ECONET WIRELESS (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY
and
COMMISSIONER GENERAL
and
STEWARD BANK LIMITED
and
CBZ BANK LIMITED
and
NMB BANK LIMITED
and
STANBIC BANK LIMITED

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 29 October 2014, 25 November and 14 December 2015

Opposed Application

T. Nyambirai, for the applicant
A. B. C. Chinake, for the1st and 2nd respondents

MUSAKWA J: Following an urgent chamber application lodged with this court an order by consent was granted as between the applicant, first, second, third and fourth respondents on 13 November 2013. Five issues were reserved for argument and these are:

(a) "Whether the importation of the base stations by the applicant during the period January 2009 to July 2013 was conducted within the law.

(b) Whether in the circumstances of this case, the 1st and 2nd respondents are prevented from reviewing the classification for customs duty purposes of base station components imported by the applicant between January 2009 and July 2013 by the doctrines of estoppel, waiver, or *functus officio*.

(c) Whether at law, the 2nd respondent is entitled to impose and collect without the agreement of the applicant a fine at all, or of the magnitude imposed on the applicant, namely US$47 654 830-38.

(d) Whether it is competent for the 2nd respondent to collect the fine imposed on the applicant through the garnishee procedure provided for under section 201 A of the Customs and Excise Act [*Chapter 23:02*].

(e) Whether the launching of an appeal or other challenge to the classification of goods for customs purposes under section 87 of the Customs and Excise Act precludes the 1st and 2nd respondents from collecting the customs duty under challenge under section 201 A of the Act pending the determination of an appeal or other challenge."

The facts of the matter are as follows. The first and second respondents placed garnishee orders on the applicant's bank accounts with the third respondents. On 3 December 2013 the applicant was served with a letter to which was attached bills of entry relating to base station components imported between January 2009 and June 2013. Related to the schedule was a revised tariff calculating the duty now payable. A penalty of 300% was also imposed. It was stated that the applicant owes customs duty and value added tax in the sum of US$15 884 943-46. It was contended that the applicant paid duty on its imports as base stations as opposed to base station components. Thus a penalty of US$47 654 830-38 was imposed, bringing the total amount claimed to US$63 539 773-84. No reason was given for the penalty that was imposed.

As regards the garnishee order made under s 58 of the Income and Tax Act [*Chapter 23; 06*] it is contended that the provision relates to tax obligations under that act. It is also contended that the procedure relating to the appointment of representative tax payers does not apply to disputed tax liabilities. Even if the Income Tax Act is applicable the applicant would be entitled to object in terms of s 62 and the time within which to object had not lapsed. Part 111A of the Revenue Authority Act [*Chapter 23:11*] does not empower the Commissioner General to arbitrarily take the applicant's money.

The applicant refers to annexures 'F' and 'G' in relation to what constitutes a base station. Annexure 'F' is a letter written on behalf of the Director of Customs and Excise on 5 October 1998 and addressed to the applicant's Manager, General Services. The enumerated goods are classified for duty free purposes under tariff 8525.2020. Annexure 'G' is another letter written on behalf of the second respondent and addressed to the applicant's Chief Logistics Manager on 24 February 2010.

It is further contended that it is impractical to have a base station assembled in bond in order to qualify for duty free status. The duty of an importer is to declare imports and not the assessment of goods for duty purposes. Thus the respondents are bound by the assessments they made.

Regarding the penalty, the applicant contends that there is no law that it violated. Section 200 of the Customs and Excise Act relates to penalties where a party admits violating

the Act. In such a case the respondents are not permitted to impose a penalty through an agent under s 201A. In addition, a penalty of 300% is manifestly excessive.

In opposing the application the first and second respondents contend that the dispute between the parties is over classification of goods for customs purposes. It is acknowledged that the applicant has always imported base stations constituted as components. The law allows importation of assembled base stations.

For classification of goods for customs purposes, the customs and Excise Tariff Notice, Statutory Instrument 245/2002 incorporates General Rules for Interpretation of Harmonised System for the Classification of Goods which is a global standard. In that respect, rule of classification 3(b) provides that composite goods made up of different components shall be classified as if they consisted of a component which gives them their essential character. All completely knocked down components shall be imported at the same time to constitute the essential character of a base station.

