IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No.1624/2014

In the matter between:

IMPUNZI WHOLESALERS (PTY) LTD **Applicant**

vs

SWAZILAND REVENUE AUTHORITY **Respondent**

Neutral citation: *Impunzi Wholesalers (Pty) Ltd vs Swaziland Revenue Authority (1624/2014) [2015] SZHC 16 (6th February 2015)*

Coram: **MAPHALALA PJ**
Heard: 16th December 2014
Delivered: 6th February 2015

For Applicant: Mr. M. Dlamini

For 1st Respondent: Mr. S. Mdladla

Summary: *(i) Before court is an Application under a Certificate of Urgency to review a decision of the Swaziland Revenue Authority that the value of each quilt to be the sum of US$14.33 to be set aside being items imported from China.*

(ii) *The Respondent opposes the Application advancing three (3) points **in limine** that **inter alia** Applicant has failed to put the basis of its Application to enable Respondent to file its proper opposition on the merits.*

(iv) *Having considered the pros and cons of the parties' contentions on the above I have come to the view that Respondent is correct in its opposition on the preliminary points and I accordingly dismiss the Application with costs.*

Legal authorities referred to in the judgment

1. **Learned author LA Rose Innes, Judicial Review of Administrative Tribunals in South Africa at page 8.**
2. **Eagles Nest (Pty) Ltd and 5 Others vs Swaziland Competition Commission and Another High Court Case No.1061/2013.**
3. **Shell Oil (Swaziland) (Pty) Ltd vs Motor World (Pty) Ltd, Appeal Case NO.23/2006.**

The Application

[1] The Applicant Impunzi Wholesalers (Pty) Ltd a private limited company duly incorporated and registered in terms of the Company Law of Swaziland and carrying a business in Mbabane has filed an urgent application against the Respondent, Swaziland Revenue Authority, a **sui generis** statutory body established by the Swaziland Authority Act 2008 for orders in the following terms:

"1. That the above Honourable Court dispenses with forms and service provided by the rules of this court and that the matter be heard as an urgent application.

2. That the applicant's non-compliance with the rules of this Honourable Court be condoned.

3. Reviewing and/or setting aside the determination made by the Respondent of the value of each quilt to be the sum of US$14.33.

4. Declaring the determination made by the Respondent of the value of US$14.33 to be invalid.

5. Declaring that the true value of each quilt to be declared is the sum of US$1.50.

6. Directing that each quilt be declared on the value of US$1.50.

7. Directing the Respondent to pay for all the expenses occasioned by its seizure of applicant's goods.

8. Granting applicant costs of application.

9. Further and/or alternative relief."

[2] The Application is founded on the affidavit of one Mr. Thembisa Matsebula who is the Chief Executive Officer of the Applicant setting out the basis of the dispute between the parties with pertinent annexures.

The opposition

[3] The Respondent opposes the Application and has filed an Opposing Affidavit in accordance with the Rules of this court. The said Opposing Affidavit is deposed to by Mr. Dumsani Masilela who is the Commissioner General answering the Applicant's averments in his Founding Affidavit. The Respondent had also filed a Notice to raise points **in limine** to the following arguments:

> **"2.1 The Application is premature and inappropriate as the Applicant has not exhausted the internal remedies, namely to appeal to the Minister (responsible for Finance), in terms of section 65(4) (a) of the Customs and Excise Act No.21 of 1971. The Applicant further does not make any effort to explain to the Honourable Court why it has not exhausted the internal remedies.**
>
> **2.2 The Applicant fails to meet the prerequisite of urgent applications as the Applicant delayed in bringing the process and/or fails to state why it has taken three (3) months to institute the current proceedings. Over and above, the Applicant has an alternative remedy in pursuance of the internal process which Applicant fails to follow.**
>
> **2.3 The Applicant does not make out a case in its Founding Affidavit. The Applicant fails to give reasons for the manner in which the Application was brought to court, save to state that Founding Affidavit does not state what is/was irregular by the Respondent. The Applicant further does not clarify whether they are**

basing their review application in terms of the Honourable Court Rules or common law for the Respondent to oppose accordingly.

2.4 Furthermore, there is nothing irregular by Respondent as the Respondent has applied provisions of section 66 of the Customs and Excise Act No.21 of 1971 to declare the transaction value of the imported quilts by Applicant at a price of US$14.33 being the selling price of similar products in Swaziland.

[4] The Respondent then filed a Replying Affidavit in accordance with the Rules of this court.

