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Battle brews over payment of depot overstay fees

BY Alan Peat

There is a potential battle brewing between the shipping lines and SA's major container depot operators, SA Container Depots (SACD), as the depot giant stands by its legal rights to charge container operators for overstay storage fees, and the lines disagree.

And, lurking in the wings as the

private sector argument occupies the centre stage, is the State Warehouse – a not-so-innocent party in the issue.

In a lengthy case presented to FTW by Graham Peinke, MD of SACD, he was adamant that, from the inception of containerisation in SA in 1977, container depots were always paid storage charges by container operators for containers and cargo stored.

Nothing really interfered with this arrangement until 2007 when a legal opinion was presented by Hester Hopkins, then an international customs consultant with Durban attorneys, Shepstone & Wylie, and published in FTW. This suggested that customers no longer had to pay storage on goods that had been detained for whatever reason after a period of 28 days.

"This opinion," said Peinke, "is fundamentally flawed as it took no account whatsoever of the contracting terms between customers and container depots.

"When a container operator (CO) – and that includes shipping lines and NVOCCs – stores containers with a container depot it enters into an agreement with the depot by which it agrees to pay rental to the depot for storage

spaced used."

That contract is in no way thwarted by whatever happens after the agreement is signed.

And this is where the State Warehouse first enters the scene.

In terms of the Customs Act, containers must be cleared by customs within 28 days of arrival in SA, failing which they must be moved from the container depots

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All the president's men ... and women



S'bu Ndebele
Minister of Transport
(Deputy: Jeremy Cronin)



Rob Davies
Minister of Trade
and Industry



Thandi Tobias
Deputy Minister of Trade
and Industry



Maria Ntuli
Deputy Minister of Trade
and Industry



Barbara Hogan
Minister of Public
Enterprises



Enoch Godongwana
Deputy Minister of
Public Enterprises

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Est. 1977

All the president's men ... and women

BY Staff reporter

The big news as this issue went to press on Monday morning was the new cabinet announced on Sunday by President Jacob Zuma.

Key members for the trade and transport sector include:

- Minister of Trade and Industry, Rob Davies, with deputies Thandi Tobias and Maria Ntuli.

Born in 1948, Davies was previously deputy minister of trade and industry.

He holds a Bachelor of Commerce degree from Rhodes University and Master of Social Science and Doctor of Philosophy degrees, both from the University of Sussex.

- Minister of Transport, Sbusiso Joel Ndebele, and deputy Jeremy Cronin.

Born in 1948 at Rorke's Drift, KwaZulu-Natal, Ndebele was previously KZN premier.

He was also one of the longest-serving transport MECs in the country, with two terms from 1994 to 2004.

According to the Natal Witness, several projects he pioneered in KZN were adopted both nationally and by other provinces. For example the Asiphephe Road Safety project was the basis for the national Arrive Alive campaign. The Renaissance Road upgrading programme, which got local communities involved in maintaining roads in their areas as a way of generating income, went national as did the Vukuzakhe emerging contractors' project. He also pioneered taxi cities and taxi co-operatives.

He holds two Bachelor of Arts degrees from the University of SA.

Previous transport minister, Jeff Radebe, has been appointed Minister of Justice and Constitutional Development.

- Minister of Public Enterprises, Barbara Hogan, with deputy Enoch Godongwana.

Hogan made her mark recently when she was appointed to head up the

health ministry, a position in which her stand on HIV earned her the respect of the nation.

She joined the ANC in 1976 after the Soweto uprising and was the first woman in South Africa to be found guilty of treason.

She was sentenced to 10 years in prison and released in 1990.

She was previously chairperson of the portfolio committee on finances.

- The Department of Foreign Affairs has been renamed and restructured to become the Department of International Relations and Cooperation headed up by Maite Nkoana-Mashabane and two deputies – Ebrahim Ismail Ebrahim and Sue van der Merwe, who held the post of deputy minister of foreign affairs previously.

Nkoana-Mashabane, who was a leader in the African National Congress, has been involved in the international affairs arena for some time.

She previously held the post of MEC for local government and housing in Limpopo and was South Africa's former ambassador to India.

Previous foreign affairs minister Nkosazana Dlamini Zuma will now head up the Department of Home Affairs.

And with SA Revenue Service Commissioner Pravin Gordhan taking up the post of finance minister, one of his three deputies, Oupa Magashula, is expected to take over as acting head of the group until a permanent replacement is found.

Battle brews

From page 1

to a State Warehouse.

"However," said Peinke, "typically the State Warehouse does not have space for these containers. This then affects the depots, because – if the State Warehouse does not have space – the act provides that a depot may be deemed a State Warehouse by customs. The depot would then have to retain the overstay containers, but now in the guise of a State Warehouse."

Hopkins' opinion was that – when depots become deemed State Warehouses in terms of the act – the contract between the CO and the depot automatically terminates. This prevents the depot from charging the CO rental on overstay containers.

'Container operators remain obliged to pay rentals for overstay containers, even when the container depots become deemed State Warehouses.'

Hopkins also suggested that the depots were only entitled to rental from the State itself in terms of the act, and that they were no longer allowed to charge rental to COs once they became deemed State Warehouses.

Not so, said Andrew Pike of logistics and maritime transport attorneys, Andrew Pike & Associates, and legal adviser to SACC.

"The COs remain liable to pay storage fees charged by the depot for the overstay container/s, as the act in no way overrides the trading terms," he told FTW.

"This is because the latter are agreed to by both parties and are not in conflict with legislation. The trading terms of some of the depots, in fact, specifically state that the contract continues, even

after the depot has been deemed to be a State Warehouse."

And, as for the State Warehouse paying these virtual state warehouses (VSWs) for storage, Peinke laughed it off – telling FTW that SACC hadn't received a single buck from the State for its surrogate SW role.

Pike agreed. "The reality," he said, "is that few, if any depots, have ever received rental from the State when they have been used as deemed State Warehouses."

But his opinion – supported by that of FTW's legal adviser on maritime issues, Andrew Robinson, director of Deneys Reitz – is that it is clear that it was not the intention of the legislature to discard or override a legitimate commercial contract between the CO and the depot.

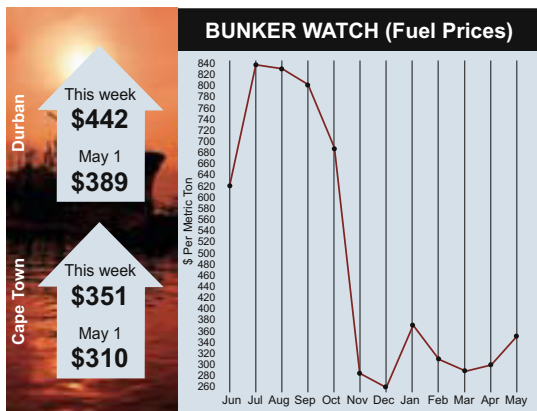
"If this were allowed," said Pike, "the depot would be greatly prejudiced as potentially no equitable compensation would be received for usage of its storage facilities."

What it all boils down to, according to Peinke, is that the container operators remain obliged to pay rentals for overstay containers, even when the container depots become deemed State Warehouses. "It's that plain and simple," he added.

While the depot operators agreed with the lines' desire to have their containers returned to them promptly, they argued with Hopkins' assertion that the act did not apply to the containers, but rather to the goods inside.

Pike said that, if this were true, it would then follow that the depot could charge storage for the goods themselves, using its own commercial rates.

"Therefore," he added, "even if the proposal were correct it would not take away the COs' liability to the depots for storage charges because both the containers and the goods inside them are subject to the trading terms of the depots."



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