



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No. 89/2012

In the matter between

SWAZILAND REVENUE AUTHORITY

APPELLANT

And

CHARLES MAFIKA NDZIMANDZE

RESPONDENT

Neutral citation: Swaziland Revenue Authority vs Charles Mafika Ndzimandze (89/2012) [2013] SZSC 24 (31 May 2013)

**Coram: M.M. RAMODIBEDI CJ, S.A. MOORE J.A. and
E.A. OTA J.A.**

Heard 23 MAY 2013

Delivered: 31 MAY 2013

Summary: Civil procedure: Dutiable goods: Sales Tax : Respondent brought two motor vehicles into Swaziland for personal and business purposes: Respondent failing to declare the vehicles or pay Sales Tax upon entry: Appellant issued an ultimatum to pay or export the vehicles: Respondent in consequence took the vehicles out of Swaziland to the Republic of South Africa: Respondent subsequently brought the vehicles back to Swaziland and declared them as second hand goods, paid duty on them as such and sought to effect registration: Appellant refused to register

one of the vehicles claiming duty for both vehicles on their purchase price at the initial entry into Swaziland; the Respondent refused to pay leading to the seizure and an embargo placed on the said vehicles by the Appellant: The Respondent moved an application before the Court *a quo* contending for a setting aside of the seizure and embargo on the vehicles on the basis that the Appellant waived its right to demand for duty on the purchase price of the vehicles at the time of their initial entry into Swaziland by giving the Respondent the ultimatum to pay the Sales Tax or export the vehicles; The Court *a quo* held that there was a waiver and ordered that duty be paid on the current value of the vehicles; Appeal against the order of the Court *a quo* upheld: Vehicles deemed imported at the initial stage of their entry into the country: Interpretation of the word “importer” as appears in the relevant statutes: Waiver: Principle thereof: No waiver: Appeal allowed.

JUDGMENT

OTA. JA

[1] INTRODUCTION

This is a classical case of Tax evasion which resonates on the duty (14% Sales Tax), payable by the Respondent to the Appellant, in respect of two motor vehicles owned by the Respondent, which are described in the processes as a BMW 750i and Mercedes Benz ML 500 respectively. This is a vexed question, which led to a total break down of relations between the

parties culminating in the seizure and an embargo placed on the said motor vehicles by the Appellant, in exercise of its statutory power pursuant to section 88 (1) (c) of the Customs and Excise Act 21/1971.

[2] CHRONOLOGY

The Respondent who is a Swazi citizen and permanently resident in Swaziland, purchased the said vehicles i.e the Mercedes Benz in October 2009 and the BMW in January 2010, from South Africa. Both vehicles were registered in that country, at the respective dates of their purchase. It appears that thereafter the Respondent brought the two vehicles into Swaziland, where he used them for personal and business purposes. He failed to declare the vehicles upon entry or register them in Swaziland.

[3] In August 2011, the Appellant which is a statutory body established by, and in terms of the Swaziland Revenue Act of 2008, and charged *inter alia* with the collection of revenue for the Government of Swaziland, approached the Respondent and demanded that he registers the two vehicles in Swaziland, which registration would attract 14% Sales Tax on the purchase price of each, which summed up to a total amount of E248,096.93.

[4] The Respondent refused to go the route proposed by the Appellant. He decried it as a crafty stratagem devised by the Appellant to unjustly enrich itself at his expense. He also contended that the vehicles were not infact imported into Swaziland. Suffice it to say that notwithstanding the foregoing issues raised by the Respondent, on 14 October 2011, he wrote a letter to the Appellant, exhibited as annexure CMN3 in these proceedings, in which he applied for a grace period of three (3) months to 14 January 2012 to comply with the registration requirements, on the basis of financial straits.

[5] CMN3 was met with a letter from the Appellant, which is of an even date (CMN4). The relevant portion of CMN4 which is now a Cross on the Appellant's back is apposite at this infantile stage:-

“Your request to have (sic) keep the vehicles for a further three months in the country is not accepted. I note that you are resident in Swaziland and your vehicles are subject to payment of sales tax. May you therefore arrange to pay the sales tax on the value of the vehicles when you acquired them or export them by the 30th October 2011” (emphasis added).