The background

[5] A brief background of the matter as gleaned from the Founding Affidavit of the Applicant is that on or about November 2013 the Applicant engaged in a business of importing various goods being toys and bedding which it still import to date from China, in the continent of Asia.

[6] The Applicant states that prior to importing these goods it enquired into the value and description of the goods in terms of the Customs and Excise tariffs for purposes of declaring the value of the goods under which clearance would be paid with the Respondents.

[7] The Applicant states that in January 2014 it began importing "quilts" into Swaziland, these being decorator covers for beds, make of two layers with soft material between.

[8] The Applicant further states in the Founding Affidavit that it identified the quilts classification to be cleared and/or declared in terms of the Customs and Excise Tariff book in accordance with Code HS 9404.90, in the value of US$1.5 per unit as per the Customs Excise Act 1971 that the value of the same in the price which the supplier charges per unit of the quilt.

[9] Respondent on the other hand contends that the importation of the quilts under the above heading was incorrect notwithstanding the fact that Applicant have been declaring the quilts under such heading and same was allowed by Respondent. That it was not explained how the value of US$14.55 was reached as the supplier sells to Applicant from US$1.50.

[10] The parties then exchanged into correspondents to and fro on this point until the Applicant sought for review before this court on a number of grounds stated above in paragraph [1] of this judgment. It is also in the evidence on the papers that various

meetings were held between the parties where clarification were sought from the Respondent. Respondent required the Applicant to furnish certain information on their last meeting. That was the last to see the Applicant until the urgent matter before court.

The arguments of the parties

[11] This court held arguments of the attorneys of the parties on 22nd December 2014 where I reserved judgment to a later date. I must also add that this matter was heard when this court was to take its Christmas vacation and also on account that the issues raised in the arguments of the attorneys were vexed I needed time to consider my judgment in this specialized file thus the delay in issuing judgment in this case.

[12] The attorneys of the parties filed comprehensive Heads of Arguments which I shall summarize in brief in the following paragraphs for one to understand the issues for decision by the court. I must also add in this regard that Mr. Mdladla for the Respondent commenced arguments in view of the points **in limine,** he addressed the merits and replied on the merits of the case. The following are the summaries.

(i) Respondent's arguments

[13] Mr. Mdladla for the Respondent advanced arguments for the Respondent and filed comprehensive Heads of Arguments on the points **in limine** which are three-fold. Firstly, that the Application was brought by the Applicant without exhausting the internal remedies available to the Applicant.

[14] The Respondent contends that the Applicant has a remedy to appeal to the Minister under section 65(4) of the Customs and Excise Act No.21 of 1971 which provides as follows:

> **"If in the opinion of the Commission the transaction value of any imported goods cannot be ascertained in terms of section 66 or has been correctly ascertained by the importer, the Commissioner may determine a value, which shall, subject to a right of appeal to the Minister be deemed to be the value for customs duty purposes of the goods."**

[15] The offshoot of the argument of the Respondent in this regard is that on or about the 14th August 2014 the Applicant was advised that the Respondent has since applied the provisions of section 66(7) of the Custom and Excise Act No.21 of 1971 in terms of which the Respondent valued the quilts imported by the Applicant in the sum of US$14.33 per unit using the selling price of similar products in Swaziland. (See pages 47-48) of

the Book of Pleadings in paragraph 7 thereof in reference to annexure SRA 1 pages 67-68. However, the Applicant instituted the current Application without invoking its statutory remedy to appeal to the Minister.

[16] The attorney for the Respondent advanced further arguments in this respect in paragraph 5, 6, 7, 8, 9, 10 and 11 of his Heads of Arguments and cited the case of **Koyabe and Others vs Minister for Home Affairs and Others, 2010(4) SA 327 CC** and that of **Nichol and Another vs Registrar of Pension Funds and Others 2008(1) SA 383 (SCA)** I shall revert to pertinent submissions later on as I proceed with my analysis and conclusions.

[17] The second point **in limine** is that of urgency advancing an argument at paragraph 16 of Mr. Mdladla Heads of Arguments that the current Application is made on urgent basis, wherein the Applicant's allegation in the Applicant's Founding Affidavit (Book of Pleadings and in particular in paragraph 21 thereof) that the matter is urgent as Respondent has declared his intention to forfeit the goods to the State and continued seizure and/or disposal of goods cause great financial loss to the Applicant.

