THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Reportable

CASE NO: 139/2002

In the matter between

A M MOOLLA GROUP LIMITED	**1ST APPELLANT**
AM CLOTHING (PTY) LTD	**2ND APPELLANT**
MAHOMED YACUB DHAI	**3RD APPELLANT**
YUSUF AHMED SADEK VAHED	**4TH APPELLANT**

AND

THE COMMISSIONER FOR SARS	**1ST RESPONDENT**
CONTROLLER OF CUSTOMS & EXCISE, DURBAN	**2ND RESPONDENT**
THE GOVERNMENT OF THE RSA	**3RD RESPONDENT**

CORAM: MARAIS, CLOETE and LEWIS JJA

HEARD: **3 March 2003**

DELIVERED*:* 26 March 2003

Summary: Trade agreement with Malawi: application of s 46 (and rule 46), Customs and Excise Duty Act 91 of 1964 to imports from Malawi.

JUDGMENT

LEWIS JA

[1] At issue in this appeal is the interpretation to be placed on an article in the trade agreement between South Africa and Malawi, entered into on 19 June 1990. The agreement was promulgated as part of the Customs and Excise Duty Act 91 of 1964. Before dealing with the actual dispute between the parties I shall set out the legislative framework of relevance to the issue.

[2] Section 49(1)(a) of the Act deals with the status and requirements for enforceability of trade agreements generally. The section reads:

‘49 Agreements in respect of rates of duty lower than general rates of duty —

(1) (a) Whenever any international agreement which binds the Republic as contemplated in section 231 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), is an agreement with the government of any country or countries or group of countries—

(i) which includes the granting of preferential tariff treatment of goods and provisions of origin governing such treatment;

(ii) concerning customs co-operation, including for the exchange of information and the rendering of mutual and technical assistance in respect of customs co-operation between the Republic and such other country or countries or group of countries;

(iii) regulating transit trade and transit facilities; or

(iv) which is a customs union agreement with the government of any territory in Africa;

(v) which provides for any other matter which either expressly or by implication requires to be administered by customs legislation,

such agreement or any protocol or other part or provision thereof is enacted into law *as part of this Act* when published by notice in the *Gazette* in accordance with the provisions of subsections (1) and (1A) of section 48 or subsection (5) or (5B) of this section' (my emphasis).

[3] Further, the definition of 'this Act' in s 1 states that it includes 'any proclamation, government notice, regulation or rule issued or made *or agreement concluded or deemed to have been concluded thereunder, any agreement contemplated in section 49* . . . ' (my emphasis).

[4] The Act makes specific provision for differential treatment of particular countries. Section 51, which regulates trade agreements with countries in Africa, provides:

'(1) The National Executive may conclude an agreement with the government of any territory in Africa in which it is provided that, notwithstanding anything to the contrary in this Act contained –

(a) goods produced or manufactured in or imported into the Republic shall be admitted into that territory free of duty or at special rates of duty and goods produced or manufactured in or imported into that territory shall be admitted into the Republic free of duty or at special rates of duty;

(b) such arrangements (including arrangements providing for the prohibition or quantitative or other limitation or restriction of the importation of any goods) as may be agreed upon between the parties to the agreement shall apply in respect of the admission of any goods into the territory of one of the parties from the territory of the other party and in respect of the entry of and the collection of duty on goods on importation into the territory of any party from a territory other than the territory of the other party;

(c) each party to the agreement shall be compensated in respect of duty on such goods to the extent and in the manner agreed upon between the parties to the agreement.'

[5] The agreement makes it clear that it is concluded under s 51. There is therefore no question as to the status of the agreement as a part of the Act. What is in issue is whether particular goods imported by the appellants from Malawi are exempt from customs duty under the agreement and the Act, a question that in turns depends on the meaning to be attributed to the relevant provision of the agreement.

[6] Article 2 of the agreement provides that 'goods grown, *produced or manufactured* in Malawi' must be imported into South Africa free of customs duty (my emphasis). Article 6 regulates what is required in order for goods to be regarded as 'produced or manufactured' in either Malawi or South Africa, as the case may be. Article 6(i) deals with the requirements in so far as imports into Malawi are concerned – to which I shall return – and

6(ii) with goods imported into South Africa. The present dispute between the parties relates to the interpretation to be given to the words ‘production cost’ in article 6(ii).

