THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 597/03
Not Reportable

In the matter between :

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES — APPELLANT

and

NASHUA LIMITED — RESPONDENT

CORAM : SCOTT, NAVSA, CLOETE JJA

HEARD : 22 NOVEMBER 2004

DELIVERED : 30 NOVEMBER 2004

Summary: Customs and Excise Act, 91 of 1964 — liability for customs and excise duty on parts and accessories of photocopying equipment — interpretation of sub-heading 9009.9 in tariff item 128.40 of Section 2B of Schedule 1.

JUDGMENT

CLOETE JA/

CLOETE JA:

[1] The respondent carries on the business of inter alia importing and distributing photocopying apparatus and parts and accessories for such apparatus. This appeal concerns the interpretation of tariff item 128.40 of section B of part 2 of schedule 1 to the Customs and Excise Act, 91 of 1964 ('the Act'). The respondent, as the applicant, obtained declaratory orders from the court below (Patel J in the Pretoria High Court) as to the meaning of sub-heading 9009.9 which forms part of tariff item 128.40. The first respondent in the court below and the appellant on appeal is the Commissioner for the South African Revenue Service, who was cited in his capacity as the functionary charged with the administration of the Act. The appeal is with the leave of the court below.

[2] Section 47(1) is the charging section. At all material times (save for the change in the name of the Revenue Fund, which is immaterial for present purposes) the relevant part of the section provided:

'Subject to the provisions of this Act, duty shall be paid for the benefit of the National Revenue Fund on all imported goods, all excisable goods, all surcharge goods and all fuel levy goods in accordance with the provisions of Schedule No. 1 at the time of entry for home consumption of such goods...'

[3] Schedule 1 has four parts. Part 1 imposes ordinary customs duty. It comprises sections divided into chapters and sub-chapters within which

there are headings. The headings are divided into sub-headings and there follow descriptions of the articles under each sub-heading and the customs duty payable. The relevant heading in this appeal is 90.09 in chapter 90 of section 18. It is convenient to note at this juncture that according to general note A1 of the general rules for the interpretation of schedule 1, the titles of sections, chapters and sub-chapters are provided for ease of reference only and that for legal purposes, classification must be determined according to the terms of the headings, any relative section or chapter notes and the provisions of the general rules.

[4] Part 2 of the schedule is divided into two sections, A and B. Section B imposes ad valorem excise duties, and ad valorem customs duties on imported goods of the same class or kind as those on which excise duties are imposed. The section has tariff items, followed by headings and sub-headings and article descriptions. The headings correspond to those used in part 1. Thus tariff item 128.40 also has tariff heading 90.09. The article descriptions of the sub-headings in part 2B are, however, frequently narrower than the article descriptions in part 1 and in some cases, tariff sub-headings to be found in part 1 are not to be found in part 2B. That was so in the case of tariff item 128.40 as I shall demonstrate below.

[5] Amendments to parts 1 and 2 of the schedule are effected by the

Minister of Finance by notice in the *Gazette* in terms of s 48 of the Act. Before its amendment on 30 January 2002, with effect from 1 January 2002, heading 90.09 in part 1 dealt with electrostatic photocopying apparatus (sub-heading 9009.1), 'other' photocopying apparatus (sub-heading 9009.2) and thermo-copying apparatus (sub-heading 9009.30), and parts and accessories (sub-heading 9009.90). After the amendment, the parts and accessories under sub-heading 9009.90 were itemized. The 2002 amendment to part 1 is not relevant to the present appeal and heading 90.09 in part 1 can accordingly be reproduced without the amendment:

Heading	Sub-Heading	CD	Article Description	Statistical Unit	Rate of duty		
					General	EU	SADC
90.09			**Photo-copying apparatus incorporating an optical system or of the contact type and thermo-copying apparatus:**				
	9009.1		- Electro-static photo-copying apparatus				
	9009.11	B	-- Operating by reproducing the original image directly onto the copy (direct process)	u	free	free	free
	9009.12	4	-- Operating by reproducing the original image via an intermediate onto the copy (indirect process)	u	free	free	free
	9009.2		- Other photo-copying apparatus				
	9009.21	2	-- Incorporating an optical system	u	free	free	free
	9009.22	9	-- Of the contact type	u	free	free	free
	9009.30	0	- Thermo-copying apparatus	u	free	free	free
	9009.90	8	- Parts and accessories	kg	free	free	free

[6] Before its amendment on 1 September 1995, item 128.40 of part 2B dealt with electrostatic photocopying apparatus and 'other' photocopying apparatus, but in each case only for use with paper not exceeding 36

centimetres in width (unfolded). The item did not deal with thermo-copying apparatus. Nor did it deal with parts and accessories. After its amendment on 1 September 1995, with effect from 15 September 1995, item 128.40 did deal with parts and accessories and it continued to do so after it was again amended on 5 September 2002 with effect from 1 January 2002. After the 1995 amendment, sub-heading 9009.90 of item 128.40 read:

'Parts and accessories (excluding parts and accessories for machines of sub-heading No. 9009.30).'