[18] The Respondent denies Applicant's allegations and contends that the Applicant has failed to meet the pre-emptory requirements of urgent matters as provided in terms of Rule (25) (b) of the High Court Rules. In this regard advanced arguments of Mr. Mdladla and cited pertinent decided cases including the High Court case of **Ben Zwane vs The Deputy Prime Minister and Another, Case No.624/2000, Yonge Nawe Environment Action Ground vs Nedbank and Four Others, Civil Case No.4165/2007** and that of **H.P. Enterprises (Pty) Ltd vs Nedbank (Swaziland) Ltd, Civil Case No.788/1999.** I shall revert to pertinent decided cases as I proceed with my judgment.

[19] The third point **in limine** raised pertains to the effect that the Applicant's Application cannot be sustained on the simple reasons that Applicant failed to explicitly outline whether they are relying on statutory or common ground for review. That Applicant does not state how the procedure from coming to its finding to declare the goods at US$14.33 is procedurally irregular necessary to be reviewed.

[20] The arguments of the Respondent in support of the above submission are canvassed in paragraph 27 to 33 of the Heads of Arguments and the Industrial Court Case of **Dumsani Masondo vs The Judges of the Industrial Court and Another Case No.2188/2001** is cited.

[21] The attorney for the Respondent then dealt with the merits of the case in paragraph 55 to 59 of the Heads of Arguments. The nub of the Respondent's case is found in paragraph 88 of the said Heads where it is contended for the Respondents that it is clear from the arguments advanced in the merits by the Respondent that it is clear that the irregularity raised by the Applicant in its Founding Affidavit and Replying Affidavit are no genuine and does not found any grounds for review.

[22] Finally in paragraph 59 of the said Heads of Arguments the Applicant must stand or fall by its Founding Affidavit and he facts alleged in it. That Applicant has clearly not taken this court into its confidence as Applicant has not directed at correcting any irregularity or attack the methods of procedure adopted by the Respondent in arriving at its conclusion. That Applicant cannot appeal the decision by the Respondent

clothed as a review. Further that the Applicant ought to be dismissed also on the merits of the case.

(ii) Applicant's arguments

[23] The attorney for the Applicant also filed useful Heads of Arguments on the points **in limine** and the merits of the Application. I shall in like manner outline the salient features of the Applicant's arguments to aide a better understanding of the issues for decision by this court.

[24] The essence of the Applicant's arguments that Applicant has not exhausted internal remedies is that section 65(4) (a) on the face of it cannot oust the jurisdiction of this court to entertain and determine this Application even if there are local or internal remedies available. That from the Customs and Excise Act No.21 of 1997 section 65(4) (a) there is an internal mechanism set up wherein the value of any imported goods cannot be ascertained in terms of section 66 or has been incorrectly ascertained by the importer, the Commissioner may determine a value. However, the importer has a right of appeal to the Minister.

[25] Furthermore on this point it is contended for the Applicant, however, does not agree with the Respondent that Applicant was mandatory required to proceed via section 65(4) (a) before approaching the High Court. That the Respondent's contention clearly suggests that the jurisdiction of the High Court cannot be invoked, until the internal remedy has been exhausted. This is not correct.

[26] That it is contended for the Applicant that the High Court has unlimited original jurisdiction to hear all civil and criminal cases in the land, except where that jurisdiction is removed or ousted by clear and unambiguous words of statute. The power of the High Court is constitutionally derived from section 151(1) (a) of the Constitution Act of 2005 in the following words:

> **1. The High Court has –**
>
> **(a) Unlimited original jurisdiction in civil and criminal matters as the High Court possession at the date of commencement of the Constitution.**

[27] To support the above contentions the court was referred to the High Court case of **Sikhumbuzo Twala vs Philile Thwala High Court Case No.101/12.**

[28] The attorney for the Applicant contends that jurisprudence has clearly demonstrated that there are instances where the court would submit its jurisdiction to domestic remedies, in cases of judicial review, however the right to seek judicial review having exhausted the domestic remedies is not automatic. To support this legal position the attorney for the Applicant has cited the legal textbook by **Lawrence Baxter, "Administrative Law", Juta 1st Edition 1984** at page 720:

> **"The right to seek judicial review might be suspended or deferred until the complainant has exhausted the domestic remedies which might have been created by the governing legislation. This is not automatic.**
>
> **The mere fact that the legislature has provided an extra judicial right of review or appeal is not sufficient to imply an intention that recourse to a court of law should be barred until the aggrieved person has exhausted the statutory remedies".**

[29] That further on this point that the right to judicial review will only be different if such intention is clearly shown from the governing legislature. In this regard the court was referred to the High Court case of **Nedbank Swaziland vs Dlamini & 5 Others, Case No.586/2012.**

[30] That **in casu** it is argued that non-exhaustion of internal remedies by the Applicant does not render the Application inappropriate and there is no requirement that one must exhaust internal remedies before seeking a review. That the Customs and Excise Act does not provide the Minister with review powers which is sought by the Applicant before this case. That the points **in limine** ought to be dismissed forthwith.