[7] Article 6 reads:

‘Goods shall not be regarded as having been produced or manufactured:

(i) in South Africa, unless the last process of manufacture shall have been performed in South Africa and, as may be prescribed from time to time under the customs legislation of Malawi for the purpose of determining the entitlement of goods to preferential rates of duty, such goods:

1. contain not less than the “specified country content”;

   or

2. have been subjected in South Africa to a specified process of manufacture; and

(ii) in Malawi unless at least twenty-five per cent, or such other lower percentage as may from time to time be agreed upon between the Parties in respect of specified goods manufactured in Malawi, of the *production cost* of those goods shall be represented by *materials produced and labour performed* in Malawi and the last process in the production or manufacture of such goods shall have taken place in Malawi’ (my emphasis).

[8] The primary contention of the appellant is that garments imported by it are produced or manufactured in Malawi since at least 25 per cent of their production cost, attributing to that phrase its ‘ordinary grammatical meaning’, is represented by materials produced and labour performed in Malawi. The respondents, on the other hand, contend that ‘production cost’

must be given meaning by having regard to the provisions of the Act and the rules made under it, in particular s 46 and rule 46.

[9] Although there is some dispute on the facts between the parties as to the percentage of material originating in Malawi used in the manufacture of the garments, for the purpose of the application in the court of first instance, and for this appeal, the respondents concede, in so far as the goods in contention are concerned, that if the appellants' interpretation is correct the combined cost of such materials and labour amounted to 25 per cent of the production cost. Conversely, if the respondents' interpretation is correct, the appellants concede that the goods in question do not meet the 25 per cent requirement.

[10] The parties formulated the question for determination by the court *a quo* in the following terms:

'Whether or not section 46 of the Customs and Excise Act 91 of 1964, as read with Rule 46, made in terms of the Act, applies in relation to the goods imported by the second applicant [appellant] and defined in paragraph 1(a) of the Notice of Motion.'

In their notice of motion the appellants had asked for an order declaring that goods imported by the second applicant under specified bills of lading, from Crown Fashions in Malawi, complied with the provisions of article 6(ii) of the trade agreement.

[11] Roux J answered the question in favour of the respondents, finding that the goods were not exempt under article 6(ii). It is against this finding that the present appeal lies, leave having been granted by this court.

[12] Section 46 read (before an amendment in 1999):

‘(1) For the purposes of this Act goods shall not be regarded as having been produced or manufactured in any particular territory unless –

(a) at least twenty-five per cent (or such other percentage as may be determined under subsection (2), (3) or (4)) of the production costs of those goods, determined in accordance with the rules, is represented by materials produced and labour performed in that territory;

(b) the last process in the production or manufacture of those goods has taken place in that territory.

(c) . . .’

An amendment to the section in 1999, the effect of which was the inclusion of the words ‘except where any agreement contemplated in section 49 or 51 otherwise provides’ after ‘Act’, is of no significance, a matter discussed below.)

[13] Rule 46.01 provides:

‘In the calculation, for the purposes of section 46, of the cost of materials produced and labour performed in respect of the manufacture of any goods in any territory, only the following items may be included

(a) the cost to the manufacturer of materials wholly produced or manufactured in the territory in question and used directly in the manufacture of such goods; and

(b) the cost of labour directly employed in the manufacture of such goods.’

Rule 46.02 provides:

‘In the calculation, for the purposes of section 46, of the production cost of any goods in the territory, only the following items expended in the manufacture of such goods may be included

(a) the cost to the manufacturer of all materials;

(b) manufacturing wages and salaries;

(c) direct manufacturing expenses;

(d) overhead factory expenses; and

(e) cost of inside containers.’

[14] The appellants argue that article 6(ii) of the trade agreement must be given a meaning different from that to be found in s 46 and the rule that elaborates upon it: that ‘production cost’ means the cost of producing an article, and that embraces a variety of costs not referred to in rule 46, which is restrictive. The lynchpin of the argument is that s 51(1) states that an agreement may be concluded with another country in terms of which goods

may be imported into South Africa free of duty, '*notwithstanding anything to the contrary'* contained in the Act. On this argument, s 46(1) and rule 46 would have no application to the goods imported under article 6(ii). (A number of general principles of statutory interpretation were advanced in support of this contention. I shall not deal with them since I consider that the meaning of article 6(ii) is informed entirely by s 46 and rule 46, a conclusion which I address below.)

