REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case Number: 328 / 04

In the matter between

THE COMMISSIONER OF THE SOUTH AFRICAN REVENUE SERVICE **APPELLANT**

and

FORMALITO (PTY) LTD **RESPONDENT**

Coram : MPATI DP, STREICHER, BRAND, LEWIS and PONNAN JJA

Date of hearing : 20 MAY 2005

Date of delivery : 31 MAY 2005

SUMMARY

S 44(11)(a) of the Customs and Excise Act 91 of 1964 – false declaration – means untrue to the knowledge of the person making the declaration.

J U D G M E N T

PONNAN JA

[1] Since 1964 the respondent (‘Formalito’), a licenced dealer in terms of the Arms and Ammunitions Act 75 of 1969, has imported firearms and ammunition into the country. During November 2000, the appellant, the Commissioner of the South African Revenue Service (‘SARS’), received information from a former employee of Formalito that the latter had under-declared the value of goods imported by it.

[2] Ms Denyssen, a member of the Special Investigations Unit of SARS, who investigated the complaint, concluded that certain goods imported by Formalito had been incorrectly cleared and that SARS in consequence had been underpaid customs duties, *ad valorem* duties and VAT to the tune of R696 652.95. She advised Formalito that the goods in question were liable to forfeiture in terms of s 87(1) of the Customs and Excise Act 91 of 1964 ('the Act'), alternatively and in the event that those goods could not be found, then in lieu thereof SARS was entitled in terms of s 88(2)(*a*) to an amount equal to the value of those goods, which in this instance amounted to R3 792 912.

[3] On 22 January 2002 Dennysen accordingly demanded, in writing, payment of those sums of money. In response to certain representations, Denyssen advised Formalito on 26 September 2002 that it had been decided ‘to levy an amount in lieu of forfeiture equivalent

to 50% of the value of the goods in issue', which in monetary terms amounted to R1 896 456.

[4] Against that backdrop, Formalito sought and obtained, on review, an order in the High Court (Pretoria), setting aside the decisions by SARS, that it: (i) pay customs duty, *ad valorem* duty and VAT in the sum of R696 652.95; and, (ii) forfeit an amount of R1 896 456.00 in terms of s 88(2)(*a*) of the Act. SARS was ordered to pay the costs of that application. The present appeal is against those orders with leave of the judge *a quo* (Hartzenberg J).

[5] It is not in dispute that firearms of a certain type and calibre (details whereof are not relevant for present purposes) came to be reflected on relevant bills of entry under the wrong tariff code resulting in the underpayment by Formalito of duty in the sum of R696 652.95 for the period 1998 to 2000. The thrust of the argument advanced by Formalito before this court, as indeed before the court below, is: First, there was no false declaration by it; and, secondly, the penalty imposed was unreasonable. Each of those contentions will be considered in turn.

Was the declaration false?

[6] Any person entering any imported goods into the country in terms of the provisions of the Act is required by s 39(1), in addition to paying all

duties, to deliver a bill of entry in the prescribed form setting forth full particulars of the goods being entered, the purpose for which the goods are being entered and to make and subscribe to a declaration as to the correctness of the particulars and purpose shown on such bill of entry.

[7] Section 44(11)(a) (inserted by the Revenue Laws Amendment Act 53 of 1999), to the extent here relevant, then provided:

'Notwithstanding anything to the contrary contained in this Act, but subject to the provisions of sections 47 (10) and (11), 65 (7) and (7A) and 69 (6) and (7) and subsection (12) of this section, there shall be no liability for any underpayment of duty on any goods where such underpayment is due to the acceptance of a bill of entry bearing any incorrect information, after such period of two years from the date of entry of such goods:

Provided that such liability shall not cease-

(i) if a false declaration has been made for the purpose of this Act; or

(ii) …. ‘

(underlining added for emphasis).

