



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

**Reportable**

Case No: 751/21

In the matter between:

**COMMISSIONER FOR THE SOUTH  
AFRICAN REVENUE SERVICE  
MINISTER FOR TRADE, INDUSTRY  
AND COMPETITION  
SOUTH AFRICAN APPAREL  
ASSOCIATION  
APPAREL AND TEXTILE ASSOCIATION  
OF SOUTH AFRICA  
SOUTHERN AFRICAN CLOTHING AND  
TEXTILE WORKERS UNION**

**FIRST APPELLANT**

**SECOND APPELLANT**

**THIRD APPELLANT**

**FOURTH APPELLANT**

**FIFTH APPELLANT**

and

**DRAGON FREIGHT (PTY) LTD**

**FIRST RESPONDENT**

**TIAN LE TRADING ENTERPRISE CC**

**SECOND RESPONDENT**

**NEW FEELING FASHION DESIGN (PTY) LTD**

**THIRD RESPONDENT**

**TINGTING SECRET BEAUTY (PTY) LTD**

**FOURTH RESPONDENT**

**HIQ PACIFIC TRADING CC**

**FIFTH RESPONDENT**

**FFB IMPORT-EXPORT CC**

**SIXTH RESPONDENT**

**CALLA TRADING (PTY) LTD**

**SEVENTH RESPONDENT**

**Neutral citation:** *The Commissioner for the South African Revenue Service and Others v Dragon Freight (Pty) Ltd and Others* (case no 751/21) [2022] ZASCA 84 (7 June 2022)

**Coram:** SCHIPPERS, PLASKET and HUGHES JJA and TSOKA and SALIE-HLOPHE AJJA

**Heard:** 24 May 2022

**Delivered:** 7 June 2022

**Summary:** Administrative Law – review of decision to seize goods under s 88(1)(c) of the Customs and Excise Act 91 of 1964 (the Act) – transaction value of goods under-declared – decision lawful, reasonable and procedurally fair – interpretation of s 96(1)(a) of the Act – notice of legal proceedings – requirements peremptory – cause of action must be set out – notice in anticipation of decision not yet taken invalid.

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## ORDER

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**On appeal from:** Gauteng Division of the High Court, Pretoria (Baqwa J sitting as court of first instance):

- 1 The application for intervention by the Southern African Textile and Clothing Workers' Union is struck from the roll with costs. Such costs shall include the costs of only one junior counsel.
- 2 The appeal is upheld with costs, including the costs of two counsel where so employed. Such costs shall be paid by the respondents jointly and severally, the one paying the others to be absolved.
- 3 The order of the high court is set aside and replaced by the following:  
  
'The application is dismissed. The applicants are directed to pay the costs of the application, including the costs of two counsel where so employed, jointly and severally, the one paying the others to be absolved.'

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## JUDGMENT

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### **Schippers JA (Plasket and Hughes JJA and Tsoka and Salie-Hlophe AJJA concurring)**

[1] The main issue in this appeal concerns the lawfulness of a decision taken by the first appellant, the Commissioner for the South African Revenue Service (the Commissioner, or SARS), to seize 19 containers of clothing (the goods), in terms of section 88(1)(c) of the Customs and Excise Act 91 of 1964 (the Act).<sup>1</sup> The goods were seized on the basis that the respondents had under-declared their transaction value – the price actually paid for the goods when sold for export to this country – which enabled the respondents to pay less customs duty than they were lawfully required to pay. A related issue is whether the respondents complied with s 96(1) of the Act which proscribes the institution of legal proceedings against the Commissioner, unless the litigant delivers a written notice setting out its cause of action at least one month before instituting those proceedings. The appeal is before us with the leave of this Court.

[2] The second appellant, the Minister of Trade, Industry and Competition (the Minister), intervened in an application by the respondents to review and set aside the decision by SARS on 13 August 2020, to seize the goods in terms of s 88(1)(c) of the Act (the impugned decision). The basic ground for the Minister's intervention is that customs fraud, particularly in relation to clothing imported from China, is a systemic problem in South Africa. This problem is illustrated in the Minister's affidavit: in 2018 the value of the exports of textiles and clothing goods from China to South Africa, as reported by the General Administration of

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<sup>1</sup> Section 88(1)(c) states that if goods are liable to forfeiture under the Act, the Commissioner may seize those goods.

Customs of the People's Republic of China (GACC) to the United Nations, was US\$ 2.4 billion, whereas the value of the imports of textiles and clothing goods into South Africa from China, as reported by SARS to the United Nations, was US\$1.5 billion – a difference of US\$900 million, even though the two values should be substantially the same. Customs fraud has significantly contributed to the displacement of locally manufactured goods which has resulted in the loss of domestic production, market share, sales, profits and jobs.

[3] The third appellant, the South African Apparel Association (SAAA), and the fourth appellant, the Apparel and Textile Association of South Africa (ATASA), are employers' organisations registered under the Labour Relations Act 66 of 1995. They represent the labour interests of a large number of employers in South Africa in the clothing and textiles industry. They opposed the review application on the ground that the values or prices of the goods declared by the respondents on importation – some 1000% less than the prices of similar clothing declared to the GACC in a previous consignment imported by the respondents from the same suppliers – are unrealistic and unattainable.

[4] The first respondent, Dragon Freight (Pty) Ltd (Dragon Freight), is a clearing agent. The second to seventh respondents imported the goods from China. Where appropriate, they are collectively referred to as 'the respondents'.

[5] The impugned decision was reviewed and set aside by Baqwa J in the Gauteng Division of the High Court, Pretoria (the high court). The court directed SARS to immediately release the goods upon payment of the applicable customs duties and fees, calculated in accordance with the respondents' declared transaction values to SARS. The appellants were ordered to pay the costs of the application, jointly and severally.