[15] The respondents contend, on the other hand, that the agreement owes its existence to the Act, forms part of the Act, and is to be construed as such. I have set out already the provisions of the statute that regulate the status of trade agreements. If there were to be an apparent conflict between general provisions of the statute and particular provisions of an agreement, difficulties of interpretation might indeed arise. The Act must, of course, prevail in such a case: the agreement once promulgated is by definition part of the Act. It must follow that where words which are defined in the Act occur in the agreement, they must be given the meaning assigned to them by the Act unless the context indicates the contrary. Just as the definition in the Act of the word 'goods' must govern the meaning to be given to the word 'goods' in the agreement, so must any other explanation in the Act of the meaning of words used in the Act be taken to extend to the same words where they appear in the agreement (unless the context in which they are used indicates otherwise).

[16] In any event, the respondents argue, there is no conflict between article 6, on the one hand, and s 46 and rule 46 on the other. It is the section, as adumbrated by the rule, that gives content to the expressions used in the article. The article sets out the basic requirements for qualification for exemption. Rule 46 provides the method for the calculation of the percentage. There is thus no conflict, nor any reason to believe that article 6(ii) should be assigned a meaning different from that set out in the Act and rules. I accept this argument.

[17] The appellants contended in addition that the officials who had implemented the agreement had in fact interpreted it in the same way as the exporters and they had done, and that goods had been imported free from duty over several years on the basis that ‘production cost’ was to be given its ‘ordinary meaning’: that is, all the costs involved in the production or manufacture of the goods.

Even if that were the case, however, (and it is not common cause that it was) there is no basis upon which to claim that the practice should be continued.

[18] In *Collector of Customs v Cape Central Railways (1888-89) 6 SC 402* it was argued for the respondent that when a senior government official had allowed the importation of cement free of duty, the appellant was precluded from claiming the duty that should have been levied. That proposition was termed ‘untenable’ by De Villiers CJ (at 404). Declining to apply any doctrine of estoppel (a term ‘used in a very vague sense in the English law’, said the court, at 405), the court characterized the issue as follows at 405:

> ‘The question to be determined, therefore, is not the limited one of estoppel, but the far wider one whether the Government can legally abandon its right to any particular source of revenue provided by Parliament, and having abandoned it, in any particular instance, it is debarred from recovering it from the person in whose favour it has been abandoned.’

[19] The court, after an examination of both English and Roman-Dutch authorities, held that the Government was not precluded from claiming the

duty. De Villiers CJ was of the view that while it might be considered an injustice that government should be permitted to enforce a right it had purported to abandon, ‘the rights of Government exist for the public good and not for the personal advantage or convenience of members of the Government’.

Buchanan J, in a concurring judgment, made the further point that legislation should not be rendered nugatory in consequence of an illegal act on the part of an official. By parity of reasoning the same would apply to a mistake.

[20] The argument of the appellants that a practice had developed, or that a particular interpretation had been adopted, and should be adhered to, must accordingly be rejected. Equally, the argument that the way in which article 6(ii) had been interpreted is an indication of what it actually means, carries no weight when that interpretation is plainly not consonant with the express provisions of the Act and the rules.

[21] A further consideration that we were urged to take into account in giving meaning to article 6(ii) is the wording of article 6(i), dealing with goods exported from South Africa to Malawi. That provision differs in significant respects from that under consideration. First, it states that the customs legislation of Malawi may ‘from time to time’ prescribe the criteria for exemption from customs duty. There is no corresponding provision in relation to goods imported into South Africa. The absence of such a provision, it was argued, indicated that the term ‘production cost’ has an

ordinary meaning (different from its statutory meaning) that does not change when (and if) the South African legislation changes. It seems to me, however, that the omission of such a provision has no significance. The agreement is a part of the statute. If the provisions in the statute, or the rules made under it, are changed from time to time, so too must the the articles of the agreement be interpreted accordingly. No express provision to this effect is required. This conclusion is a logical consequence of the principle discussed earlier that the agreement takes its meaning from the statute of which it forms a part.

[22] Secondly, article 6(i)(a) states that such goods must 'contain not less than the "specified country content"' or (b) that they must 'have been subjected in South Africa to a specified process of manufacture'. The contrast, it was suggested, supports the proposition that the terms of the agreement do not take their meaning from the South African legislation but are to be independently construed.

