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IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO. NO

(3) REVISED.

12-9-2003 

DATE SIGNATURE

IN THE MATTER BETWEEN:

DATE:

CASE NUMBER: 25447/2002

NASHUA LIMITED

APPLICANT

AND

THE COMMISSIONER FOR

THE SOUTH AFRICAN REVENUE

SERVICE

FIRST RESPONDENT

THE MINISTER OF FINANCE

SECOND RESPONDENT

JUDGMENT

PATEL, J

A. INTRODUCTION

[1] The applicant is a multinational entity. It is a public company incorporate in accordance with the company laws of South Africa. It carries on business,

inter alia, as an importer and distributor of photocopying apparatus and parts and accessories thereof.

[2] The first respondent is the Commissioner for the South African Revenue Service. It is the authority charged with the administration of the Customs and Excise Act 91 of 1964 as amended. The second respondent is the Minister of Finance under whose control the first respondent administers the Act.

[3] The applicant seeks a declaratory order pertaining to the interpretation of the phrase "*parts and accessories*" relating to photocopying apparatus contained in the article description of sub-heading 9009.9 under item 128.40 in Part 2B of Schedule 1 of the Act.

[4] It is common cause that certain of the photocopying apparatus imported and distributed by the applicant does not attract the payment of any customs duty. The crisp issue is whether parts and accessories for such photocopying apparatus attract the payment of *ad valorem* customs duty upon importation.

[5] Synoptically, the applicant's case is that on a proper contextual and purposive interpretation of the article description the words only refer to parts and accessories of such photocopying apparatus as are dutiable under sub-heading 9009.1 and 9002.2. Whereas on the other hand, the first respondent's case is that the phrase extends beyond the applicant's interpretation, rendering dutiable in terms of the item, also parts and accessories of photocopying apparatus which are not in themselves dutiable.

B BACKGROUND

[6] The applicant imports and distributes photocopying apparatus as well as parts and accessories thereof which are classified under tariff heading 90.09 in Part 1 of Schedule 1 to the Act. In terms of the provisions of Part 1, the relevant goods are imported free of duty. However, in respect of some photocopying apparatus an *ad valorem* duty is levied and payable in terms of the provisions of Part 2B of Schedule 1. The duty applies to photocopying apparatus for use with paper not exceeding 36 cm in width (unfolded). Most of the photocopying apparatus imported by the applicant are exempted from the payment of customs duty levied in terms of the provisions of item

128.40, because of the exclusions contained in the article descriptions of sub-headings 9009.1 and 9009.2.

- [7] The current article descriptions of sub-headings 9009.1 and 9009.2 were introduced with effect from 15 September 1995 by way of an amendment to the Schedule, contained in *Government Notice* No. R1367 published in *Government Gazette* No. 16654 dated 1 September 1995. A further effect of the amendment was the inclusion of parts and accessories of photocopying apparatus in item 128.40. The article description of sub-heading 9009.90, after the amendment, reads:

"Parts and accessories (excluding parts and accessories for machines of sub-heading 9009.30)."

- [8] This amendment was foreshadowed in *Notice* 314 of 1995, published in *Government Gazette* No. 16380 on 28 April 1995. In this notice, the first respondent's predecessor, the Commissioner for Customs and Excise, announced his intention to approach the second respondent to amend Part 2B of Schedule 1 with the view of:

- "(f) reducing the rate of duty in item 128.40 on the goods of the item from 10% to 6%; and
- (g) imposing a customs and excise duty of 6% on parts and accessories of the goods specified in paragraphs ... and (f) above, falling within sub-headings No's ... and 9009.90 of Part 1 of Schedule 1 to the Customs and Excise Act, 1964."

Thus including, *inter alia*, the imposition of a customs and excise duty at a rate of 6% on parts and accessories of the goods subject to *ad valorem* duties in terms of Part 2B.

- [9] The subsequent amendments to Part 2B by way of *Government Notice* No R1367 of 15 September 1995 manifestly reflected the intention expressed in *Notice* 314 of 28 July 1995 in all respects, except for an ambiguity created by the literal wording of the article description of sub-heading 9009.90. This sub-heading was substituted by sub-heading 9009.9 as a result of an amendment of the sub-heading in Part 1 of Schedule 1. It was to create new sub-headings for specific parts and accessories of photocopying apparatus. The requisite consequential amendment to item 128.40 in Part 2B was made in terms of *Government Notice* No. R922 published in *Government Gazette* No. 23593 on 5 July 2002. It was effective from 1 January 2002. However, the previous wording of the article description was left unchanged.

