Reportable
483/99

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between

CAPRI ORO (PTY) LIMITED	**First Appellant**
DAVID MAZOR	**Second Appellant**
PENTAGOLD SRL	**Third Appellant**
and	
THE COMMISSIONER OF CUSTOMS & EXCISE	**First Respondent**
THE MINISTER OF FINANCE	**Second Respondent**
THE CONTROLLER OF CUSTOMS AND EXCISE AT JOHANNESBURG INTERNATIONAL AIRPORT	**Third Respondent**

Court : **HARMS, STREICHER, MPATI JJA; CONRADIE AND CLOETE AJJA**

Date of hearing : **30 AUGUST 2001**

Date of delivery : **7 SEPTEMBER 2001**

SUMMARY

Goods brought into South Africa and not declared as required by s. 15(1) of the Customs and Excise Act 91 of 1964 are liable to forfeiture in terms of s. 87(1). An intention subsequently to remove the goods to another country is irrelevant to the operation of ss. 87(1) and 15(1).

J U D G M E N T

CLOETE AJA

INTRODUCTION

[1] This appeal concerns primarily the circumstances under which goods brought by a person into South Africa when he enters the country may be seized and are liable to forfeiture under the Customs and Excise Act, no 91 of 1964 ('the Act') even where an offence under the Act has not been alleged.

[2] The relief sought by the appellants, as plaintiffs, in the court below was refused by MacArthur J in a judgment which has been reported: 1998(3) SA 571(T). The appellants appeal with the leave of that court.

CONDONATION

[3] There is a formal application for condonation for the late delivery of the notices of appeal. Those notices and new notices delivered the day before the matter was argued still did not comply with rule 7(3)(b) of this Court. A further oral application for condonation was made from the bar. I shall assume, without deciding the point, that such a procedure is competent. The essential question is then whether the appellants have a reasonable prospect of success on appeal.

ISSUES

[4] The relevant facts appear from the judgment of the court below (at 572E-573H and 574G-575C) and need not be repeated in detail. In essence the appellants' version which (so far as it relates to the events at the Johannesburg Airport) may be accepted for the purposes of this appeal, despite its shortcomings, is the following. The second appellant arrived from overseas at the Johannesburg Airport. He had with him hand luggage containing 77 kg of jewellery which was the property of the third appellant. His intention was to fly to Namibia later the same day to offer the jewellery for sale to one Cohen, who would be responsible for clearing it through customs. Because there was a three-and-a-half hour delay between the time of his arrival and the departure of the flight to Namibia, he had arranged to meet his father at the airport. He obtained permission from an official at passport control to leave the transit area for that purpose. He went through the green 'nothing to declare' channel and once past the customs point, he was promptly detained by the police, who seized the jewellery. The following day a further quantity of jewellery was seized at the premises of the first appellant, the second appellant's employer.

[5] The primary question on the merits is whether the learned trial judge was correct in finding that the jewellery which was seized at the Johannesburg Airport in terms of the provisions of section 88(1) of the Act, was liable to forfeiture in terms of the provisions of section 87(1) read with section 15(1) of the Act. (In view of the conclusion reached in this judgment, it is not necessary to consider whether the provisions of section 81 provide a further defence to the appellants' claims.) Subsidiary questions raised are whether (as found by the court below) the respondents returned all of the additional jewellery seized from the premises of the first appellant and the appropriateness of the costs order made by the trial court.

JEWELLERY SEIZED AT THE AIRPORT

[6] The provisions of the Act relevant for present purposes read as follows:

> **'1. Definitions.** – (1)
> **"Commissioner"** means the Commissioner for Customs and Excise ... [a new definition was substituted by section 34(1) of Act 34 of 1997];
> **"Controller",** in relation to any area or any matter, means the officer designated by the Commissioner to be the Controller of Customs and Excise in respect of that area or matter and includes an officer acting under the control or direction of any officer so designated by the Commissioner;
> **"Goods"** includes all wares, articles, merchandise, animals, currency, matter or things;
> **"Officer"** means a person employed on any duty relating to customs and excise by order or with the concurrence of the Commissioner, whether such order has been given or such concurrence has been expressed before or after the performance of the said duty.

