CRUISER BOND (PRIVATE) LIMITED
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 19 February, 29 July and 18 November 2009

Opposed Application

A P de Bourbon (SC), for the applicant
A Moyo, for the respondent

UCHENA J The applicant is a duly registered company which among other goods imports top of the ranch motor vehicles for sale in Zimbabwe. It places the motor vehicles in its duly authorised Bonded Warehouse pending their sale to the public. It processes importation papers at the port of entry where customs duty and value added tax are calculated, but payment is deferred till the motor vehicles' removal from the bonded warehouse.

The respondent is a statutory body established in terms of s 3 of the Zimbabwe Revenue Authority Act [*Cap 23*:*11*]. It is responsible for the collection of duties payable for goods imported into this country.

The brief facts of this case are as follows.

The applicant imported several batches of motor vehicles into Zimbabwe, and placed them into its bonded warehouse. The batches fall into three categories;

(a) those imported and placed in applicant's bonded warehouse before 5 April 2007,

(b) those imported and placed in applicant's bonded warehouse before 6 September 2007

(c) those imported prior to 6 September 2007 and warehoused on or after that date.

In the case of scenario (c) the respondent's officers had used one rate in calculating duty and value added tax at the port of entry, and another rate on entering the goods into the bonded warehouse. The parties however resolved that dispute and the rate used at the port of entry, was also used when the goods were entered for warehousing.

The duty payable for these motor vehicles was calculated at the ports of entry, but its payment was deferred until their removal from the bonded warehouse. The rate used to calculate the duty in foreign currency at the port of entry was Z$250-00 to US$1-00. The rate of exchange changed on 6 September 2007, to Z$30 000-00 to US$1-00. The applicant later sought to pay customs duty and value added tax for the motor vehicles in preparation of their removal from the bonded warehouse and subsequent sale. The respondent required the applicant to pay customs duty and value added tax at the exchange rate prevailing at the time of importation. The applicant offered to pay customs duty and value added tax at the exchange rate applicable at the time of intended removal of the motor vehicles from the bonded warehouse. The applicant appealed to the respondent's higher offices which concurred with the lower office's determination. The applicant then filled this application seeking the following declaratory order:

1. It is declared that in respect of any motor vehicle imported by the applicant and placed in its bonded warehouse, the rate of exchange to be utilized for the purposes of converting any customs duty, and value added tax required by law to be paid in foreign currency shall be the rate of exchange stipulated in terms of s 115 of the Customs and Excise Act [*Cap 23:02*] applicable as at the date the motor vehicle is taken from or delivered from the bonded warehouse.
2. It is ordered that in respect of the 27 bills of entry listed in annexure A to the founding papers in this matter, the respondent shall within fourteen (14) days hereof recalculate the amount of foreign currency due in settlement of the customs duty and value added tax reflected in the bills of entry as required by para 1 above.
3. The respondent shall pay the costs of this application.

The dispute between the parties arose as a result of the introduction, by SI 80A of 2007, on 5 April 2007 of legislation requiring importers like the applicant to pay duty in foreign currency for specified goods. Prior to that date duty and value added tax was payable in Zimbabwe dollars, after the conversion of the value of the imported goods from their foreign currency value to Zimbabwean dollars. The need for conversion from Zimbabwean dollars back to foreign currency did not arise until after the introduction of SI 80A of 2007. After 5 April 2007 the value of imported goods is first converted to Zimbabwean dollars from their value in foreign currency. In the case of luxury items the payable duty and value added tax in Zimbabwe dollars will then be converted for payment of duty and value added tax in foreign currency.

The issue to be determined is the applicable rate of exchange to be used when the motor vehicles are taken from or delivered from the bonded warehouse. The answer lies in the interpretation to be placed on the provisions of the Customs and Exercise Act [*Cap 23:02*], herein after called the Act, applicable for purposes of calculating duty and value added tax for goods to be removed from or delivered from a bonded warehouse. This case has been complicated by the introduction of the use of foreign currency in February 2009 and the subsequent demonitisation of the Zimbabwean dollar. The question which now arises is whether or not a declaratory order to the effect sought is still relevant to the current circumstances. I called the parties to appear before me on 29 July 2009, to clarify this issue. I requested them to make further submissions on :

a) The formula now being used by ZIMRA in the calculation of duty payable in respect of such matters
b) What effect if any, has the introduction of multi-currencies and the demonitisation of the Zimbabwean dollar had on the formula used by ZIMRA as per 1.1 above?
c) Whether or not there is still a dispute between the parties.