## **The factual background**

[6] This litigation has its origin in an earlier application which the respondents launched in the high court in November 2019, in which they successfully reviewed and set aside SARS' decision to seize 11 containers of clothing (the first application). In that application, which was decided by Tuchten J, the respondents pre-emptively sought an order to review and set aside a decision by SARS to seize the goods, in the event of that decision being taken. However, they did not persist in seeking that order because it concerned, as they put it, 'future importations and the containers were still on the water'.

[7] It is not in dispute that the contents of the containers in the first application were the same as the contents of the 19 containers in the present case, namely clothing and textile goods imported from China, and that both consignments involved the same exporters and importers. The answering papers in the first application stated that SARS had approached the Chinese customs authorities for assistance concerning the clothing exported in that application. Tuchten J recorded in his judgment that when the first application was decided, the Chinese export authorities had not responded to the request for information, and that SARS might still be able to produce evidence to contradict the respondents' version.

[8] In order to counter customs fraud and other illegal activities, SARS uses a customs electronic system with built-in risk and identification analysis capabilities. This system utilises information furnished in, amongst others, customs declarations to identify potential risks. For example, the system compares the declared value of a product with the international price of the yarn used to produce the constituent materials of that product. A declared customs value lower than the risk price will automatically flag the consignment on the SARS system for further investigation. The 19 containers were so flagged and

consequently detained under s 88(1)(a) of the Act, between 4 November and 20 December 2019.

[9] The goods were detained by SARS because it suspected that the respondents had under-declared their value. SARS proceeded to investigate and engage with the respondents in order to determine whether the goods were liable to seizure. They were requested to complete SARS' standard Trader Questionnaire – a request for information in terms of s 4 of the Act. The respondents were asked to furnish the following information:

- '8. How did the importer source this foreign supplier and establish a trading relationship?
- 9. Trips abroad to negotiate trade must be substantiated with a copy of the importers/buyers passport showing all his trips overseas to meet with the suppliers. Copies of all correspondence with the foreign supplier in terms of negotiating the price, quality and terms and conditions of sale must be presented.'

[10] The respondents did not answer questions 8 and 9. They simply replied that the importer acquired suppliers during his trips abroad and that they were unable to obtain a copy of passport evidence at the time. This failure to respond must be seen in the light of further allegations in the founding papers that employees of the importers obtained clothing at reduced prices from factories in China which were closing down and trying to get rid of stock; that they bought 'old' stock (clothing out of season); and that they also bought clothing, at substantially reduced prices, from manufacturers and sellers whose orders had been cancelled at the last minute.

[11] The respondents never provided any passport evidence of the trips to China to purchase the goods. When questioned on this issue, they conceded that the goods were sourced from only three suppliers that were named in the sale agreements. This concession contradicted the respondents' initial explanation

that their employees had bought the goods at various markets in China at very low prices.

[12] On 21 January 2020 and in terms of a customs mutual assistance agreement, the GACC, provided SARS with the Chinese export declarations submitted to the GACC in relation to eight of the 11 containers in the first application (the export declarations). These declarations showed that the invoice prices furnished by the respondents to SARS were impossibly low – the prices stated in the export declarations were 1000% more than the prices declared to SARS. It was not disputed that the export declarations relate to eight containers that formed the subject matter of the first application.

[13] On 24 February 2020 the respondents launched an application in the high court to review and set aside SARS' decision to detain the 19 containers, and that it be ordered to release the goods. They also sought an order that the one-month period specified in s 96(1)(a)(i) of the Act be reduced so as to render the application compliant with that provision, alternatively that non-compliance with the time period be condoned.

[14] On 6 March 2020 the export declarations were furnished to the respondents as attachments to notices of intent in relation to the containers in the first application. The respondents were informed that SARS intended to hold them liable for underpaid customs duty and VAT, to declare the goods liable to forfeiture under s 87 of the Act, and to impose an amount in lieu of forfeiture in terms of s 88(2) of the Act. They were given an opportunity to submit evidence and make submissions concerning the intended action. Their attention was drawn to the reverse onus provisions in s 102(4) of the Act, namely that in any dispute



as to whether the proper duty has been paid, it shall be presumed that such duty has not been paid, unless the contrary is proved.<sup>2</sup>

[15] On 13 March 2020 SARS received a report by Dr Jaywant Irkhede, an expert in textile technology. He was instructed to examine and compare samples of clothing taken from each of the 19 containers with samples previously taken from eight containers in the first application, to determine whether they were similar, and to assess their value. Dr Irkhede concluded that the samples of the two consignments were similar, and that the values which he had determined were similar to or in the same range as the prices or values declared in the Chinese export declarations. Dr Irkhede's valuation was prepared independently of the export declarations.

[16] On 16 March 2020 the respondents were issued with a second notice of intent concerning the 19 containers. They were informed of SARS intention to seize the goods in terms of s 88(1)(c) of the Act. As with the first notice of intent, the respondents were given an opportunity to present evidence, make written submissions, and referred to s 102(4) of the Act.

[17] On 30 March 2020 the respondents' attorney made written representations in respect of both notices of intent. Statements and affidavits by the Chinese suppliers were attached to the representations. It was clear from these affidavits that the Chinese suppliers were willing to assist the respondents, and the agreements allegedly concluded between the suppliers and the importers were

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<sup>2</sup> Section 102(4) of the Act states:

'If in any prosecution under this Act or in any dispute in which the State, the Minister or the Commissioner or an 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.'

furnished to SARS. The suppliers alleged that the importers did not pay the higher values in the export declarations. In their representations the respondents contended that the export declarations were ‘demonstrably false’ and ‘inadmissible and irrelevant’ for various reasons.

[18] The reason given by the respondents for the vast difference between the Chinese export values and the values declared to SARS, was this:

‘SARS knows, or should know, for it is a notorious fact, that many Chinese export agents inflate the pricing of exported goods when declaring to the General Administration of Customs of the People’s Republic of China. The purpose of inflating the price on the export declarations is for applying for loans from the banks as well as receiving national export tax rebates from the Chinese government, calculated at 16% of the declared export price on the export declarations. In consequence, SARS should have been alerted to the prospect of this kind of fraud before jumping to the conclusions it did before issuing its letters of intent.’