[6] In the wake of the above directive, the Respondent removed the two vehicles from Swaziland and returned them to the Republic of South Africa before the deadline.

[7] Thereafter, the Respondent alleges that he re-purchased the vehicles from two dealerships in South Africa, by some strange device which I will come to anon. Suffice it to say that the end product of these measured activities is that the Respondent, whom I have come to view as a very crafty businessman, brought the vehicles back into Swaziland on 9 February 2012 and 11 July 2012 respectively, declared them as second hand goods and paid 14% Sales Tax on each of them at the alleged price of their re-purchase. After this, Respondent effected registration of the Mercedes Benz in Swaziland, but all attempts to register the BMW met with stiff resistance from the Appellant which insisted on duty at the purchase price of the vehicles in 2009 and 2010 respectively.

[8] The foregoing facts precipitated the seizure and embargo leading to the proceedings *a quo*, per **Hlophe J**, wherein the Respondent claimed for a setting aside of both the seizure and embargo on the vehicles as well as declaratory orders.

[9] In the final analysis, the Court *a quo* narrowed down the issues before it to the purport of CMN4. The Court deemed it a waiver of the Appellant's right to demand Sales Tax at the initial purchase price of the vehicles in 2009 and 2010 respectively; and having discarded the alleged re-purchase of the

vehicles and its associated prices, the Court concluded as follows in paragraph [41] of its judgment:-

“[41] Consequently, the Applicant’s application succeeds to the extent set out in the orders made herein below:-

41.1 The motor vehicles concerned are to be forthwith taken for evaluation by a lawfully appointed evaluator or assessor, failing which one appointed by agreement between the parties, to determine their true value before they are released to the Applicant.

41.2 The Applicant be and is hereby ordered to pay to the Respondent 14% Sales Tax based on the value of the motor vehicles as shall have been determined by the assessor or evaluator appointed in terms of order 1 above, which should incorporate the amounts already paid.

41.3 There having been losses and successes on both ends, each party to bear it’s costs,”

[10] THE APPEAL

It is the foregoing judgment of the Court *a quo* that the Appellant bemoans in this appeal, premised on grounds which sound in the following terms:-

“1 The Court *a quo* erred in law in holding that the Appellant had waived or elected not to pursue the payment of Sales Tax against the Respondent when Appellant directed the Respondent to pay Sales Tax on the two vehicles on their values when they were acquired or export them by 30th October 2011.

2. The Court *a quo* erred in holding that the Respondent should pay Sales Tax on the current values of the motor vehicles as per the values to be placed on them or determined by an assessor or valuator or

3. The Court *a quo* erred in holding that the motor vehicles were imported in the country in 2012” .

[11] After a very mature compass of the matrix of facts serving before Court, I come to the inexorable conclusion, that the only question arising for determination is: whether or not the Respondent is liable to pay duty on the two motor vehicles at their price of purchase in 2009 and 2010 respectively? A proper determination of the above poser to my mind, will entail a construction of the word “*import*” as it appears in the Customs and Excise Act, 1971 and the Sales Tax Act, 1983.

[12] These statutes advance no definition or explanation for this word. What they define is the word “*importer*”, interpreted in section 2 (1) thereof as follows:-

“importer” means any person who, at the time of importation:-

- (a) owns any goods imported;**
- (b) carries the risk of any goods imported.**
- (c) represents that or acts as if he is the importer or owner of any goods imported;**
- (d) actually brings any goods into Swaziland;**
- (e) is beneficially interested in any way whatever in any goods imported; or**
- (f) acts on behalf of any person referred to in paragraph (a), (b) or (c)”.**

[13] Legal texts such as **Blacks Law Dictionary** lend little or no help. All it says of the word “*import*” is:-

“A product brought into a country from a foreign country where it originated;--- the process of bringing foreign goods into a country”.

