Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 22826/11

Before: The Hon Mr Justice Binns-Ward

In the matter between:

HENTA'S VERSPREIDERS CC	Applicant
and	
THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	Respondent

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JUDGMENT DELIVERED: 6 MARCH 2013

BINNS-WARD J:

[1] The applicant has applied for an order directing the release by the revenue authority of 48 master cases and 47 bricks of Mega Blue 20's cigarettes, 97 master cases of Chicago cigarettes, 34 master cases of Kingdom cigarettes and 41 master cases of Sevilles cigarettes.[1] The goods in question are being held by the South African Revenue Service ('SARS') under the provisions of the Customs and Excise

[1] A 'master case' in the tobacco industry denotes a container containing 50 'bricks'. A 'brick' is also commonly referred to as a 'carton'. Each 'brick' in turn contains 10 packets of cigarettes, each containing 20 cigarettes.

Act 91 of 1964 ('the Act'). SARS suspects that the goods in question have been dealt with irregularly in terms of the Act. Section 87(1) of the Act, which has the subheading '*Goods irregularly dealt with liable to forfeiture*', provides, insofar as relevant, that '[a]*ny goods imported, exported, manufactured, warehoused, removed or otherwise dealt with contrary to the provisions of this Act or in respect of which any offence under this Act has been committed ... shall be liable to forfeiture wheresoever and in possession of whomsoever found*'.

[2] The applicant close corporation is a trader 'in different wares with various traders and entities in and around Cape Town'.[2] Its sole member alleges that in September 2010 he was requested by a certain Mr Yusuf Paruk to supply cigarettes to a new customer. He sourced stock for this purposes from two suppliers, Delta Tobacco Corporation (Pty) Ltd ('Delta') and Caledonian Supermarket. Caledonian Supermarket is owned by Yusuf Paruk's brother, Ismail. The Kingdom and Seville cigarettes were sourced from Delta and the Chicago and Mega cigarettes from Caledonian Supermarket. Delta issued the applicant with an invoice, dated 17 September 2010, for the goods supplied by it. The invoice was for 1850 cartons (37 cases) of Kingdom cigarettes at R252 062,50 and 2250 cartons (45 cases) of Seville cigarettes at R306 562,50 (inclusive of VAT). The applicant also received an invoice, dated 22 September 2010, from Caledonian Supermarket CC for 55 master cases of Mega Blue cigarettes at R374 000 and 100 master cases of Chicago cigarettes at R615 000 (inclusive of VAT).

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[2] The description of the applicant's business is quoted from the founding affidavit of its sole member, Nicolaas Hendrik Roos.

[3] According to the applicant, the cigarettes were sold on consignment to an entity called SABCO. Shortly after the delivery of the cigarettes to SABCO the applicant was informed that the goods had been detained by SARS. It was subsequently ascertained that the goods had been detained at premises at 70 Middel Road, Rylands Estate, Athlone, Cape Town, after having been discovered there by the police in circumstances which do not appear from the papers, together with a large number of other cigarettes that are not subject to the current proceedings. The cigarettes were in the physical possession of Messrs Jappie Salie and Hassiem Ismail at the time. As the goods had been sold to SABCO on consignment, the latter declined to pay for them. The applicant in turn was unable, in the circumstances of not having turned the stock to account, to pay its suppliers. (The applicant, as a seller on consignment bore the risk of loss in respect of the goods; see *Sun Couriers (Pty) Ltd v Kimberley Diamond Wholesalers* 2001 (3) SA 110 (NC), [2001] 2 All SA 646, at para. 73-4.)

[4] It appears to be common ground that the goods in question were detained by SARS in terms of s 88(1)(a) read with s s 4(4)(a) of the Act. An 'officer' (as defined in s 1 of the Act) is empowered to detain goods under those provisions if it is reasonably suspected by him that they are susceptible to forfeiture. The object of the detention is to enable it to be established that the goods are indeed liable to forfeiture, whereupon they may be seized as forfeit under the Act. SARS is afforded a reasonable period within which to establish whether the goods are liable to forfeiture. If the detained goods in question are not seized before the effluxion of such period they must be released from detention; see *Commissioner, South African Revenue Service v Trend Finance (Pty) Ltd and Another* 2007 (6) SA 117 (SCA), at para. 29.

It has not been suggested that the respondent had not been entitled to detain the goods in the circumstances of the current case. The question is whether they should be released from detention.

[5] After the detention of the goods the applicant embarked on a long drawn out correspondence with SARS in an attempt to procure the release of the cigarettes. SARS indicated that it would be prepared to release the cigarettes only once it had been satisfied that the detained cigarettes had not been dealt with irregularly in terms of the Act and that all appropriate duties and VAT had been paid. SARS invited the applicant to arrange with the suppliers of the cigarettes to provide a batch number or stock sheets listing the batch codes of the cigarettes. An audit trail was required to enable the detained cigarettes to be positively matched up against the particulars on any documentation to be supplied. The Mega Blue, Kingdom and Seville cigarettes are manufactured in Zimbabwe. Customs duty would have been payable when they were imported into this country. Chicago cigarettes are made in South Africa and subject to the payment of excise duty by the manufacturer.