The parties agreed that they would make further submissions after hearing how ZIMRA was now calculating duty and value added tax. The applicant was to file its Supplementary Heads by 21 August 2009. The respondent was

to file its supplementary Heads by 4 September 2009. Both parties submitted their Supplementary Heads by the agreed dead lines.

ZIMRA is no longer using conversion rates for new imports, but is still doing so for the removal of goods from bonded warehouses, if they were put therein before the use of multi currencies started. Both parties agreed in their supplementary Heads that the issue of the conversion rate to be used is still relevant. The dispute between them has therefore not been resolved.

There are in my view two groups of goods to be considered. Those warehoused before the introduction of duty in foreign currency, and those warehoused thereafter.

Goods warehoused prior to 5 April 2007.

In respect of the goods warehoused before the payment of duty in foreign currency was introduced the case can be determined by establishing whether or not payment of duty in foreign currency was introduced with retrospective effect. If they were not the entry which will factor in the foreign currency payment is that for the removal of the goods from the bonded warehouse. Statutory Instrument 80A of 2007 in s 1 (1) provides as follows:

> (1) This notice may be cited as the Customs and Excise (Designation of Luxury Items) Notice, 2007.
>
> (2) This notice shall come into force on 5 April, 2007.

The intention of the legislature was to bring the payment of duty in foreign currency into effect from 5 April 2007. This means any duty which was charged on entry at the port of entry before 5 April 2007 was charged in Zimbabwean dollars and created a debt by the importer ("the applicant"), to the respondent in Zimbabwean dollars. The Zimbabwean dollars is therefore the currency of account, which, can now only be paid in foreign currency as converted on, the date, of removal from the bonded warehouse. This means the entry which will factor in foreign currency is the entry for consumption. Any other interpretation would bring retrospective operation to SI 80A of 2007, when it specifically provides that it came into effect on 5 April 2007. I would therefore grant the order sought in respect of goods warehoused before 5 April 2007.

Goods warehoused after 5 April 2007

The position in respect of goods imported after 5 April 2007 will depend on what the law provides as regards, the calculation of duty at the port of entry.

Advocate *de Bourbon* for the applicant submitted that the respondent calculates duty and value added tax in Zimbabwean dollars at the port of entry, and only converts it into foreign currency on entry for consumption that is at the time the goods are removed from the bonded warehouse. He submitted that the currency of account is therefore in Zimbabwean dollars, and that of payment is in foreign currency.

Mr *Moyo* for the respondent submitted that duty is calculated into foreign currency at the port of entry. He therefore submitted that the issue of conversion into foreign currency on the date of entry for consumption does not arise as the conversion is done at the port of entry, when the goods are imported into the country.

The dispute between the parties would have been easily resolved if the applicant had attached bills of entry which confirm, their contention. That would have proved or disproved, the respondent's contention, that, the currency of account and the currency of payment, were, both in foreign currency from the time the goods were entered for importation. This demonstrates the importance of attaching documents to affidavits in terms of r 227 (4)(b) of the High Court Rules 1971 to verify averments in affidavits. Rule 227 (4)(a) and (b) provides as follows:

(4) An affidavit filed with a written application -

(*a*) shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out in therein; and

(*b*) may be accompanied by documents verifying the facts or averments set out in the affidavit, and any reference in this Order to an affidavit shall be construed as including such documents.

The court must now interpret the law to determine the legal position as to when the conversion into foreign currency ("United States dollars") must be done. That will resolve the issue on whether or not the issue of conversion arises at the time of entry for consumption.

The law

Counsel for both parties, are agreed on the following provisions of the law on the importation of goods and the payment of duty and value added tax.

1. That in terms of s 38 (1) of the Act goods may not be imported without entry being made and the duty (which includes any V A T) being paid or secured.
2, That in terms of s 39 (1) of the Act entry must be made at the port of entry, that is at the boarder post through which the goods are imported.

3. That in terms of s 40 (1) (c) of the Act, duty must be paid at the port of entry, or be secured if the importer is taking the goods into a bonded warehouse., licensed in terms of s 68 of the Act
4. That in terms of s 69 of the Act a security bond, must be given to secure the payment of duty for the goods placed in a bonded warehouse.
5. That in terms of s 70 (1) goods are stored in a bonded warehouse without the payment of duty, but if they are lost or damaged on the way to the warehouse, duty immediately becomes due for the value by which the value of the goods to be warehoused are diminished

I agree with counsel for the parties on their interpretation of the above mention sections. These sections will be used in arriving at the determination of the dispute between the parties without a detailed analysis as their meaning is common cause.