- [10] Initially, at least, the first respondent's predecessor was of the opinion that a customs and excise duty (*ad valorem duty*) was only imposed on parts and

accessories of photocopying apparatus that were dutiable under sub-headings 9009.1 and 9009.2. Such photocopying apparatus would, in terms of the sub-headings, be dutiable if for use with paper not exceeding 36 cm in width (unfolded). In this regard, the first respondent's predecessor addressed a letter on 15 September 1995 to Olivetti which stated that:

"... in paragraph 1(g) that it was the intention to impose a customs and excise duty on, inter alia, parts and accessories of the goods specified in item 128.40."

- [11] Ever since the amendment of September 1995, the first respondent and his predecessor adopted the stance that parts and accessories of all photocopying apparatus are durable in items of item 128.40 whether the apparatus itself is dutiable or not. Except for a brief period from March to June 2002, the first respondent was of the erroneous view that the amendment of 1 January 2002 to the tariff heading 90.09 rendered certain parts and accessories not dutiable.

C. THE DISPUTE

- [12] As a result of the amendment to Part 1 of Schedule 1, published in *Government Gazette* No. 23058 on 30 January 2002, confusion reigned in the market place as to what extent *ad valorem* duties were payable on spare parts and accessories of photocopying apparatus. This, invariably led to an exchange of correspondence between applicant and first respondent ultimately resulting in a dispute between them.

[13] Having regard to the background circumstances culminating into a dispute, the issue at stake is whether, on a proper interpretation of sub-heading 9009.9 (previously 9009.90) in item 128.40 of Part 2B, the phrase "*parts and accessories*" refers to parts and accessories of *all* photocopying apparatus whether dutiable or not or it *only* refers to parts and accessories of photocopying apparatus which are dutiable under sub-headings 9009.1 and 9009.2.

D RELIEF SOUGHT BY THE APPLICANT

[14] It is against that backdrop that the applicant is seeking the following relief:-

- "1. It is declared that the expression "parts and accessories" contained in the article description of sub-heading 9009.09 under Item 128.40 in Part 2B of Schedule 1 to the Customs and Excise Act, 91 of 1964, as introduced in the Schedule with effect from 1 January 2002 by Government Notice R922 on 5 July 2002, refers only to parts and accessories of such photocopying apparatus as are dutiable under sub-headings 9009.01 and 9009.2 of the said Item 128.40; "
2. It is further declared that the expression 'parts and accessories' contained in the article description of sub-heading 9009.90 under Item 128.40 in Part 2B of Schedule 1 to the Customs and Excise Act, 91 of 1964, as introduced in the Schedule with effect from 15 September 1995, referred only to such parts and accessories of photocopying apparatus as were dutiable under sub-headings 9009.1 and 9009.2 of the said Item 128.40;
3. First Respondent is ordered to pay the costs of the Application;

4. Further and/or alternative relief.

[15] Before considering the substantive issue at the heart of the dispute, it is necessary to briefly consider two subsidiary issues raised by the first respondent primarily against the relief that is being sought in the notice of motion by the applicant.

(a) **DISTINCTION BETWEEN PRAYERS 1 AND 2**

[16] The first respondent faintly contended that the distinction between prayers 1 and 2 is that the relief sought is formulated in such a way to overcome the unreasonable delay in launching the application. The applicant accepts that the wording of the article description under sub-heading 9009.90 in the amendment of September 1995 and wording of the article description under sub-heading 9009.0 are identical. However, the applicant in law, had to deal with two separate legislative provisions and therefore had no choice but to frame the relief that it seeks with reference to both provisions. I am of the opinion that it is inconceivable that the applicant would formulate the relief in a manner with some ulterior motive or sinister purpose. Nor is it cosmetic contortion to overcome the applicant's supineness in timeously launching the application. It had to couch both prayers in such a manner to properly deal with two separate legislative provisions. The first respondent's objection is of any real significance or consequence pertaining to the substantive issue of interpretation which lies at the heart of this matter. Therefore, the first respondent's object to the formulation of the relief by the applicant cannot be sustained.