15. Persons entering or leaving the Republic and smugglers.-(1) Any person entering ... the Republic shall, in such a manner as the Commissioner may determine, unreservedly declare-

(a) at the time of such entering, all goods (including good of another person) upon his person or in his possession which he brought with him into the Republic which-

(i) were purchased or otherwise acquired abroad or on any ship, vehicle or in any shop selling goods on which duty has not been paid;

(ii) were remodelled, processed or repaired abroad; or

(iii) are prohibited, restricted or controlled under any law;

(b) ...

and shall furnish an officer with full particulars thereof, answer fully and truthfully all questions put to him by such officer and, if required by such officer to do so, produce and open such goods for inspection by the said officer, and shall pay the duty assessed by such officer, if any, to the Controller.

87. **Goods irregularly dealt with liable to forfeiture.**-(1) Any 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 ... or any plant used contrary to the provisions of this Act in the manufacture of any goods shall be liable to forfeiture wheresoever and in possession of whomsoever found: Provided that forfeiture shall not affect liability to any other penalty or punishment which has been incurred under this Act or any other law, or entitle any person to a refund of any duty or charge paid in respect of such goods.

88. Seizure.-(1) (a) An officer, magistrate or member of the police force may detain any ... goods at any place for the purpose of establishing whether [those] ... goods are liable to forfeiture under this Act.

89. Notice of claim by owner in respect of seized goods.-(1) Any ... goods which have been seized under this Act, shall be deemed to be condemned and forfeited and may be disposed of in terms of section 90 unless the person from whom such ... goods have been seized or the owner thereof or his authorized agent gives notice in writing, within one month after the date of the seizure, to the person seizing or to the Commissioner or to the Controller in the area where the seizure was made, that he claims or intends to claim the said ... goods under the provisions of this section.

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93. Remission or mitigation of penalties and forfeiture.- The Commissioner may direct that any ... goods detained or seized or forfeited under this Act be delivered to the owner thereof, subject to payment of any duty which may be payable in respect thereof and any charges which may have been incurred in connection with the detention or seizure or forfeiture, and to such conditions (including conditions providing for the payment of an amount equal to the value for duty purposes of such ... goods plus any unpaid duty thereon) as he deems fit,

> or may mitigate or remit any penalty incurred under this Act, on such conditions as he deems fit: Provided that if the owner accepts such conditions, he shall not thereafter be entitled to institute or maintain any action for damages on account of the detention, seizure or forfeiture.'

[7] The three respondents, who were the defendants in the court below, are respectively the Commissioner, the Minister of Finance and the Controller at the Johannesburg Airport.

[8] At the pre-trial conference counsel representing the respondents asked the following question: 'Is it the Plaintiffs' case that at the time when the jewellery was brought into the Republic of South Africa, any of the Plaintiffs unreservedly declared the jewellery in terms of Section 15(1) of the Customs and Excise Act 91 of 1964?' and the appellants replied with an unqualified 'no'.

[9] The learned trial judge said (at 576H-J) that the second appellant had 'contravened' section 15(1) of the Act. The appellants seized on this word and submitted that the trial judge had erred in that far from establishing the commission of a criminal offence - a *sine qua non,* so it was submitted, for the operation of section 87(1) - the evidence suggested the contrary. But it is quite apparent, if regard is had to the judgment of the trial court as a whole and particularly to the statement (at 577D) that: '[T]he goods become liable to forfeiture once a prohibited act has been committed', that the trial court did not find that the second respondent had committed a criminal offence

under the Act. Nor is it necessary for this Court to consider whether he did. In section 87(1) the phrase 'in respect of which any offence under this Act has been committed' is introduced by the conjunction 'or' and is quite clearly additional to, and distinct from, the preceding provisions, namely 'imported, exported, manufactured, warehoused, removed or otherwise dealt with contrary to the provisions this Act'. The phrase 'contrary to the provisions of this Act' cannot be interpreted as congruent with the phrase 'in respect of which any offence under this Act has been committed' as the one or the other phrase would then be tautologous. The conclusion is inescapable that an offence under the Act is sufficient, but not necessary, to render the goods liable to forfeiture under section 87(1).

[10] Assuming that no offence was committed by the second appellant in the present matter, the decision of this Court in *Secretary for Customs and Excise and Another v Tiffany's Jewellers Pty (Ltd)* 1975(3) SA 578(A) is indeed, as was submitted on behalf of the appellants, distinguishable. But the distinction does not avail the appellants if there was non-compliance with section 15(1) – the question I now turn to consider.