For an importer to rely on a tariff ruling on imports, the ruling must be issued according to law in order to constitute a Revenue Advance Tax Ruling (which includes a Tariff Ruling). The ruling must be issued by the second respondent and not an administrative head or manager at station level.

Some specific agents of the applicant imported base stations without placing them in bond to enable reconciliations. They also imported other telecommunications equipment under the guise of base stations. When this was brought to the applicant's attention the proper amounts of duty were paid.

Following such a development, the first respondent, as it is entitled to do, conducted a post-clearance audit relating to base stations. In the process significant anomalies were noted. There was an erroneous declaration of base stations. The applicant was advised of the outcome of the audit and asked to pay in terms of the Special Warrant Customs Duty. The applicant asked for more time to consider the issue. The respondents conceded that the wrong garnishee form was used. Instead of the one used for Customs and Excise they used the one for Income Tax. The erroneous garnishee was subsequently withdrawn.

Lawfulness of the Imports

Mr *Nyambirai* submitted that illegality does not arise by virtue of the letter dated 3 December 2013. This is because the letter made reference to an administrative arrangement. An allegation of illegality presupposes that the applicant acted on its own. Bills of entry were

reviewed by the respondents. The duty to classify is not that of the importer. He further submitted that if there is any misclassification, it is the fault of the respondents.

Mr *Chinake* submitted that the applicant can only succeed in the relief sought if the facts do not support the respondents' actions. He further submitted that ordinarily courts should not interfere with the powers bestowed on administrative authorities.

According to the Customs and Excise (Tariff) Notice, Statutory Instrument 245/2002 general rules for the interpretation of the Harmonized System Classification of Goods in the nomenclature shall be governed by the following principles:

> "Rule 2
> (a)…….
> (b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3.
> Rule 3
> When by application of Rule 2 (b) or for any other reason, goods are *prima facie*, classifiable under two or more headings, classification shall be effected as follows:
> (a)…….
> (b) Mixtures, composite goods consisting of different materials or made of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable."
> (c)……"

The respondents' contention is that following a post-clearance audit regarding imports made by the applicant between January 2009 and June 2013 certain anomalies were detected. These included the importation of certain telecommunication equipment other than equipment that constituted a base station. In other instances the applicant is said to have imported individual components that could have constituted a base station had they been imported at the same time and moved into a bonded warehouse. In fact, the respondents' contention is that the equipment was imported under the guise of a base station. This resulted in the declared base stations by the applicants amounting to 491 142. In contrast, the Postal and Regulatory Authority noted that the applicant had 2 440 base stations.

The applicant acted through agents. It is the duty of an importer to make an entry of the importation of goods in a bill of entry. In this respect see s(s) 39 and 40 of the Customs and Excise Act [*Chapter 23: 02*]. It is also clear that a principal is liable for the transgressions of an agent. In this respect see s 218 (3) of the Act.

It is only when the individual components of telecommunication equipment constituted a base station that they could not attract duty. I cannot see for example how cables could be billed as base station.

Therefore in light of the audit conducted in respect of the importations done by the applicant, the false declarations amount to a contravention of the Act. It matters not that these declarations were made by the applicant's agents.

Estoppel

Mr *Nyambirai* submitted that the acts of functionaries are deemed to be those of the principal. This acts to protect the rights of others who rely on the acts of administrative authorities as in the present case. Thus, it is inappropriate for the respondents to turn around and claim duty for goods that previously did not attract duty. A reclassification can only be done on appeal. He referred to s 87 (2).

Mr *Chinake* submitted that the dispute must be analysed in the context of the provisions of the Customs and Excise Act. Thus the statute in question bestows certain powers on the respondents which cannot be overridden by common law principles. For example, there is provision for payment of duty pending the resolution of a dispute.

The defence of estoppel was explained by McNally JA in *Mashave* v *Standard Bank of S.A. Ltd* 1998 (1) ZLR 436 (SC), at 438 as follows:

> "The Roman-Dutch law protects the right of an owner to vindicate his property, and as a matter of policy favours him as against an innocent purchaser." See for instance *Chetty* v *Naidoo* 1974 (3) SA 13 (A) at 20A-C.

