IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Case No. 20/2012

In the matter between:

C I C (PTY) LTD **Appellant**

And

SWAZILAND REVENUE AUTHORITY **1st Respondent**

FIRST NATIONAL BANK OF SWAZILAND LIMITED **2nd Respondent**

Neutral citation : *C I C (PTY) LTD v Swaziland Revenue Authority & First National Bank of Swaziland Limited (20/2012) [2013] SZSC 36 (31 May 2013).*

Coram : **A.M. EBRAHIM JA**
P. LEVINSOHN JA,
B.J. ODOKI JA

Heard : 23 May 2013

Delivered : 31 May 2013

Summary : ***V.A.T legislation from Swaziland to Mozambique – export transactions – whether such V.A.T zero – rated in terms of 2nd Schedule.***

JUDGMENT

P. LEVINSOHN, JA

[1] For ease of reference and for convenience I shall refer to the parties to this appeal by their respective designations in the court *a quo.*

[2] On the 8th of January 2013 the Applicant brought an urgent application before the court *a quo* seeking *inter alia* relief by way of review and various declaratory orders.

[3] I proceed to summarise in very brief outline the salient features of the applicant's case which emerge from its founding affidavit.

[4] The applicant is a company incorporated in accordance with the laws in force in the Kingdom of Swaziland and whose principal place of business is in Mbabane. It is engaged in the business of importing liquor from the Republic of South for purposes of exporting same to Mozambique. It appears that the applicant's associated companies in the first instance import these products into South Africa.

[5] The applicant explains in great detail the Swaziland customs protocols that are rigorously applied in the export process. These procedures were put into place by the 1st respondent when the VAT act of 2011("the Act) came into force. Every consignment of liquor emanating from South Africa is physically checked by the Swaziland customs authority at the South African /Swaziland border post to ensure that the quantities brought in accord with the documentation

evidencing the particular consignment. The documents concerned are then stamped and the consignment is sealed. Thereafter it is then transported to the applicant's bonded warehouse in Matsapha. A bonded warehouse is a facility under the supervision of the customs authorities where goods are kept pending exportation. On arrival at Matsapha the consignment is met by Swaziland customs officials who once again physically check the quantities to ensure same accords with the documentation and ensure the seals have not been tampered with. The documentation is then stamped and the goods sealed.

[6] The goods are then stored in the bonded warehouse pending exportation.

[7] When a particular consignment is exported officials of the 1st respondent ("SRA") are called to the warehouse to supervise loading of the goods onto the truck transporting same. This truck has to fit a particular description – it is described as a "sealable vehicle." Once loaded the truck in question is sealed by the SRA and its officials sign

and stamp the necessary documentation. At the border post officials of the SRA will once again inspect the vehicle and stamp the documentation.

[8] On 7th of November 2012 officials of the SRA visited the applicant's premises for purposes of inspecting the bonded warehouse and ascertaining the true nature of the applicant's business methods. They also wished to make enquiries in regard to VAT. The applicant's public officer furnished them with a detailed explanation. He told them *inter alia* that customers from Mozambique came to Swaziland to take delivery of the goods for export and paid for same. He further explained that these customers provided their own transport. However, their vehicles when leaving the bonded warehouse had to fully comply with the specifications and description mentioned above inasmuch as they had to be "sealable"

[9] First respondent's officials indicated that in their opinion VAT was payable on these goods inasmuch as they were paid for and delivered

in Swaziland. This opinion was formally recorded in a letter addressed to the applicant dated 12 November 2012. First respondent's stance was that the method of export used by the applicant could be classed as an "indirect export" as outlined in the guidelines issued by the first respondent. In the same letter the first respondent called on the applicant to furnish proof that the goods in question had in fact been exported. The applicant complied. Under cover of a letter of a letter dated 30 November 2012 furnished documentation which traced the history of the arrival of the goods into Swaziland and thereafter the export thereof via the Lomahasha border post into Mozambique.

[10] The applicant avers that no discrepancy could be found in any of the documents submitted.