(b) **DELAY IN LAUNCHING THE APPLICATION**

- [17] The first respondent's other objection of some significance is in essence a point *in limine* that the undue delay on the applicant's part precludes it from securing the declaratory relief. The objection is based on the premise that the cause of action arose when the September 1995 amendment was published.
- [18] Mr Voster, on behalf of the first respondent, argued that the applicant could have launched an application for the relief in terms of prayer 2 of the notice of motion at any time after 15 September 1995. The amendment effected on 5 July 2002 is merely cosmetic and not of substance. The applicant could have obtained relief in terms of prayers 2 seven years ago and it would still be binding on the first respondent. However, the applicant's explanation was two fold. It had to depend for advice concerning its imports on its customs clearing agents and occasionally on its legal advisors and that the question regarding dutiability of the relevant parts and accessories never arose prior to mid-2002. According to the applicant, it launched the application when it became aware of its cause of action after receiving legal opinions from counsel. There is nothing untoward in seeking and relying on professional advice. It is prudent to do so. However, Mr. Voster submitted that the applicant's explanation boils down to a lack of concern by it regarding the dutiability of the relevant parts and accessories for a period of seven years, simply because it relied on the advice of others. Thus, the delay was unreasonable and that no sound basis was advanced by the applicant upon which the Court could exercise its discretion to condone the unreasonable delay. Under the circumstances the application should be dismissed.

- [19] There are essentially two pertinent questions when considering the issue of unreasonable delay. First, was there an unreasonable delay? In deciding this question no discretion comes into play. It involves an examination of facts in order to determine whether the period that has elapsed was, in all the circumstances, reasonable or not. (*Wolgroeiërs Afslaërs (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 42C-D) Hefer, JA in *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie, en 'n Ander* 1986 (2) SA 48 (A) at 86E-F alluded:

"Naturally, the finding of the Court in this regard does not imply that the Court has made a value judgment in the sense of the Court's view of the reasonableness of the period that has elapsed in the light of all the circumstances. To equate such a value judgment with a discretion is, however, not justifiable legally or logically."

(Translation at 59I/J)

If the Court finds on the facts, by having regard to all the circumstances, that there was a delay then the second question is whether the unreasonable should be condoned. (See: *Lion Match Co Ltd v Paper, Printing, Wood and Allied Workers Union* 2001 (4) SA 149 (SCA) at 156H-I; *Mamabolo v Rustenburg Regional Local Council* 2001 (1) SA 135 (SCA) at 141J-142A). Ultimately, it entails the exercising of judicial discretion which must be both fair and just by considering whether or not the other side will be prejudiced and the extent thereof may be a decisive factor. The first respondent has not shown that it is being prejudiced by the applicant's delay.

- [20] The applicant's explanation is simply that it had no reason, prior to August 2002, when it became aware of the fact that *ad valorem* duties were erroneously levied to question the validity of the Commissioner's actions. There was no duty on the applicant to be proactive in ascertaining whether the Commissioner was entitled to levy the duties and concomitantly, if necessary to take legal action. (See: *Johan Van Zyl and 1699 Others v The Associated Institutions Pension Fund and Others* (TPD Case No:18773/99 – unreported judgment dated 24/2/03.)
- [21] Further, in my view, Mr Puckrin rightly submitted that the first respondent's contention *in limine* is wrong both in law and in fact because the applicant's real cause of action arises from the first respondent's erroneous interpretation of a statutory provision which occurs each time there is an entry for home consumption of parts and accessories imported by the applicant is made. It constitutes a continuous wrong which arises on every occasion the applicant imports part that are not subject to *ad valorem* customs duty but which are imposed through erroneous interpretation of sub-heading 9009.9, previously 9009.90. I am of the considered opinion that the applicant's omission or for that matter failure, prior to August 2002, to take any steps does not detract from that that there is a continuous wrong because of the erroneous interpretation of sub-heading 9009.9 of the item. Thus, the first respondent's point *in limine* cannot succeed and is dismissed.