[14] It is this state of affairs that generated a huge debate *a quo* on whether a proper construction of the word “import” in terms of the relevant legislation, involves a consideration of the intention of bringing the goods into Swaziland, with Mr. Mlangeni who appeared for the Respondent, calling upon this Court in his heads of argument, to lay this haunting ghost to eternal rest in the interest of posterity.

[15] Let me preface a resolution of this matter by observing here that the Courts have a duty to ascertain the meaning of a statute before they can apply it. Therefore, the first port of call in interpreting any statute is the wording of the statute itself. In this process, it is commonsensical for the Court to assume that the legislature uses the right words to express its intention, is consistent, reasonable and legislated with a practical object in mind. The Court in its interpretative jurisdiction thus strives to achieve a harmony with the objects of the statute by ascribing to its words meaning which yield a practical result with due regard to its object. Therefore, clear and unambiguous words of statute are interpreted in such a manner as to satisfy these basic assumptions and ensure a realization of justice. It is imperative to test such clear and unambiguous words in light of the consequences, to see what sort of result they produce. If they produce a workable result then it is correct. If the end

product is not reasonably workable or runs counter to the object of the statute or produces an absurdity or futility, then it is wrong.

[16] The Court *a quo* came to the conclusion in paragraph [22] of the assailed decision, that the intention of bringing the goods into the Kingdom is a factor in the construction of the word “import” I agree with this finding.

[17] This conclusion in my view, can easily be extrapolated from the language of the enabling statutes, which it is convenient for me to discuss at this juncture. My first port of call is section 6 (d) of the Sales Tax Act, which states thus:-

“Subject to section 8 there shall be charged, levied, collected and paid into the consolidated fund of Swaziland tax to be known as ‘Sales Tax in respect of -----

(d) goods imported or manufactured by any person which are applied by such person to his private or domestic use or consumption or for the use or consumption thereof in any enterprise carried on by him or by any other person”. (emphasis added)

[18] Since this debate involves goods brought over land section 9 (1) (c) of the Customs and Excise Act, is pertinent. It provides thus:-

“9(1) For the purpose of this Act goods consigned to or brought into Swaziland shall be deemed to have been imported into Swaziland --

(c) Subject to subsection (2) in the case of goods brought to Swaziland overland, at the time when the goods entered Swaziland “. (emphasis mine)

[19] The foregoing is amplified by section 44 (1) (a) of the Customs and Excise Act which states as follows:-

“Notwithstanding anything to the contrary in this Act, all goods consigned or imported into Swaziland or stored or manufactured in a customs and excise warehouse or removed in bond shall upon being entered for home consumption be liable to such duties (including anti dumping and countervailing duties specified in schedule No. 2 and new or increased duties referred to in section 58 (2) and duties imposed under section 53) as may at the time of such entry be liable upon such goods”. (emphasis added)

[20] Then there is Section 2 of the Act which took the pains of defining the phrase **“home consumption”** as appears in section 44 (1) above as meaning **“consumption or use in Swaziland”**.

[21] It is beyond dispute that a synthesis of the legislation detailed ante, makes duty by way of 14 % Sales Tax, payable upon entry thereof, on any dutiable goods brought into Swaziland over land for the private or domestic use or consumption of the person bringing them in, or for their use and consumption in any enterprise carried on by him or by any other person in Swaziland. As can be perceived, the words ‘use’ and ‘consumption’ play a prominent role in the meaning of ‘import’ as envisaged by Law.

[22] This goes to establish that duty is not payable on all goods landed in the Kingdom. It is payable only on goods imported for use and consumption in Swaziland.

[23] This is in accord with the salutary objects of the Act to ensure that duty is paid on all goods which are brought into the Kingdom other than goods only in transit e.g for a temporary purpose like holidays, shopping e.t.c. Section 44(1) (a) of the Customs and Excise Act in fact provides for the removal of goods in bond and for them to be first entered for home consumption for the bonded goods to be liable to duty. See **Tieber v Commissioner For Customs and Excise 1992 (4) SA 844 (A)**.