[6] One De Villiers, an official employed in the Enforcement Investigations unit of SARS, inspected the goods detained on 22 September at the state warehouse in Cape Town. He found:

i. 97 boxes of Chicago cigarettes, each containing 50 bricks. The packets of cigarettes were properly packaged in accordance with the applicable regulations. The packets bore the prescribed SA Diamond Stamp[3] and health warnings.[4]

ii. 48 boxes of Mega Blue cigarettes each containing 50 bricks and one box containing 47 bricks of Mega Blue cigarettes. The packets of cigarettes were properly packaged in accordance with the applicable regulations. The packets bore the prescribed SA Diamond Stamp and health warnings.

iii. 41 boxes of Seville cigarettes each containing 50 bricks. Some of the packets of Seville cigarettes were not properly packaged in accordance with the applicable regulations. They did not bear the prescribed SA Diamond Stamp or the stamp impression was so faint that it could not be determined whether it was the SA Diamond Stamp. All the packets carried the prescribed health warnings.

iv. 34 boxes of Kingdom Blue cigarettes each containing 50 bricks. The packets of cigarettes were properly packaged in accordance with the applicable regulations. The packets bore the prescribed SA Diamond Stamp and health warnings.

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[3] In terms of s 35A(2)(a) of the Act, no cigarettes may be removed from a customs and excise warehouse for home consumption unless a stamp impression determined by the Commissioner has been made on their containers. In terms of s 54(2)(a), if entered for home consumption, cigarettes may not be imported unless a stamp impression determined by the Commissioner has been made on their containers. Section 54(1)(b) of the Act authorizes the Commissioner to prescribe by rule '*distinguishing marks or numbers in addition to the stamp impression referred to in subsection (2) which must or must not appear on containers of imported cigarettes*'. My attention was not directed to any provision that indicates that the Commissioner has exercised his authority in terms of s 54(1)(b).

[4] Health warnings are required in terms of the regulations made in terms of the Tobacco Products Control Act 83 of 1993.

v. A large quantity of other brands of cigarettes which did not bear the prescribed SA Diamond Stamp and health warnings, or which were marked 'Not for sale in South Africa'

It is notable that the goods claimed by the applicant are those that were on their face, apart from some of the Seville cigarettes, compliant with South African packaging regulations. No-one has claimed title to the other cigarettes which were non-compliant. The applicant contends that this peculiarity should not count against it, but rather against SABCO, which was in possession of the goods. There is some cogency in this contention having regard to the subsequent behaviour of the person in control of SABCO, who denied the existence of the entity notwithstanding that it is clear that he arranged the burglar alarming of the premises on which the goods were found for SABCO.

[7] Mr De Villiers testified that a waybill number was found on four of the boxes of Seville cigarettes. He was able to trace the references back and establish that the goods to which the waybill pertained should have been held in the bonded warehouse of Delta and had not been intended for consumption on the local market. The relevant import duties and VAT had not been paid on the cigarettes and they were unlawfully out of bond in South Africa. De Villiers alleged that the aforementioned Yusuf Paruk was in some way connected with Delta, but he was unable to identify the precise nature of the connection.

[8] De Villiers also testified that the invoice from Delta annexed to the applicant's founding papers in respect of the transaction in terms of which the applicant alleges it acquired the Kingdom and Seville cigarettes differed from the invoice submitted to

him under an earlier affidavit by the same deponent supposedly for the same purpose. The date and invoice numbers differ. De Villiers points out that both invoices cannot relate to the same goods. The invoice(s) is/are in respect of 37 master cases of Kingdom cigarettes and 45 master cases of Sevilles. Mr De Villiers highlighted the absence of any explanation in the applicant's founding papers of the discrepancy between the amount of cigarettes being sought in terms of the notice of motion and that allegedly obtained by the applicant in terms of the invoices from its alleged suppliers. The applicant is claiming the release of only 41 of the 45 cases of Seville cigarettes that were supplied to it by Delta. Of course, according to the inventory only 41 cases of Seville cigarettes were detained.

[9] De Villiers established that the manufacturer of the Chicago brand of cigarettes is Goldleaf Tobacco Company of Gauteng. He submitted samples of the detained Chicago cigarettes to the manufacturer, which confirmed that the samples conformed to all the characteristics of its products. Gold Leaf Tobacco Company, through its trading arm, Gwaai Marketing (Pty) Ltd, had invoiced Caledonian Supermarket for 160 cases of Chicago cigarettes during the period from 8 June to 8 September 2010, and for a further 100 cases on 23 September 2010. An affidavit by the production manager of Gold Leaf Tobacco Company, Mr Bilal Mohamed, put in by the respondent indicated that the company was unable to link the samples provided for testing by SARS with those that were subject of the goods subject of the invoices made out to Caledonian Supermarket because 'at present, GLTC does not have a "track and Trace" system in place nor a batch numbering system'. (There appears to be no statutory provision requiring a relevant 'track and trace' or batch numbering system.)

[10] The applicant, having initially supplied SARS only with the invoices it had obtained from the two suppliers of the cigarettes, thereafter, through its attorneys, supplied the following further documentation:

(a) A sales invoice, dated 1 April 2010, made out by Breco International (Pvt) Ltd of Harare in respect of 70 master cases of Mega Blues cigarettes, and 130 master cases of two other types of cigarettes, which I am unable to identify by name because of the poor legibility of the copy of the invoice in the papers. The invoice identified the consignee-delivery address as 'International Cigarette Manufacturers (Pvt) Ltd c/o Kingfisher Freight', Johannesburg, and the purchaser as 'International Cigarette Manufacturers (Pty) Ltd, Maude Street, Sandton, Johannesburg'. Payment (in the amount of US$15600) was on 90 day terms and, according to the tenor of the invoice, had to be made by 30 June 2010.

