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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.
(3) REVISED.
DATE 15/5/01 SIGNATURE

CASE NO.: 18044/2000

In the matter between:

DELTA MOTOR CORPORATION (PTY) LTD APPLICANT

and

COMMISSIONER OF SOUTH AFRICAN REVENUE SERVICES RESPONDENT

JUDGMENT

BOTHA, R:

The applicant is Delta Motor Corporation (Pty) Ltd (Delta).

The respondent is the Commissioner for the South African Revenue Services (the Commissioner).

The respondent asks an order in the following terms:

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IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

"(a) Declaring that the engineering, styling and tooling charges ("the EST charges") paid and/or payable by the applicant to Adam Opel Aktiengesellschaft ("Opel") did not and do not constitute part of the value for customs duty purposes or the transaction value, in terms of sections 65, 66 and 67 of the Customs and Excise Act, 1964 (:the Act") of goods purchased by the Applicant from Opel and imported into the Republic ("the goods").

(b) Alternatively to (a):

Upholding the Applicant's appeal in terms of section 66 of the Act, against the Respondent's determination in his letter dated 1 December 1999, read with his letter dated 20 July 1999, of the value for customs duty purposes of the goods, and in particular the Respondent's determination that the EST charges constituted part of the transaction value of the goods, for customs duty purposes.

(c) Reviewing and setting aside the commissioner's refusal to grant Applicant's application of 22 September 1997 for a refund of duties and ordering the Commissioner to grant Applicant's aforesaid application, alternatively referring the matter back to the Commissioner to forthwith consider the Applicant's aforesaid application having regard to the fact that the EST charges did not constitute part of the transaction value of the imported goods.

(d) **Reviewing and setting aside the Commissioner's refusal to grant Applicant's application of 22 September 1997 for a refund of duties prior to the two-year period provided for in section 76(4) of the Act and ordering the Commissioner to grant Applicant's aforesaid application retrospectively to 1 June 1991, alternatively referring the matter back to the Commissioner to forthwith consider the Applicant's aforesaid application.**

(e) **Ordering Respondent to pay the costs of the application.**

The application concerns the calculation for customs duty purposes of certain imported goods. The applicant is an assembler, manufacturer and distributor of motor vehicles and motor vehicle parts and accessories.

Amongst others it assembles, manufactures and distributes motor vehicles in terms of certain agreements with Adam Opel Aktiengesellschaft (Opel). In the process it imports components from Opel for the assembly and manufacture of motor vehicles. The parts with which this application are concerned are imported in kits called completely knocked down kits (CKD kits).

Built into the invoice prices of these CKD kits was a charge for engineering, styling and tooling (EST charge).

The issue in this application is whether the EST charges form part of the transaction value of the imported CKD kits for the purposes of sections 66 and 67 of the Custom and Excise Act, 1964 (Act 91 of 1964) (the Act).

The case of the application is that these EST charges do not form part of the transaction value of the imported goods. The case of the respondent is that they do form part of the transaction value and that they are therefore dutiable.

It is common cause that if the applicant succeeds it would be appropriate simply to grant relief in the form of the declaration sought in prayer (a) of the notice of motion.

Section 65(1) of the Act provides as follows:

> "65. Value for customs duty purposes. -
>
> (1) Subject to the provisions of this Act, the value for customs duty purposes of any imported goods shall, at the time of entry for home consumption, be the transaction value thereof, within the meaning of section 66."

Section 66(1) of the Act reads as follows:

> 66. Transaction value. - (1)
>
> Subject to the provisions of this Act, the transaction value of any imported

goods shall be the price actually paid or payable for the goods when sold for export to the Republic, adjusted in terms of section 67, ..."

In section 65(9) the following definition appears for the purpose of section 66 and 67:

"Price actually paid or payable", in relation to imported goods, means the total payment made or to be made, either directly or indirectly, by the buyer to or for the benefit of the seller for the goods, but does not include dividends or other payments passing from the buyer to the seller which do no directly relate to the goods;"

Section 67 contains the following provisions relating to adjustments to the transaction value of imported goods:

"67 Adjustments to price actually paid or payable. -

(1) In ascertaining the transaction value of any imported goods in terms of section 66(1), there shall be added to the price actually paid or payable for the goods -

.....

