

***Ex Parte:*** The Commissioner for the South African Revenue Services  
(Consultant)

***In re:*** Considering the GMLS Report and the Opinions of Professor  
Eiselen and Adv Pammenter SC regarding the Revised Policy  
contained in the Draft Customs Control Bill

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## **OPINION**

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**GILDENHUYS MALATJI INC**  
**MR T MOETI KANYANE**  
**ATTORNEYS FOR CONSULTANT**

**A P JOUBERT SC**  
**MAISELS CHAMBERS, SANDTON**  
**3 FEBRUARY 2014**

- [1] My opinion is sought on the substance of the views expressed in a "Research Impact Study Report" conducted by Global Maritime Legal Solutions (Pty) Ltd ("GMLS") and on the responses thereto by Prof. Eiselen and Adv Pammenter SC contained in their written opinions dated 4 November 2013 and 20 December 2013. In addition to these three documents, I have been briefed with some media reports and the powerpoint submission made by Mr Pat Corbin to the Parliamentary Standing Committee on Finance.
- [2] The issues dealt with in the Report and the two opinions arose in the following circumstances:
- [a] Section 18 of the Customs and Excise Act, 1964 ("the Act") makes provisions for containers manifested for an inland container terminal to be removed in bond to such terminal without customs clearance, the container manifest serving as authority for such removal.
- [b] The revised policy on this aspect contained in the draft Customs Control Bill will make it an obligation for importers to lodge a national transit declaration at the first port of entry for goods consigned to an inland terminal such as City Deep.
- [c] Some sectors of business and in particular the Johannesburg Chamber of Commerce and Industry have expressed concerns about what they perceive to be the negative impact of this

revised policy on the importation of goods, especially on the use of International Commercial Terms ("INCOTERMS"). The research impact study report of GMLS is relied upon to motivate and support these concerns.

- [3] The issues referred to have been fully dealt with in Prof. Eiselen's opinion under the rubrics "SARS Change in Policy and Procedure" (pp. 3-7) and "Business' Opposition with reference to INCOTERMS" [pp. 7-8]. The nature of the INCOTERMS has been dealt with concisely and persuasively by Prof. Eiselen, as one would expect from an internationally renowned academic in this field. The views expressed by Adv Pammenter SC described in his opinion, founded on many years of practice in this field of law, complete the picture.
- [4] In his opinion Pammenter SC, inter alia, referred to his experiences as an advocate dealing with INCOTERMS and their use in matters in which he was briefed. The views expressed by him carry considerable weight, for he is widely regarded as one of South Africa's most respected counsel in the field of international trade law. I agree with the opinions expressed by Prof. Eiselen and Adv Pammenter SC. My experiences also accord with those described by Pammenter SC.
- [5] The GMLS Report is 114 printed pages long. In typed format it would probably exceed 200 pages. Most of the content deal with matter that is ancillary at best, irrelevant at worst, to the issues that lie at the heart

of the debate. The sections that are pertinent to the issues are really only the chapters styled "Covering Executive Summary" (6 pages), the Executive Summary, etc (15 pages), "Impact of the Proposed Customs Policy Change on Contracts of Sale & Incoterms" (12 pages) and the "Conclusion" (4 pages); amounting all in all to some 37 pages. Prof. Eiselen comprehensively dealt with what the GMLS Report referred to as the impact that the proposed customs policy would have on the contracts of sale and INCOTERMS. The end result of Prof. Eiselen's analysis is a demolition of the arguments advanced in the GMLS Report. Eiselen's conclusion is that there is no real evidence or substantive argument indicating that the proposed change in policy and procedure will force any international seller to change its policy on which of the INCOTERMS should apply. Particularly, there is no reason to believe that the proposed change will have any impact on the use of the CIF term as the proposed changes have no impact on the liabilities of the seller.