After the 2002 amendment, the sub-heading read:

'Parts and accessories (excluding parts and accessories for thermo-copying machines falling within sub-heading 9009.30).'

Sub-heading 9009.30 dealt at all relevant times with thermo-copying machines and the alteration in wording in sub-heading 9009.9 effected by the 2002 amendment was cosmetic only. It accordingly suffices to reproduce tariff item 128.40 after the 2002 amendment:

Item	Heading	Sub-Heading	Article Description	Rate of Duty	
				Excise	Customs
128.40	90.09		**Photo-copying apparatus incorporating an optical system or of the contact type and thermo-copying apparatus**		
		9009.1	Electrostatic photo-copying apparatus for use with paper not exceeding 36 cm in width (unfolded)	5%	5%
		9009.2	Other photo-copying apparatus for use with paper not exceeding 36 cm in width (unfolded)	5%	5%
		9009.9	Parts and accessories (excluding parts and accessories for thermo-copying machines falling within subheading 9009.30)	5%	5%

[7] I pause to note that item 128.40 was deleted with effect from 1 April

2004. The deletion does not affect this appeal.

[8] The appellant's argument is that the parts and accessories in sub-heading 9009.9 of tariff item 128.40 are parts and accessories of all photocopying apparatus incorporating an optical system or of the contact type, irrespective of whether that apparatus is for use with paper not exceeding 36 centimetres in width (unfolded). The respondent's argument is that the parts and accessories in that sub-heading are only those for the apparatus mentioned in the two preceding sub-headings of tariff item 128.40, namely, electrostatic photocopying apparatus and 'other' photocopying apparatus (i.e. apparatus of the contact type), in each case for use with paper not exceeding 36 centimetres in width (unfolded).

[9] There are three differences between part 1 and part 2B, so far as the sub-headings of heading 90.09 are concerned:

(1) Part 1 includes three types of copying apparatus, namely, photocopying apparatus incorporating an optical system, photocopying apparatus of the contact type (referred to in sub-heading 9009.2 as 'other' photocopying apparatus) and thermo-copying apparatus. Part 2B omits sub-heading 9009.30 which relates to thermo-copying apparatus.

(2) Part 1 covers all photocopying apparatus, whether incorporating an optical system or of the contact type. Part 2B limits both to apparatus for use with paper not exceeding 36 centimetres in width (unfolded).

(3) Part 1 covers parts and accessories for all three types of apparatus. Part 2B excludes parts and accessories for thermo-copying machines.

[10] Because the headings correspond exactly in parts 1 and 2B, as do the sub-headings when sub-headings are mentioned in part 2B, it must be the case that the goods referred to in the headings and sub-headings in both parts are the same, save to the extent that part 2B limits the description of those goods. Such an interpretation is supported by the provisions of s 47(7) of the Act, the relevant part of which provides:

'To the extent that any goods, classifiable under any tariff heading or sub-heading of Part 1 of Schedule No. 1 that is expressly quoted in any tariff item ... of Part 2 ... of the said Schedule or in any item in Schedule No. 2, are specified in any such tariff items ... the item concerned shall be deemed to include only such goods classifiable under such tariff heading or sub-heading.'

The only limitation to sub-heading 9009.9 in part 2 is the exclusion in parenthesis which relates to thermo-copying apparatus. This leads to the conclusion that apart from the exclusion specifically mentioned, the goods in sub-heading 9009.9 in part 2B are the same goods dealt with in the corresponding sub-heading in part 1; and the sub-heading in part 1 is not limited to parts and accessories for photocopying apparatus for use with paper of a particular size.

[11] If the intention had been to limit parts and accessories in

width.

[13] The respondent's counsel submitted in the alternative that this

interpretation results in several anomalies. Some were not alleged in the respondent's founding affidavit and not all of those that were, were mentioned in argument. I shall nevertheless deal with all of them.