[11] Notwithstanding the submission of these documents the first respondent ruled that the applicant was obliged to pay an amount of E 2,925,011.95 being the amount of VAT owing in respect of the

months of April 2012 to September 2012. The first respondent demanded payment within 7 days. (Subsequently, a further amount of E 633,935.50 was levied for the month of October 2012).

[12] Despite an attempt by the applicant to negotiate the issue with the first respondent the latter insisted that the amount demanded be paid. The first respondent proceeded on 18th December 2012 to attach monies held in the Applicant's bank account to cover the applicant's alleged indebtedness. On the same day the officials of the first respondent entered the applicant's business premises accompanied by armed police and informed the applicant's staff that they had come to close down the applicant's operation. The first respondent took an inventory of the stock on the premises, sealed the premises and posted security guards to ensure that no goods were removed.

[13] Following the seizure of its monetary assets and the closure of its business by the first respondent the applicant through its attorneys

arranged to furnish a guarantee to cover an amount of E1, 928,588.63 pending the final resolution of the dispute.

[14] The applicant makes the case that it is entitled to review the first respondent's decision to levy VAT in the circumstances of this case and it makes detailed submissions in support of its legal contentions. Relying on the Swaziland Constitution the applicant submits that the seizure of its assets and closure of its business operations without obtaining a court order was in violation of its constitutional rights not to be deprived of its property.

[15] The applicant finally avers facts in support of its contention that this application be dealt with as a matter of urgency.

[16] The first respondent delivered an opposing affidavit. I do not propose to summarise in any detail the contents of that affidavit save to highlight some of the contentions that appear therein. The first respondent vigorously contests the applicant's contention that the

goods in question were exported within the meaning of the said VAT act. It asserts that for purpose of that act having regard to the fact that the Mozambique customer pays for the goods in Swaziland and receives possession thereof in that country, a taxable supply within the meaning of the VAT act is triggered off and the goods in question are subject to VAT. The first respondent furthermore, denies that the applicant's customs documentation passes muster and establishes that the goods were duly exported into Mozambique. It avers that a particular "SADC" document issued by the Mozambique customs authorities has not been put up. In the result as I understand the contentions, applicant's allegations that the goods have been exported by it are disputed.

[17] The above brief summary, I think, paints a picture of the essential factual background and the issues that arise in this appeal. I turn now to consider these.

[18] The Swaziland Value Add Tax Act ("the Act") was passed in 2011 .It repealed the Sales Tax Act of 1983. In section 3 the principal purpose is proclaimed:

> *"3. A tax, to be known as value added tax, shall be charged in accordance with the provisions of this Act on-*
>
> > *"(a) every taxable supply in Swaziland made by a taxable person;*
> >
> > *(b) every import of goods other than an exempt import; and,*
> >
> > *(c) the supply of any imported services other than an exempted import by any person.*

[19] Section 4 provides:

> *"Except as otherwise provided in this Act, the tax payable in the case of-*
>
> *(a) a taxable supply, is to be collected by the taxable person making the supply*
>
> *(b) an import of goods, is to be paid by the importer; and,*

(c) an import of services , is to be paid by

the recipient of the imported services.

[20] A helpful description of the nature of VAT is set forth by *Kriegler J* in the South African Constitutional court in the case of *Metcash Trading Ltd v The Commissioner for the South African Revenue Service* and another 2001 (1) S.A. 110G (CC). The South African VAT Legislation is fundamentally similar to that of Swaziland. At paragraph [12] of the typed judgment the learned judge observed:

"VAT is, as its name signifies, a tax on added value.

It is imposed at each step along the chain of

manufactured and distribution of goods or services

that are supplied in the country in the course of

business;……."

[21] At paragraph [12] of the typed judgment the learned judge observed:

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distribution of goods or services that are supplied in the country in the course of business;……..”