- [6] Adv Pammenter SC dealt with what he described as "a few comments on the practical aspects" of the INCOTERMS (pp. 5-10), multi-model contracts of carriage (pp. 11 to 12) and answers the question on how the change in policy will affect INCOTERMS and multi-model contracts of carriage (pp. 13-16). The substantive issues raised by the GMLS Report are dealt with specifically. The conclusions reached by Pammenter SC are, in the final analysis, that there is no merit in the arguments raised in the GMLS Report, nor in its prognostications of

what will happen should the proposed change in policy become law. My experiences accord with Pammenter's. I also agree with the opinions expressed by him and the reasons advanced in support of his views.

[7] Returning to Prof. Eiselen's opinion. There is no ambivalence in his incisive analysis of the GMLS Impact Study on the INCOTERMS, dealt with at pp. 70-81 of the GMLS Report. Each point of substance raised in the GMLS Report has been dealt with in its terms by Prof. Eiselen. His conclusion is, in every instance, fully motivated [see Eiselen's opinion at pp. 8-14, par 24(a) to 24(m)]. As the reasons for his conclusions can, in every instance, be found in his opinion, it is unnecessary to repeat them herein. What is repeated are some of Eiselen's views on the points made in the GMLS Report. I do so to demonstrate the Report's paucity of merit. Prof. Eiselen, usually known for his restrained response, reacts in what amounts to a stern condemnation of the unwarranted conclusions drawn in the GMLS Report. Some examples will suffice:

- **"The conclusion is incorrect and totally misleading"** [par 24(c), p. 9, line 3]; Eiselen commenting on the conclusion drawn in the GMLS Report that it is clear that interference in INCOTERMS will have detrimental consequences to all concerned within the Global Supply Chain.

- “Interviews with some of the biggest international carriers operating ...have also **proved this conclusion to be false and misleading**” [par 24(d), p. 10, lines 3-5]; Eiselen commenting on the GMLS Report's conclusion that the “shift in trade practice” (brought about by amending the current Act through the Customs Control Bill) impacts on existing and long-standing trade patterns for parties involved in the multi-model options for containerised cargo.
- “(T)his statement is **without any foundation in law**. There is no substantiation for the conclusion that the point of delivery may be subject to a potential forced change.” [par 24(e), p. 10, lines 13-15]
- “The underlined **conclusion is simply incorrect**.” [par 24(f), p. 11, line 6]; Eiselen here commenting on the plainly wrong proposition contained at p. 72 of the GMLS Report that “customs clearance in turn can impact on the questions of delivery, passing of the risk and who is responsible for the costs.”
- “This **statement is misleading** as the risk of delay is a risk that is borne by the importer and not the exporter” [par 24(g), lines 16-17]; Eiselen commenting on the proposition contained in the GMLS Report that if the time and place where the obligation to

present customs clearance must be met is the coastal port, it will heighten the risk of delay associated with the customs intervention.

- “Although this statement is true, it is **totally misleading within the context where it is used**” [par 24(h), p.12 lines 2-3]. “The conclusion implied here” (in the GMLS Report) “that a custom’s delay in Durban will entitle a South African buyer to cancel the contract or claim damages for breach of contract is simply not true and is therefore misleading” [par 24(h), lines 7-10].
- “This statement is generally true, but **misleading in the particular context** where it is implied that the changed procedures in South Africa will have an impact on these aspects.” [par 24(k), p. 13, lines 12-14]. Under the CIF term it will have no impact. Risk passes from the seller to the buyer when the goods are loaded onto the ship for export at the named port.
- “This **conclusion is simply wrong and unfounded in law**” [par 24(l), lines 24-25]; Eiselen commenting on the GMLS Report’s proposition that customs clearance can impact on the questions of delivery, passing of the risk and who is responsible for the costs.