[14] The first anomaly alleged in the founding affidavit is that a person who imports an entire photocopying machine for use with paper exceeding 36 centimetres in width (unfolded) will not have to pay the customs and excise duty because such a machine is not covered by sub-headings 9009.1 or 9009.2 of tariff item 128.40; whereas a person who imports parts and accessories comprising such a machine and then assembles the machine in South Africa, will have to pay customs and excise duty because such parts and accessories are, on the plain wording of sub-heading 9009.9, covered by that sub-heading. In the founding affidavit the respondent submitted that 'this result is completely contrary to and subversive of the architecture, structure and underlining rationale of part 2B of schedule 1 to the Act which aims to achieve exactly the opposite result, i.e. a levelling of the playing field between local and foreign industry'. It was this argument that commended itself to the court *a quo*. Counsel representing the respondent on appeal supported the approach by the court *a quo* and submitted that if regard is had to the provisions of both sections of part 2 of schedule 1, there is not a single instance where local industry is not protected. I shall assume that this is

so. Counsel in his written heads of argument also referred us to the following extracts from an unpublished doctoral thesis by S P Basson entitled '*Regte op Invoere as Instrument van Ekonomiese Politiek: 'n Historiese en Analitiese Beskouing*' (I have not been able to check the quotations):

'Die totstandkoming van die Raad op Handel en Nywerheid in 1921 het, onder andere, ten doel gehad om die tariefbeleid te hernu en om die Regering te adviseer oor die ontwikkeling van nywerhede. Dit het die aanname van die nuwe Tariefwet (Wet No 36 van 1925) tot gevolg gehad. Dit kan beskou word as die begin van 'n beslisde en meer doelbewuste beskermingsbeleid as voorheen.'

And

'Met die inwerkingtreding van die Doeanetarief Wet van 1925 het Suid-Afrika hom verbind aan die gebruik van tarief as 'n instrument van beskerming.'

[15] Although the Act may no doubt be used to protect local industry, it is primarily a fiscal measure: *First National Bank of South Africa v Commissioner, SARS* 2002 (4) SA 768 (CC) para [4] at 777G. The answering affidavit deposed to on behalf of the appellant specifically denied the allegations in the founding affidavit that the rationale of part 2B is to level the playing fields between local and foreign industry, and claimed that the ad valorem duties imposed by that part represented a purely domestic tax arrangement.

[16] It is not necessary to consider the dispute any further. The difficulty

sub-heading 9009.9 in part 2B to optical and contact ('other') photocopying apparatus for use with paper not exceeding 36 centimetres in width (unfolded) and parts and accessories for thermo-copying machines, as the respondent contends, sub-heading 9009.9 would have said so. It would have referred, in terms, to the previous two sub-headings of heading 90.09 under tariff item 128.40. It would also not have excluded parts and accessories for thermo-copying machines, as thermo-copying machines are not included in the previous two sub-headings. On the respondent's interpretation, the exclusion is unnecessary and tautologous and that in itself is a reason for rejecting this interpretation, the more particularly as the exclusion was retained after the 2002 amendment — but in slightly modified terms, which indicates that the terms of the sub-heading were specifically considered.

[12] The plain and unambiguous meaning of sub-heading 9009.9 of tariff item 128.40 is that it excludes only parts and accessories for thermo-copying machines. It therefore obviously includes parts and accessories for the other two types of apparatus, irrespective of whether such apparatus is for use with paper not exceeding 36 centimetres in width.

[13] The respondent's counsel submitted in the alternative that this

facing counsel for the respondent is that the meaning of sub-heading 9009.9 of tariff item 128.40 is clear and accordingly, as this court held in *Shenker v The Master and Another* 1936 AD 136 at 142:

'The meaning being thus plain and clear and unambiguous, it does not suffice for [counsel] to point to the general policy of the Act. He must go further, and show that this is one of those exceptional cases in which a court of law must "modify" or "cut down" or "vary" the actual language of a statute. That is to say, he must show that the case falls within the rule of *R v Venter* (1907 T.S. 915), which has again and again been approved and followed by this Court. That rule is that, where the language of a statute is unambiguous, and its meaning is clear, the Court may only depart from such meaning "if it leads to absurdity so glaring that it could never have been contemplated by the Legislature, or if it leads to a result contrary to the intention of Parliament as shown by the context or by such other considerations as the Court is justified in taking into account." (I quote from the judgment of INNES C.J., in *Rex v Venter*.)'

[17] Although the general policy behind the provisions of part 2B is irrelevant to the construction of sub-heading 9009.9 of tariff item 128.40, the anomaly produced by its literal construction to which I have already referred in para [14] above, remains. It may well be the only case where local assemblers are not protected; but that does not suffice to constitute an absurdity so glaring that it could not have been contemplated by the Minister. The other alleged anomalies can be dealt with relatively briefly.

[18] The second anomaly alleged in the founding affidavit in paragraph

7.8 was that a person who imports a complete photocopying machine for use with paper exceeding 36 centimetres in width (unfolded) will not have to pay customs and excise duty, because such a machine is not covered by sub-headings 9009.1 or 9009.2 of tariff item 128.40; whereas a person who imports a machine which, because of manufacturing delays, does not have all its parts or accessories, will have to pay customs and excise duty on the missing parts and accessories when they are imported. The appellant's answer in the answering affidavit was:

'The [respondent] could avoid the so-called absurd results described in paragraph 7.8 by simply waiting for the part or component, the manufacture of which is delayed, to be manufactured before importing the whole of the apparatus.'

