Sneller Verbatim/ms

CASE NO. 8816/96

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA

2000-09-06

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO
(3) REVISED

DATE 13/10/2000 SIGNATURE

(10)

In the matter between:

ENGEN PETROLEUM LTD AND 3 OTHER Plaintiff

versus

THE COMMISSIONER OF CUSTOMS AND EXCISE 1st Defendant

THE MINISTER OF FINANCE 2nd Defendant

J U D G M E N T

BERTELSMANN J: The plaintiffs are oil companies doing business (20) in the Republic of South Africa and beyond the country's borders. During the period 21 March 1990 until 22 February 1994 the four plaintiffs operated inter alia at Walfish Bay, Namibia. During that period Walfish Bay was regarded as a South African port. This was the case both in terms of the then South African and the Namibian Constitution.

It is common cause between the parties that during the aforesaid period the plaintiffs supplied distillate fuel in the form of diesel oil to certain fishing vessels which were at that time registered as Namibian ships. In terms of the (30)

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JUDGMENT

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Merchant Shipping Act, Act 57 of 1951 they could consequently not be and were not recognised as ships of South African nationality. This is not in dispute between the parties. The diesel that was supplied as stores was intended for and was in fact used as fuel in the propulsion of these fishing vessels. It is common cause that diesel oil at all relevant times fell into the category of distillate fuels within the meaning of Schedule 1 to the Customs and Excise Act, Act 91 of 1964 as amended.

At the time of supply, locally manufactured distillate fuels were excisable goods and fuel levy goods as defined in section 1 of the Customs and Excise Act (hereinafter refer to as "the Act"). They were liable to excise duty in terms of section 37(1) of the Act according to part 2 of Schedule 1 thereto, item 105.10.15, at a rate of 3.817 cents per litre at the time the particulars of claim were drawn; and in terms of section 37(8) were liable to a fuel levy according to part 5 of Schedule 1 to the Act, item 195.10.15, at the time of the drawing of the particulars of claim at 55.4 cents per litre.

After having supplied the fuel, the plaintiffs paid the excise duty and fuel levy in full and thereafter became entitled to a partial refund of duty to each of the plaintiffs' customers in terms of section 75(1)(d) of the Act read with Schedule 6 thereto under item 60905.10 (code 02,00) in respect of excise duty, and under item 640.3 (code 02,00) of that Schedule in respect of fuel levy.

On the pleadings, these facts were not admitted, but in terms of an agreement reached between the parties it is not necessary to decide exactly which amounts were paid as

duty and levy and which amount was paid as partial refund thereof. It is clear that the partial refund was indeed paid. On 26 October 1993 Schedule 6 to the Act was amended retrospectively to 1 January 1988 by Government Notice R2033, in terms of which rebate items 603.02.01 and 640.06 were added to the said schedule. The amended items allow full rebate of excise duty and fuel levy where the fuel which was supplied as stores for any fishing vessel not recognised as a ship of South African nationality in terms of the Merchant Shipping Act.

Section 40 of the Act deals with the validity of entries and sets out the terms in which imported or exported goods must be properly described in the bill of entry. Section 40(3), subject to the provision of section 76 and 77 of the Act, makes provision for the amendment of existing bills of entry, where the goods have been described in error. In respect of items which were intended for the purposes or use under rebate duty under section 75 an amended bill of entry may be filed, inter alia where any schedule which applies to such goods is amended with retrospective effect and in which such goods, if such amended or new determination had been in operation on the date on which such goods were so entered, would have been described as goods intended for the said storage or manufacture or the said purposes or use. (Section 40(3)(a)(A)(cc)).

In terms of section 76(2)(f) the first defendant is obliged to consider any application for a refund or repayment by any applicant who has paid any duty or other charge for which he was not liable by reason of the substitution of any bill of entry in terms of section 40(3). Payment, if due, must

then be effected in terms of section 76(5) of the Act. The retroactive amendment of the rebatable item and fuel levy item of Schedule 6 as aforesaid did entitle the plaintiffs and their clients to a repayment of duty and levy in terms of a substituted bill of entry.