(c) **royalties and licence fees in respect of the imported goods, including payments for patents, trade marks and copy right and for the right to distribute or resell the goods, due by the buyer, directly or indirectly, as a condition of sale of the goods for export to the Republic, to the extent that such royalties and fees are**

not included in the price actually paid or payable, but excluding charges for the right to reproduce the imported goods in the Republic;

....

(2) In ascertaining the transaction value of any imported goods in terms of section 66(1) there shall be deducted from the price actually paid or payable for the goods, to the extent that they are included therein, amounts equal to -

...

(c) any of the following costs, charges or expenses if identified separately from the balance of the price actually paid or payable for the goods, namely -

...

(vii) any charge for the right to reproduce the imported goods in the Republic."

Also relevant to the interpretation of section 65, 66 and 67 is section 74A, which reads as follows:

"74A Interpretation of sections 65, 66 and 67. -

(1) The interpretation of sections 65, 66 and 67 shall be subject to the agreement concluded at Geneva on 12 April 1979 and known as the Agreement of Implementation of Article VII of the General Agreement on Tariffs and Trade, the Interpretative Notes thereto, the Advisory Opinions, Commentaries and Explanatory Notes, Case Studies and Studies issued under the said Agreement of Implementation of Article VII of the General Agreement on Tariffs and Trade.

...

(3) **The provisions of sub-section (1) shall not derogate from the interpretation which would but for that subsection be given to section 65, 66 or 67."**

Delta has been importing components from Opel since 1987. Four agreements governed their relationship: a Trade Mark Licence (TLA) agreement, an Assembly and Distribution (A&D) agreement, a Production Material (PM) agreement and a Supply Agreement for Service Parts and Accessories (P & A agreement).

In the A & D agreement it is provided that Delta is obliged to pay Opel a royalty for the licence to assemble and sell Opel motor vehicles as provided in section (clause) 4(c) of the PM agreement.

Clause 3(c) of the PM agreement provides as follows:

"(c) <u>Payment</u>

Buyer shall buy CKD Sets and/or Component Parts at the Deutsche Mark prices and on the terms applicable at the time of delivery of CKD Sets and/or Component Parts by Seller to carrier."

Clause 5 of the PM agreement provides, *inter alia,* that delivery shall be accompanied by the presentation of Opel's commercial invoice covering the CKD sets and component parts.

Clause 4(c) of the PM agreement reads as follows:

> "(c) **In case Buyer will change to total local manufacture of parts and components or source them from other than Seller resulting in a zero CKD requirement, Buyer shall pay to Seller for granting licences to manufacture/assemble vehicles and Component Parts from Seller's technologies and to use Seller's trademarks a royalty in respect of each vehicle sold, of not less than 3% of the price of a CKD Set representing the total vehicle. This undertaking is subject to the South African Exchange Control Authorities approving the payment of the said Royalty and the Buyer undertakes further to use its best endavours to secure such approval."**

It is common cause that the situation envisaged in clause 4(c), namely one where no parts are imported, never arose.

It is common cause that the PM agreement contained no provisions for the payment of a royalty other than clause 3(c).

In April 1995 an amendment, numbered amendment 6, to the A & D Agreement was adopted. It provided with effect from 1 April 1995, for the payment of a royalty of 3% on Opel Astra 2700 vehicles assembled by Delta. It is the applicant's case that this royalty agreement was concluded because it was thought necessary at the time for foreign currency purposes. The royalty was fixed at 3% because it was under the impression that that was the maximum allowable under the applicable

foreign exchange regulations. This 3% royalty was henceforth reflected separately on invoices. It was also extended to other vehicles.