The parties are in dispute on the interpretation of s 115 of the Act as it was after its amendment by s 13 of the Finance Act No 8 of 2007, and before it was repealed and substituted by s 37 of the Finance Act No 3 of 2009. The amendments to s 115 of the Act by s 13 of the Finance Act No 8 of 2007 came into effect on 6 September 2007. It was repealed by s 37 of the Finance Act No 3 of 2009, which came into effect on 30 January 2009.

This means the current provisions of s 115 do not apply to the dispute between the parties because the dispute predates it. The dispute between the parties started in late September 2007. On 19 February 2008 the applicant notified the Commissioner General of its intention to institute proceedings. The applicant then filed this application in April 2008. The repealed provisions of s 115, which were in force between 6 September 2007 and 30 January 2009, are therefore applicable. Section 17 (1) (b), (c) and (e) and (3) of the Interpretation Act [*Cap 1:01*] which provides for such a situation provides as follows:

17 Effect of repeal of enactment

(1) Where an enactment repeals another enactment, the repeal shall not—

(*a*) …

(*b*) affect the previous operation of any enactment repealed or anything duly done or suffered under the enactment so repealed; or

(*c*) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment so repealed; or

(*d*) …

(*e*) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid and any such investigation, legal proceeding or remedy shall be exercisable, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the enactment had not been so repealed.

(3) Where an enactment repeals and re-enacts, with or without modification, any provision of any other enactment, all proceedings commenced under any provision so repealed shall be continued under and in conformity with the provision so repealed.

I must therefore interpret the law as it was at the time this dispute was brought to court. The applicable law is therefore s 115 of the Act as it was after it was repealed and substituted by s 13 of the Finance Act No 8 of 2007, which came into effect on 6 September 2007.

The then s 115 provided as follows:

(1) When the value or cost of any imported goods, or any element that is required to be included in such value or cost, is expressed in the currency of a foreign country, it shall be converted to the currency of Zimbabwe at the selling rate for that foreign currency, as designated by the Commissioner in consultation with the Reserve Bank of Zimbabwe, applicable as a customs rate at the time the goods concerned were entered in terms of this Act.

Provided that where one or more special rates in addition to the general rate at which the Zimbabwe dollar may be exchanged for the United States dollar as specified in the Exchange Control ("Exchange Rate") Direction, 2002 (S I 223 of 2002) or in any other statutory instrument amending or replacing that Direction, the Minister may, by instruction to the Commissioner published in the Gazette, determine that a special rate shall apply in respect of certain goods specified in the instruction.

(2) …

(3) In calculating the duty payable on any luxury items, the value for the duty payable shall be calculated in the same way as for goods that are not luxury items, except that the Zimbabwe dollar duty and import or value added tax thus arrived at shall be converted at the general rate referred to in the proviso to subs (1) into United States dollars.

Provided that where any amount of duty and import or value-added tax thus payable may require payment to be made in coins, the Commissioner is authorised to increase or reduce the amount to the nearest figure to enable payment to be made in notes only.

The issue between the parties can be resolved by the interpretation of s 115 (3) of the Act. Advocate *de Bourbon* in the applicant's heads of argument para 9.12, submitted that:

> "Section 115 (1) provides that where the value or cost of any goods is expressed in foreign currency, it is to be converted into Zimbabwean currency at the applicable customs rate at the time when the goods were entered in terms of the Act. It is submitted that here the concept of entered must apply to the first time on entry"

I agree with his interpretation of s 115 (1) of the Act but would add that that subs refers to goods in general without distinguishing between ordinary and luxury goods. It must be therefore read to mean that in general the value of goods expressed in foreign currency, must be converted into Zimbabwean currency, at the port of entry. The distinction between ordinary and luxury goods is made in subs (3). In para 9.13 of his heads Advocate *de Bourbon* briefly dealt with the other subsections of s 115 as follows:

> "other subsections of s 115 deal with the payment of certain duties in foreign currency. These are the crux of this matter".

He is correct in saying that these are the crux of this case. In fact subs (3) is the crux of this case. In para 16 of the applicant's heads Advocate *de Bourbon* commented on it as follows:

> "Subsection (3) of the Act requires that the VDP on luxury items be calculated in the same way as goods that are not luxury items, except that the Zimbabwean dollar duty and value added tax so calculated is to be converted at the general rate referred to in subs (1). The question, is when is that conversion to be done?"

A careful reading of subss (1`) and (3) answers the question. Subsection (1) provides that the calculation of duty shall be done at the time of entry for importation at the port of entry. Subsection (3) then provides that the duty for luxury items shall -

> "be calculated in the same way as for goods that are not luxury items, except that the Zimbabwe dollar duty and import or value added tax thus arrived at shall be converted at the general rate referred to in the proviso to subs (1) into United States dollars".