The respondents went on to say:

‘The Importers are aware of the 16% export tax rebate and they are aware that export agents sometimes inflate the value on the export documents in order to obtain larger rebates. We enclose hereto an affidavit of a Chinese/South African importer and exporter – Mr Li Xinzhu and wherein he describes in detail the inflation of the value on exports from China in order for export agents to obtain export tax rebates from the Chinese government.’

[19] In support of these assertions all three Chinese exporters involved made affidavits in which they said:

‘The Chinese export agent industry often “inflate[s]” the actual price of the commercial invoices for the purposes of applying for loans from banks as well as receiving export tax rebates from our Chinese government.’ (Emphasis in the original.)

The exporters gave general and similar explanations for the low selling prices. These were that at the end of a season, unsold clothing stock is sold at reduced prices; overruns and order cancellations are also sold cheaply; and ‘dead stock’ is often sold at prices well below the cost of production.

[20] The difficulty with the respondents' new explanation for the low prices of the goods – fraud by Chinese export agents – was immediately apparent. Any export tax rebate would accrue to Chinese exporters, not their agents. That much is clear from Mr Xinzhu's affidavit. He said that in China, exported goods are subject to a zero tax rate and that VAT paid to the State by upstream enterprises during the domestic circulation of export goods must be refunded to the export enterprise at the export stage. Further, it is unlikely that by committing fraud, export agents would be able to obtain loans from banks.

[21] SARS therefore, on 29 May 2020, requested further particulars and documents from the respondents, which included the following: an explanation for the identical format, font and terms of the written agreements in respect of both consignments (the eight containers relating to the export declarations and the 19 containers) concluded between three different suppliers and the importers; the originals or copies of each of the three agreements; the particulars of the individuals who signed each agreement on behalf of the Chinese supplier and the importer, and their identity and passport numbers; and details of the invoices issued by the suppliers in respect of each of the consignments and how they were rendered to the importers.

[22] In their reply dated 12 June 2020, the respondents contended that the request for further particulars was 'unlawful'. They refused to provide an explanation for the identical format, font and terms of the written agreements, the particulars of the sellers and buyers who signed them, and any details regarding the invoices issued by the suppliers.

[23] Upon receipt of the three agreements furnished by the respondents, SARS engaged the services of Mr Jannie Bester, a forensic document examiner, to ascertain whether the signatures on the agreements had been appended

individually. Mr Bester identified identical handwriting similarities in the signatures of the buyer and seller, and concluded that the agreements originated from the same source document, because they contain the same spelling and spacing errors. Mr Bester's reports were given to the respondents on 19 June 2020.

[24] On 10 July 2020 the respondents provided SARS with an affidavit by their own document examiner, Mr Ludwig Du Toit. He considered Mr Bester's reports and concluded that the identical signature of the buyer and seller, which appeared on each of the agreements of the different importers, was an electronic signature. Mr Du Toit however did not challenge Mr Bester's conclusion that all three agreements originated from the same source document.

[25] On 13 August 2020 SARS informed Dragon Freight of the impugned decision. The reason given was that SARS had considered the evidence and submissions by the respondents and was satisfied that the goods had not been entered as required by ss 38(1), 39(1), 40(1) and (2) read with ss 65(1) and 66 of the Act. Consequently, the goods and the containers in which they were imported were liable to forfeiture as contemplated in s 87(1) and (2) of the Act. Dragon Freight was also informed that it was entitled to written reasons for the impugned decision. The respondents however did not request written reasons for the decision.

[26] On 10 September 2020 the respondents delivered a supplementary affidavit in support of the relief foreshadowed in paragraph 4 of the notice of motion, namely that the decision to seize any of the containers referred to in the founding papers, where applicable, be reviewed and set aside, and that SARS be ordered to immediately release the 19 containers and the goods contained therein. As stated earlier, the high court granted these orders, together with costs. The

appellants contend that the orders are incompetent because the respondents failed to comply with the peremptory provisions of s 96(1) of the Act.

### **Section 96(1) of the Act**

[27] Section 96(1) of the Act, so far as is relevant, provides:

‘(1)(a)(i) No process by which any legal proceedings are instituted against the State, the Minister, the Commissioner or an officer for anything done in pursuance of this Act may be served before the expiry of the period of one month after delivery of a notice in writing setting forth clearly and explicitly the cause of action, the name and place of abode of the person who is to institute such proceedings (in this section referred to as the “litigant”) and the name and address of his or her attorney or agent if any.

...

(iii) No such notice shall be valid unless it complies with the requirements prescribed in the section ...’.

...

(c)(i) The State, the Minister, the Commissioner an officer may on good cause shown reduce the period specified in paragraph (a) ...

(ii) If the State, the Minister, the Commissioner or an officer refuses to reduce any period as contemplated in subparagraph (i), a High Court having jurisdiction may upon application of the litigant, reduce or extend any such period where the interests of justice so requires.’

[28] The respondents did not deliver a s 96(1) notice of their intention to review the impugned decision. Instead, they relied on a notice by Dragon Freight to SARS dated 17 February 2020, of its intention to bring legal proceedings against SARS (the February notice). It read:

‘In the event of the detained containers having been seized by SARS or at any stage hereafter, the Applicants claim that such seizure(s) be reviewed and set aside and that it be ordered that the goods overseas be released immediately by the Respondent.’

[29] In the notice of motion, the respondents asked for an order that the one-month period in s 96(1)(a)(i) be reduced; alternatively, that their failure to comply

with the requirements of the section be condoned. The high court granted this relief. It made an order that the one-month notice period,

‘be reduced to such an extent that this application is then construed as being compliant with section 96 of the Act; alternatively, that non-compliance with the time period specified in section 96(1)(a)(i) be condoned’.