(b) A tax invoice, dated 13 April 2010, rendered by Kingfisher Freight Services CC to 'International Cigarette Manf… (Pty) Ltd', Maude Street, Sandton, Johannesburg, in respect of a shipment of 200 cases of cigarettes from 'Breco Intl –Harare'. Two of the items listed on the invoice were Customs Duties in the amount of R894 000 and VAT on Bill of Entry in the amount of R142399,46. An amount of R136,80 was also indicated on the invoice as having been charged for 'SARS Release DA74'. The goods subject of the invoice are indicated as having entered on Flight SA6743 on ‘12/04’. No bill of entry number is reflected on the invoice.

(c) A tax invoice, dated 28 April 2010, rendered by Kingfisher Freight Services CC to International Cigarette Manufacturers (Pty) Ltd, Maude Street, Sandton on respect of a shipment from ‘Breco Intl –Harare, invoice no. 0701 attn: Dave Jackson. Two of the items listed on the invoice were ‘Import Duty’ in the amount of R35522,16 and ‘VAT on Bill of entry’ in the amount of R223500. Bill of Entry particulars were indicated on the invoice as follows: ‘Bill of Entry No. 54653 22/04’.

(d) A copy of a sales invoice number 0701, dated 21 April 2010, issued by Breco International (Pvt) Ltd of Harare to International Cigarette Manufacturers (Pty) Ltd, Maude Street, Sandton, Johannesburg in respect of 50 Master cases of Mega Blues cigarettes.

(e) A copy of a tax invoice (invoice no. HOJ004) issued by International Cigarette Manufacturing (Pty) Ltd, Maude Street, Sandton to Hojas Trading of Johannesburg, dated 2 May 2010 in respect of 50 master cases of Mega Blue at R335000.

(f) A copy of a tax invoice (invoice no. HOJ001) issued by International Cigarette Manufacturing (Pty) Ltd, Maude Street, Sandton to Hojas Trading of Johannesburg, dated 4 March 2010, in respect of 135 master cases of Mega Blue at R793420,65 (excluding VAT).

(g) A copy of a tax invoice (invoice no. HOJ002) issued by International Cigarette Manufacturing (Pty) Ltd, Maude Street, Sandton to Hojas Trading of Johannesburg, dated 2 May 2010 in respect of 71 master cases of Mega Blue at R475700.

(h) A copy of a tax invoice (invoice no. HOJ003) issued by International Cigarette Manufacturing (Pty) Ltd, Maude Street, Sandton to Hojas Trading of Johannesburg, dated 2 May 2010 in respect of 55 master cases of Mega Blue at R368500.

(i) A tax invoice issued by Hojas Trading to Caledonian Supermarket, Cape Town, dated 15 July 2010, in respect of '60 x 50 x 200's'Mega Blue in the amount of R401986,80.

(j) A copy of a chain of email correspondence between Dave Wilson (whose '@icman'.co.za' email address suggests that he is attached to International Cigarette Manufacturing (Pty) Ltd and one Graeme Fick of the CBCU[5] at SARS. In an email dated 30 August 2010, Fick had requested '*batch numbers/codes for the Mega Blue cigarettes listed in the attach* (sic) *spread sheet*'. The response from Wilson, dated 31 August 2010 stated '*The stock we bring in has no barcodes or batch numbers. The packaging, externally and internally identifies the brand name*'. The copy of the chain of email correspondence has endorsed at its foot in handwriting: '*This stock was released on ± 18/9/2010. Thanks*'. (The spreadsheet referred to in the email correspondence was

[5] Customs Border Control Unit.

not enclosed as part of the relevant annexure in the applicant's founding papers.)

(k) A copy of a letter, dated 30 August 2010, from a Mr Mandel Sarris of Hojas Trading requesting the release by SARS of certain seized stock. It is not evident from the content of the letter what the stock is, but it appears to be of the same character as '400 master cases' held in bond at OR Tambo Airport. The reference to master cases suggests that the stock in issue was probably cigarettes. The stock that was the subject of Mr Sarris's letter had obviously been seized at some time prior to the date of the letter.

(l) A copy of a letter, dated 8 September 2010, from Dave Wilson, Financial Manager of International Cigarette Manufacturing (Pty) Ltd, to the Manager, Hojas Trading CC. The body of the letter reads: '***SARS query*** *Further to your query from SARS, the manufacturers advise that stamp has no reference regarding manufacture*'.

[11] It would appear that SARS undertook to investigate the position in respect of the Mega Blue cigarettes based on the aforementioned documentation that the applicant had supplied. Correspondence attached to the founding affidavit also indicates that SARS had undertaken to investigate the position of the seized Chicago branded cigarettes with the manufacturer, Gold Leaf Tobacco Corporation (Pty) Ltd. In an email to the applicant's attorneys, dated March 24, 2011, Mr JC De Villiers of SARS stated '*This office is in constant communication with Mr Bilal Mohamed of Gold Leaf Tobacco Company regarding the "Chicago" brand cigarettes. He is*

currently out of the country. He assured me per e-mail on 22 March 2011 via his blackberry that he would afford his serious attention to finalise the matter by early next week'. (As appears from the affidavit of Mr Mohamed referred to in paragraph [9], above, the information obtained by the respondent would suggest that the cigarettes concerned were indeed manufactured by Gold Leaf Tobacco.)

[12] When De Villiers was subsequently pressed for a progress report he responded on 6 May 2011 saying that he was not attached to 'Customs' and was in no position to make decisions in their ambit. He reported that the applicant's attorney's request had been forwarded to the case officer, Inspector Olkers. De Villiers stated that Olkers had assured him that a response in respect of the request would follow shortly.