E. CORE DISPUTE : A MATTER FOR INTERPRETATION

(a) *Architecture of the Act*

- [22] The Customs and Excise Act is essentially a vital drawbridge of the economy. It prohibits and controls the orderly migration of a variety of commodities and goods by primarily levying customs and excise duties. The construction of the statute indicates that parliament created a vehicle to collect revenue in an orderly way. (*Micro and Peripheral Distributors (Pty) Ltd v The Minister of Finance and The Commissioner of Customs and Excise* (TPD Case No: 11339/1994 unreported judgment.)
- [23] The duties and levies are scheduler. The various charges and measures of relief are listed in the Schedules to the legislation. The Act levies the duties, provided for the payment to the national revenue fund on all imported goods, all excisable goods, all surcharge goods and fuel levy in accordance with the provisions of Schedule 1. This Schedule is divided into four parts corresponding to the four categories of goods mentioned in the charging provision. Part 1 of Schedule 1 contains the various headings and sub-headings regulating the rates of duty applicable to the importation of goods into the country. This part imposes ordinary customs duty. Part 2 of Schedule 1 is divided into two sections. Section A imposes specific excise duties and customs duties on goods of the same kind. Section B performs the same function for *ad valorem* excise and customs duties. The headings of Part 2 are cross-referenced to the equivalent headings of Part 1; but, for the most part, the description of the goods in Part 2 are more clearly circumscribed than the general heading of Part 1. (LAWSA 1st Reissue) Vol 1, Part 22 paras 521, 526 and 527.)

(b) *Status of tariff items*

[24] Fundamentally, the dispute relates to the proper interpretation of the phrase "*parts and accessories*" contained in the article description of sub-heading 9009.9 (previously 9009.90) in item 128.40. Section 1(1) defines:

"this Act" includes any proclamation, government notice, regulation or rule issued or made ...'

[25] Any insertion to and amendment of Schedule 1 are effected by issuing of a government notice by the second respondent in terms of section 48 read with section 47(1) and form part of the Act subject to the provisions of section 48(6). The provisions of the tariff items contained in Part 2B insofar as they relate to imported goods have the status of an Act of Parliament. They are to be interpreted in accordance with the common law principles of statutory interpretation where there is ambiguity, uncertainty or obscurity.

(c) *Argument*

[26] The applicant's submission is that the expression "*parts and accessories*" is susceptible to different interpretations in teleological sense. At the core of the dispute at stake is the question of whether purposively and contextually considered, the phrase applies to the parts and accessories of the goods liable to the *ad valorem* customs duty contemplated by sub-heading 9009.1 and 9009.2 of the item 128.40, or to *all* goods classifiable under heading 90.90 of Schedule 1 (save for the goods of sub-heading 9009.30 which are expressly excluded). But, the first respondent's contention is that, literally

considered, it applies to all parts and accessories of all the goods (except for those goods of sub-heading 9009.30) classifiable under heading 90.09 irrespective of whether such goods are subject to *ad valorem* customs duty or not. The first respondent's contention is predicated on the article description heading:

"Photo-copying apparatus incorporating an optical system or of the contract type and thermo-copying apparatus."

[27] It is on the basis of this that the first respondent submits that the intention of the legislature is that on a consideration of the wording of item 128.40 it is indicative that the phrase "*parts and accessories*" in the item was intended to bear the same meaning as the phrase in tariff heading 90.09 (except for the exclusion in the parenthesis, namely, "*excluding parts and accessories for machines of subheading No 9009.30*"), Hence, the legislature expressly and unambiguously specified in parenthesis *which* parts and accessories are excluded from payment of duty, that is, those parts and accessories for thermo-copying apparatus. Thermo-copying apparatus does not attract the payment of *ad valorem* customs duty since it does not fall within sub-heading 9009.1 or 9009.2.

[28] But, the applicant submits that contextually considered, even on a purely literal interpretation, it does not necessarily lead to the first respondent's conclusion. Thus, it is necessary to give effect to the legislature's true intention. It is in any event permissible to depart from a purely literal interpretation of the phrase in dispute. (See: *University of Cape Town v Cape Bar Council* 1986 (4) SA 903 (A) at 905E-G and 913H-914B.)