In 1997, as result of an audit it was realized that Delta had been paying EST charges. In an attempt to bring the agreements in line with practice an amendment, amendment no 7, was effect to the A & D Agreement. It reads as follows:

"Amendment No. 7

to the Assembly and Distribution Agreement ("Original Agreement") effective 1 January 1987 concluded between: -

Adam Opel AG, a company duly organized and existing the laws of Germany, having ist principle place of business at D-65423, Rüsselheim, Germany; hereinafter referred to as "Opel", and

Delta Motor Corporation (Pty.) Limited (formerly General Motors South African (Proprietary) Limited) a company duly organized and existing under the laws of South Africa, having its principal place of business at Port Elizabeth, South Africa.

Whereas:

A. Under the Original Agreement, Opel licensed Assembler to manufacture, assemble and

distribute in South Africa certain Opel vehicles and components (more particularly described therein) and the parties have executed superseding Schedules A and/or expanded the licensed Vehicles to the Original Agreement under various amendments.

B. The parties wish to clarify the definition of the royalty as being the Engineering and Styling portions of the charge identified as E/S/T in documentation which charge is levied by Opel on Assembler. The E/S/T charge in turn covers the costs of:

1. Manufacture of vehicles by Assembler using Opel technology.
2. Permission for Assembler to manufacture Opel parts in South Africa.
3. Use, by Assembler, of technical information provided by Opel to enable Assembler to reproduce, sell and service vehicles.
4. Use by Assembler of Opel's technical know-how in relation to parts.
5. Assembler's right to distribute the product
6. Assembler's share of Opel's investment in component tooling.

C. The E/S/T charge has been levied since the inception of the Opel/Assembler relationship, and is historically a constant charge that can and has been altered and renegotiated as necessary. The Engineering and Styling elements of this charge is covered in the royalty in clause 4 (c) of the Supply Agreement for Production Material effective 1 January 1987 ("Supply Agreement").

D. The E/S/T charge represents the portions of Opel's design and development costs as well as component tooling investment costs, incurred by Opel that are rebilled to Assembler. The charge is levied irrespective of whether components are ordered from Opel or not, for so long as Assembler distributes the vehicles covered by the Agreement.

E. The tooling portion of the E/S/T charge is a charge levied by Opel on Assembler and covers the rebilling of a portion of the total component tooling investment incurred by Opel for a defined range of vehicles.

Now therefor, the parties hereby agree to amend the Original Agreement as follows:

1. Clauses 1, 2 and 3 of Amendment No. 6 to the Original Agreement are cancelled.

2. The royalty charge that is covered in clause 4 (c) of the Supply Agreement is represented by the Engineering and Styling portion of the E/S/T charge levied by Opel on Assembler.

3. Assembler agrees to pay the tooling charge as contemplated in Clause E above. The amount to be subject to negotiation between t he parties from time to time. This amount will be levied irrespective of whether assembler purchases components for the subject vehicles from Opel or not and is not varied by any changes in the CKD kits.

4. The total charges levied by Opel in the past are acknowledged by both parties to be

correct and are represented on the attached Addendum. The parties acknowledge that this Amendment does not represent a decision to alter the charges in any way."

It is common cause that amendment no 7 was effected when the applicant was in the process of making representations for a refund of duties paid as a result of the inclusion of EST charges in the transaction value of imports from Opel.

It is common cause that EST charges were never reflected on the invoices supplied by Opel.

The documentation on which EST charges are reflected is the Car Set Order (CSO) listings. A CSO listing is a schedule of components that may be required by Delta for the assembly of one motor vehicle.

In paragraph 50 of the founding affidavit the applicant's deponent, mr Martin, explains the nature of EST charges as follows:

49 **Delta is only liable for the EST charge in respect of a motor vehicle manufactured, assembled and sold in the territory. It remains payable even if no CKD kit is imported from Opel (i.e. zero CKD requirement) and the motor vehicle is assembled from components which are all sourced elsewhere than from Opel and/or manufactured locally. The EST charge for a particular carline is determined entirely independent of the price of the imported components and an analysis of the EST charges over the years reveals only**

slight changes in the EST charges for a carline.