[13] Olkers wrote to the applicant's attorneys on 30 May 2011. The relevant part of the letter went as follows:

> Unfortunately we do not agree with your contention as per your letter dated the 05th May 2011 that the invoices supplied by your client are compliant with the Act and rules. We hold the view that no duty has been paid on the goods under detention for the following reason:
>
> The invoices and bill of entry supplied cannot be reconciled to these specific goods. As we mentioned in previous cases in which you [i.e. the applicant's attorneys] were involved in (sic) we once again reiterate that as far as we are concerned these invoices could be for any goods upon which duty has legitimately been paid, hence the need for code, description, character or other marks as provided in section 41(2) [of the Act].
>
> Your attention further drawn (sic) to section 87 of the Act which empowers the Commissioner to forfeit any goods which have been irregularly dealt with in terms of the Act from (sic) wheresoever and in the possession of whosoever found. We herewith wish to advise that this matter was presented to a Discretion Decision Committee consisting of senior managers, technical customs specialist and legal advisors on the 20th May 2011, and a decision was taken not to release the aforementioned cigarettes.

[14] The relevant part of s 87 of the Act referred to in Olkers' letter has been quoted above.[6] Section 41(2) of the Act reads as follows:

> Every exporter or manufacturer shall allocate to any goods of a class or kind specified in the rules for the purposes of this subsection and exported to or from or manufactured in the Republic a distinctive and permanent identification number, code, description, character or other mark in such manner and in accordance with such method as may be prescribed in the rules and such number, code, description, character or other mark shall be quoted or reproduced in all prescribed invoices relating to such goods and in all such other documents relating to such goods as may be specified in the rules.

The definition of '*exporter*' in s 1 of the Act includes '*in relation to imported goods, includes the manufacturer, supplier or shipper of such goods or any person inside or outside the Republic representing or acting on behalf of such manufacturer, supplier or shipper*'. The provisions of s 41(2) thus apply to imported goods of a kind specified in the rules as well as to locally manufactured goods of the same kind.

[15] The reliance in Olkers' letter on s 41(2) is explicable in the relevant regulatory context. In this connection regard needs to be had to the statutory provisions relating particularly to tobacco products. Thus s 35A(1) of the Act provides:

> (1) The Commissioner may prescribe by rule-
>
> (a) the sizes and types of containers which may be used by a manufacturer for the packing of cigarettes and cigarette tobacco;
>
> (b) distinguishing marks or numbers in addition to the stamp impression referred to in subsection (2) which must or must not appear on containers of cigarettes and cigarette tobacco removed from a customs and excise warehouse for home consumption or for export;
>
> (c) any other matter which is necessary to prescribe and useful to achieve the efficient and effective administration of this section.

Section 35A(2) and (3) of the Act provides:

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[6] See para. [1], above.

(2) No licensee may remove any cigarettes or allow any cigarettes to be removed from a customs and excise warehouse unless-

(a) if removed for home consumption, a stamp impression determined by the Commissioner has been made on their containers; or

(b) if removed for export, such stamp impression does not appear on the containers; and

(c) the cigarettes otherwise comply in every respect with the requirements prescribed by rule.

(3) No cigarettes or cigarette tobacco shall be sold or disposed of or removed from the customs and excise manufacturing warehouse in question in partly or completely manufactured condition except in accordance with the provisions of this Act.

and s 54 provides:

Special provisions regarding the importation of cigarettes

(1) The Commissioner may prescribe by rule-

(a) the sizes and types of containers in which cigarettes may be imported into the Republic;

(b) distinguishing marks or numbers in addition to the stamp impression referred to in subsection (2) which must or must not appear on containers of imported cigarettes;

(c) any other matter which is necessary to prescribe and useful to achieve the efficient and effective administration of this section.

(2) No person may import any cigarettes unless-

(a) if entered for home consumption, a stamp impression determined by the Commissioner has been made on their containers; or

(b) if entered for storage in a customs and excise warehouse for export such stamp impression does not appear on the containers; and

(c) the cigarettes otherwise comply with the requirements prescribed by rule.

(3) No imported cigarettes shall be sold or disposed of or removed from the customs and excise warehouse concerned except in accordance with the provisions of this Act.

(4) (a) No cigarettes in containers bearing the stamp impression referred to in subsection (2), may be entered for removal in bond as contemplated in section 18 for transit through the Republic.

> (b) Any cigarettes in containers bearing such stamp impression so entered for removal in bond shall be liable to forfeiture in accordance with the provisions of this Act.

(As mentioned, the Commissioner does not appear to have exercised the authority conferred on him in terms of s 35A(1)(b) or s 54(1)(b) of the Act.)

[16] The most notable characteristic of Inspector Olkers' letter of 30 May 2011 is that it stopped short of advising that the goods that the applicant wanted released had been seized as forfeit. The effect of the letter was to advise that the goods were to be retained in detention.

[17] After receipt of the letter from Inspector Olkers the applicant filed a notice in terms of s 96(1)(a) of the Act on 11 July 2011. The giving of notice in terms of this provision is a prescribed precondition to the valid institution of litigation against the revenue authority for anything done or arising out of action taken in terms of the Act. SARS requested time to deal with the investigation into the matter.

[18] On 9 September 2011, Mr Olkers wrote again to the applicant's attorney. He referred back to his aforementioned letter of 30 May 2011 and advised that because the invoices and bill of entry supplied could not be reconciled with the cigarettes that had been detained, the cigarettes were being seized in terms of s 88(1)(c) read with s 87 of the Act. The applicant's attorneys' attention was directed to the provisions of ss 89 and 90 of the Act, which deal with the disposal of seized goods and prescribe steps that an affected party must take if it wishes to challenge the seizure or disposal of the goods. It is evident, in my view, that Olkers cannot have been aware when he purported to seize the goods that SARS had received a notice in terms of s 96(1)(a) of the Act and had asked (through one Ms Makhala Moloi, a manager Customs and

Excise: Litigation at SARS) for time to consider its position. That no doubt explains the despatch of a letter by SARS on 16 September 2011, withdrawing the notice of seizure.