[30] The starting point for an understanding of the meaning and effect of s 96(1) is the language of the provision, in the light of its context and purpose.<sup>3</sup> In this regard the dictum of Unterhalter AJA in *Capitec Bank Holdings Limited*,<sup>4</sup> bears repetition:

‘The much-cited passages from *Natal Joint Municipal Pension Fund v Endumeni Municipality* (“*Endumeni*”) offer guidance as to how to approach the interpretation of the words used in a document. It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. As *Endumeni* emphasised, citing well-known cases, “[t]he inevitable point of departure is the language of the provision itself”.’

[31] Section 96(1)(a)(i), on its plain language, proscribes the institution of any proceedings unless one-month’s written notice, ‘setting forth clearly and explicitly the cause of action’, is given to the Commissioner. That is made clear by the introductory words that no process by which legal proceedings are instituted, may be served before the expiry of the one-month notice period. It is reinforced by s 96(1)(a)(iii), which states that a notice that does not comply with the requirements of the section, is invalid.

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<sup>3</sup> *Natal Joint Municipality Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 para 18, affirmed by the Constitutional Court in *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others* [2018] ZACC 33; 2019 (5) SA 1 (CC) para 29.

<sup>4</sup> *Capitec Bank Holdings Limited v Coral Lagoon Investments 194 (Pty) Ltd* [2021] 3 All SA 647 para 25, footnotes omitted.

[32] In *Evins v Shield Insurance*,<sup>5</sup> Corbett JA defined a cause of action as the ‘material facts which must be proved in order to enable the plaintiff to sue’. Applied to the present case, it means that when a notice under s 96(1) is delivered to SARS, the litigant must be able to make out a cause of action: it must assert facts which it would be necessary to prove, if traversed, to support its right to the judgment of the court. The respondents however had no cause of action when they delivered the February notice. That this is a prerequisite is underscored by the phrase ‘anything done in pursuance of this Act’ in s 96(1)(a)(i) – it clearly envisages action already taken.

[33] The purpose of s 96(1) is self-evident: to allow SARS, the organ of state charged with the administration of the Act, to investigate or review the merits of the intended legal proceedings and decide what position to adopt in relation thereto. It may, for example, in an appropriate case decide to resolve the dispute before the institution of legal proceedings, so as to avoid unnecessary and costly litigation at public expense.<sup>6</sup>

[34] SARS is a large and complex institution with extensive administrative responsibilities and high workloads. Its functions are not confined to the levying of customs and excise duties under the Act, but include the recovery of taxes under the Income Tax Act 58 of 1962 and the administration of the Value-Added Tax Act 89 of 1991. The s 96(1) notice enables SARS to ensure that a matter is brought timeously to the attention of the appropriate official for investigation or review. In my opinion, s 96(1)(a) of the Act promotes the efficient and economic

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<sup>5</sup> *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838H-839A.

<sup>6</sup> See *Mohlomi v Minister of Defence* [1996] ZACC 20; 1997 (1) SA 124 (CC) para 9, regarding the purpose of a notice of intended legal proceedings under the Defence Act 44 of 1957.

use of resources, in accordance with the basic values and principles governing public administration set out in s 195 of the Constitution.<sup>7</sup>

[35] The impugned decision had not been taken when the February notice was delivered to SARS. It was thus impossible for the respondents to set out any cause of action in that notice: there was none. Section 96(1)(a)(i) of the Act does not permit a notice in anticipation of a decision not yet taken, by the functionaries referred to in that provision. Such a construction would nullify its purpose and render the sanction of invalidity in s 96(1)(a)(iii), nugatory.

[36] What is more, when the February notice was delivered, no ‘administrative action’ as defined in the Promotion of Administrative Justice Act 3 of 2000 (PAJA), had been taken. That definition includes a decision taken by an organ of state when exercising a public power or performing a public function in terms of any legislation ‘which adversely affects the rights of any person and which has a direct, external legal effect’. This merely reinforces the absence of any cause of action when the February notice was delivered.

[37] In *SARS v Prudence Forwarding*,<sup>8</sup> the facts were essentially the same as those in the present case. The Commissioner detained a container of blankets imported from China on the basis that the transaction value of the goods had been under-declared. The importers delivered a written notice in terms of s 96(1) of the Act, of their intention to apply to the high court for an interim order directing SARS to release the goods against payment of a provisional amount of customs duty. The importers launched that application in November 2013. Subsequently, the Commissioner made a decision to seize the goods. The importers then

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<sup>7</sup> Section 195(1)(b) of the Constitution provides that public administration must be governed by democratic values and principles enshrined in the Constitution, including the promotion of efficient, economic and effective use of resources.

<sup>8</sup> *The Commissioner for the South African Revenue Service v Prudence Forwarding (Pty) Ltd* 2015 JDR 2545 (GP).



amended their notice of motion and sought an order reviewing and setting aside the seizure decision, without delivering a s 96(1) notice in relation to that decision. The high court reviewed and set aside the seizure decision and ordered the release of the goods against payment of a provisional amount of customs duty. The Commissioner appealed this order.

[38] A full bench of the high court upheld the appeal. The full court, correctly in my view, held as follows:

‘It was therefore incumbent upon [the respondents] to serve the relevant notice and to obtain the agreement of the Commissioner or the sanction of the court to reduce the one-month period in respect of the new cause of action involving a review of the seizure decision. This was not done. The respondents could not rely on the notice they served to obtain the release of the goods from detention. Section 96(1)(a)(i) of the Act makes it plain that the notice must relate to a specific cause of action, which is required to be set forth “clearly and explicitly” in the written notice. And section 96(1)(a)(iii) provides that no notice shall be valid unless it complies with the requirements prescribed in the section. Thus, since no notice was delivered in respect of the review, and neither the Commissioner or the court agreed to a reduced period, the jurisdictional conditions precedent were not fulfilled, and the court accordingly lacked jurisdiction to grant the final relief it granted, in the form of an order setting aside the seizure of the goods. For that reason alone, the appeal must succeed.’<sup>9</sup>

[39] The high court however distinguished *Prudence Forwarding* on the basis that the February notice and the notice of motion provided for the review of both the decisions to detain and seize the containers. However, the February notice did not comply with s 96(1)(a)(i) of the Act, in that it did not, and could not, explicitly set out a cause of action because the impugned decision had not been taken. For the same reason, the relief sought in the notice of motion that the court reduce the one-month period specified in s 96(1)(a)(i) in relation to the impugned decision,

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<sup>9</sup> Ibid para 28.

was incompetent. And there is no power in the Act to condone non-compliance with this provision.