50 The EST charge represents Opel's design and development costs as well as component tooling investment costs incurred by Opel. It specifically covers the costs of:

(i) the manufacture of the Opel motor vehicle using Opel technology;

(ii) the permission for Delta to manufacture Opel parts in South Africa;

(iii) the use, by Delta, of technical information provided by Opel to reproduce, sell and service Opel motor vehicles;

(iv) the use by Delta of Opel's technical knowledge in regard to components;

(v) Delta's right to distribute Opel motor vehicles;

(vi) Delta's share of Opel's investment in component tooling.

51 The engineering and styling components of the Est charge are payable in respect of each Opel motor vehicle manufactured, assembled and sold in the territory and covers the design, construction, development, calculation and endurance testing of the carline by Opel. These charges are not related to the imported

components, but are determined periodically in advance and remain relatively constant in respect of a particular carline. The tooling component of the EST charge represents the tooling investment per carline and is calculated by dividing the total investment by the total anticipated worldwide production."

The following points are made in respect of EST charges:

(a) that they are payable in respect of each Opel motor vehicle manufactured assembled and sold.

(b) that they are not related to the imported components, but that they are determined periodically in advance of a particular carline.

(c) that the CKD kits on the average contain anything from 20% upwards, but never 100%, of the components required to manufacture one motor vehicle, the balance being made up of local content or imports from other sources.

(d) that EST charges are not related to the number, weight or value of the components in a kit.

(e) that the end product is comprised of many more components than are contained in a kit.

(f) that if a vehicle is not sold, Delta would be entitled to a refund of EST.

(g) that the components in a kit are priced at market related prices.

(h) that the contents of a kit can by reduced as a result of Delta being able to obtain certain components cheaper elsewhere, whilst the EST charge would not be reduced.

The applicant also annexed an affidavit of mr Axon, its manager for material cost and sourcing. He explained that a CSO listing is prepared before the production of a particular model, that it covers the cost of each component in each list as well as EST charges, and that the EST charge remains constant while the components of the kit may vary.

In its replying affidavits the applicant annexed affidavits from employees of Opel, notably one of mr Colcomb. He confirmed the nature of the EST charge as set out in amendment 7, that it is levied in respect of each vehicle manufactured and sold and that it bears no relation to the value of the components or contents of a kit.

The respondent's deponents obviously had no personal knowledge of the dealings between Delta and Opel and confined themselves to pointing out aspects of the applicant's case that appeared to be inconsistent or suspicious. It is more convenient to deal with these issues when the arguments are considered.

Mr Solomon SC, who with mr Stais, appeared for the applicant, stressed the fact that customs duty is levied on goods.

He argued that it is significant that when it is not possible to establish the transaction value of goods, the Act, in section 66, prescribes a method to establish the price actually paid for the goods. The same intention to tax the value of the goods appears from the provisions dealing with transactions between related parties.

Then he referred to the definition of "price actually paid or payable" in section 65(9) which includes the total payment made or to be made, either directly or indirectly for the goods, but excludes payments passing from the buyer to the seller which do not directly relate to the goods. He accordingly argued that both elements apply: even if an amount is ostensibly part of the payment for the goods, if it does not directly relate to the goods, it is not part of the transaction value.

In respect of the facts he conceded that the agreements did not deal with EST and that the reference to clause 4(c) of the PM agreement is inappropriate. He contended however, that it is clear that the agreements did not reflect the relationship between he parties. There was a charge for EST and it did not relate to the components of a particular kit. It represented a consideration for the right to assemble, manufacture and distribute.

Amendment 7 was not contrived. It was an attempt to bring the agreement in line with the facts. He submitted that the EST charges did not form part of the price of the goods. Even if it were found that

they were part of the price of the goods, he argued that they represented payments passing from the buyer to the seller that did not directly relate to the goods.

He contended that the EST charges could not be considered to be royalties and licence fees to be added to the price actually paid in terms of section 67(1)(c) because they had no relationship to the goods.

Nor were they charged as a condition of sale of the goods. In this regard he referred to the affidavit of Colcomb.

He moved for an order in terms of prayers (a) and (e).