[19] By letter dated 6 October 2011, SARS then advised the applicant that it intended to seize the Chicago branded cigarettes that it had detained on 22 September 2010. SARS invited the applicant to provide further information in respect of the other cigarettes. The letter in question read as follows:

> **<u>NOTICE OF INTENTION TO SEIZE –CIGARETTES IN TERMS OF SECTION 88(1)(C) OF THE CUSTOMS AND EXCISE ACT 91 OF 1964</u>**
>
> We refer to our Notice of Detention dated 22 September 2010 and various communications between you, your client and SARS.
>
> Kindly be informed that this office intends to seize the Chicago cigarettes which were detained on the 22 September 2010.
>
> At this stage it is not clear to SARS that any duty has been paid on these goods as we could not reconcile the invoices and bills of entries supplied to the detained goods. This office therefore requests that your client furnishes them with documents in terms of Section 101 and 102 of the Customs and Excise Act in order for them to reconcile the invoices, bills of entries supplied to the detained cigarettes (sic).
>
> As mentioned in previous correspondences (sic) we hold the view that some of the invoices supplied do not to conform to the requirements mentioned in Section 41(2) of the Customs and Excise Act in that the invoice need (sic) to indicate code, description, character or other marks.
>
> Furthermore, the following cigarettes were detained on even date:
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> a) 48 Master cases and 47 Bricks: Mega Blue cigarettes;
> b) 80 Master cases and 48 Bricks: Pacific Blue cigarettes;
> c) 97 Master cases: Chicago cigarettes;
> d) 34 Master cases: Kingdom cigarettes;
> e) 718 Bricks, 67 packets (20's) and 1 packet (10'S): Wild Horse cigarettes;
> f) 41 Master cases: Seville's cigarettes;
> g) 3 Master cases and 46 Bricks: House of Seba cigarettes.
> h) 1 Master case and 22 Bricks: Sunset cigarettes;

i) 24 Bricks and 7 Packets (20'S): Tradition of Seba cigarettes;

j) 5 Bricks and 7 packets (20'S): Boston cigarettes; and

k) 3 Bricks and 6 packets (20's): New York cigarettes;

This office would appreciate if your client can (sic) identify the cigarettes it alleges belongs to them (sic) and provide proof of documentation as requested in paragraph 3 of this letter above.

Your client should also provide this office with the following documents:

- Invoices linked to the detained cigarettes;
- Proof of ownership of the cigarettes;
- Purchase agreements if the cigarettes were bought from someone;
- Bills of entry and any other documentation that might be useful to us

Your client is therefore invited to make representation in regard to any aspect herein before this office can make its final decision to seize.

This office therefore grants your client 14 days from date of this letter within which your client has to supply us with the requested documentation to enable us to make an informed and final decision in this matter.

It is clear from the content of the letter that, unlike the notice given on 9 September 2011, it did not constitute a notice of seizure, merely the giving of notice of an intention to seize. It is furthermore apparent from the content of the letter that the respondent had at that stage not established whether duty had been paid on the cigarettes or not. In my view the letter of 6 October 2011 did not advance matters in any substantive sense from the situation which obtained from the initial detention of the goods. The respondent avers that the letter of 6 October 2011 should have referred to all the detained cigarettes and not just the Chicago cigarettes. In the circumstances I do not consider that anything turns on that.

[20] The applicant contends that the withdrawal of the notice of seizure, dated 9 September 2011, had the effect that SARS had made a determination in respect of the cigarettes on which it was not permitted to go back. The applicant contends that the

withdrawal of the notice of seizure entitles it to the return of the cigarettes. I do not agree with this contention. The reason for the withdrawal of the seizure notice is evident, as explained in the previous paragraph. In terms of s 93(1) of the Act the Commissioner may release detained goods on good cause shown. There was nothing in the aforementioned communications between SARS and the applicant's attorneys that indicated that SARS had completed its investigations in respect of the detained goods and decided to release them. The decision that the applicant would have to show had been made by SARS to release the detained goods has not been established. The applicant's contention thus cannot be sustained.

[21] The alternative contention of the applicant is that SARS's expressed reliance on s 41(2) of the Act in the circumstances is misplaced. The applicant points out, correctly, I think, that SARS has sought to employ s 41(2) of the Act in the circumstances to place an onus on the applicant to prove that the cigarettes in issue were lawfully imported or lawfully manufactured and introduced into the local market in terms of the applicable excise duty provisions of the statute. The applicant contends that s 41(2), properly construed, places no onus on it in that respect because it is not an exporter or manufacturer as referred to in the provision. The respondent, on the other hand, as I understood the argument advanced on his behalf, sought to find support for his officials' reliance on s 41(2) in the approach adopted by the court in *Commissioner, South African Revenue Service v Saleem* 2008 (3) SA 655 (SCA), of which I shall treat presently.