[22] The words in the foregoing passage “distribution of goods or services that are supplied in the country need to be emphasised. *Kriegler J* at paragraph 18 states:

“A special feature of VAT relates to exports. VAT is payable only on consumption in South Africa and as a result output tax is not payable on goods sold and exported .In the arcane language of the Act, they are zero-rated. ……This exemption, which aims at promoting exports and enhancing their competitiveness in the world market, holds self evident benefits for export oriented vendors……”

[23] The above dicta apply with equal force to Swaziland. Section 24(4) of the Act states:

“(4) A supply of goods or services is zero-rated supply if it is

specified in the Second Schedule"

[24] Section 1 (a) of the Second Schedule provides:

> *"The following supplies are specified for the purposes of section 24(4)*
>
> *(a) The supply of goods or services are exported from*
>
> *(b) Swaziland as part of the supply."*

[25] Section 2 of the Second schedule reads as follows:

> *"2. For the purpose of clause 1(a), goods or services are treated as exported from Swaziland if-*
>
> *(a) in the case of goods, the goods are delivered to, or made available at, an address outside Swaziland as evidenced by documentary proof acceptable to the Commissioner General; or*
>
> *(b)……."*

[26] Counsel for the applicant submits (quoting Webster's 3rd International Dictionary) that the ordinary meaning of "delivery" is "involving the

actual transfer of the physical control of the object from one to another." The ordinary meaning of "available" which is given in the New American Oxford dictionary is:" to be used or obtained; at someone's disposal."

[27] In my opinion there is no real dispute of fact on these papers in regard to the evidence of the applicant's deponent pertaining to the Swaziland customs procedures and protocols. It must be emphasised that the import/export regime is governed by the Customs and Excise Act. Thus the import and export of goods into Swaziland would be governed by the latter legislation and it is administered by the officials of the first respondent. Section 17 and 18 respectively of the Customs and Excise Act provides for the licensing of "Duty Warehouses" and the various methods of securing and locking same. Provision is also made for the export of goods from such warehouses. It seems to me that the description "bonded warehouse" where it is referred to in the founding affidavit is a synonym for "duty warehouse."

[28] Counsel for the first respondent submitted at the outset of his oral argument

that the issues in the present case must be determined solely against the background of the VAT legislation. He argued that an application of the provisions of section 2 (a) of the second schedule (*supra*) to the facts of the present case leads to the inevitable conclusion that a delivery of the goods and for that matter, "the making available" thereof occurred in Swaziland when the Mozambique customer both paid for the goods, took possession thereof and provided the transport for their removal out of the country. Counsel said that in reality the said customer took the goods out of Swaziland. The customer not the applicant thereupon became the "exporter". Counsel emphasised that there cannot be two exporters of the same consignment of goods.

[29] Now we know from the detailed evidence given by the applicant's deponent that goods exported from South Africa are closely monitored

by the Swaziland Customs authorities. As indicated above the goods are checked at the South African border post against the documentation. Thereafter the consignment is transported to the bonded warehouse where it is once again checked by the customs officials. It is then placed in this warehouse under secure lock and key under supervision by the officials. In as much as the applicant is in the export business, there is nothing untoward about it concluding a sale of the merchandise in the bonded warehouse to a customer from Mozambique and issuing an invoice in respect thereof. Nor is there anything strange about that customer paying for same in Swaziland.

[30] The unchallenged evidence on affidavit establishes that in the instant case the vehicle used to transport the goods had to comply with certain specifications and configuration-loosely referred to as a "sealable vehicle." The object obviously is to avoid anyone gaining access to the consignment and breaching the secure customs environment. We know too that customs officials are routinely called to supervise the loading and to check physically that the quantities of

goods accord with the documentation. According to the evidence this exercise is once again performed at the Lomahasha border post. On reaching the Mozambique side the customs officials of that country do their checks and cause the documentation to be stamped thus completing the export process. As indicated in above summary the applicant furnished the first respondent with all the relevant documentation for the months in question. To avoid prolixity it did not annex all of these to its affidavit. However, as an example it put up at pages 86 to 97 of the record the documentation for the August 2012 export. I am satisfied on the papers before us that there is nothing to show that the first respondent found any discrepancies in all the documentation presented to it. On perusing the above documentation I note that the Swaziland officials have affixed their stamps both at the bonded warehouse facility and at the border post. Indeed it is clear that the Mozambique authorities also affixed their stamp on" SAD 500" signifying that the goods had indeed been imported into that country. All the documentation shows that the applicant is the "exporter".