[40] In the notice advising the respondents of the impugned decision, they were specifically informed of the peremptory notice to SARS in s 96(1) of the Act. They chose to ignore it. The high court erred in its interpretation and application of s 96(1) of the Act and on this basis alone, the appeal must be upheld.

### **The decision to detain the goods**

[41] The high court reviewed and set aside SARS' decision not to release the 19 containers and ordered SARS to immediately release those containers and the goods held in them. This order should not have been granted because the decision to detain the goods had been overtaken by the impugned decision.

[42] SARS' powers of detention and its powers of seizure are set out under different provisions of the Act. Section 88(1)(a) provides:

‘An officer, magistrate or member of the police force *may detain* any ship, vehicle, plant, material or goods at any place for the purpose of establishing whether that ship, vehicle, plant, material or goods are liable to forfeiture under this Act.’ (Emphasis added.)

[43] By contrast, s 88(1)(c) reads:

‘If such ship, vehicle, plant, material or goods are liable to forfeiture under this Act the Commissioner *may seize* that ship, vehicle, plant, material or goods.’ (Emphasis added.)

[44] The power to detain and the power to seize are discrete administrative acts, which require two separate decisions. Detention is a temporary assertion of control over the goods, which does not necessarily result in any seizure with a view to ultimate forfeiture. The stated purpose of the power to detain in s 88(1)(a) of the Act, is to establish whether the goods are liable to forfeiture. The provision thus enables SARS to examine or secure the goods, pending an investigation to

establish whether they are liable to forfeiture, as happened in this case. It is only once it has subsequently been established that the goods in question are liable to forfeiture, that SARS may then seize the goods. Put differently, seizure flows from detention if liability for forfeiture is established. The decision to detain the goods is then overtaken by a new decision to seize.

[45] In prayer 3 of the notice of motion the respondents sought an order that the decision not to release the 19 containers (the detention of the goods under s 88(1)(a)), be reviewed and set aside. In prayer 4 they sought an order reviewing and setting aside the decision to seize any of the containers, ‘where applicable’. Until there was a decision to seize the goods, prayer 3 remained operative, as long as the goods were detained for a reasonable period of time in order to establish whether they were liable to forfeiture.<sup>10</sup>

[46] The high court conflated the decision to detain the goods with the subsequent impugned decision. In so doing the court failed to appreciate that once the impugned decision had been taken, the separate issue of detention was rendered moot.<sup>11</sup> The fate of the goods then had to be decided with reference to s 88(1)(c) of the Act and not s 88(1)(a).

[47] The only relevance of the detention relief concerns the question of costs, but in the present case there is no basis for a separate costs award in relation to that relief. The costs pertaining thereto should follow the result of the appeal.

## **The review**

[48] In the founding papers the respondents alleged that the decision to detain the goods was reviewable on ‘any and all the grounds’ in s 6(2) of the PAJA,

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<sup>10</sup> *Commissioner, South African Revenue Service v Trend Finance (Pty) Ltd and Another* 2007 (6) SA 117 (SCA) para 29.

<sup>11</sup> *Commissioner: South African Revenue Service and Another v Alves* [2020] ZAFSHC 123 para 11.

which tend to overlap. These grounds include bias, ulterior purpose, procedural unfairness, arbitrariness, unreasonableness, and that the impugned decision was otherwise unconstitutional and unlawful. However, the challenge to the impugned decision on the grounds that the Commissioner was biased or that the decision was taken for an ulterior purpose, has no basis in the evidence.

[49] The respondents' case in the supplementary founding affidavit was essentially that the impugned decision fell to be set aside on the ground of procedural unfairness, irrationality and unreasonableness. It should be noted that when these grounds were formulated, the respondents did not have the reasons for the decision. They chose not to ask for the reasons, despite being informed of their right to do so.

[50] The attack on the ground of procedural unfairness can be dealt with briefly. It has no merit. Throughout the course of the complex administrative process that led to the seizure, the respondents were given adequate notice of the administrative action that SARS was considering taking and a reasonable opportunity to make representations before any decision was taken.

[51] The supplementary founding affidavit states that the respondents were 'left totally uninformed as to why SARS made the decision to seize the containers', and that there 'has been no fairness, accountability and transparency'. In the supplementary replying affidavit, the following allegation is made:

'SARS admits that it has taken an administrative decision and has failed to provide the Applicants with any reasons therefor. The decision to seize the 19 containers is therefore unlawful and ought to be set aside on review.'

[52] These allegations are false. Detailed reasons for the impugned decision are recorded in SARS' supplementary answering affidavit. The reasons, in sum, are these. The Commissioner considered all the evidence and the respondents' failure

to respond to requests for information, and concluded that the written agreements submitted by the respondents could not be relied upon as proof of the prices actually paid for the goods. The evidence demonstrated that the agreements were false and that the values of the goods had been under-declared. The evidence supporting these reasons is dealt with below.