[29] Mr Puckrin argued that the existence of the ambiguity, uncertainty, or obscurity contended by the applicant becomes apparent when due consideration is given to the fact that customs duty and the levying of it is essentially a trade policy instrument primarily designed and deployed for the fostering and protection of the local economy and industry. It is within this context that the structure of Part 2B in relation to the structure of Part 1 of Schedule 1 must be considered with specific reference to the provisions of section 47(7). In essence the subsection provides that the article descriptions of sub-headings contained in tariff items of Part 2B may be restricted to such goods as are expressly stated in any such tariff item and thereby narrowing the scope and extent of the relevant sub-heading. The rationale and purpose of Part 2B, that is the levying of *ad valorem* excise duties and *as valorem* customs duties on imported goods of the same class or kind as specified the items protects local manufacturing industries subject to *ad valorem* excise duties against unfair competition by importers of goods of the same class or kind. Therefore, any interpretation of a provision of Part 2B contrary to the general legislative intent is anomalous and contrary to the true intention of the legislature.

(d) *What is the Legislature's real intention?*

[30] The fundamental question is, what is the true intention of the legislature? To ascertain that intention, it is pertinent to consider if the words used by the legislature are plain, admitting of only one meaning, there is no room for anomalies, unless the consequences are inexorably so absurd to lead to ambiguity, uncertainty or even obscurity.

- [31] Mr Puckrin persuasively argued that any interpretation of the provision of Part 2B contrary to the general intent is anomalous and violative of the true intention of the legislature. First and foremost, it was contended that applying the literal rule leads to the inescapable conclusion that the wording of the tariff item 9009.9 (previously 9009.90) pertaining to parts and accessories of all photocopying apparatus (excluding those expressly mentioned) are dutiable. The problem with the literal interpretation is that it leads to an anomaly, that is, that whilst photocopying apparatus, which in terms of the exclusion in sub-headings 9009.1 and 9009.2 are exempted from duty, the parts and accessories of such machines are dutiable in terms of tariff item 9009.9. This invariably leads to an unjust and unreasonable result that an importer who imports the constituent components of a photocopying apparatus for local assembly will be disadvantaged because it will be obliged to pay duty on it while the importer of a complete apparatus can do so without paying duty. This is surely repugnant to the general object of Part 2B of Schedule 1 which is to protect local industry and enterprise. It is clear that the literal interpretation as contended by the first respondent leads to a result which is manifestly absurd, unjust, unreasonable and repugnant to the general intent of the statute.
- [32] Generally, a Court is reluctant to go outside the wording of a statute to establish the intention of the Legislature it is trite that in aid to decide on the legislator's true intention the Court may have regard to the "*mischief*" that the statute was designed to remedy. The mischief which the legislature intended to remedy was by the introduction of the amendment contained in *Government Notice R1367* of 1 September 1995. The mischief the legislature intended to address was to impose an *ad valorem* duty on parts

and accessories of photocopying apparatus which were subject to duties in terms of the provisions of the tariff item 9009.90 (subsequently 9009.9). This remedied the previous situation where parts and accessories of those machines that were imported free of duty in terms of 90.09.90 and free of *ad valorem* duty since there was no provision for it in Part 2B. The duty postulated that there was no intention to impose *ad valorem* duty on parts and accessories of all photocopying apparatus.

- [33] It was also submitted on behalf of the applicant that the *contra fiscum* rule requires that in the case of ambiguity in fiscal legislation it is appropriate interpretation to follow that which is less onerous on the subject. The general rule that a legislation imposing a burden should in the case of ambiguity be construed in favour of the subject. This leads to the necessary conclusion that only parts and accessories of photocopying apparatus which are subject to *ad valorem* duty should be subject to *ad valorem* duty.

F. CONCLUSION

- [34] Having regard to all the considerations, in my judgment that on a proper interpretation of the sub-heading, the phrase "*parts and accessories*" refers only to parts and accessories of the apparatus that are dutiable under sub-headings 9009.1 and 9009.2 of item 128.40.

[35] In the result an order is granted in terms of prayers 1 and 2 of the notice of motion and the first respondent is ordered to pay the applicants costs, such costs to include the costs consequent upon the employment of two counsel.



E M PATEL
JUDGE OF THE HIGH COURT

Adv C E Puckrin SC with Adv J A Meyer, instructed by Maluleke Seriti Mngkume Metlaki Inc, Pretoria.

Adv J P Vorster SC with Adv J Motepe, instructed by State Attorney, Pretoria.