[22] Section 41(2) resorts in chap. V of the Act, which is entitled '*Clearance and Origin of Goods; Liability for and Payment of Duties*'. The chapter comprises of

sections 38 to 54 of the Act. Section 41 is one of the provisions contextually relevant to those provisions in the chapter that regulate the entry of dutiable goods (which covers both goods subject to import and export duty) (s 38); the duty of any person entering such goods to produce documents and pay duties (s 39) – one of the class of documents which such a person is required to produce is '*invoices as prescribed*' (see s 39(1)(c)); the invalidity of entries which have not been in a manner strictly compliant with the requirement of the Act and how errors made in this connection may be corrected (s 40); entry by bill of sight in cases where an importer is able to make a declaration that he cannot, for want of full information, make due entry of any goods (s 42); the disposal of goods on failure of the person responsible to make due entry, or goods imported in contravention of any other law and seized and abandoned goods (s 43); the determination of liability for duty (ss 44 and 44A); the determination of duty applicable and its payment (ss 45, 46A and 47), the determination of origin of goods (s 46) and the prohibition of any dealing in goods which have not been duly entered (s 47A). Apart from s 54, which provides for special provisions regarding the importation of cigarettes, the remainder of chap V is concerned with matters quite unconnected with s 41, such as international tariff and customs agreements and joint one-stop or juxtaposed international land border posts.

[23] It is evident that the relevant bill of entry provisions applicable to importers of dutiable goods apply in an essentially equivalent manner to the removal from a customs and exercise warehouse[7] of locally manufactured goods subject to excise duty (see s 38(4). A prescribed or approved certificate or invoice from the owner of the goods is required.

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[7] In terms of s 19 of the Act

[24] Section 41(1) requires the exporter of any goods imported into or exported from South Africa or the owner of any excisable goods to '*render a true, correct, and sufficient invoice, certificate of value and certificate of origin of such goods in such form and declaring such particulars of such goods as may be prescribed in the rules and as may be necessary to make a valid entry of such goods and shall furnish such additional information in connection with such invoice, certificate, particulars or goods as the Commissioner may, for the purpose of this Act, require at any time: Provided that different requirements may be prescribed in the rules in respect of invoices and certificates relating to goods of different classes or kinds or goods to which different circumstances specified in the rules apply*'. It is clear, in my view, that the particularity which s 41(2) contemplates must appear on the prescribed invoices referred to in the subsection is particularity which must be reflected on the invoice required in terms of s 41(1). It is the invoice that any importer of cigarettes is required in terms of s39(1)(c) of the Act to deliver when delivering the required bill of entry to the Controller, or which any person removing goods from a customs and excise warehouse, as contemplated in terms of s 38(4), must deliver in terms of s 39(2A). The prescribed requirements in respect of such invoices are to be found in the rules made by the Commissioner under the Act. Rule 39.04 provides '*Any invoice or number of invoices presented to the Controller in respect of goods imported into the Republic shall be accompanied by a statement reflecting a summary of all the invoices relating to such goods including the total value of each invoice to which such statement relates, as well as all the charges (including freight, insurance and commission) and full particulars of the marks and numbers of the containers or packages concerned*'.

[25] Rule 41 provides :

Requirements regarding invoices

41.01 Any person entering any goods imported or to be imported shall produce to the Controller at the time of presenting the bill of entry in question an original invoice from the supplier of the goods showing all particulars required in terms of these rules.

41.02 (a) Invoices issued in respect of the sale, disposal, supply or transfer of excisable goods shall be in such form for each class or kind or such goods as the Controller may require.

(b) All invoices in respect of good specified in Section B of Part 2 of Schedule No.1 intended for export or for incorporation in an unused condition in other such goods shall show the duty paid to the Office separately.

(c) If invoices in respect of the sale, disposal, or supply of goods specified in Section B of Part 2 of Schedule No.1 show the duty specified in Section B of Part 2 of Schedule No.1 separately such duty shall represent the exact amount paid to the Office.

41.03 Any person entering any goods for export shall produce to the Controller at the time of presentation of the bill of entry in question, an invoice containing the particulars as the Controller may require.

41.04 An invoice required in terms of the provisions of rule 41.01 shall not be taken as satisfying the requirements of that rule if it does not contain, in addition to any proprietary, or trade name of such goods, a full description of the nature and characteristics of such goods together with such particulars thereof as are required to assess the duty due and to compile trade statistics.

41.05 Any particulars on any invoice in respect of any imported goods shall be in one of the official languages.

[26] Rule 35A.05 makes the provisions of rule 36.04, which pertains to the manufacture of beer, applicable *mutatis mutandis* in respect of any removal of manufactured tobacco ex warehouse. Rule 36.04 provides '*Invoices reflecting the names of the licensee and consignee, quantity, date, trade name, type of packaging and such other particulars as the Controller may require, shall be completed by every*

manufacturer to cover all beer removed from any customs and excise manufacturing warehouse, and copies of such invoices shall at all times be available for inspection by the Controller'.

[27] Counsel did not draw my attention to any other provisions in the rules concerning the prescribed requirements in respect of invoices that might be applicable in the current circumstances. Thus there is nothing in the rules of which I am aware that would derogate from the interpretation that I have given s 41(2) of the Act. It is doubtful anyway whether it would be proper to use the rules to construe the governing provisions of the statute itself.

[28] In *Saleem* supra, the party seeking to recover the goods in issue in that case was accepted to have been a person established as having had '*a beneficial interest in the said stock during the importation thereof*', which I understand to mean that if he was not the importer he was nevertheless closely connected to the process of importing the goods; see *Saleem* at para. 11. One can readily understand in that context why the court considered that the party concerned should have been in a position to furnish the officers who had detained the goods with the documentation establishing that the imported goods involved were the subject of a valid bill of entry – the party would in any event qualify as the '*importer*' within the meaning of the Act, see paragraph (e) of the definition of importer in s 1 of the Act.