[24] The foregoing is amplified by the pronouncement of the Court in the case of **Commissioner of Customs and Excise v Container Logistics (Pty) Ltd, Commissioner of Customs and Excise v Rennies Group Ltd t/a Renfreight; 1999 (3) SA para 10 page 780, when dealing with Section 99 (2)(a) of the Customs and Excise Act 91 of 1964 of the Republic on goods landed in South Africa**. The Court said the following:-

“What is known in ordinary language as ‘customs clearance’ is referred to in the Act as ‘due entry’. Within a prescribed period after goods are imported the importer is required to make due entry thereof in the prescribed form. This is done by submitting a bill of entry containing

particulars *inter alia*, of the goods in question and the purpose for which they are being entered to the controller (an official designated by the Commissioners for a particular area). At the same time, unless the controller allows a deferment, the duties due on the goods must be paid. If the controller is satisfied, a release order is issued. Goods entered for home consumption are presumably released without further ado, what happens to them thereafter does not concern us. Goods destined for a neighboring country may be entered either for removal in bond--- or for storage in a Customs and Excise Warehouse --- whence they may later be removed upon due entry for export. In either case, if they are destined for a place beyond the borders of the common Customs area, there is an immediate liability to pay the duty but the actual payment thereof is conditioned upon it being proved to the satisfaction of the Commissioner that the goods have been duly taken out of the area. If proof is furnished within the prescribed time, the liability ceases; if not, the duty is payable on demand. Goods removed in bond or for export from a customs and excise warehouse may not be diverted without the permission of the Commissioner to any destination other than the one declared on entry”

[25] It is an inescapable conclusion therefore, that the intention of bringing the dutiable goods into the country, is relevant. This is commonsensical. To hold a contrary view will run counter to the objects of the legislation, render it draconian and lead to absurdity. See **Queen v Bull (1974 – 5) 131 CLR at 403 A-B, Beckett & Co Ltd v Union government 1920 TPP 142 at page 149.** Whether or not such intention can be apprehended is a question of fact to be distilled from the peculiar circumstances of each case. What then are the incidents *in casu*?

[26] THE INTENTION OF RESPONDENT VIS A VIS THE VEHICLES

The Court *a quo* held in para [24] of the impugned decision, that the initial purpose of bringing the Mercedes Benz into Swaziland in 2009, was to have

it permanent in Swaziland, which is confirmed by the established fact that it was purchased by the Respondent who is a Swazi and delivered at his residential address in Swaziland; also from the reasons why Respondent registered the two vehicles in the Republic of South Africa as disclosed in his letter of 14th of October 2011, annexure CMN3. I cannot on the facts fault these findings of the Court.

[27] I am however disinclined to agree with the Court *a quo* on its findings in paragraph [25] with respect to the BMW, where it held as follows:-

“As concerns the BMW, the position is different in my view. It was purchased by a South African entity and registered in that country. Clearly its being brought to Swaziland was in my view for a specific purpose which was for business. It could be that the Applicant used it as a daily vehicle but his intention was in my view clearly not consistent with importing the motor vehicle into Swaziland. The circumstances with regards this particular motor vehicle are somewhat similar to what happened in Tieber v Commissioner for Customs and Excise 1992 (4) SA 844. In that case it was held that unwrought gold which had been brought into the Republic of South Africa in transit to a European country, was not imported into South Africa despite its being brought into that country”

[28] The foregoing findings of fact, in my respectful view, are not borne out of the incidents of this case. The findings are tipped heavily against the weight of available evidence which gives me the latitude to re-evaluate the evidence giving it its pride of place on the balance of probabilities, in a bid to come to

a just decision. This is in appreciation of the fact that an appeal is by way of a re-hearing on the record.

[29] The indisputable facts are that the Respondent who is permanently resident in Swaziland, by his own showing in paragraph 4.6 of his founding affidavit, brought the two vehicles into the Kingdom for both personal and business purposes. These are the activities envisaged by the relevant legislation for the dutiable goods to be deemed imported. Though Respondent says he similarly used the vehicles as such in the Republic of South Africa where he also established a business and was temporarily resident, this does not detract from the fact that the Respondent is permanently resident in Swaziland where he runs an on going business concern, Interfreight (Pty) Ltd.