[53] The respondents, in their supplementary replying affidavit and heads of argument, submitted that it was insufficient that the seizure notice informed them of their right to request written reasons, ‘as both PAJA as well as the Constitution require SARS to give reasons when taking an administrative decision’, and that if there were no reasons when the decision was taken, then the decision is unlawful since ‘[i]t is not permissible to retrofit reasons after the event’. It was further submitted, in reliance on s 5(3) of the PAJA, that ‘on account of SARS’ admitted failure to provide reasons and in the absence of proof to the contrary’, it should be presumed that the impugned decision was taken without reason.<sup>12</sup>

[54] These submissions are baseless. Section 5(1) and (2) of the PAJA make it clear that the reasons for an administrative decision need not be given simultaneously with the notice of that decision to the affected party.<sup>13</sup> And there is not a shred of evidence to show that when the impugned decision was taken, there were no reasons for it. In these circumstances, the respondents’ so-called retrofit argument is startling.

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<sup>12</sup> Section 5(3) of the PAJA reads:

‘If an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason.’

<sup>13</sup> Section 5 of the PAJA, in relevant part, provides:

‘(1) Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.

(2) The administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action.

[55] The respondents' challenge of irrationality is based on s 6(2)(f)(ii) of the PAJA, namely that the impugned decision is not rationally connected to the purpose for which it was taken; the purpose of empowering provision; the information before the decision-maker; and the reasons given for it.<sup>14</sup> The supplementary founding affidavit states that in the notices of intent, the request for further particulars and the expert reports, SARS relied on two new issues, namely the export declarations and an expert's opinion that the signatures on the agreements were forgeries.

[56] The basic grounds for the irrationality challenge may be summarised as follows. The export declarations are 'inadmissible and irrelevant', illegible and 'demonstrably false'. SARS' request for further particulars is not authorised by the Act and unlawful. Had SARS in fact considered all the evidence presented by the respondents, it would have concluded that the respondents' evidence was a rebuttal of SARS' prima facie findings in the notice of intent (that the respondents dealt with the goods irregularly, thereby rendering them liable to forfeiture).

[57] The notice of seizure states that the impugned decision was taken in terms of s 88(1)(c) of the Act. In *Saleem*<sup>15</sup> this Court held that an officer seizing goods in terms of s 88(1)(c) is required to hold a suspicion on reasonable grounds that such goods are imported goods; that they have been imported without compliance with the provisions of the Act; and that they are liable to forfeiture. The notice further states that the goods are liable to forfeiture as envisaged in s 87(1) and (2) of the Act, since respondents failed to establish that the goods were imported in accordance with the provisions of the Act. Section 87(1) of the Act provides that any goods imported or otherwise dealt with contrary to the provisions of the Act, are liable to forfeiture. In short, goods brought into the country without declaring

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<sup>14</sup> C Hoexter and G Penfold: *Administrative Law in South Africa* (3 ed 2021) at 464-465 and 497.

<sup>15</sup> *Commissioner, South African Revenue Service v Saleem* 2008 (3) SA 655 (SCA) para 9.

them or paying the necessary customs duty are liable to forfeiture.<sup>16</sup> Section 87(2) renders any ship, vehicle, container or other transport equipment used in the carriage of goods, liable to forfeiture.<sup>17</sup>

[58] The Constitutional Court has held that where a decision is challenged on the grounds of rationality, ‘the decision must be rationally related to the purpose for which power was conferred’, otherwise the exercise of the power would be arbitrary.<sup>18</sup> The question then, simply put, is whether the impugned decision is justified, having regard to the purpose of s 88(1)(c) of the Act, the information before the Commissioner and the reasons given for it.<sup>19</sup>

[59] The impugned decision was taken because the agreements submitted by the respondents and consequently, the transaction values of the goods declared, are false. In the result, the respondents failed to comply with ss 38(1), 39(1), 40(1) and (2) read with ss 65(1) and 66 of the Act. This conduct also constitutes an offence in terms of s 84 of the Act. It provides that any person who makes a false statement in connection with any matter dealt with in the Act, or makes use of a declaration or document containing any such statement for the purposes of the Act, shall be guilty of an offence.<sup>20</sup>

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<sup>16</sup> *CSARS v Saleem* fn 14 para 9.

<sup>17</sup> Section 87(2) reads: ‘(2) Any— (a) ship, vehicle, container or other transport equipment used in removal or carriage of any goods liable to forfeiture under this Act or constructed, adapted, altered or fitted in any manner for the purpose of concealing goods; (b) goods conveyed, mixed, packed, or found with any goods liable to forfeiture under this Act on or in any such ship, vehicle, container or other transport equipment; and (c) ship, vehicle, machine, machinery, plant, equipment or apparatus classifiable under any heading or subheading of Chapters 84 to 87 and 89 of Part 1 of Schedule No. 1 in which goods liable to forfeiture under this Act are used as fuel or in any other manner, shall be liable to forfeiture wheresoever and in possession of whomsoever found.’

<sup>18</sup> *Democratic Alliance v President of the Republic of South Africa* [2012] ZACC 24; 2013 (1) SA 248 (CC) paras 27 and 29-32 (*Democratic Alliance*); *Albutt v Centre for the Study of Violence and Reconciliation and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC) para 51; *Minister of Defence and Military Veterans v Motau* [2014] ZACC 18; 2014 (5) SA 69 (CC) para 69 (*Motau*).

<sup>19</sup> *Democratic Alliance* fn 18 paras 29 and 32; *Motau* 2014 (5) SA 69 (CC) fn 18 para 69.

<sup>20</sup> Section 84(1) of the Act provides:

‘Any person who makes a false statement in connection with any matter dealt with in this Act, or makes use for the purposes of this Act of a declaration or document containing any such statement shall, unless he proves that he was ignorant of the falsity of such statement and that such ignorance was not due to negligence on his part, be guilty of an offence and liable on conviction to a fine not exceeding R40 000 or treble the value of the goods to which such statement, declaration or document relates, whichever is the greater, or to imprisonment for a period not exceeding ten years, or to both such fine and such imprisonment, and the goods in respect of which such false statement was made or such false declaration or document was used shall be liable to forfeiture.’