Mr Vorster SC, who appeared for the Commissioner, mainly argued that the royalty charge known as EST was on the applicant's own version an inextricable part of the price of the CKD kits, and therefore had to be considered as part of the transaction value. He also questioned the applicant's allegations regarding the nature of EST and its payment with reference to various inconsistencies.

He referred to the agreements and their failure to mention the EST charge. He argued that the provision in clause 4(c) of the PM agreement for a 3% royalty in the case of zero importation was an indication that otherwise Opel was content to recover compensation for the rights in the TLA and A & D agreements through the purchase price of the SKD kits.

He stressed the fact that according to mr Martin the applicant was unaware until 1997 that EST was a royalty. He referred to the problems the applicant had in locating the contractual source of the EST charge.

He contrasted the applicants unawareness of the nature of the Est charge with a telefax dated 19 November 1995 in which Delta asked Opel for separate billing of EST charges for customs purposes.

He pointed out that all the relevant agreements had non variation clauses, which precludes a reliance on terms not reduced to writing. Even on the applicant's version there was no consensus as to the nature of the EST charge.

He stressed the fact that the invoices did not reflect the EST charge at all.

He argued that an invoice is *prima facie* proof of the price of the goods to which it relates. In this regard he also referred to the duty imposed by section 41(4)(a) on an exporter to state all particulars in an invoice that may have a bearing on the value of a transaction.

He referred to the fact that Delta, in a letter dated 10 April 1995, mentioned the 3% royalty to the Department of Trade and Industry, but made no mention of the balance of the royalty, being EST.

In respect of amendment no 7 he contended that it was window dressing to place a different construction on past events for the purposes of an application for a refund. In this regard he referred

to the notes of mr Busuttil, The consultant, who advised Delta. He referred to the use of the phase "redefinition of EST charges" by ms Hille of Opel in a letter dated 11 November 1998, where she apparently referred to amendment 7. He submitted that that should have been clarified. He also pointed out that the operative part of amendment no 7 only refers to tooling charges.

He submitted that the EST charges formed part of the "price actually paid or payable" as referred to in section 65(9). They represented but one example of the costs which Opel sought to recover by means of the purchase price.

In the alternative he argued that the EST charges should be added to the price actually paid or payable by virtue of section 67(1)(c) as royalties in respect of the goods. In this regard he relied on the unreported judgment in **Samcor (Manufacturing) Pty Ltd v The Commissioner for the South African Revenue Services, case no 22655/98**, an unreported judgment delivered in this division on 30 November 1999.

He submitted that the case was in *pari materia* and that the court in that case found that the payment of royalties calculated on the price of a full CKD kit for the assembly of a single motor vehicle was inextricably linked to the parts and components supplied by the exporter and therefore at least indirectly due as a condition of sale.

In essence the court only has the applicant's version before it. In a matter of this nature it is inevitably so. The predicament of a litigant like the respondent is that unless he can demonstrate on

the papers that the applicant's version is unacceptable he has to avail itself of his right to apply to have the applicant's deponents called for cross examination in terms of Rule 6(5)(g). No such application was made in this case.

In spite of all the misgivings of the respondent I must find on the papers that the EST charges were paid from the commencement of the relationship between the parties and that they were paid as royalties for the right to assemble, manufacture and sell Opel vehicles.

The fact that the agreements do not refer to the EST charges does not preclude proof that they were levied as royalties and paid as such. This case is not a case between the parties to the contracts. If the parties were in agreement as to the liability for EST charges and if the charges were paid there was no reason for either of them to resort to rectification or a reliance on implied terms.

As it is, it is clear from clause 2.3 of the A & D agreement that a royalty is payable for the licence to assemble and sell Opel vehicles and to manufacture parts for these vehicles. The reference in clause 2.3 of that agreement to clause 4(c) of the PM agreement is clearly inapt, because clause 4(c) deals with the situation of zero importation. In my view this constitutes a *lacuna* in the agreement which can be filled by an implied term or by rectification. On the papers the parties had no problem in applying clause 2.3 of the A & D agreement.