This must mean the conversion from Zimbabwean dollars to United States dollars for luxury items must be done at the port of entry, to complete the calculation of duty just as the calculation of duty for none luxury goods is completed at the port of entry. In terms of s 38 (1) of the Act duty is calculated at the port of entry. This means for an importer who does not have a bonded warehouse or intent to take the goods to a bonded warehouse duty is paid at the port of entry. Duty must therefore be calculated into foreign currency at the port of entry. If goods are to be taken into a bonded warehouse the importer will then have to provide security for the payment of duty already stated in foreign currency.

Mr *Moyo* for the respondent submitted in paras 18, 19, and 21.1 of his heads that:

18. It is respectfully submitted that by virtue of the above provisions, the applicable exchange rate is the one prevailing at "the time the goods concerned were entered in terms of this Act", to wit, at the time of importation and the same rate applies in reverse, i e, for the determination of the duty payable.

19. It is inconceivable that the intention of the legislature was to have multiple exchange rates in one transaction, that is to say, in one bill of entry. What is clear from an examination of all the provisions is that the value for duty purposes is determined using the exchange rate applicable upon importation and likewise the duty payable is determined at the same rate.

21.1 It is submitted that duty is determined at the time of importation and is fixed for luxury items in foreign currency and is due in the same currency. The question of conversion does not therefore arise.

He relied on what the respondent had said in para 12 of its opposing affidavit, which reads as follows:

> "All the information on the bill of entry for consumption will be the same as on the bill of entry for warehousing save only for the rate of duty if same would have changed as the law provides that the rate of duty prevailing at the time of removal from the warehouse will apply. Before the introduction of duty in foreign currency for motor vehicles such duty as had been calculated on the defined value in the bill of entry for importation would be payable in local currency. However after the introduction of duty in hard currency the duty in local currency will be converted back to foreign currency using the same rate that was used to calculate the defined value of the vehicle at the time of importation."

An examination of subss (1) and (3) reveals a continuous process by which duty and value added tax should be calculated for luxury items. Subsection (1) provides that the customs exchange rate applicable at the time of entry shall be used to convert the foreign currency value of the imported goods into Zimbabwean currency. Subsection (3) then provides that "the calculation of duty and value added tax for luxury items shall be the same as for none luxury items, except that the Zimbabwean dollar duty and import or value-added tax thus arrived at shall be converted at the general rate referred to in the proviso to subs (1) into United States dollars …" This means the procedure for calculating duty for both luxury, and none luxury items starts from the conversion of their foreign currency value to Zimbabwean dollars at the rate prescribed by subs (1). In the case of none luxury goods the process ends with the calculation of duty and import or value added tax in Zimbabwe dollars. In the case of luxury items the process proceeds to the conversion of the resultant Zimbabwean dollar duty and import or value added tax into foreign currency at the general rate referred to in the proviso to subs (1). This means the calculation of duty for luxury items at the port of entry would not be complete until the Zimbabwean dollar duty has been converted into foreign currency.

I therefore agree with Mr *Moyo*'s submission that the conversion of duty at the time of removal of goods from the bonded warehouse does not arise unless there has been a change in the rate of duty as provided by s 75 of the Act.

The applicant's application for a declaratory order in respect of goods imported before the introduction of the payment of duty in foreign currency for luxury items, must succeed, but must be dismissed in respect of goods imported after the introduction of the payment of duty in foreign currency for luxury items.

Both parties partially succeeded. This means there was merit in the application in respect of part of the goods in dispute, and merit in the opposition in respect of part of the goods in dispute. As a result each part must pay its own costs. There will therefore be no order as to costs.

In the result the following amended Order is granted:

1. It is declared that in respect of any motor vehicle imported by the applicant and placed in its bonded warehouse, before 5 April 2007, the rate of exchange to be utilized for the purposes of converting any customs duty, and value added tax required by law to be paid in foreign currency shall be the rate of exchange stipulated in terms of s 115 of the Customs and Excise Act [Cap 23: 02] applicable as at the date the motor vehicle is taken from or delivered from the bonded warehouse.

2. It is ordered that in respect of the bills of entry listed in annexure A to the founding papers in this matter, for goods imported and warehoused before 5 April 2007, the respondent shall within fourteen (14) days hereof recalculate the amount of foreign currency due in settlement of the customs duty and value added tax reflected in the bills of entry as required by para 1 above.
3. There shall be no order as to costs.

Wintertons, applicant's legal practitioners
Kantor & Immerman, respondent's legal practitioners