The innocent purchaser's only defence is estoppel. Estoppel depends upon an allegation that a D representation was made by the owner/claimant. In *Aris Enterprises (Finance) (Pty) Ltd* v *Protea Assurance Co Ltd* 1981 (3) SA 274 (A), Corbett JA (as he then was) said at 291:

> "The essence of the doctrine of estoppel by representation is that a person is precluded, i.e estopped, from denying the truth of a representation previously made by him to another person if the latter, believing in the truth of the representation, acted thereon to his prejudice (see Joubert *The Law of South Africa* vol 9 para 367 and the authorities there cited). The representation may be made in words, i.e expressly, or it may be made by conduct, including silence or inaction, i.e tacitly (Ibid para 371); and in general it must relate to an existing fact (Ibid para 372)."

See also *Grosvenor Motors (Potchefstroom) Ltd* v *Douglas* 1956 (3) SA 420 (A) at 427G; *Johaadien* v *Stanley Porter (Paarl) (Pty) Ltd* 1970 (1) SA 394 (A); *Oakland F Nominees (Pty) Ltd* v *Gelria Mining & Invstm Co Ltd* 1976 (1) SA 441 (A); *Jones & Ors* v

Trust Bank of Africa Ltd & Ors 1993 (4) SA 415 (C) at 424-5; *Basson t/a Repcomm Community Repeater Svcs* v *Postmaster General* 1994 (3) SA 224 (SE) at 235A-C; Rabie *The Law of Estoppel in South Africa* p1; Miller *The Acquisition and Protection of Ownership* p 306 et seq; Visser and G Potgieter Estoppel: *Cases and Materials* p 240; Silberberg & Schoeman's *The Law of Property* 3 ed 284-299; Gibson's *SA Mercantile & Company Law* 6 ed 186-7.

Section 87 (2) of the Customs and Excise Act provides that-

> "The Commissioner shall vary or set aside a classification of goods made in terms of subsection (1) if he is satisfied, whether on appeal by the importer of the goods or otherwise, that the classification was incorrect."

The provision empowers the commissioner to vary an erroneous classification of goods. Such variation is not limited to an appeal as contended by Mr *Nyambirai*. I am fortified in this view by the wording- "whether on appeal by the importer of the goods or otherwise,……"

The ordinary dictionary meaning of otherwise is- "in another or different way; in other or different respects: or apart from that." Therefore, I construe that provision to mean that the Commissioner-General may vary or set aside a classification of goods, if he is satisfied, whether on appeal by the importer of goods or in any other circumstances, that the classification was incorrect.

It would be absurd to restrict the Commissioner General's intervention to an appeal when there is provision for a post clearance audit as provided in s 223A of the Act. In this respect s 223 (4) of the Act provides that:

> "The Commissioner, after releasing the goods subject to entry and in order to satisfy himself or herself as to the accuracy of the particulars contained in the declaration, may undertake a post-clearance audit in relation to those goods, that is to say he or she any officer or person authorised by him or her in writing may—
> (a)…….
> (b)…….
> (c)…….
> (d)……"

Waiver

Mr *Nyambirai* submitted that by virtue of classifying some components for base stations as duty free, the respondents waived an intention not to impose duty on the class of goods so specified. This is sufficient to invoke estoppel. He further submitted that the

applicant published its financial statements over the years based on this information and it had impact on the public. Therefore, the respondents must be estopped from reclassifying the components.

It is also contended that the classifications made in the letters dated 5 October 1998 and 24 February 2010 were made by agents of the Commissioner-General and not officers in terms of s 87 of the Customs And Excise Act. In that context it is tantamount to a classification made by the Commissioner-General himself. Consequently, the Commissioner-General would be precluded from reclassifying goods that were classified by his agents. As previously noted, of the letters in contention, the one dated 5 October 1998 was signed by T. Chimunhu on behalf of the Director of Customs and Excise. That of 24 February 2010 was signed by M. Madongorere on behalf of the Commissioner General.

Mr *Chinake* countered this argument by submitting that the respondents have an unfettered right to conduct post-clearance audit within six years.

Just as the argument on estoppel, I find merit in the argument advanced by the respondents. The people who signed the letters referred to are officers of the first respondent as defined in the Customs And Excise Act. It is those officers who made the classifications of the imports in terms of s 87 (1) of the Act. It is clear that the classification was not made by the second respondent. In that event the applicant's recourse was either to appeal to the second respondent (if the classification was made by an officer) or to appeal to the Fiscal Appeal Court (if the classification was made or varied by the second respondent). See s 87 (3) of the Act.