[29] The position in the current matter is materially distinguishable on the facts from that which obtained in *Saleem*. In the current matter there is no suggestion that the applicant qualifies as the importer or the manufacturer of the cigarettes it seeks to

have released, or that it had a '*beneficial interest*'[8] in them at the time of their importation or manufacture.

[30] Section 41(2) does not require someone in the position of the applicant to be in possession of a prescribed invoice of the nature contemplated in terms of the relevant provisions of chap. V of the Act. I have therefore concluded that the respondent's reliance on s 41(2) is indeed misplaced.

[31] That is not to say, however, that the applicant was not under any obligation in respect of the investigation into the regularity of the detained goods to which it lays claim. As pointed out by Combrinck JA in *Saleem*, at para. 10, ss 101 and 102(1) of the Act have relevance. Section 101 requires any person carrying on business in the Republic to keep such books, accounts and documents relating to his transactions as the Commissioner may prescribe by rule and to retain them in possession for such period as may be prescribed by rule. These documents must be produced to the Controller or the Commissioner upon demand. In related vein s 102(1) of the Act places a duty on anyone selling or dealing in imported or excisable goods to produce on request by an officer proof as to the person from the goods were obtained '*and if he is the importer or manufacturer or owner, as to the place where the duty thereon was paid, the date of payment, the particulars of entry for home consumption and the marks and numbers of the cases, packages, bales and other articles concerned, which marks and numbers shall correspond to the documents produced in proof of the payment of the duty*'.

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[8] For the significance of the expression 'beneficial interest' see para. (e) of the definitions of 'exporter' and 'importer', respectively, in s 1 of the Act.

[32] The applicant indicated to the respondent whence it obtained the cigarettes. The respondent's counsel submitted that was not enough. Counsel argued that the applicant was an 'owner' within the meaning of s 102(1) and had failed to furnish the particulars required in terms thereof. I do not think that the word '*owner*' in the context in question has an unrestricted meaning. This is apparent when the provision is considered in the context of the Act as a whole. The provision places an obligation not on any dealer in imported or excisable goods, only on those who are the importers or manufacturers or owners of the goods in question. Importers are the persons responsible for the payment of duty on imported goods (see s 39(1)(b) of the Act) and manufacturers are liable for the payment of excise duties. Section 44(8) provides: '*The manufacturer, owner, seller or purchaser of any excisable goods or fuel levy goods shall, subject to the provisions of Chapter VII, be liable for the duty on such goods, and his liability shall continue until such goods have been duly entered and the duty due thereon paid*' and s 44(8A) provides : '*Notwithstanding anything to the contrary in this Act contained, any person who owns, purchases, removes, receives, takes, delivers or deals with or in any imported goods or excisable goods which should have been duly entered in any other Member State of SACU, shall be liable for the duty on such goods brought into the Republic from such State, and if the question arises whether such goods have been duly entered, it shall be presumed, unless the contrary is proved, that such goods have not been so entered, and such goods shall be subject to the provisions of this Act as if they were goods which have, contrary to the provisions of subsection 47A (1), not been duly entered in the Republic*'.[9] It is plain, in my view, that an '*owner*' in this context is a person who owns the goods when duty

[9] See also s 38(4)(a) of the Act in respect of the removal of excisable goods from a customs and excise warehouse upon the issue by the owner of a prescribed invoice or certificate.

on them originally became payable. The liability of such owners continues until the duty is paid. It is not a liability that falls upon any person to whom they may subsequently transfer the goods; for such persons would not have any original liability which would be susceptible to 'continuation'. The provisions of s 102(1), and in particular the word '*owner*' therein, fall to be understood in this context. Regard to the context makes for a sensible understanding of the grouping within s 102(1) of an 'owner' together with an 'importer' or 'manufacturer' for each of them in the relevant sense is a person originally liable for the payment of the duty. By contrast, to construe the provision as the respondent's counsel would have it would place an extraordinary and inexplicably onerous burden on persons who had no connection with the importation or manufacture of the goods and no obligation to have ensured payment of the duty, or to present a prescribed invoice. Such an unreasonable object is unlikely to have to be intended, which militates against the construction that the respondent would seek to ascribe to the provision. A further reason for holding against the respondent's construction is that its constitutional sustainability, assessed in the context of the fundamental rights conferred in terms of s 33(1) of the Constitution, is doubtful, to say the least.

[33] In the result I have concluded that the approach of the respondent which has been to maintain that there is an onus on the applicant to prove that duty has been paid on the cigarettes and that they have been lawfully entered for consumption in South Africa is misplaced. The respondent's counsel's emphatic reliance in that regard on paragraph 13 of the judgment in *Saleem* supra, where Combrinck JA, writing for a unanimous court, stated '*I therefore take issue with the judge in the court below that* [the officer in the employ of the Commissioner] *had to do more by way of*

investigation than wait for documentary proof from respondent in order to establish that the goods were illegally imported. I also cannot agree that there was an obligation on [the officer in the employ of the Commissioner] *to accompany respondent to his suppliers. As stated earlier, respondent was under a statutory duty to maintain books of account and documents to reflect from whom the goods were purchased. These provisions, I suggest, were introduced in the Act for the very purpose of facilitating the policing of the importation of goods into the country. The respondent's inability to produce any such documents together with the suspicious conduct recorded above, were in my view sufficient grounds for* [the officer in the employ of the Commissioner] *to reasonably conclude that the goods were liable to forfeiture. He was therefore entitled to seize them*', is also misplaced. As observed earlier, the submission overlooks the materially distinguishing features of the two cases. In *Saleem* the person expected to provide the relevant information was plainly 'the owner' or 'importer' of the goods, within the meaning of s 102(1); the applicant, as I have found, was not. Paragraph 13 of the judgment in *Saleem* falls to be understood in that context.