[31] The attorney for the Applicant then dealt at some length with the merits of the case advanced from paragraph 5.1 to paragraph 7.1 of the Heads of Arguments of the attorney for the Applicant.

[32] Mr. Dlamini for the Applicant must through painstaking arguments on the effect of section 66(7) that it was not automatic. That Respondent cannot apply section 66(7) without taking into consideration the other parts of section 66. That this goes step by step until one get-to gets to section 66(7). That **in casu** there is no explanation as to why the Respondent jumped or rather ignored all the other provisions or section 66 and chose section 66(7) that this is where the irregularity is.

[33] In conclusion the following is contended by the Applicant:

> **"1. It is submitted in a nutshell that Respondent erred in rejecting the actual value of the quilts and jumped to apply section 66(7);**
>
> **2. The application of section 66(7) is irregular when the actual value is readily ascertainable;**
>
> **3. Section 66(7) cannot be applied without first exhausting the other sub sections, being subsection (1) to (6).**
>
> **4. The application ought to be granted."**

The court's analysis and conclusion thereon

[34] Having considered all the papers and the arguments of the attorneys of the parties I shall first proceed with the determination of the preliminary points raised in the Answering Affidavit of the Respondents as outlined in full at paragraph [3] of page 2 of this judgment. Thereafter, if I find against these preliminary points to consider the merits of the case.

[35] The preliminary points as I stated above are in paragraph [3] of this judgment and I will therefore paraphrase them as follows:

1. **That the Application is premature as Applicant has not exhausted the internal remedies provided by section 65(4) (a) of the Custom and Excise No.21/1971.**

2. **That Applicant fails to meet the prerequisite of urgent Application.**

3. **That Applicant does not make out a case in its Founding Affidavit.**

4. **That furthermore, there is nothing irregular by Respondent as the Respondent applies the provisions of section 66 of the Custom and Excise Act No.2 of 1971.**

[36] I shall proceed to consider the above points **ad seriatim** in the following paragraphs of this judgment.

(i) That the Applicant has not exhausted internal remedies

[37] It is contended for the Respondent under this heading that the Application is premature and inappropriate as the Applicant has not exhausted the internal remedies, namely to appeal to the Minister (responsible for Finance), in terms of section 65(4) (a) of the Customs and Excise Act No.21 of 1971. That Applicant further does not make any effort to explain to this court why it has not exhausted the internal remedies.

[38] The Applicant on the other hand has taken the position that it does not agree with the Respondent, that the Applicant was mandatory required to exhaust and proceed via section 65(4) before approaching the High Court. That the Respondent's contention clearly suggest that the jurisdiction of the High Court cannot be involved, until the internal remedy had been exhausted. This is not correct.

[39] I have considered the arguments of the attorneys of the parties to and fro and I have come to the view that the position adopted by the Respondent is correct mainly in view of the fact that the dispute between the parties is a highly specialized matter where the relevant Act has provided a **fora** for resolving dispute in that area. I had occasion to deal with a similar matter in High Court Case No.1001/2013 being **Eagles Nest (Pty) Ltd and 5 Others vs Swaziland Competition Commission and Another.** The Applicant in that case were aggrieved by this decision and on appeal before the Supreme Court ensued. The Supreme Court in its judgment agreed with what was decided by the court **a quo** gave a useful survey of the law in this field.

[40] Lastly on this point it is without question that the Application before court deals with a highly specialized field in business and therefor a lot of caution should be exercised by the parties and the courts not to depart from the **fora** established by the Act in section 65(4) (a) thereof.

(ii) That Applicant fails to meet the prerequisite of urgent Applications

[41] In this regard it is contended for the Respondent that Applicant has failed to meet the prerequisites of an urgent Application as the Applicant delayed in pursuance of the internal process.

[42] The Applicant on the other hand has taken the view that it has proved urgency in this matter.

[43] I have considered the Founding Affidavit of the Applicant and this aspect of the matter is not mentioned in the body of that affidavit in accordance with the decided cases cited by the attorney for the Respondent cited above the Applicant falls on this ground. However, I have dealt with the matter in the long form to consider all the arguments of the parties on account of its importance in this specialised field. In this regard I have sought refuge in the Supreme Court of **Shell Oil Swaziland**

(Pty) Ltd vs Motor World (Pty) Ltd Appeal Case No.23/2006.