The duty to classify goods rests with the first respondent's officers or the second respondent. In the event of error in the classification of such goods, such classification can be varied by the Commissioner-General who is the second respondent. Therefore, an erroneous classification of goods cannot be viewed as waiver of duty payable on the class of goods affected by such erroneous classification. The respondents would be failing in their statutory obligations were they to turn a blind eye to the need to rectify any anomaly exposed by a post-clearance audit.

A party relying on waiver has the onus to show that the other party had full knowledge of its rights and abandoned such rights expressly or impliedly. See *Barclays Bank of Zimbabwe* v *Binga Products* 1984 (2) ZLR 26 (SC). The classification of goods in their correct tariff cannot be viewed as a right. It is a duty and where it is not done correctly, it must be rectified.

Effect of Noting Appeal

Mr *Nyambirai* submitted that s 201A relates to appointment of agents by the Commissioner-General. Since an appeal was noted against the decision of the Commissioner-General, the decision made in the letter of 3 December 2013 was suspended. He based this submission on the common law. However, Mr *Nyambirai* further submitted that there is conflict regarding the effect of noting an appeal against the decision of an administrative authority. Nonetheless Mr *Nyambirai* placed reliance on the case of *Econet* v *Telecel Zimbabwe (Pvt) Ltd* 1998 (1) ZLR149 (HC). He also referred to s 14 of the Fiscal Appeals Court Act.

Mr *Chinake* countered this submission with the argument that the respondents have no problem with the importation of complete base stations duty free. Rather, it is the fact that the applicant imported single components which were then classified as base stations. In such a case the imports would be liable for duty.

Regarding the effect of noting of the appeal, s 14 of the Fiscal Appeal Court Act [*Chapter 23:05*] provides that-

> "The obligation to pay and the right to receive and recover any tax, additional tax, penalty or interest chargeable under this Act shall not, unless the Commissioner so directs, be suspended by any appeal in accordance with section 11 or 13 or pending the decision of the court, but if any assessment is altered on appeal or in conformity with any such decision or a decision by the Commissioner to concede the appeal to the court, a due adjustment shall be made, amounts paid in excess being refunded with interest at the prescribed rate and calculated from the date proved to the satisfaction of the Commissioner to be the date on which such excess was received, and amounts short-paid being recoverable with penalty and interest."

In *Econet* v *Telecel Zimbabwe* (*supra)* Smith J held that in civil cases the noting of an appeal automatically suspends the execution of any judgment or order granted by the court of first instance. Having noted that there are statutes that provide against the suspension of a judgment or order upon the noting of an appeal the learned judge went further to recommend that the law be amended in as far as it provides for the automatic suspension of the execution of a judgment or order upon the noting of an appeal.

In *Longman Zimbabwe (Pvt) ltd* v *Midzi & Others* 2008 (1) ZLR 198 (S) the Supreme Court noted that the common law rule on the effect of noting an appeal has not been applied uniformly, resulting in a divergence of opinion. However, at pp 205-206 Garwe JA had this to say:

> "There is a presumption in our law that Parliament does not intend to alter the common law unless it does so expressly or by necessary implication. Silence by the Legislature should not be taken to mean that the Legislature intends to alter the common law position. If the enabling

> legislation is silent, then the common law position must apply: *PTC* v *Mahachi* 1997 (2) ZLR 71 (H).
>
> The position may now be accepted as settled in this jurisdiction that, unless empowered by law to do so, an inferior court, tribunal or other authority has no power to order the suspension of its own orders or judgments and, further, that the noting of an appeal against the judgment or order of such a court, tribunal or other authority, in the absence of a statutory provision to that effect, does not have the effect of suspending the operation of the judgment or order that is sought to be appealed against."

In light of s 14 of the Fiscal Appeal Court Act, the noting of an appeal with the Fiscal Appeal Court did not suspend the decision of the Commissioner-General. I did not hear any contention that the Commissioner-General directed the suspension of the order against the applicant pending the appeal noted.

Whether the Respondents Can Impose and Collect A Penalty without Agreement

Mr *Nyambirai* submitted that the second respondent cannot impose a penalty where an importer has not consented. He referred to s 200 of the Act. Where an importer does not admit the matter should be referred for prosecution. He further submitted that a penalty of 300% was not justified. Even where there is such power to impose a penalty, it was unreasonably exercised.