- [8] In the GMLS Report notions are often floated and conclusions drawn where no proof for them exist and where substantiation of the propositions are entirely lacking. For example, at p. 75 of the GMLS Report it is claimed that it is evident that the amendment will have far-reaching impacts on existing trade patterns. Prof. Eiselen, quite correctly, criticises this approach at p. 14, lines 3-7 of his opinion:

*"It is significant that the impact report fails to make a detailed analysis of the most important aspects and INCOTERMS to show how the proposed Bills will in fact impact on the existing trade patterns. The report finds it sufficient to base its conclusions on generalities and misleading statements."*

- [9] I now wish to deal with a few other issues.

- [10] The GMLS Report of 5 August 2013 laments at p. 103:

*"It is also apparent that Business and SARS are presently in a stand-off position regarding the possibility of port congestion, cargo delays and the usage of road or rail. The reluctance of SARS to enter a robust debate around these issues is compounded by the fact that despite huge investment scheduled for Transnet, there appears to be no coordinated programme to take into consideration the implications of the new Bills."*

- [11] Almost 6 months have lapsed since then. The "robust debate" that the GMLS Report so eagerly sought, has now taken place. Every issue raised has since been turned upside down and inside out. All possible consequences of the proposed amendments have been examined and debated to the point of exhaustion. The matter is now ripe for



decision and finalisation.

[12] In deciding whether the proposed amendments are appropriate and necessary, it should be at the forefront of all considerations that it is the Commissioner for SARS' duty to administer the Act. To this end he should be empowered with statutory provisions enabling him to do his duty properly and efficiently. Business sectors that have raised concerns are aware of the Commissioner's concerns regarding proper administration and control. (see the GMLS Report; p. 15, 4<sup>th</sup> par; p. 19 last two lines to p. 20, bullet points 1 to 7; p. 20 last par to p. 21, first par; p. 21 par 7.2. There are others.) Yet, after all was said and done, the thrust or the Commissioner's concerns regarding proper administration and control have not been met.

[13] By contrast, all the fears raised by the concerned commentators regarding INCOTERMS and the like have been allayed by the Commissioner.



**MAISELS CHAMBERS, SANDTON**  
**3 FEBRUARY 2014**

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**A P JOUBERT SC**

## CURRICULUM VITAE of ALEWYN PETRUS JOUBERT SC

### [A] University

- Primarius Wilgenhof, Stellenbosch
- Chairman of the Primarii-Primariae Committee
- Chairman US Debating Society. Winner of the Debating Competition for all South African Afrikaans Universities.
- Editor-in-Chief of "Die Matie", the student newspaper of Stellenbosch University.
- Editor of Die Akkerjol, the rag magazine of US.
- Obtained the degrees BA LL.B (Stell); MBA (UCT) and LL.M cum laude (PU).

### [B] Career as an Advocate

- Practising at the Johannesburg Bar since 1980. Letters patent granted on 22 September 1993.
- Acted as counsel in 71 reported cases, 23 of them in the Supreme Court of Appeal; see the attached list, Annexure "A".
- Appeared as advocate, or consulted as advocate on brief, in several countries, viz. Swaziland, Botswana, Namibia, Lesotho, Mozambique, Zambia, Hong Kong, Australia, Singapore, Taiwan, Britain, Republic of Ireland, France, Germany, The Netherlands, Belgium, United States of America and the Crown Colony of Jersey.
- Lead claimant's team in an international arbitration held under the rules of the ICC in Paris. The substantive law applicable to the issues was French law (2013).
- Acting judge of the High Court, from time to time, since 1996. A list of his judgments is attached, see "A".
- Chairman Johannesburg Bar Council 2001 – 2002; previously served as Vice-Chairman (2000) and the three years proceeding as Treasurer of the Bar Council.
- Represented the South African Bar at festivities of Netherlands's Bars in The Hague (2001).
- Represented Johannesburg Bar at the First International Conference of Barristers and Advocates in Edinburgh (2002).
- Spoke on "Privilege and Confidentiality in South African Law" at the International Bar Association Conference held at Durban (2002).
- Director of AFSA (Arbitration Foundation of South Africa), 1996 -2002.
- Lecturer to pupils at the Johannesburg Bar on civil trials and cross-examination since 1993.
- Chairman of Management Committee of Maisels Group (consisting of some 90 advocates) since 2006.