[8] The proper interpretation of s 44(11)(a)(i) depends in no small part on the meaning to be ascribed to the word 'false'. According to the Concise Oxford English Dictionary, the word ‘false’ in its narrower sense means 'deliberately intended to deceive' and in its wider sense 'not according with truth or fact'. It follows that 'false' could mean untrue in

an objective sense as also untrue to the knowledge of the maker of a statement. In the present context, as I see it, ‘false’ must mean untrue to the knowledge of the maker of the statement. That narrower construction accords with the scheme of the section and gives proper effect to the distinction between 'incorrect' used in the first part of s 44 (11)(a) and 'false' as employed in subsec (i). Further, as was held in *R v Mahomed* 1942 AD 191 at 202: ‘the word “false” when used in relation to a statement is more commonly used to mean “untrue to the knowledge of the person making the statement”, than to mean “incorrect”'. In this case, to ascribe to the word ‘false’ its wider meaning – a meaning synonymous with ‘incorrect’ - would be absurd and illogical and do violence to the intention of the legislature.

[9] Was the declaration false to the knowledge of Formalito? No discernible pattern consistent with a genuine error arising from the misapplication of the relevant tariff codes emerges on the papers. On the contrary, the evidence such as it is (given that any *bona fide* dispute of fact must be resolved in favour of SARS) points strongly in the opposite direction. Ignoring his own professed ignorance about such matters, Mr Engelbrecht, the managing director of Formalito, when asked by one of his clearing agents which tariff codes should be employed, ventured an answer. An admittedly wrong tariff code was

utilised resulting in an under-declaration of customs duty. Faced with such a query, Engelbrecht should simply have referred the clearing agent in question to SARS for a directive. Instead, undeterred that in truth there was no choice, he instructed his clearing agents to reflect tariff codes of his choosing on the bills of entry. Those particular tariff codes were carefully chosen by him to garner the greatest possible financial benefit for Formalito and, it goes without saying, loss to SARS. He expressed the view to his clearing agents that clearance documents should be submitted with those tariff codes to test the attitude of SARS.

[10] Although instructions apparently emanated from the same source (Engelbrecht), the different clearing agents employed by Formalito utilised different tariff codes resulting in disparities in duty. That could hardly have passed unnoticed. Frequently enough imported goods entered the bonded warehouse under one tariff code and exited, after having been cleared, under another. Errors extended in many instances beyond tariff codes to the actual description of the imported firearms. That no doubt was designed to achieve a measure of consistency on the bill of entry, in the belief, so it would seem, that the risk of detection would be reduced.

[11] It is inconceivable that the disparities that arose in consequence of the employment of incorrect tariff codes went undetected in the ultimate

pricing structure of Formalito over a protracted period of several years. On the view that I take of the evidence the declaration was, to the knowledge of Formalito, false. It follows that on this aspect of the case Formalito had to fail.

Was the penalty reasonable?

[12] In determining the monetary value of the penalty, Denyssen ignored the Customs Offences and Penalty Policy of SARS. Those guidelines, the purpose of which is 'to define the policy and procedure for customs offences and to provide guidelines for the uniform imposition of penalties to declarants that are non-compliant with Customs Law', stipulate, for a contravention of this kind, a penalty of '50% of the underpayment with a minimum of R500'. Had those guidelines been invoked the penalty in this case would have been less than twenty percent of the value of that actually declared forfeit by SARS. A deviation to that extent from its own policy by SARS is grossly unreasonable. Denyssen who took the decision believed, without advancing any plausible justification, that those guidelines did not apply. She accordingly ignored it. That decision plainly cannot stand. On this aspect of the case, the matter must accordingly be referred back to SARS for reconsideration (see *Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council (Johannesburg*

Administration) 1999 (1) SA 104 (SCA) at 109 C-J; *Commissioner, Competition Commission v General Council of the Bar of South Africa* 2002 (6) SA 606 (SCA) paras 14-15).

In the result:

1 The appeal succeeds with costs.

2 The order of the court below is set aside and replaced with:

‘(a) The application to review and set aside the decision of SARS to claim customs duty, *ad valorem* duty and VAT from Formalito in the amount of R695 652.95 is dismissed.

(b) The decision of SARS that Formalito forfeit an amount of R1 896 456.00 in terms of s 88(2)(a) of the Customs and Excise Act is set aside. The matter is remitted to SARS for reconsideration.

(c) SARS is ordered to pay the costs of the application.’

V M PONNAN
JUDGE OF APPEAL

CONCURRING:

MPATI DP
STREICHER JA
BRAND JA
LEWIS JA