[31] In my view the goods in question were neither delivered nor made available to the Mozambique customer in Swaziland. Insofar as there was a suggestion by the First respondent that the transactions herein can be classed as “indirect exports”, that suggestion in my view has no legal foundation in either of the relevant acts. The facts show that the goods were at all times under his supervision of the Swaziland customs officials. The consignment was placed in an approved sealed vehicle and upon arrival at the border post its contents were checked against the documentation. Delivery within the meaning of the VAT act connotes a transfer of possession and ownership and more particularly the notion of control, that is to say, that one is free to deal with ones own property. Moreover, the term “making available” carries the connotation of placing he goods at the purchaser’s disposal. None of these things occurred in my view. From the time the goods were taken out of the bonded warehouse under supervision until the time they arrived at the

border post they were, in a supervised, secure and quarantined environment. It can hardly be suggested that the purchaser had any form of control until such time as customs clearance had taken place.

In the result I find that the first respondent misdirected itself as matter of law in concluding that the respective transactions between April 2012 and September 2012 attracted the payment of VAT. The subsequent assessment in respect of October 2012 falls into the same category. There is a line of weighty South African authority that its Supreme Court (as it then was) has jurisdiction to determine income tax cases turning on legal issues and to issue appropriate declaratory orders. These are reviewed in detail in the Metcash cases (supra) at paragraph 44. *Kriegler J* makes the point that there is no reason why this principle should not apply to VAT as well. At paragraph 71 the learned judge observes:

> *"A court would certainly have jurisdiction to grant declaratory relief to such a vendor if, for instance, it were to*

be alleged that the Commissioner had erred in law in regarding the applicant as a vendor; or had misapplied the law in holding a particular transaction to be liable to VAT ……. or had failed to apply the proper legal test to any particular set of facts."

[32] I accept with great respect the dicta of *Kriegler J* as being good law and which ought to be adopted in this jurisdiction. I am also satisfied that this court would be entitled to review the legality of the impugned administrative decision made by the first respondent in the present case. (See Metcash case supra at paragraph 40).

[33] The above conclusion in regard to the legality of the first respondent's decision to levy VAT in the particular circumstances of this case makes it unnecessary for this court to consider the constitutionality of the various enforcement power given to the first respondent in the VAT act. In the case of *Jerry Nhlapo* and *24 Others* versus *Lucky Howe N O* decided on 22nd May 2008, this court per *Ramodibedi JA* (as he then was) stated:

> *"It is a fundamental principle of litigation that a court will not determine a constitutional issue where a matter may properly be determined on another basis. In general a court will decide no more than what is absolutely necessary for an adjudication of the case."*

[34] It follows in the premises that the appeal falls to be allowed with costs such costs to include counsel's certified costs. The order of the court *a quo* is set aside and there is substituted the following order:

> *(a) The first respondent's decision to levy VAT in the sum of E2925011.95 in respect of the export transactions from April 2012 to September 2012 as set out in the first respondent's letters dated 12th November 2012 (annexure CIC1) is reviewed and set aside.*
>
> *(b) It is hereby declared that the said export transactions set forth in the said annexure CIC1 are for purposes of VAT to be zero rated within the meaning of Section 1 (a) of the Second Schedule to the VAT act.*

(c) *The first respondent's decision to levy VAT in respect of the export transactions for the month of October 2012 in an amount of E633, 935.50 as set out in the first respondent's letter dated 4 January 2013 (annexure CIC 8) is reviewed and set aside.*

(d) *It is hereby declared that the said export transactions as set out in annexure CIC8 are for purposes of VAT to be zero rated within the meaning of Section1 (a) of the Second Schedule to the VAT act.*

(e) *The first respondent is directed to pay the Applicants cost of the application such costs to* include Counsel's certified costs.

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P. LEVINSOHN
JUDGE OF APPEAL

I agree _____

A.M. EBRAHIM
JUDGE OF APPEAL

I agree _____

B.J. ODOKI
JUDGE OF APPEAL

For Appellant : Attorney Z. Shabangu
For 1st & 2nd Respondent: Attorney N.S. Manzini