### [C] Academic Career

- Extraordinary Professor of Public Law, University of Stellenbosch, 1 July 2001 to 30 June 2004. Still lecture there from time to time.
- Extraordinary Professor of Law, University of Potchefstroom (now North-West) since 2001. (Presents the course on customs and excise law as part of the LLM in International Trade Law.)
- Visiting Professor of Law, National University of Mongolia, Ulaanbataar (2007).
- Visiting Professor in the Humanities at the State University of Ryazan (Russia) and visiting Professor in International Trade Law at the Odessa National Law Academy (Ukraine) during 2009. (His experiences are related in "n Maand in die Vreemde", published in the "Advocate" of April 2010, December 2010 and April 2011).
- Visiting Professor of Law at the State University of Saint Petersburg (2013).
- Guest lecturer from time to time at the Rand Afrikaans University (now University of Johannesburg), University of the Witwatersrand and Pretoria University.
- Visiting lecturer at Tilburg University (Netherlands) during February 2005.
- Spoke on "Recognition and Enforcement of Foreign Judgements in South African Law" at the conference hosted by the Center for International Legal Studies at Santiago, Chile (2003).
- Spoke on "Courts and Arbitration Tribunals in South Africa" at the conference hosted by the Centre for International Legal Studies at Whistler B.C., Canada (2005).
- Spoke on "Unlawful Competition in South African Law" at a conference hosted by Centre for International Studies at Alyeska, Alaska (2006).