On 21 April 1994 the plaintiffs applied in writing to the first defendant for a refund of excise duty and fuel levy paid in respect of fuel supplies which, they contended, had in terms of the retroactively amended schedule, become eligible for repayment in respect of a refund of excise duty and fuel levy which had not already been paid partially, prior to the amendment of schedule 6, to the plaintiffs' customers.

Correspondence ensued between the parties. The first defendant replied on its official letter head on 3 May 1995 as follows to the plaintiffs' demand:

> "Your representations that fishing vessels registered in Namibia should be regarded as 'foreign registered' fishing vessels in terms of the provisions in item 603.02 and 640.06 of Schedule 6 to the Customs and Excise Act 1991 of 1964 (the Act) cannot be acceded to.
>
> In terms of the provisions of the Customs Union Agreement, which agreement is in terms of the provisions of section 1 of the Act deemed to be part of the Act, Namibia has since 10 July 1990 been part of the common customs area.
>
> In view of the aforegoing the refund claim submitted by fishing companies through you cannot be entertained and will be returned to you by the controllers of customs and excise concerned."

It emerges from this letter that, in essence, first

defendant interpreted the provisions of the amended items in Schedule 6 differently from the plaintiffs, coming to the conclusion that because of the existence of the Customs Union Agreement, ships which were flying the flag of states which were members of the customs union could not be classified or regarded as ships which were not recognised as ships of South African nationality in terms of the Merchant Shipping Act.

The plaintiffs thereupon instituted action for a declaratory order. Pleadings were exchanged. During the pre-trial conference the action became settled in respect of the claims for the refund. The first defendant conceded that the plaintiffs were entitled to the full rebate under the headings and in respect of the items in respect of which it had been claimed. This concession appears to have been made in the light of the judgment of the Supreme Court of Appeal in Engen Petroleum Limited and Others v Commissioner of Customs and Excise and Another, 1999(3) SA 690 (S.C.A.). One issue remains, namely whether the plaintiffs are entitled to interest on the refund to which they had become entitled. The parties are agreed that, if interest is indeed payable, it must be payable from 3 May 1995.

The defendants contend that no liability for interest can arise in consequence of the provisions of section 47(9) of the Act. This section reads as follows:

"47(9)(a) (i) The Commissioner may in writing determine the tariff headings, tariff sub-headings or items of any Schedule under which any imported goods or goods manufactured in the Republic shall be classified.

(ii) The acceptance by any officer of the bill

of entry or the release of any goods as entered shall be deemed not to be any such determination.

(b) Any determination so made shall, subject to appeal to the court, be deemed to be correct for the purposes of this Act, and any amount due in terms of any such determination shall remain payable as long as such determination remains in force.

(c) The Commissioner may publish any such determination by notice in the Gazette. (10)

(d) .....

(e) An appeal against any such determination shall lie to the division of the High Court of South Africa having jurisdiction to hear appeals in the area where the determination was made, or the goods in question were entered for home consumption.

(f) Such appeal shall, subject to section 96(1), be prosecuted within a period of 1 year from the date of determination." (20)

The defendants contend that the letter from which I have quoted, which forms annexure B to the particulars of claim, constitutes a determination as intended in section 47(9). Consequently, so the argument runs, the determination is deemed to be correct until such time as the defendants admitted that the plaintiffs were entitled to the refund. The defendants argue that as the determination was at all times deemed to be correct, the defendants could not be in mora until they conceded that their determination was incorrect and accepted the (30)

plaintiffs' contentions that they were entitled to a full refund.