[30] It is worth mentioning also, that though registered in South Africa, the Respondent's other business viz, the Circle Way Trading 256, which the papers reveal bought the BMW, carries on its business by Respondent's own admissions, at Oshoek Border Post, Golela Border Post, Mananga Border Post and Mahamba Border Post. I take judicial notice of the fact that all these border posts are situated at the border lines between South Africa and Swaziland.

[31] It is therefore beyond controversy, as admitted by the Respondent himself, that it was for his personal and business purposes that he brought the vehicles into the country. They were intended for permanent use in Swaziland, thus liable to payment of the concomitant duties.

[32] Respondent clearly conceded to this fact when he wrote annexure CMN3 to the Appellant, seeking a 3 month extension to register the vehicles in Swaziland which process includes payment of the duty for their importation. The reasons which the Respondent advanced for this request which are self evident are as follows:-

- “(1) **My financial resources are presently insufficient to meet the GST. I have, by virtue of having breached the time frame of changing it into a Swaziland registered vehicle, lost out on E241,088.60 VAT Refund Claim.**
- (ii) **I have approached RSA dealerships for both vehicles to dispose on my behalf. The local market does not have the capacity to acquire high value-second hand vehicles. It is cheaper to buy a new luxury vehicle and pay over 60 months as opposed to acquiring second hand vehicles and pay over 36 months as dictated by local financial institutions. It was to mitigate this local handicap that I registered the vehicles in RSA – based on advice that was provided to me at period of registration. The RSA dealership have indicated that the sellers markets is active in December” (underlining mine).**

[33] As I have already indicated in paragraph [26] above, the Court *a quo* relied on the foregoing excerpt from CMN3 in finding that the Mercedes Benz was imported by the Respondent into Swaziland. The Court however,

erroneously in my respectful view, appears to have shut its eyes to its potency in making a finding in relation to the BMW, inspite of the fact that CMN3 referred to the two vehicles.

[34] The fact that the vehicles were registered in South Africa; the Respondent paid duty on them in South Africa and the BMW was to be delivered at the Respondent's address in South Africa does not derogate from this position. In any event, there is no evidence to show that the BMW was ever delivered to the address in South Africa as indicated on the papers. The established facts are that the Respondent brought it into Swaziland after its purchase, which is fatal to any contention that it was to be delivered at the Respondent's address in South Africa.

[35] I am reinforced in my deductions *in casu*, by the Respondent's subsequent activity of taking the vehicles out of Swaziland to South Africa and surreptitiously re-importing them as second hand goods. Certainly, this activity is axiomatic. It fore-shadows Respondent's intention right from the outset.

[36] I also hold the view, but with respect, that the Court *a quo* misdirected itself when it placed reliance on the case of **Tieber v Commissioner for Customs and Excise (Supra)** in making its findings. This is because **Tieber** was a classical case of goods in transit and thus easily distinguishable from the facts of this case. In **Tieber**, the unwrought gold which was in issue, was indisputably on transit. The Appellant had checked in the baggage containing 38 kg of unwrought gold on flight from Gaborone to Zurich, via Jan Smuts and Frankfurt Airports. The Appellant's intention was to remain in transit in both airports. The police seized the gold from transit luggage at Jan Smuts airport. The Court held that the gold was not imported into the Republic in terms of the Act and that the Respondent was not entitled to seize it. This is however not such a case. *In casu*, the Respondent not only brought the vehicles into the Kingdom for his personal and business use, but they remained in Swaziland from December 2009 and January 2010 respectively, until August 2011 when the Appellant demanded for payment of duty on them.

[37] In my respectful view, there was clearly an intention to import the motor vehicles into the Kingdom. The portion of the impugned judgment to the effect that it was not the initial intention of the Respondent to import the BMW into Swaziland is hereby set aside.