## "A"

## A. REPORTED CASES

- 1 S v Sam 1980 (4) SA 289 (T)  
2 S v Ramaligela en 'n Ander 1983 (2) SA 424 (V)  
3 Rauties Transport (Edms) Bpk v Voorsitter, Plaaslike Padvervoerraad, Johannesburg, en 'n Ander 1983 (4) SA  
146 (W)  
4 Anderson Transport (Pty) Ltd v Chairman, National Transport Commission and Others 1985 (2) SA 97 (C)  
5 Eljomo Vervoer (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie en Ander 1985 (2) SA 199 (T)  
6 Heavy Transport and Plant Hire (Pty) Ltd and Others v Minister of Transport Affairs and Others; South North  
Haulage (Pty) Ltd and Another v South African Transport Services 1985 (2) SA 597 (W)  
7 Suid-Afrikaanse Vervoerdienste v Voorsitter, Nasionale Vervoerkommissie en 'n Ander 1985 (3) SA 531 (NC)  
8 Olgar v Chairman, National Transport Commission, and Another 1985 (3) SA SA 1030 (D)  
9 South African Transport Services v Olgar and Another 1986 (2) SA 684 (A)  
10 Voorsitter, Nasionale Vervoerkommissie, en 'n Ander v Sonnex (Edms) Bpk 1986 (3) SA 70 (A)  
11 Mokoena v Minister of Law and Order 1986 (4) SA 42 (W)  
12 S A Freight Consolidators (Pty) Ltd v Chairman, National Transport Commission, and Another 1987 (4) SA 155  
(W)  
13 South African Transport Service v Chairman, Local Road Transportation Board, Cape Town, and Others;  
Unicorn Lines (Pty) Ltd v Chairman, Local Transportation Board, Cape Town, and Others 1988 (1) SA 665 (C)  
14 S A Freight Consolidators (Pty) Ltd v Chairman, National Transport Commission, and Another 1988 (3) SA 485  
(W)  
15 LTA Construction BPK v Administrateur, Transvaal 1992 (1) SA 473 (A)  
16 Tieber v Commissioner for Customs and Excise 1992 (4) SA 844 (A)  
17 Commissioner for Customs and Excise v C I Caravans (Pty) Ltd 1993 (1) SA 138 (N)  
18 Purnell v Purnell 1993 (2) SA 662 (A)  
19 Commissioner of Customs and Excise v Bank of Lisbon International Ltd and Another 1994 (1) SA 205 (N)  
20 Administrateur, Transvaal v Van der Merwe 1994 (4) SA 347 (A)  
21 Transnet Bpk h/a Coach Express en 'n Ander v Voorsitter, Nasionale Vervoerkommissie, en Andere 1995 (3) SA  
844 (T)  
22 Crown Chickens (Pty) Ltd v Minister of Finance and Others 1996 (4) SA 389 (E)  
23 Minister of Finance v Ideal Fasteners Corporation CC 58 (1996) SATC 145; also in [1996] 1 All SA 373 (C)  
24 Joseph and Another v Air Tanzania Corporation 1997 (3) SA 34 (W)  
25 Unitrans Passanger Bpk v Voorsitter NVK; Transnet Bpk v Voorsitter NVK 1997 (4) SA 663 (T)  
26 Interkaap Ferreira Busdiens (Pty) Ltd v Chairman NTC 1997 (4) SA 687 (T)  
27 Beier Industries (Pty) Ltd (formerly OTH Beier Company (Pty) Ltd) v Commissioner for Customs and Excise  
1998 (4) SA 345 (N); also reported in 60 (1998) SATC 39  
28 The Minister of Finance and Others v EBN Trading (Pty) Ltd 1998 (2) SA 319 (N); also in [1997] 3 All SA 481 (N).  
29 Society of Advocates of South Africa (Witwatersrand Division) v Edeling 1998 (2) SA 852 (W)  
30 Ward and Another v Smit and Others: In Re Gurr v Zambia Airways Corporation Ltd 1998 (3) SA 175 (SCA)  
31 S v Valashiya 1998 (1) SACR 713 (NKA)  
32 Tina Cosmetics (Pty) Ltd v Commissioner for Customs and Excise 60 (1998) SATC 220 (W)  
33 Commissioner of Customs and Excise v Strauss and Others 1998 (4) SA 593 (T); also in [1998] 3 All SA 104 (T)  
34 Klopper en Andere NNO v Engelbrecht en Andere NNO 1998 (4) SA 788 (W)  
35 Commissioner for Customs and Excise v Capital Meats CC 1999 (1) SA 570 (SCA)  
36 Commissioner for Customs and Excise v Container Logistics (Pty) Ltd; Commissioner for Customs and Excise v  
Rennies Group Ltd t/a Renfreight 1999 (3) SA 771 (SCA); also 1999 (8) BCLR 833 (SCA).  
37 Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission and  
Others; Transnet Ltd (Autonet Division) v Chairman, National Transport Commission and Others [1999] 3 All  
SA 365 (SCA); also reported as 1999 (4) 1 (SCA)  
38 EBN Trading (Pty) Ltd v Commissioner of Customs and Excise and Another 1999 (3) JTLR 45 (N)  
39 EBN Trading (Pty) Ltd v Commissioner of Customs and Excise and Another 2001 (2) SA 1210 (SCA)  
40 Union Finance Holdings Ltd v I.S. Mirk Office Machines II (Pty) Ltd and Another 2001 (4) SA 842 (W)  
41 Henbase 3392 (Pty) Ltd v Commissioner, South African Revenue Service,  
and Another 2002 (2) SA 180 (T)  
42 Woodlands Dairy (Pty) Ltd v Parmalat SA (Pty) Ltd 2002 (2) SA 268 (ECD)  
43 Henbase 3392 (Pty) Ltd v Commissioner, SARS and Another 2002 (3) SA 26 (SCA)  
44 Biotech Laboratories (Pty) Ltd v Beecham Group PLC and Another 2002 (4) SA 249 (SCA)  
45 Commissioner for South African Revenue Service v Nutec Southern Africa (Pty) Ltd 64 SATC 260, 2001 (SCA)  
46 Telkom SA v Nedtel Cellular (Pty) Ltd and Others 2004 (2) SA 324 (T)  
47 Kevin and Lasia Property Investment CC and Another v Roos NO and Others 2004 (4) SA 103 (SCA)  
48 Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd 2004 (6) SA 29 (SCA)  
49 Orange River Export (Pty) Ltd v TDC International Fruit Frais du Monde Inc 2005 (1) All SA 764 (NC)