[60] As to the purpose of the empowering provision, s 65(1) of the Act states that ‘the value for customs duty purposes of any imported goods shall, at the time of entry for home consumption, be the transaction value thereof, within the meaning of section 66’. Section 66(1) provides that ‘the transaction value of any imported goods shall be the price actually paid or payable for the goods when sold for export to the Republic’.

[61] Section 74A(1) of the Act provides that the interpretation of ss 65, 66 and 67 of the Act shall be subject to the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (the Customs Valuation Agreement), the interpretive notes thereto, the advisory opinions, commentaries and explanatory notes, case studies and studies issued under the Customs Valuation Agreement.

[62] Generally, the actual price paid or payable for imported goods should be reflected on the invoices issued, which are held by the importers. Thus, the transaction value method is largely dependent on the information that importers provide. However, importers have an obvious commercial incentive to manipulate the transaction value. The possibility of customs fraud is therefore an inherent risk in a system of self-accounting and self-assessment upon which the Act is based.<sup>21</sup>

[63] Article 17 of the Customs Valuation Agreement is designed to address this risk. It provides that ‘[n]othing in this Agreement shall be construed as restricting or calling into question the right of customs administrations to satisfy themselves as to the truth or accuracy of any statement, document or declaration presented for customs valuation purposes’. It is precisely this right that SARS has exercised

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<sup>21</sup> *First National Bank of South Africa t/a Wesbank v Commissioner South African Revenue Service and Another* [2002] ZACC 5; 2002 (4) SA 768 (CC) para 15.



in this case. There is nothing in the Act or the Customs Valuation Agreement that precludes SARS from taking robust enforcement measures against customs fraud.

[64] That brings me to the reasons for the impugned decision. In summary, they are the following. There was no credible explanation for the unbelievably low prices charged by the suppliers of the goods. The initial explanation that an employee of the importers bought the goods at very low prices at various markets in China is false. So too, the importers' assertions that the low prices were obtained because they were able to exploit the 'trade war' between the United States and China; that the goods comprised old or 'dead' stock, or clothing not in demand in China; and that the goods could be purchased at ridiculously low prices on the Alibaba website. The evidence of the expert, Dr Irkhede, and that of SAAA and ATASA, makes it clear that the prices declared by the importers were unrealistic and unattainable.

[65] The goods were allegedly bought from only three separate Chinese suppliers, which contradicted the importers' initial explanation. No explanation was furnished for the identical prices charged by the three suppliers. The importers' claim that they are not related in any way was not borne out by the evidence. Their modus operandi to source and buy clothing was the same. They obtained their stock from the same Chinese suppliers. The agreements allegedly concluded with different Chinese suppliers are identical. The declared prices of clothing are in the same price bracket. They used the same agents in China and the same clearing agent in this country. All of this cast serious doubt on the declared prices of the goods.

[66] The format, font and terms of the agreements are identical. All the sale agreements record the payment terms as 90 days after receipt of the goods by the importer. This is illogical since no exporter would render payment subject to

conditions over which it had no control, in another country. The respondents refused to provide information concerning the conclusion of the sale agreements: who signed them, and when and where they were signed. When confronted with the expert's report on the agreements (by Mr Bester), they said that the purchaser's signature on the agreements was electronically effected by Chinese agents who represented them 'from time to time'. They never mentioned Chinese agents before. And if the agreements were electronically concluded, there was no reason why they could not have been concluded directly between the suppliers and the importers. The ineluctable inference is that the agreements were created by the importers to support the entries, and the explanation regarding the signatures, is false.

[67] There is no evidence to support the respondents' claim that Chinese export agents inflated prices on commercial invoices. The importers refused to identify the Chinese export agency which prepared and submitted the declarations to the Chinese customs authorities, or to furnish the export documentation given by the suppliers to the export agents. The Chinese suppliers were prepared to assist the respondents, who were in a position to provide objective evidence to support their assertion that the export declarations concerning the first application, were false. They failed to provide this evidence.

[68] And, of course, the true transaction values of the goods could have been placed beyond question by simply producing the export declarations relating to the 19 containers, submitted to the Chinese customs authorities by the three exporters. The respondents failed to produce this evidence, despite being called upon to do so.

[69] For all these reasons, the Commissioner was satisfied that the respondents failed to prove that the goods were entered as prescribed by the provisions of the

Act, as they were required to do under s 102(4). Consequently, the goods and the containers in which they were imported, were liable to forfeiture. Before us, counsel for the respondents conceded, correctly, that s 102(4) applied in the instant case.

[70] In the circumstances, can it be said that having regard to the purpose of s 88(1)(c) of the Act, the information before the Commissioner and the reasons given, the impugned decision is unjustified? I think not. It follows that the decision was not arbitrary. The high court's finding that 'it was common cause that SARS had been presented with the requisite documents by the applicants in terms of the Act', is incorrect. This was not common cause but specifically disputed. SARS' reasons for disputing the documents presented by the respondents were amply explained. The high court erred in disregarding not only the evidence showing that the agreements were false, but also the reasons for the impugned decision, despite quoting those reasons verbatim in its judgment.

[71] The findings that the export declarations 'were of poor quality and illegible'; that 'they had nothing to do with the 19 containers'; and that 'SARS was wrong . . . to rely on the Export Declarations in order to reach the seizure decisions', are unsustainable on the evidence. The high court ignored the fact that the respondents were provided with legible, translated versions of the export declarations. Further, it dismissed the respondents' application to strike out the export declarations on the basis that they were inadmissible. In so doing, the court confirmed that the translator had been enrolled as a sworn translator from Chinese into English and vice versa, and consequently, that the declarations were understandable.