[34] It is necessary next to consider respondent's counsel's reliance on the onus provisions of s 102(4) of the Act. They read as follows:

> If in any prosecution under this Act or in any dispute in which the State, the Minister or the Commissioner or any officer is a party, the question arises whether the proper duty has been paid or whether any goods or plant have been lawfully used, imported, exported, manufactured, removed or otherwise dealt with or in, or whether any books, accounts, documents, forms or invoices required by rule to be completed and kept, exist or have been duly completed and kept or have been furnished to any officer, it shall be presumed that such duty has not been paid or that such goods or plant have not been lawfully used, imported, exported, manufactured, removed or otherwise dealt with or in, or that such books, accounts,

> documents, forms or invoices do not exist or have not been duly completed and kept or have not been so furnished, as the case may be, unless the contrary is proved.

[35] Whether the respondent can rely on s 102(4) depends on whether the current proceedings can properly be characterised as a dispute between the applicant and the respondent in which the question has arisen whether the proper duty has been paid or whether any of the other matters mentioned in the provision have been done. The current proceedings raise the question whether it is reasonable for the respondent to continue to hold the detained goods.

[36] I do not consider that s 102(4) is of application in respect of the question in issue in this case. It seems clear that the goods are in detention because the respondent considers that the applicant has failed to produce documentation proving that the imported goods were duly entered and import duty paid thereon. As I have sought to explain, the respondent's approach to the detention of the goods has been premised on a misdirected understanding of the extent of the obligations on the respondent under the Act in the particular circumstances. It was for the respondent, not the applicant, to establish within a reasonable period whether the goods were liable to seizure; in other words, whether they were goods that had been irregularly dealt with within the meaning of s 87(1), and, if they were, to seize them. The onus in terms of s 102(4) does not arise where it is evident that that the respondent has not confirmed what he had only reasonably to suspect in order to detain the goods. Section 88 read with s 87 of the Act places the onus on the respondent to establish that detained goods are indeed susceptible to forfeiture. Answering the question whether the detention of the goods has endured longer than reasonably necessary for the

respondent to establish that the goods are liable to forfeiture does not require a determination as to whether or not the duty has been paid.

[37] In all the circumstances it is clear that the respondent's dealing with the duty upon it to establish whether the detained cigarettes had been irregularly dealt with in terms of the Act proceeded on a misconception of the applicable provisions of the statute. A reasonable period to establish whether the goods were irregularly dealt with posits an efficiently active approach to the required investigation by the respondent. It is apparent from the evidence that this has either not occurred, alternatively if it did occur (which as I say is not apparent) it has not given a conclusive result. There is nothing to show that the Chicago cigarettes were dealt with irregularly. They appear to have been locally manufactured by the Gold Leaf Tobacco Company and there is nothing to show that the manufacturer has fallen foul of its relevant obligations in respect of the payment of excise duty. With regard to the imported brands of cigarettes the respondent's investigations seem to have been impeded by the absence of batch or code numbers by which the particular cigarettes in issue might be linked to prescribed invoices delivered together with the pertinent bills of entry. The respondent's counsel were unable, however, to direct my attention to any provision in terms of the Act or the rules which requires containers of cigarettes to be identifiable by such particulars. I have concluded that the respondent has had a reasonable period within which to establish that the goods in question were dealt with irregularly and that in the circumstances its failure to do so, alternatively, having established that some of them were so dealt with, to seize them, entitles the applicant to an order for their release from detention.

[38] I should mention that each party contended that various passages in affidavits in the papers of the other should be struck out. I have not found it necessary to address that issue, save with regard to the application to strike out the respondent's fourth set of affidavits. It was not necessary to rely on the contentious material to decide the case. Accordingly, neither party has been prejudiced by it. The respondent filed a fourth set of affidavits in the matter. The applicant had consented to this, apparently without knowledge of what the content thereof would be. The applicant, as also agreed between the parties, was given a consequent opportunity to respond to the fourth set, which it did. The fourth set of affidavits concerned various investigations undertaken by the respondent's officer, De Villiers, during mid 2012, into the applicant's income tax and value added tax compliance. These are not matters centrally germane to the current case. The only relevant point sought to be made in the fourth set was to contest the applicant's assertion of ownership in the subject goods. On the basis of answers to interrogatories addressed by De Villiers to the sole member of the applicant close corporation, the respondent argued that the applicant was not the owner thereof. These allegations were denied in the fifth set of affidavits. The conclusion contended for by the respondent in the fourth set of affidavits is argumentative. It is founded on the respondent's construction of ambiguous material. I do not consider that the further paper took the case anywhere. Even if the applicant were accepted not to be the owner, it is clear on any interpretation of the answers to De Villiers' interrogatories that it would receive a dividend upon the sale of the impounded cigarettes and that it thus has a sufficiently beneficial interest in the goods to have standing to seek their release.

[39] In the result the following order is made:

1. The respondent is directed to release to the applicant the following goods included in the inventory, dated 22 September 2010, a copy of which was annexed as annexure NHR4 to the applicant's founding affidavit:

   1.1 48 master cases of Mega Blue 20's cigarettes;

   1.2 47 bricks of Mega Blue 20's cigarettes;

   1.3 97 master cases of Chicago 20's cigarettes;

   1.4 34 master cases of Kingdom 20's cigarettes;

   1.5 41 master cases of Seville 20's cigarettes.

2. The respondent shall be liable to pay the applicant's costs of suit.

A.G. BINNS-WARD
Judge of the High Court