The fact that the invoices did not reflect the EST charges as a separate charge is not a bar to the applicant proving that they were in fact a separate charge. Certainly the invoices provide *prima facie*

proof against the applicant of the price actually paid or payable for the goods, but such *prima facie* proof can be rebutted by credible evidence.

I see nothing sinister in amendment no 7. No doubt is was inaptly drafted, given its purpose. Its genesis can be traced through the documentation produced by mr Busuttil. I do not detect in it any attempt to falsify history or to amend an agreement retrospectively. Mr Busutil was alive to the fact that the version of Opel had to be obtained, but he made it clear that it was for the purpose of verification. The fact that he at a stage toyed with the idea of relying on section 67(2)(b)(vii) can be attributed to a wrong interpretation of the law. There was never any question that Delta was engaged in the reproduction of components contained in CKD kits. It is obvious that amendment no 7 was brought about for the purpose of supporting representations for a refund. It was patently done so and I see nothing wrong in it. The object was simply to codify or regularize the factual situation.

The fact that mr Martin said that the applicant was not aware of the nature of the EST charge must be seen in its context. He said that it was not aware of its nature as a non dutiable royalty. The fact that a mr Walters on 19 November 1993 requested separate billing of EST charges for customs purposes, shows that this ignorance was not universal. It supports the proposition that EST was a royalty that was included in the invoice price.

Even if the applicant had been ignorant of the existence of the EST charges, and merely paid the invoice price, such ignorance cannot make those charges part of the price if it appears that, objectively speaking, they were not part of the price.

Mr Axon and Mr Colcomb, from opposite ends, have confirmed the existence, nature and working of EST charges.

I am therefore of the view that the matter must be approached on the basis of the facts advanced by the applicant. There is no reason to doubt the *bona fides* of the applicant. It can be criticized for inconsistencies and for its failure to document properly what it had been doing, but its basic account of the relationship between it and Opel and the nature of the EST charges must be accepted.

The first question to be answered is whether the EST charges formed part of the "price actually paid or payable" as defined in section 65(9). That is the cornerstone of the transaction value.

It is clear from the definition of "price actually paid and payable" that not every payment passing from the buyer to the seller falls to be included in the price. Payments that do not relate to the goods are excluded.

A payment that is not payment for the goods, but for something else, even though it is included in the total payment for the goods, must be excluded. The definition clearly visualizes a situation of a composite payment of which only part may relate to the goods.

It is of course true that any true price is composed of elements. It is also true that any manufacturer should be aware of all the elements that make up the price of his product. Once the price has been fixed, however, it is the price and it cannot be whittled down after an analysis of its components.

Bearing in mind the definition of "price actually paid or payable" I am convinced that the EST charges were not part of the price paid for the CKD kits.

To begin with, one should look at what the goods were. The goods were the CKD kits. Every kit had its price. The price varied according to the model concerned. It varied according to the content of a kit. During the production of a carline the content of the CKD kit could vary, and so would the price in DM. All that is graphically illustrated by annexure LM41. The kit price of an Astra 200 IE decreased between 1994 and 1999 from something over DM3500 to just over D1500, picking up slightly at the end. During all that time the EST charge was constant at just over DM500.

The EST charge clearly was not related to the value of the goods. The evidence was that it represented payment for the right to assemble, manufacture and sell a complete motor car. The goods, the contents of the kits, never constituted all the components of a full motor car. In fact the evidence shows that the content obtained from other sources than Opel was preponderant.

The only fact that links the EST and the price of the goods is the fact that they were lumped together for the purposes of invoicing and payment. I do not see any significance in that for the purpose of the definition of "price already paid or payable".

It was obviously convenient for Opel to invoice Delta for the kits as well as for EST in one invoice. As long as zero importation was not reached, it made sense. Of course the invoices should have reflected EST as a separate charge. That does not, however, *per se* mean that the EST charge had

become invisibly merged into the price like other components of the price. The EST was separate and distinct from the price of the kit. It was quantified and identifiable. It was documented. It related to something else. In short, the EST charge had all the attributes of an ostensible element of the price that did not directly relate to the goods.

For these reasons I am of the view that the EST charge did not form part of the transaction value for the purposes of section 66(1).