Mr *Chinake* submitted that the Act provides for a penalty up to three times the value of the goods. It is up to the court to determine whether that was justified in the present case. In the event of the penalty being excessive the court can vary it or direct the second respondent to amend it.

Regarding the imposition of a fine by the Commissioner-General, s 200 (1) of the Customs and Excise Act provides that-

> "If any person has contravened any provision of this Act and has admitted to the contravention, he shall pay a fine determined by the Commissioner, which does not exceed the maximum penalty provided by this Act for the offence in question:
> Provided that if criminal proceedings have been instituted against the person concerned for such offence, the power conferred by this subsection shall not be exercised without the prior approval of the Prosecutor-General."

The above provision is analogous to the payment of admission of guilt fines in terms of s 356 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The major difference though is that in terms of s 356 of the Criminal Procedure and Evidence Act the payment of fines in lieu of appearing before a court is restricted to minor offences.

A plain reading of s 200 (1) of the Customs and Excise Act leaves no doubt that the Commissioner-General can only determine a fine where a person is admitting. The only other

situation is where criminal proceedings have been commenced and there is prior approval by the Prosecutor-General. There is no evidence of such a development taking place.

Propriety of Collecting a Fine By Way of Garnishee

Section 201 A of the Customs and Excise Act provides that:

> "(1) For the purpose of subsection (1)—
> "person" includes—
> (*a*) the People's Own Savings Bank constituted in terms of the People's Own Savings Bank Act [*Chapter 24:22*] and any financial institution registered or required to be registered in terms of the Banking Act [*Chapter 24:20*] or the Building Societies Act [*Chapter 24:02*]; and
> (*b*) a partnership or company.
> (2) The Commissioner may, if he thinks it necessary, declare any person to be the agent of any importer or excise manufacturer, and the person so declared an agent shall be the agent of such importer or excise manufacturer for the purposes of paying any duty due in terms of this Act, and, notwithstanding anything to the contrary contained in any other law, may be required to pay any duty due from any moneys in any current account, deposit account, fixed deposit account or savings account or from any other moneys, including pensions, salary, wages or any other remuneration, which may be held by him for, or due by him to, the importer or excise manufacturer whose agent he has been declared to be.
> (3) For the purpose of this section, the Commissioner may require any person to give him within a specified period information in respect of any moneys, funds or other assets which may be held by him for or due by him to, any importer or excise manufacturer.
> (4) Any person who fails to comply with any provision of this section with which it is his duty to comply shall incur a penalty of five *per centum* of the unrecovered revenue for every day during which the default continues, and every such penalty shall be recoverable by the Commissioner by action in any court of competent jurisdiction.
> In the general definition section of the Act, duty is defined as-
> "duty", subject to subsection (4) of section *thirty-four*, subsection (4) of section *thirty-eight*, subsection (6) of section *thirty-nine*, subsection (5) of section *forty*, subsection (6) of section *forty-five*, subsection (3) of section *forty-six*, subsection (1) of section *one hundred and eighteen*, subsection (2) of section *one hundred and ninety-two*, subsection (2) of section *one hundred and ninety-three*, subsection (3) of section *two hundred and four* and subsection (10) of section *two hundred and nine*, means any duty leviable under this Act or any other law relating to customs and excise and includes surtax;"

Therefore, a fine cannot be duty. A fine is a penalty. Section 201 A (2) relates to the appointment of an agent for collection of duty. It makes no reference to a fine. Therefore a garnishee cannot operate in relation to a fine.

Since no draft order was prepared, the issues raised by the parties are disposed of as follows:

1. The declarations made by the applicant amounted to a contravention of the law.
2. The respondents were entitled to reclassify goods arising from the post-clearance audit.
3. The respondents could not waive a duty to correctly classify the goods.

4. The noting of appeal to the Fiscal Appeal Court did not suspend the decision of the second respondent.
5. The second respondent could not impose a penalty without the consent of the applicant.
6. The second respondent could not collect the penalty imposed by way of garnishee.

None of the parties completely succeeded in the arguments advanced. It is ordered that each party shall bear their own costs.

Mtetwa & Nyambirai, applicant's legal practitioners
Kantor & Immerman, 1st and 2nd respondents' legal practitioners