The respondent in its replying affidavit did not suggest that this course would be impractical, or even inconvenient; the deponent to the replying affidavit said simply:

'Notice is taken of the contents of this paragraph.'

[19] The third anomaly, not contained in the founding affidavit, was formulated as follows by the respondent's counsel:

'An importer, who intends to deal in parts, can import a complete apparatus, take it apart and deal with the parts and not be subjected to the payment of ad valorem duties. However, should the parts be imported as such, those parts will be subjected to ad valorem duty.'

The argument must be confined to photocopying apparatus for use with

paper exceeding 36 centimetres in width (unfolded). The problem with the argument is that it would be uneconomic for the importer to pay the cost of the assembly of the machine and the cost of disassembling it, unless these costs were less that the duties imposed; and there is no evidence in this regard. Nor has the appellant been afforded the opportunity of dealing with the alleged anomaly.

[20] The fourth and last anomaly, also not contained in the founding affidavit, was said by the respondent's counsel to be this: According to rule 2(a) of the general rules for the interpretation of part 1, a consignment consisting of an unassembled or disassembled machine or apparatus, i.e. in parts, has to be regarded and classified as a complete machine or apparatus. This leads to the anomaly, submitted counsel, that where the parts of the apparatus are imported in one consignment those parts are to be regarded as the complete apparatus, not subject to ad valorem duties; whereas if the identical parts do not form part of the same consignment, then all parts will be subject to ad valorem duties. Again, the argument must be confined to photocopying apparatus for use with paper exceeding 36 centimetres in width (unfolded); and again, the problem with the argument is that it was not advanced in the papers with the consequence that the appellant has not had an opportunity of refuting it. It may well be that if the interpretation given by the respondent's counsel to rule 2(a) of

the general rules is correct, there would be no practical reason why an importer should not wait for the consignment to be complete before importing it.

[21] For the reasons I have given, the respondent has not laid the necessary factual foundation for a finding that the latter three anomalies alleged, exist. But even if it had, the cumulative effect of all the anomalies would not in my judgment be such as to result in absurdity so glaring that it could not have been contemplated by the Minister. The first part of the test in *R v Venter* has therefore not been satisfied. The second part of the test requires a consideration of inter alia 'such other considerations as the court is justified in taking into account'.

[22] In support of its interpretation of sub-heading 9009.9 of tariff item 128.40, the respondent in its replying affidavit and its counsel referred to an affidavit of Mr Enslin, a senior official in the office of the appellant, which was annexed to the appellant's answering affidavit and which sets out the reason behind the 1995 amendment to part 2B; and to a letter drafted by Enslin which was submitted to the Deputy Minister and which resulted in the amendment. It is not necessary to consider whether the interpretation sought to be placed on the affidavit or the letter is correct. Even if the respondent's approach is permissible in law, it can only be adopted if the legislative provision in question is ambiguous: *Nissan SA*

(Pty) Limited v Commissioner for Inland Revenue 1998 (4) SA 860 (SCA) 870E-H; *Case and Another v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC) para 12 (n 18) and cases there quoted. The legislative provision is not ambiguous and that is the end of the argument.

[23] Finally, the respondent's counsel referred in his heads of argument to passages in Government Notice 314 of 1995, published in *Government Gazette* 16380 dated 28 April 1995, in support of the respondent's interpretation of sub-heading 9009.9 of tariff item 128.40. In that notice the appellant announced for general information and comment that, in view of representations received, it was intended to approach the Minister of Finance with a view to imposing a customs and excise duty on certain goods. The submission on behalf of the respondent was that what was contemplated in the case of item 128.40 was duties on parts and accessories only in respect of apparatus already subject to this duty i.e. apparatus falling within sub-headings 9009.1 and 9009.2 under tariff item 128.40. It is not necessary to consider whether the interpretation of the Government Notice is correct. The short answer to the contention is that the contents of a Government Notice issued for discussion are not a safe guide to the intention of the law giver after the discussion has taken place and cannot legitimately be taken into account: cf *Nissan* at 870D. The second part of the test in *R v Venter* has accordingly not been satisfied

either.

[24] I therefore conclude that sub-heading 9009.9 of tariff item 128.40 in part 2B of schedule 1 to the Act at all times relevant to this matter included all parts and accessories for photocopying apparatus incorporating an optical system or of the contact type and was not limited to such apparatus for use with paper not exceeding 36 centimetres in width (unfolded); and that the court below was wrong in granting the declaratory orders to the opposite effect.

[25] The following order is made:

(1) The appeal is allowed, with costs, including the costs of two counsel.

(2) The order of the court below is set aside and the following order substituted:

'The application is dismissed with costs, including the costs of two counsel.'

T D CLOETE
JUDGE OF APPEAL

Concur: Scott JA
Navsa JA