[11] It was submitted on behalf of the appellants that the trial court had erred in finding that the second appellant had entered South Africa without unreservedly declaring the jewellery:

(i) in the absence of evidence as to what the Commissioner had determined should be the 'manner' of the declaration;

(ii) when the evidence did not establish whether the second appellant had been asked to declare anything;

(iii) where the second appellant did make a declaration to officers of the South African Police Services;

(iv) when the second appellant did not leave the airport and in particular, the precincts of the international section; and

(v) where the second appellant intended to take the goods to Namibia.

[12] The first three arguments cannot be maintained in view of the concession made at the pre-trial conference which I have quoted in paragraph [8] above. In any event the *onus* was on the second appellant to make the declaration. He did not. He passed through the green 'nothing to declare' channel and a 'declaration' made by a person who has been apprehended by the police after he has passed the customs point, obviously does not constitute compliance with section 15(1). The fact (much stressed in oral argument) that the second appellant asked a passport control officer whether he might leave the transit area to meet with his father and then return to fly to Namibia, does not avail the appellants: the second appellant did not indicate to the official concerned (who was in any event not a

customs officer) that he intended taking the jewellery with him outside the transit area.

[13] The fourth argument is equally without merit. The second appellant clearly entered the Republic with the goods in his possession. The decision in *Tieber v Commissioner for Customs and Excise* 1992(4) SA 844(A), relied upon by the third appellant, is distinguishable for the reasons given by the learned trial judge (at 576E-F) namely, that in the *Tieber* matter the goods had remained in the transit area. This Court held at 850H-I:

> 'The submission is that when the appellant left the transit area he was "in possession" of the gold and was obliged to declare it. Again, I do not agree. The only purposes of declaring goods are:
> (a) to enable the customs officer to determine whether duty is payable; and
> (b) to prevent prohibited or restricted goods being brought into the country.
>
> Goods in transit do not fall into either of those two categories.'

That reasoning is not applicable where goods leave the transit area and are brought into South Africa and it is idle to argue, as counsel representing the third appellant did (I quote from the heads of argument): '[F]or practical purposes the jewellery remained in the international section analogous to the same situation as if it remained in the transit area'. The distinction between the two situations is both patent and fundamental.

[14] The fifth argument on this part of the case relates to the intention of the second appellant to remove the goods to Namibia. It was this question which prompted the learned trial judge to grant leave to appeal. I do not

consider that there is any merit in the point. The crucial fact is that the goods were brought into South Africa by the second appellant, who intended to do so. Reliance was nevertheless placed by the appellants on the decision in *Beckett & Co Ltd v Union Government (Minister of Finance)* 1919 TS 6 and on a passage in the *Tieber* case at 848H-849B.

[15] In *Beckett's* case a cargo of flour intended for Delagoa Bay was landed in Durban because it could not be shipped directly to its destination. The Collector of Customs was requested to keep the flour in bond. He refused, contending that the flour must be regarded as an import and accordingly subject to the Wheat Conservation Act. Bristowe J disagreed and upheld the argument that 'imports' under that Act only applies to goods intended for use in the country.

[16] In the passage relied on in the *Tieber* case, *loc. cit.*, this Court held:

> 'The first question is whether the gold was imported by the appellant into the Republic. Section 1 of the Act is the definition section. A number of words and expressions are defined there; not, however, the word "import". "Importer" is defined but not in a manner which gives an indication of any particular meaning to be attributed to "import". In *Beckett & Co Ltd v Union Government (Minister of Finance)* 1919 TPD 6 at 8 Bristowe J pointed out that in its derivative sense an "import" means "any goods which are actually landed in the country". The question is whether it has that meaning for the purposes of the Act. In the *Beckett* case, for instance, the goods concerned, although *prima facie* imported, were landed for the purpose of immediate reshipment to another country and were therefore held not to have been imported within the meaning of the legislation in issue there.
> If one has regard to the scheme of the Act, it appears clearly that its main purpose is to ensure that customs and excise duties are paid on all goods which are <u>brought into</u> the Republic other than goods only in transit, ie goods which are landed in this country but destined for conveyance to another country. For that

> reason, one sees in s 18 that elaborate provision is made for the removal of goods in bond'.
> (Emphasis supplied.)