The next question is whether the EST charges had to be added to the price actually paid or payable as an adjustment in terms of section 67(1)(c).

The applicant concedes that the EST charges were royalties or licence fees. The question is whether they were "royalties and licence fees in respect of the imported goods, including payments for patents, trade marks and copyright and for the right to distribute or resell the goods due by the buyer, directly or indirectly, as a condition of sale of the goods for export to the Republic ...." (my underlining)

I agree with mr Solomon that two requirements have to be met. The royalty must be (a) in respect of the goods, and (b) for the right to distribute or resell the goods due by the buyer, directly or indirectly, as a condition of sale of the goods.

In this case the first requirement is not met. The royalty was not in respect of the goods. The goods

were the contents of the kits. The royalty was for the right to assemble, manufacture and sell motor cars irrespective of the degree to which they were composed of the goods. The royalty was also not for the right to distribute and resell the goods. They were going to be used in the assembly and manufacture of motor cars, thereby losing their separate identity by accession. The words "directly or indirectly" cannot extend this requirement, because they qualify the second requirement. The Afrikaans text makes it clear.

I am prepared to accept that if the seller required, as a condition of sale of the goods, that a royalty not in respect of the goods should also be paid, that the payment of such royalty is at least indirectly a condition of the sale of the goods. That is probably the position in this case. I know that mr Colcomb said that the EST charges were only due when a vehicle is sold. That does not mean that Opel cannot insist, as it apparently did, on payment of the royalty in advance of the ultimate sale of the vehicle to be assembled and manufactured. In that sense the payment of the EST charge contemporaneously with the payment of the goods can be considered to be at least indirectly a condition of the sale of the goods.

In view of the fact, however, that the royalty is not in respect of the goods, and not for the right to distribute or resell the goods, I am of the view that the requirements of section 67(1)(c) have not been met and that the royalty cannot be added to the price actually paid or payable.

To the extent that the judgment in the Samcor case *supra*, accepts that a royalty need only indirectly relate to goods, I am with respect, constrained to differ. I refer to the following passage on p 6 of that

judgment:

"On analyzing the clauses of the agreement set out above it is clear in my view, that the payment of royalties is inextricably linked to parts and components supplied to Samcor. It is also clear that the legislator, by inserting the words "directly or indirectly" in section 67(1)(c) of the act, intended to include not only royalties for which direct provision is made in agreement but also to include royalties which in an indirect manner fall to be classified as being due as a condition of sale of the goods for export. In my view the wording of the agreement clearly indicates that the royalties were at least indirectly due as a condition of sale. It is also noteworthy that section 67(1)(c) of the act goes much wider than relating exclusively to royalties in respect of patents, trade marks and copyright. It in fact emphasizes the indirect nature of the royalties which are to be brought into reckoning. To hold that the fees and royalties were paid in respect of licences and technical assistance only would be to ignore the provisions oft he agreement and the intention of the legislature in enacting section 67(1)(c) of the act."

I may also add that it is not clear to me to what extent the facts of that case are similar to the facts of this case.

My conclusion is therefore that the EST charges are to be excluded from the transaction value and that they are not to be added by way of an adjustment in terms of section 67.

The parties are in agreement that in the event of the applicant succeeding, an order should be made

in terms of prayer (a), suitably amended to take account of an agreement mentioned in a supplementary affidavit filed by the respondent.

Accordingly an order is made:

(a) **Declaring that the engineering, styling and tooling charges ("the EST charges") paid and/or payable by the Applicant to Adam Opel Aktiengesellschaft ("Opel"), but excluding the engineering, styling and tooling charges paid under the T3000 agreement, did not and do not constitute part of the value for customs duty purposes or the transaction value, in terms of sections 65, 66 and 67 of the Customs and Excise Act, 1964 ("the Act") of goods purchased by the Applicant from Opel and imported into the Republic ("the goods").**

(b) **Ordering the respondent to pay the costs of the application, which costs will include the costs attendant on employing two counsel.**

C BOTHA
JUDGE OF THE HIGH COURT