- 50 **Valunet Solutions Inc t/a Dinkum USA and Another v eTel Communications Solutions (Pty) Ltd** 2005 (3) SA 494 (W)
- 51 **Geysler v Nedbank Ltd and Others: In Re Nedbank Ltd v Geysler** 2006 (4) SA 544 (W)
- 52 **Geysler v Nedbank Ltd and Others: In Re Nedbank Ltd v Geysler** 2006 (5) SA 355 (W)
- 53 **Distell Limited and Another v Commissioner for South African Revenue Service and Another** 69 SATC 15, 2006 (T)
- 54 **Colgate Palmolive (Pty) Ltd v Commissioner, South African Revenue Services** 2007 (1) SA 35 (N)
- 55 **Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd** 2007 (6) SA 87 (SCA)
- 56 **Western Flyer Manufacturing (Pty) Ltd v Dewrance and Others NNO : In Re Dewrance and Others NNO v Northwest Transport Investments (Pty) Ltd (Under Judicial Management) and Others** 2007 (6) SA 459 (B)
- 57 **Oosthuizen's Transport (Pty) Ltd and Others v MEC, Road Traffic Matters, Mpumalanga, and Others** 2008 (2) SA 570 (T)
- 58 **Minister of Finance and Another v Paper Manufacturers Association of South Africa** 2008 (6) SA 540 (SCA)
- 59 **Commissioner for SARS v Duro Pressings (Pty) Ltd** 71 SATC 88, 2008 (T)
- 60 **National Lotteries Board v Bruss NO and Others** 2009 (4) SA 362 (SCA)
- 61 **Nedbank Ltd v Master of the High Court, WLD and Others** 2009 (3) SA 403 (W)
- 62 **LG Electronics SA (Pty) Ltd v Commissioner for South African Revenue Service** 71 SATC 275, 2009 (T)
- 63 **Espag and Another v Hattingh** 2010 (3) SA 22 (SCA) (Drew Heads of Argument, not available for presentation of argument)
- 64 **Pahad Shipping CC v Commissioner for South African Revenue Service** [2010] 72 SATC 35 (SCA)
- 65 **Distell Ltd v Commissioner for South African Revenue Service** [2011] 73 SATC 265 (NGP)
- 66 **Distell Ltd v Commissioner for South African Revenue Service** [2011] 1 All SA 225 (SCA); also [2011] 73 SATC 148 (SCA)
- 67 **Commissioner for South African Revenue Service v Multichoice Africa (Pty) Ltd and Another** [2011] 73 SATC 209 (SCA)
- 68 **Commissioner for South African Revenue Service v LG Electronics SA (Pty) Ltd** 2012 (5) SA 439 (SCA); also [2011] 73 SATC 326 (SCA)
- 69 **Commissioner for South African Revenue Service v Colgate-Palmolive (Pty) Ltd** [2012] 74 SATC 157 (SCA)
- 70 **Distell Ltd v Commissioner, South African Revenue Service** 2012 (5) SA 450 (SCA); also [2012] 74 SATC 272 (SCA)
- 71 **Commissioner for South African Revenue Service v Smith Mining Equipment (Pty) Ltd** [2012] 74 SATC 312 (NGP)

## B. JUDGMENTS

- 1 **S v Opperman** 1997 (1) SACR 285 (W)
- 2 **S v Badenhorst** 1997 (1) SACR 311 (W)
- 3 **S v Oosthuizen** 1997 (1) SACR 315 (W)
- 4 **Faiga v Body Corporate of Dumbarton Oaks and Another** 1997 (2) SA 651 (W); also in [1997] 1 All SA 367 (W)
- 5 **Tudoric-Ghemco v Tudoric-Ghemco** 1997 (2) SA 246 (W)