[17] It is fallacious to argue as the appellants' counsel did that, because the jewellery was intended for Namibia and would have been transported to Namibia, it was not 'imported' and that section 87(1) is therefore not applicable. Section 87(1) is not confined to goods which are 'imported'; it includes, in terms, the situation where goods are 'otherwise dealt with' contrary to the provisions of the Act. One of those provisions is section 15(1). The position under that section is that whether or not goods in the possession of a person entering the Republic as the second respondent did are, in the long or the short term, intended by him to be removed to another country, they have to be declared when they are brought into South Africa if they fall within one of the categories specified in section 15(1)(a). Given the purpose behind section 15(1) as stated in the *Tieber* case in the passage quoted in paragraph [13] above, it is evident that the final destination of the goods is irrelevant: the necessity for the declaration is triggered by the nature of the goods and the fact that they are brought into South Africa as opposed to remaining in transit or in bond.

[18] Additional and separate submissions were made by each of the counsel representing the appellants.

[19] It was submitted on behalf of the first and second appellants that the trial court erred in finding (at 577D-E) that it had no discretion to direct that the goods be returned. Reliance was sought to be placed on *Deacon v Controller of Customs & Excise* 1999 (2) SA 905 (SE). But in that matter the applicant attacked the Commissioner's exercise of the power conferred on him by section 93 (see eg 914C-H and 923A-924G). In the present matter the appellants did not attempt to make out such a case. It appears necessary to state the obvious: there is a fundamental distinction between a case that a seizure of goods took place in circumstances not sanctioned by the Act; and a case which accepts that goods were legitimately seized, but seeks to impugn the exercise of the discretion vested in the officials mentioned in section 88, or the Commissioner by section 93. In the *Tiffany's Jewellers* case this Court (at 587B-C) quoted the following passage in *Vincent and Pullar Ltd v Commissioner for Customs and Excise* 1956 (1) SA 51(N) and (at 587 in fine) expressly approved it:

> '... [T]he only ground upon which the Court could declare a seizure as invalid, would be if it were made illegally. The Court has no discretion in regard to the question as to whether or not the breach of the Customs regulations was one which was so serious as to justify a seizure and forfeiture. The discretion on those questions is clearly vested in the Commissioner under sec. 143'.

The section 143 to which reference was made corresponds to section 88 of the Act; and the same reasoning applies to section 93.

[20] It was submitted on behalf of the third appellant that the learned trial judge erred in finding that the knowledge or intention of the owner of the goods, *in casu* the third appellant, is irrelevant to the operation of section 87(1). The answer to this argument is to be found in the following passage in the *Tiffany's Jewellers* case at 587G-*in fine:*

> 'The wording in sec. 87(1) indicates that the goods become liable to forfeiture, wherever they may be, if the prohibited or irregular acts have been committed, no matter who commits them, whereas in the other sections it is the act of the individual who commits the offence in relation to particular goods which causes those goods to be liable to forfeiture. This means that under sec. 87(1) ... it matters not whether the owner exported or attempted to export the goods in contravention of the law. No doubt, if circumstances exist which show that the true owner is innocent, eg where a thief seeks to export stolen goods, the Secretary [now the Commissioner] will exercise his discretion in terms of sec. 93. Hence, for the purposes of this case, even assuming Tiffany's [the owner of the goods, which comprised diamonds] was in no way party to the wrongful conduct of Favarolo [who committed an offence under the Act in respect of the diamonds], the diamonds were liable to forfeiture.'

The same reasoning applies to goods brought into the Republic.

[21] The trial court was therefore correct in interpreting and applying sections 87(1) and 15(1) of the Act and there is accordingly no prospect of success on appeal in respect of the jewellery seized at the Johannesburg airport.

JEWELLERY SEIZED AT FIRST APPELLANT'S BUSINESS PREMISES

[22] Counsel representing the first and second appellants submitted that not all of the jewellery seized at the first appellant's business premises was returned. There is no merit in this contention for the reasons given by the learned trial judge (at 574G-575B) which it is not necessary to repeat.

COSTS

[23] The final submission made by counsel representing the first and second appellants was that the trial court should have made a different order as to costs for reasons it is not necessary to traverse. It suffices to say that the argument was without merit.

[24] The merits of the appeal were argued in the context of the applications for condonation. It would accordingly be appropriate for the appellants to pay the costs of the appeal as well as the costs of those applications.

ORDER

[25] The following order is made:

1. The applications for condonation for the late delivery of the notices of appeal and the failure to deliver notices of appeal in proper form, are dismissed.

2. The appellants are directed, jointly and severally, to pay the costs of the applications for condonation and the costs occasioned by the appeal.

.....
TD CLOETE
ACTING JUDGE OF APPEAL

CONCUR

HARMS JA

STREICHER JA

MPATI JA

CONRADIE AJA