[38] In these circumstances, the Respondent was under an obligation in accordance with the well established operational mode of the Customs department, to declare the vehicles which are dutiable goods at the border, on their initial entry into Swaziland in December 2009 and January 2010 respectively, and to pay duty (14% Sales Tax) on them, calculated at their respective prices of purchase. This is in accordance with the dictates of Section 43 (1) of the Customs and Excise Act, which provides **“Liability for duty on any goods to which section 9 relates shall commence from the time when such goods are in terms of that section deemed to have been imported into Swaziland.** This is amplified by Section 9 (1) (c) which defines when goods are deemed to have been imported in the present situation as follows:- **“in the case of goods brought to Swaziland overland, at the time when the goods entered Swaziland”.** (emphasis added)

[39] The Appellant was thus entitled to demand the duty payable, which it did. When Respondent failed to pay the duty requesting for an extension of time, the Appellant wrote CMN4 to the Respondent directing him to pay the Sales Tax on the value of the vehicles or export them by 30 October 2011.

[40] It is this directive that the Court *a quo* held constitutes a waiver or election by the Appellant not to pursue the 14% Sales Tax which was due to it in October 2009 and January 2010 respectively.

[41] WAIVER

The Poser here is: was the Court *a quo* right? With respect, I think not! There is no doubt as correctly propounded by the Court *a quo*, that a party who elects a particular position is not allowed to alter that position in law, particularly, if by his altering same, he engenders prejudice to the other party. This principle however finds no application in this case.

[42] I say this because a waiver must be clear cut. The intention to waive must be unequivocal. From the facts of this case, it is obvious to me that the Appellant did not have complete information concerning the entry of the vehicles into Swaziland as the Respondent failed to declare them upon entry. In spite of this, Appellant took the position that the goods were imported into Swaziland. The Respondent on the other hand was insistent that they were on transit. Since the Appellant did not have complete information concerning the entry of the vehicles, I am inclined to hold that it was within the discretion of the Commissioner General to give the Respondent the benefit of the doubt that the

vehicles were on transit; by directing him to either pay the duty or export the vehicles by 30 October 2011. Implicit from this ultimatum is that if by that date the Respondent had not exported the vehicles, the Appellant will deem the goods as having been imported and thereby fully apply the provisions of the Customs and Excise Act as it relates to goods imported without payment of customs duty i.e. their forfeiture.

[43] Analogous to the foregoing proposition is the following commentary by learned Counsel for the Appellant Mr. Manzini, which appears in the Appellant's heads of argument:-

“8.3 The fact that the Appellant advised the Respondent to pay the 14% Sales Tax or export the motor vehicles does not amount to waiver of the right to demand payment.

8.3.1 It is our submission that since the Respondent failed to declare the motor vehicles in terms of section 37 (1) of the Customs and Excise Act, the Appellant then invoked section 42 (1) of the same Act by directing the Respondent to export the motor vehicles. In the event the Respondent failed to comply, then section 42 (2) would apply, which would result in the forfeiture of the motor vehicles”

[44] I am highly persuaded by the above exposition. I have no wish to depart from it. The issue of waiver of payment of duty cannot arise in the circumstances. The facts are not consistent with waiver.

[45] Out of the abundance of caution, let me interpolate here to observe, that even if I were to apprehend the option given to the Respondent of exporting the goods as an intention by the Appellant to waive its rights, such a waiver can only be perceived if the option of exporting the goods is exercised. That is the incontrovertible position of the law.

[46] On the facts, the Respondent must also fail on this limb. This is because he did not comply with the directive to export the vehicles. He was unconscionable in that process in that he circumvented the due and established process of an export, which is also synonymous with payment of certain export tariffs. There is no evidence of payment of such export tariffs or entry of such an export. No documentation of such an export is urged in these proceeding.

[47] In the Respondents heads of argument, Mr Mlangeni conceded the fact that the Respondent did not export the vehicles, in the following words:-

“6 In the circumstances of the present case, the Respondent could not legally be required to export the motor vehicles if they had not in the first place been imported.

6.1 It is submitted, therefore, that in the context of the letter annexure “CMN4” the word “export” means nothing more than “repatriate” or “return” the motor vehicles to south Africa, and the Respondent did just that”.

