FINE TIMES (PVT) LIMITED
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
MATAND-MOYO J
HARARE, 21 November 2016 & 18 January 2017

Opposed matter

W Muchengeti, for the applicant
S Bhebhe, for the respondent

MATANDA-MOYO J: The applicant approached this court seeking the following relief;

1. That the respondent be and is hereby ordered to release to the applicant the cargo of 1950 cartons of bulbs 220 volts-240 volt and 975 cartons of 100 watts bulbs (220 volts-240 volts) from seizure No. 046932K dated 22 July 2015 for re-exportation to the supplier Barssa Trading (Pvt) Ltd in China and to waive storage charges within 7 days of the respondent being served of this order.

   Or alternatively

2. Failing the compliance of paragraph 1 above, respondent be and is hereby ordered to make applicant pay the correct duty without penalties and to waive storage charges for the consignment described above in paragraph 1 of this order within 7 days of being served of this order.
3. Respondent be and is hereby ordered to pay the costs of this application

The brief facts are that the applicant ordered and imported 1950 cartons of energy saver florescent bulbs and tubes. The applicant was given payment receipt number 267 which receipt reflected the correct consignment. The consignment arrived in Zimbabwe. The applicant engaged a clearing agent. The clearing agent prepared and generated an electronic bill of entry which reflected bulbs. A physical examination was carried out and it reflected a total of 1950 cartons of bulbs comprising 975 cartons of 60W bulbs (220v-240v) and 975

cartons of 100 W bulbs (220v-240v). Each carton had 100 pieces thus giving a total of 195 000 bulbs. The physical examination revealed a discrepancy between what was declared and what was in the containers. Such misdeclaration caused a potential prejudice of revenue to the State in the amount of US$43 605.61. The respondent as a result seized the goods on 22 July 2015. Following representations to the regional manager of the respondent, the goods could only be released upon payment of additional duty in the sum of US$43 6-05.61, 25% of the prejudice as fine in the sum of US$10 901.40 and 10% interest and storage charges up to date of release. An appeal to the Commissioner General has since been dismissed.

The applicant applies to this court for the reversal of the applicant's decision on the basis that it never contravened any provisions of the Customs and Excise Act [*Chapter 25:02*]. The applicant argued that before any penalties could be levied upon it, there should have been evidence of fault in the form of same unlawful, wrongful or blameworthy conduct of commission or omission.

It is the applicant's case that since the supplier has acknowledged shipping the wrong goods, no fault can lie on the applicant. The applicant had merely prepared a Bill of Entry based on the invoice, a procedure recognised by s 40 of the Customs and Excise Act. The mere fact that the supplier did not ship the correct consignment cannot be imposed upon the applicant. In any case the applicant was aware that physical examination would be conducted and could not have intentionally misrepresented what was contained in the shipment. Without any fault been imputed on the applicant the penalties are not justified.

The respondent on the other hand submitted that s 32 of the Customs and Excise (General) Regulations, 2001 imposes obligations on the clearing agents to satisfy themselves on the correctness of the documents to be submitted to the respondent. Such obligations are concluded in peremptory terms. The respondent argued that it is common cause that the agent provided an incorrect bill of entry as per s 32 above. Once he did that an offence as envisaged under s 174 (1) (d) of the Act was committed. That meant the goods were liable for seizure in terms of s 193 of the Act.

What is not in dispute is that the invoice and the receipt had different description of what exactly was bought by the applicant. The applicant also submitted he paid for the goods based on the invoice. That alone tends to cast aspersions on the innocence of the applicant. That fact of having an invoice and a receipt which are totally different points to an act of dishonesty. With such evidence it is difficult to fault the decision of the respondent in seizing

the goods and levying penalties on such goods. Section 174 (1) (d) of the Act makes it and offence for a person who:

> "….. being required to make or render any report or statement, document, bill of entry, declaration or return or to supply any information demanded or asked for or to answer any question, neglects or refuses to do so or makes or renders any untrue or false report, statement, document, bill of entry, representation, declaration, return or answer or conceals or makes away with any goods required to be accounted for by this Act or any law relenting to customs and excise."

In terms of the above section it is obvious that failure to declare goods and their correct values can lead to seizure of such goods. The law of agency is very clear. The clearing agent was acting on behalf of the applicant and its actions are imputed upon the applicant. It is common cause that the declaration done by the agent was false. The applicant tried to lay all the blame on the supplier. The applicant has however not explained why the description of goods as appearing on the invoice and receipt are different. I believe that difference in the two documents is evidence of wrong doing on the part of the applicant. Moreso when the applicant submitted that he used the same invoice to effect payment. That alone makes the applicant's case disbelievable.

The respondent cited the case of *Industrial Equity* v *Walker* 1996 (1) ZLR 296 (H) where the court cited at p 286, the dictum by the Honourable GREENBERG JA in *R* v *Meyers* 1948 (1) SA 375 (A) at 382:

> "I think it can be summoned up, for the purposes of the present case, by saying that if the maker of a representation which is false has no honest belief in the truth of his statement when he makes it, then it is fraudulent."

> At p 374 of the report in *Derry* v *Peek* Lord HERSCHELL said:

> "….. fraud is proved when it is shown that a false representation has been made (1) knowingly or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in its truth."

From the facts of this matter the agent of the applicant never bothered to carry out an inspection of the goods before making the declaration. It is clear the agent had no information or at best was deliberately hiding information when he made the declaration in the bill of entry. Such act amounts to negligence. The agent made the declaration without belief in their truthfulness.

Whilst I agree with the applicant's submission that liability is imputed where there is fault in the form of some unlawful or blameworthy act or omission, I do not share the

applicant's submission that in this present case no fault can be imputed on the applicant. Section 45 of the Customs and Excise Act can be made use of by an importer who is not sure of how to classify his goods. As I have pointed out above the applicant was in possession of a receipt and an invoice with different description of goods. A diligent importer would in the circumstances have inspected the consignment before making any declaration.

I am of the view that in the circumstances the respondent's decision cannot be faulted and in the result, I order the dismissal of the applicant's application with costs.

Muchengeti & Company, applicant's legal practitioners
Kantor & Immerman, respondent's legal practitioners