There are insurmountable obstacles in the way of this argument. In the first instance, a determination of the items or tariffs under which goods are to be classified, is a process which normally follows upon an application on a prescribed form by the manufacturer or importer or exporter to the first defendant for such a determination. In the present instance no process in which the goods concerned, namely distillate fuels, had to be classified, took place. It was at all times clear that these distillate fuels had been supplied to Namibian ships as stores for purposes of bunker oil i.e to propel these ships. The only question which arose and which formed the dispute between the parties was not whether the goods had to be classified, but whether the purpose for which they were intended, namely the supply to Namibian ships, was such as to fall within the amended Schedule. The process of interpretation did not enquire after the categorisation or classification of specific goods which had to be allocated for purposes of the payment of excise duty or fuel levy, but whether the end to which the said goods were used qualified them for a full rebate or not.

This is clear from the terms of the letter, Annexure B. It is common cause that the first defendant's interpretation of the relevant purpose, namely the supply to Namibian ships, was incorrect. The first defendant adopted the attitude that these ships were to be regarded as ships of South African nationality because of the provisions of the Customs Unions Agreement. This interpretation was wrong. On the facts before me, I am of the view that the first defendant at no stage intended to, nor did he in fact make, a determination as

intended in section 47. Consequently the defendants must fail.

There is another ground upon which I incline to the view that the defendants' contentions cannot be upheld. Although not strictly necessary for purposes of this judgment, in the light of the conclusion which I have reached above, I will briefly set out my reasoning in case this matter proceeds further. Section 47(9)(b) ordains that a determination made by the first defendant shall be deemed to be correct for purposes of the Act as long "as such determination remains in force." The words "deemed" or "shall be deemed" are used in legislation in order to predicate that the subject matter concerned is regarded or accepted for purposes of the statute in question as being of a particular or specified kind. Compare S v Rosenthal 1980 1 SA 65 (A) at 75 G; Ter Beek v United Resources CC and Another 1997 3 SA 315 C at 330 H to 331 G. In the latter case VAN REENEN, J quotes the above-mentioned extract from Rosenthal's case with approval and emphasises the following:

> "That which is deemed shall be regarded or accepted; (i) as being exhaustive of the subject-matter in question and thus excluding what would or might otherwise have been included therein but for the deeming; or (ii) in contra-distinction thereto, as being merely supplementary, i.e. extending and not curtailing what the subject-matter includes; or (iii) as being conclusive or irrebuttable; or (iv) contrarily thereto, as merely being prima facie or rebuttable. I should add that in the absence of any indication in the statute to the contrary, a deeming that is exhaustive is also usually conclusive, and one which is merely prima facie or rebuttable is likely to be

supplementary /...

supplementary and not exhaustive."

Considering the wording of section 47(9)(b), I am of the view that the deeming provision is merely prima facie or rebuttable, as it clearly determines that the fact which was deemed, namely the correctness of the determination, is rebuttable by way of an appeal to the High Court.

Mr Dunn S.C. on behalf of the defendants argued that, in the event of an appeal against the determination being successful, the order of the High Court would operate ex nunc. Consequently, he argued, no interest could run prior to 2 June 2000, when the defendants conceded that the determination was incorrect. I do not agree with this submission. It is the very essence of an appeal that, if the judgment, order, ruling or, as in this case, determination of the body or tribunal or court appealed against is set aside, the appeal court's order operates as from the date upon which the incorrect judgment, order, ruling or determination was made, as it substitutes the lower tribunal's order, ruling, judgment or determination.

Consequently, once it is clear that the determination was incorrect, the deeming provision has been rebutted and falls away. The fact that the determination was incorrect from the moment it was made is then established and the correct determination is substituted in its place. It follows from the aforegoing that even if the letter, Annexure B to the particulars of claim, could be regarded as a determination, the defendants are still liable to refund the plaintiffs from the date of the incorrect determination having been made, alternatively from the date upon which the defendants became liable to repay the duty or fuel levy.

The plaintiffs succeed. An order is made, as was agreed

by the parties in the event of my holding in favour of the plaintiffs, as set out in the draft order annexed to the pre-trial minute.

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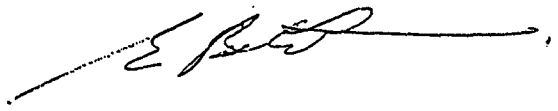

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