

In a document headed 'Customs Policy and Process', dated 20 August 2003, it is stated (in para 4 thereof) that 'Vehicles requiring repairs or servicing must be removed as contemplated in Rule 18A.10(b)(ii)'. This, of course, might very well have applied to the truck. But we are now concerned with the trailers and whether they had been diverted to a destination other than that declared on entry for removal in bond.

[12] In a further affidavit filed on behalf of the appellant it is alleged that the respondent

had not been totally frank with the appellant; that 'there is considerable cause for concern as to what its true intention was in relation to the truck and trailers', and that the 'diversion' of the truck to Johannesburg – where it was apparently repaired – and the trailers to Durban also created some cause for suspicion. The respondent has alleged, however, that it had always been its intention to remove in bond the truck, together with the trailers, to their declared destination.

[13] In my view, the appellant's officials were clearly justified in conducting investigations into the reasons for the presence of the trailers on the premises of Sensation Transport. The truck and trailers were entered for removal in bond as a unit. The officials were thus entitled to issue a detention notice (s 88(1)(a)), for purposes of establishing whether the imported goods had been irregularly dealt with and thus liable to forfeiture (s 87(1)). The question though, is whether the further detention after such investigations was justified.

[14] The mere statement by the respondent that its intention had always been to remove the truck and trailers to their declared destination is not enough. Other factors relevant to the issue need to be considered. *Beckett & Co Ltd v Union Government* 1921 TPD 142 at 147. In my view, the respondent (through its attorneys) gave a reasonable explanation for the separation of the truck from the trailers, which was that 'the importer was of the opinion, based on the expert report of his motor mechanic' that due to mechanical failure the truck 'was not capable' of hauling the trailers to Zimbabwe. Consequently the trailers had to be stored, temporarily, at the premises of Sensation Transport until alternative arrangements had been made. Moreover, it has also not been suggested by the appellant that the trailers had been unpacked or in any way tampered with. The high-water-mark of the appellant's case is that the trailers should have been moved for storage in a customs and excise warehouse. It is true that the premises of Sensation Transport were not a licensed warehouse for storage of goods in bond, but neither the Act nor the Rules promulgated in terms of it required goods in bond being hauled by a vehicle licensed to do so, must be stored in a bonded warehouse in the event of the vehicle breaking down en route to its declared destination. And it cannot be inferred from the fact that the truck might have been repaired contrary to the appellant's policy (set out in the document quoted in para 11 above), that the respondent intended to divert the trailers to a destination other than the

one declared on entry for removal in bond.

[15] The appellant has annexed to its answering affidavit a copy of a facsimile from the importer, Mashbury Motors, dated 2 June 2003 and addressed to the respondent, in which the following appears:

‘... Unfortunately this unit (the truck) developed gear changing problems when leaving Durban and the driver thought it wise to proceed to Zimbabwe without its load to have the vehicle checked and then return later to collect the trailers.

The truck broke down en route to the border and had to be repaired. ... This vehicle has now been repaired and is on its way to the border. In view of the time delay a decision was made to export the unit immediately without collecting the trailers.

We would be very grateful if you could now arrange to have these trailers delivered to Beit Bridge using another horse as soon as possible.

...’

The letter, which must have been made available to the appellant’s officials during their investigations, clearly shows that the trailers had not been ‘diverted’ to a destination other than the one declared on entry, but were still intended for removal to the declared destination. The fact that the cross-border permit had expired – it was valid from 12 May 2003 until 26 May 2003 – does not detract from such intention.

[16] Section 18(13)(a) prohibits the diversion, without the permission of the Commissioner, of goods removed in bond to a destination other than that declared on entry for removal in bond. The words underlined are important and have been overlooked by the appellant. The section does not proscribe a detour; it proscribes a deviation to another destination. ‘Destination’ is defined in the Shorter Oxford English Dictionary as ‘the intended end of a journey or course’. A driver who, while transporting goods in bond, deviates from the normal route between, say, Durban and Harare, for whatever reason, but who intends to continue with his journey, does not make himself guilty of a contravention of s 18(13). His intended destination has not changed. Of course the extent of the detour would be one of the factors which would be taken into account in deciding whether the section had been contravened, but it cannot be concluded, merely by reason of the deviation, that the goods have been diverted to a destination other than that declared on entry for removal in bond. The driver may yet intend to reach the declared destination. In the present matter there was insufficient evidence produced by the appellant to rebut the

prima facie case made out by the respondent that the trailers were only temporarily being kept in Durban and that it remained the respondent's intention to export them to their declared destination.

[17] Counsel for the appellant submitted that goods entered for removal in bond in transit to a destination outside the common customs area must be removed 'directly' to such destination. By this counsel meant that the goods should be kept on a direct route between the place of commencement and the customs and excise border post where such goods are to exit the Republic. For this submission counsel relied on rule 18.01(a)(ii)(bb), which reads:

'Goods entered for removal in bond under the provisions of section 18(1) shall –

- (a) if imported, and -
 - (i) . . .
 - (ii) (bb) intended for direct removal in bond in transit to a destination outside the common customs area, be entered on a form DA500, purpose code RIT;'

Clearly the subrule makes provision for the type of form to be used where goods are intended for direct removal in bond as opposed to goods which are intended for storage in a customs and excise warehouse prior to being exported. The word 'direct' does not mean that the goods have to be moved 'directly' and counsel's construction of the subrule is patently wrong. Moreover, the appellant did not prescribe a route along which the imported goods were to be transported from the point of commencement of the journey to the customs and excise border post where they were to exit the Republic. The Controller had the authority to prescribe such route (s 18(12)), but did not do so. It follows that the further detention of the trailers was unlawful.

[18] The appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

L MPATI DP

CONCUR:

STREICHER JA

NUGENT JA

CLOETE JA

CACHALIA AJA