[48] I beg with respect, to distance myself completely with the foregoing proposition. Certainly the word “export” cannot remotely be construed in the way and manner suggested. When this matter was heard Mr. Mlangeni on being questioned, could not direct the Court to any portion of the relevant legislation where the words “repatriate” or ‘return’ are used as synonyms to the word “export”. In the circumstances, the Respondent cannot validly contend for a waiver as he did not export the vehicles as directed. What he effectively did was to simply drive the vehicles through the border gates to South Africa. This does not amount to an export.

[48] In any event, I am of the firm conviction, that the Respondent’s conduct after he took the vehicles to South Africa divests him of any claim to waiver. This is because, having taken the vehicles to South Africa, the Respondent who is engaged in the business of importation and exportation of goods and is thus well versed with the operational mode of the Appellant, devised a disingenuous scheme to defraud the Government of Swaziland by evading the appropriate duties payable thereon, in complicity with some questionable car dealerships.

[49] To this end the Respondent alleges, that upon removing the vehicles to South Africa, he handed same over to two car dealerships thereat to sell as second hand vehicles. The Dealerships failed to secure purchasers; whereupon he re-purchased the two vehicles from the said dealers, in respect of which he paid E300,000.00 for the Mercedes Benz and E526, 315.79 for the BMW. The learned Judge *a quo*, refused to buy this tale of “ re-purchase” of the vehicles, discarding it for reasons which enure in the impugned judgment. I agree with him.

[50] I say this because the Respondent’s allegations in this regard are certainly self defeating. In one breath, he says he handed the vehicles over to two dealerships to sell for him as second hand vehicles, yet in another breath, he claims to have re-purchased the vehicles from the same dealerships. These allegations are clearly irreconcilable robbing them of any probability. There is no evidence that the vehicles were ever sold to the car dealerships to require their re-purchase.

[51] It is also preposterous in my view, to suggest that the Respondent who refused to pay a total VAT amounting to the sum of E248,098.93 for the two vehicles would turn around to “*re-purchase*” them for an amount almost four times the price of the VAT. This is certainly fanciful.

[52] To my mind, the incongruous story depicted ante, is consistent with a clear and certain intention to deceive the Appellant and avoid payment of appropriate duties. Respondent's attempt to bring the vehicles back into the country as second hand goods is part of this whole stratagem, which he almost got away with but for the Appellant's belated cry of foul!

[53] It is on the basis of these illegal and fraudulent activities that the Respondent is now invoking the principle of waiver contending that by giving him the option of exporting the vehicles the Appellant waived the right to collect appropriate duties from him. A situation he was able to secure through his guile and deception.

[54] This Court does not think that he should be allowed to benefit from his own wrong or illegality. That is in effect what the decision of the Court *a quo*, did.

[55] It is a principle of law and equity that no party should be allowed to reap from the benefits of his own illegal and fraudulent action. It is morally despicable for the Respondent to seek to enjoy the benefit he secured through his artifice and treachery. This is clearly unsustainable.

[56] For the above reasons, the issue that there is a waiver is resolved against the Respondent. Accordingly, I hold that there was no waiver and the portion of the judgment *a quo* to the effect that there was a waiver is set aside.

[57] It is also my considered view and pursuant to Section 5(3) of the Court of Appeal Act, that the order *a quo* to the effect that each party bears its own costs should be set aside. The justice of this case is deserving of costs against the Respondent as a show of this Court's censure for his invidious conduct.

[58] In the result this appeal is allowed. The orders contained in paragraphs 41 to 41.3 of the judgment *a quo* are hereby set aside. In their place I substitute the following order:-

“Applicant’s application be and is hereby dismissed with costs” .

[59] Costs of this appeal go to the Appellant.

E.A. OTA
JUSTICE OF APPEAL

I agree

M.M. RAMODIBEDI
CHIEF JUSTICE

I agree

S.A. MOORE
JUSTICE OF APPEAL

For Appellant:

N.S. Manzini

For Respondents:

T. Mlangeni