[23] It is clear that article 6(i) of the agreement specifically quotes what are statutory terms of art in the Malawian legislation (such as 'specified country content') while article 6(ii) does not. An examination of the Malawi customs and excise legislation and rules made available to this Court by the appellants' counsel during the hearing shows that the words used in article 6(i) owe their origin to such legislation. The only inference to be drawn is that the South African legislation correspondingly informs the meaning of article 6(ii). Had the Malawian terms of art not been employed in article 6(i) and had the same expression as is found in article 6(ii) ('production cost') been used instead, the South African statutory criteria governing what was

to be regarded as production cost, and not the Malawian criteria, would have had to be applied to goods entering Malawi from South Africa.

[24] In short, the different language in article 6(i) was employed to make it clear that as far as goods entering Malawi from South Africa were concerned, the Malawian legislation would control whether those would be regarded as having been produced or manufactured in South Africa. Where, on the other hand, Malawian goods entering South Africa were concerned, the South African legislation would control the answer to that question.

[25] The absence in article 6(ii) of the words 'determined in accordance with the rules' which was relied upon by counsel for the appellant is not, in my view, a strong pointer away from the conclusion that production cost was to be so determined. At the time when the agreement was concluded (June 1990) the words 'except where any agreement contemplated in section 49 or 51 otherwise provides' did not appear in s 46(1) of the Act and subsec(1)(a) referred to the production cost of goods 'determined in accordance with the regulations'. It followed that at that time the empowering provisions in both s 49 and s 51 which related to 'goods produced or manufactured in . . . (a) territory', had to be read subject to s 46(1) which provided that 'For the purposes of this Act (excluding Chapters VI and IX), goods shall not be regarded as having been produced or manufactured in any particular territory unless', inter alia, 'at least twenty-five per cent (or such other percentage as may be determined under sub-section (2), (3) or (4)) of the production cost of those goods, determined in accordance with the regulations, is represented by materials produced and labour performed in that territory'.

[26] It was therefore not open to the State President at that time to conclude an agreement that enabled the production cost of goods to be determined in any other manner. Had he purported to do so, he would have

acted *ultra vires*. The presence in s 51 of the words ’notwithstanding anything to the contrary in this Act contained’ does not derogate from the fact that inasmuch as that provision dealt with ‘goods produced or manufactured in (a) territory’, those goods could only be so regarded if they satisfied the requirements of s 46.

[27] It is trite law that unless the language of a provision compels it, one does not read it in such a way as to visit it with invalidity. The language of article 6(ii) does not compel such a reading. The subsequent amendment of s 46 (1) so as to substitute for the words ‘(excluding Chapters VI and IX)’ the words ’except where any agreement contemplated in s 49 or 51 otherwise provides’ could not have altered retroactively the original meaning of article 6(ii). And even if, potentially, it could have done so, it would only have done so if it clearly ‘otherwise provide(d)’. I agree with Roux J that it plainly did not.

[28] Counsel for the appellant pressed upon us the contention that the agreement was intended to be ‘cast in stone’ so that entrepreneurs in Malawi would know where they stood and be willing to commit capital to business ventures. While it may have been hoped that no unfavourable changes in customs legislation might come about, the agreement provides no guarantees in that regard. On the contrary, it expressly provides for changes in the Malawian legislation and for the unilateral suspension, withdrawal or modification by either party of the concession granted in respect of ‘any product’. It is true that such action requires advance notice and an opportunity to consult to be given to the other party but the fact remains that the benefits provided by the agreement were not cast in stone.

[29] The structure of the Act and the incorporation of the agreement as a part of it lead to the inevitable conclusion that the agreement must be construed in such a way as to avoid any conflict between the Act itself, and the rules promulgated under it, on the one hand, and the terms of the agreement on the other. While there is no definition of the term ‘production cost’ in the Act itself, the provisions of s 46, read with rule 46, which gives the section more precise content, are the equivalent of a definition. They tell one exactly how the term is to be read, and which costs are to be included in the calculation of the production cost.

[30] Accordingly I find that, in the determination of the production cost of the garments imported under the particular bills of lading, rule 46 must be applied and article 6(ii) interpreted accordingly.

[31] The appeal is dismissed with costs, including the costs occasioned by the employment of two counsel.

C H LEWIS

JUDGE OF APPEAL

MARAIS JA)

CLOETE JA) concur