(iii) That Applicant does not make out a case in its Founding Affidavit

[44] The Respondent's argument in this regard is that Applicant does not make out a case in its Founding Affidavit. That the Applicant fails to give reasons for the manner in which the Application was brought to court save that the Founding Affidavit doe not state/what is/was irregular by the Respondent. That further the Applicant does not clarify whether they are basing their review Application in terms of Rule 53 or the common law for the Respondent to oppose accordingly.

[45] In answer to the above attack by the Respondent the Applicant directed the court's attention to paragraph 17 of the Founding Affidavit of the Applicant contending that Applicant has advanced a case for review before this court. The said paragraph 17 reads as follows:

> **"17.1I state that the Respondent's conduct of holding the goods embargo, being 87x40 foot containers and determining it to the value of US$14.33 and ignoring the**

actual price charged by the supplier is grossly irregular and baseless. It is moreso because it is not clear as to why the price charged by the supplier should not be receipted by the Respondent."

[46] Further on in paragraph 17.2 the Applicant avers the following:

"17.2 I humbly submit that the conduct of the Respondent of refusing to release the goods (quilts) to Applicant and further accepting the value as per the suppliers invoice is irregular. At all material times the goods have been declared and cleared as per the suppliers invoice. In fact this is the procedure that is followed."

[47] The above averments of the Applicant should be viewed either within the preview of Rule 53(1) or common law since the Applicant has not stated in its Founding Affidavit whether it was bringing the Application under Rule 53 of the common law. However, in the argument before court Mr. Dlamini submitted that the Application for review is brought in terms of the common law and that ground no.5 as stated by the learned author, **La Rose-innes, Judicial Review of Administrative Tribunals in South Africa** at page 8 as follows:

"There are seven grounds with common law upon which the proceedings of administrative bodies may be subject to review and these are as follows:

1. **Where the proceedings are *ultra vires* and this will include bad faith or fraud by the tribunal or official exercising his power;**

2. **Violation of the principles of natural justice;**

3. **Failure to give reasons for a decision where there is a duty upon a tribunal to do so;**

4. **Mistake of law or fact in certain circumstances;**

5. **Unreasonableness of decisions in certain circumstances;**

6. **Non-compliance with the rules of evidence in limited circumstances;**

7. **Where the power exercised was unlawfully delegated."**

[48] I have assessed the averments of the Applicant in his Founding Affidavit against the ground of review stated by the attorney for the Applicant from the bar and I have come to the view that the Respondent's contention are correct on the facts. I say so for the following reasons.

[49] Firstly, the Applicants do not state how the procedure from coming to its finding to declare the goods at US$14.33 is procedurally irregular necessary to be reviewed.

[50] Secondly, the Applicant did not clearly attack the validity and the methods or procedure adopted by the Respondent, although it seems to challenge the correctness of the decision it came to.

[51] All in all, I agree **in toto** with the arguments of the Respondent under this Head of Argument.

(iv) Application of the provisions of section 66 of the Act

[52] In this regard it is contended for the Respondent that there is nothing irregular by Respondent as the Respondent has applied the provisions of section 6 of the Custom and Excise Act No.21 of 1991 to declare the transaction value of imported quilts by Applicant at a price of US$14.33 being the selling price of similar product in Swaziland.

[53] In this regard I am persuaded by the argument of the Respondent on the operation of section 66 of the Act.

[54] Lastly, I wish to point out that there is an anomaly in the arguments of the Applicant that the goods are in the custody of the Respondent under an embargo. However, this point was

clarified by the attorney for the Respondents and also in the Answering Affidavit that this is not the position.

[55] I wish to comment **en passant** that this Application was ill conceived from inception as Applicant did not specify whether the review Application was under section 53 of the Rules of this court or common law. In submissions from the bar by the attorney for the Applicant the court is informed that the review is in terms of the common law. Further, to identify the paragraphs alleging the complaint these paragraphs do not take the matter any further except the arguments of the attorney in court. This Application was indeed misconceived as Applicant states in the Founding Affidavit that it does not have any other remedy when in fact the Act provides such remedy. Further, the Applicant was to meet the Respondent providing certain information to assist Respondent to properly access the matter. The Applicant did not come back but launched this Application under a Certificate of Urgency. The **bona fides** of the Applicant to file this Application are questionable in these circumstances.

[56] In the result, for the aforegoing reasons the Application is dismissed with costs on the basis of the preliminary points

raised by the Respondent. The Applicant is advised to allow the structures of the Act to take effect by taking its grievances to the Minister as provided in the said Act.

STANLEY B. MAPHALALA
PRINCIPAL JUDGE