[72] The export declarations relating to eight containers in the first application, were highly relevant to the decision to seize the goods. SARS was entitled to take

those declarations into account in arriving at its decision, and as a specialist administrator, to decide what weight should be given to them, for the following reasons. The clothing covered by the export declarations was materially similar to the clothing in the 19 containers. It was not disputed that the export declarations reflect the export values stated therein – more than 1000% of the values declared on importation into this country by the same exporters and importers in relation to similar goods. The respondents’ explanation for this – fraud by Chinese export agents – is false. What is more, the respondents’ own import documentation corroborates the export declarations. The Minister explained the reasons for this in his supplementary answering affidavit, to which was attached a schedule containing a detailed analysis for each of the eight containers. The respondents did not deal with the Minister’s evidence in reply.

[73] The high court’s conclusion that the respondents provided the relevant information prior to requests by SARS, and that they ‘responded copiously’ to requests for information which SARS ‘chose to ignore . . . as inadequate’, is likewise incorrect. This conclusion is based on a landscape table furnished by the respondents and reproduced in the judgment. However, a comparison between this table and SARS’ request for particulars and documentation, and the respondents’ replies (which form part of the reasons for the impugned decision), shows that the respondents declined to answer or provide satisfactory answers to a number of pertinent questions posed by SARS.

[74] Given that the impugned decision was not arbitrary, the respondents’ remaining challenge based on unreasonableness in terms of s 6(2)(h) of the PAJA, must fail. The decision is not one that a reasonable decision-maker could not reach.<sup>22</sup>

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<sup>22</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC) para 44.

[75] Moreover, SARS made the impugned decision in its capacity as a specialist administrator with specific expertise in the levying of customs duties. It is a settled principle that the distinction between appeals and reviews remains significant and that courts should be careful not to usurp the functions of administrative agencies.<sup>23</sup> In *Bato Star O’ Regan J* described judicial deference as follows:<sup>24</sup>

‘[A] judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy laden or polycentric issues, to accord the interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped . . . by a careful weighing up of the need for – and the consequences of – judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.’

[76] For the reasons set out above, the high court erred in holding that the impugned decision was unlawful and thus reviewable. It follows that the appeal must succeed.

### **The intervention application**

[77] At the hearing of this appeal, an application filed in this Court in August 2021 by the Southern African Clothing and Textile Workers Union (SACTWU), for leave to intervene as an appellant in these proceedings, was refused with costs. SACTWU was advised that the reasons for that order would be given in this judgment. These are the reasons.

[78] SACTWU’s intervention application is in effect a disguised application to this Court for leave to appeal. It was a party in the review application in the high

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<sup>23</sup> *Bato Star* para 45.

<sup>24</sup> *Bato Star* para 46.

court. However, it failed to file an application for leave to appeal that court's order. Its explanation for this failure was that it needed to assess its financial position as a result of the effects of Covid-19 on its resources. This explanation however is superficial and unconvincing. More fundamentally, the refusal of an application for leave to appeal under s 17(2)(a) of the Superior Courts Act 10 of 2013, is a jurisdictional fact for an appeal to this Court.<sup>25</sup> In terms of s 17(2)(b) of that Act, this Court's jurisdiction to grant leave itself is dependent on the court below having refused leave to appeal.<sup>26</sup> Thus, s 17(2)(b) not only prescribes the proper procedure, but also defines the jurisdiction of this Court to entertain an application for leave to appeal.

[79] Apart from this, SACTWU has not shown that it has a legal interest in the subject matter of the appeal which may be affected by the decision of this Court.<sup>27</sup> This appeal is against the high court's order reviewing and setting aside the impugned decision. Any order that this Court might make will have no effect on SACTWU or its avowed interest of protecting the local clothing and textile industries. For these reasons, SACTWU's intervention application could not be entertained and was thus refused with costs.

## **The order**

[80] In the result the following order is issued:

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<sup>25</sup> *National Union of Metalworkers of South Africa v Jumbo Products CC* [1996] ZASCA 87; 1996 (4) SA 735 (A) at 740A-D; *Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health and Another* [2004] ZASCA 122; 2005 (3) SA 238 (SCA) para 22.

<sup>26</sup> Section 17(2) of the Superior Courts Act provides:

‘(a) Leave to appeal may be granted by the judge or judges against whose decision an appeal is to be made or, if not readily available, by any other judge or judges of the same court or Division.

(b) If leave to appeal in terms of paragraph (a) is refused, it may be granted by the Supreme Court of Appeal on application filed with the registrar of that court within one month after such refusal, or such longer period as may on good cause be allowed, and the Supreme Court of Appeal may vary any order as to costs made by the judge or judges concerned in refusing leave.’

<sup>27</sup> *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 659, affirmed *Pheko and Others v Ekurhuleni Municipality (No 2)* [2015] ZACC 10; 2015 (5) SA 600 (CC) para 56.

- 1 The application for intervention by the Southern African Textile and Clothing Workers' Union is struck from the roll with costs. Such costs shall include the costs of only one junior counsel.
- 2 The appeal is upheld with costs, including the costs of two counsel where so employed. Such costs shall be paid by the respondents jointly and severally, the one paying the others to be absolved.
- 3 The order of the high court is set aside and replaced by the following:  
  
'The application is dismissed. The applicants are directed to pay the costs of the application, including the costs of two counsel where so employed, jointly and severally, the one paying the others to be absolved.'

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A SCHIPPERS  
JUDGE OF APPEAL

## Appearances:

For first appellant: B H Swart SC (with him J A Meyer SC)  
Instructed by: Klagsbrun Edelstein Bosman & Du Plessis  
Attorneys, Pretoria  
Symington De Kok Attorneys, Bloemfontein

For second appellant: A Cockrell SC (with him M Stubbs)  
Instructed by: Webber Wentzel, Pretoria  
Symington De Kok Attorneys, Bloemfontein

For third and fourth  
appellants: E Webber  
Instructed by: Norton Rose Fulbright, Pretoria  
Lovius Block, Bloemfontein

For first to seventh  
respondents: A P Joubert SC (with him L F Laughland)  
Instructed by: Richard Meaden & Associates, Pretoria  
Webbers Attorneys, Bloemfontein