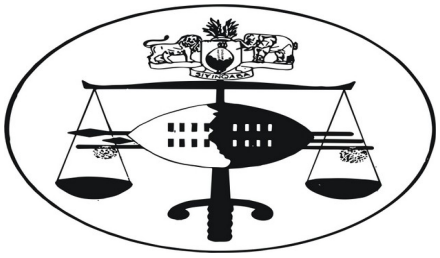

IN THE HIGH COURT OF SWAZILAND

Case No.1803/2012

In the matter between:-

CHARLES MAFIKA NDZIMANDZE **Applicant**

and

SWAZILAND REVENUE AUTHORITY **Respondent**

Neutral citation: *Charles Mafika Ndzimandze v Swaziland Revenue Authority* (1803/12) [2012] SZHC 258 (3rd December 2012)

Coram: HLOPHE J

For the Applicant: Mr. T. M. Mlangeni

For the Respondent: Mr. N. Manzini

Hearing dates: 08/11/2012

Delivered: 3rd December 2012

JUDGMENT

[1] In October 2009 and January 2010, the Applicant purchased two motor vehicles described as a Mercedes Benz ML500 and a BWM 750i respectively from Union Motors in Nelspruit, Republic of South Africa and Zambezi Auto in Pretoria also in the Republic of South Africa.

[2] It is common cause that these two motor vehicles were registered in the Republic of South Africa. The Mercedes Benz ML500 (Mercedes) was registered in the name of the Applicant whilst the BMW 750i (BMW) was registered in the name of a company incorporated in terms of the laws of South Africa, called Cycle Way Trading 256. It is not in dispute that the Applicant is a Director and Shareholder in the said Company.

[3] It is further not in dispute that the Mercedes was, notwithstanding its being registered in the Republic of South Africa in the name of the Applicant, delivered to the latter at 58 Ncoboza Street, Dalriach Plot, in Mbabane whilst the BMW, which although registered in the name of the South African Company referred to above, was delivered to the Applicant at a place called Unit 312, Tandia Gardens, Parkville Road, Buccleuch 2010 in the Republic of South Africa.

[4] The Applicant, who describes himself as a Swazi citizen, also stated in his papers that he has a home in the Republic of South Africa, at the residential address stated above which is the one where the BMW was delivered. This he says is necessitated by the fact that he carries on business in the two countries – Swaziland and the Republic of South

Africa – which apparently necessitates that he resides in both countries from time to time. His company described above as Circle Way Trading 256, operates a clearing business as a customs and excise agent on most of the Border gates accessing Swaziland from the Republic of South Africa, and on the South African side for the South African Government.

[5] It was with these facts in the background that in or around August 2011, the Respondent demanded that Applicant registers the above mentioned vehicles in Swaziland and pays 14% Sales tax on their values as determined by the purchase prices of the motor vehicles way back in October 2009 and January 2010, when they purchased and were allegedly imported into Swaziland. It is not in dispute that at the time of their purchase on the dates referred to above, the Mercedes cost a sum of R822, 067.85 whilst the BMW cost R1, 198, 150.00.

[6] It is common cause that there had, as a result of this demand by the Respondent, ensued a dispute between the parties herein, with the Applicant disputing the obligation to pay the 14% Sales Tax on each motor vehicle's purchase price as demanded by the Respondent. The Applicant contended at first that the motor vehicles had not been imported to Swaziland because he was using them for business between the two countries regularly. He also contended that at the time he brought the said motor vehicles to Swaziland, he did not know that he was not required to keep the motor vehicles in Swaziland when they were purchased and registered in South Africa. Had he known about this requirement, Applicant contends, he would not have paid the 14% sales tax he had had to pay to the South African Government during the

time of the purchase of the motor vehicles, as displayed in the invoices annexed to the papers. This would be possible if he was buying the vehicles as exports to Swaziland from the Republic of South Africa.

[7] This dispute between the parties could not be resolved through the engagements to resolve same. Not even a request by the Applicant to be afforded a period of three more months of use of the motor vehicles whilst it raised finances to settle the amounts demanded – the 14% of the purchase price as sales tax – could yield any fruits .

[8] Of significance in the letter of the 14th October 2011 advancing this request, was the following excepts which in my view also go to clarify what the purpose of bringing one or both motor vehicles to Swaziland was:-

> *"I have, by virtue of having breached the time frame of changing them into Swaziland registered vehicles lost out on E241,088.60 VAT refund claim."*

The other relevant except is expressed in the following words:-

> "*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 the 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 (sic) period of registration."*

[9] These excepts I have referred to in an attempt to indicate the Applicant's request to the Respondent on the one hand as well as determine what the Applicant's intention in bringing the motor vehicles to Swaziland

was. It will be noted that contrary to these excepts as contained in the letter written to the Respondent on 14th October 2011, the Applicant contended in his founding affidavit that he had brought the motor vehicles into Swaziland for business purposes and that he could not be held responsible to pay the 14% sales tax in Swaziland because his intention was never to import the cars into Swaziland as opposed to using them for business purposes in both countries from time to time. It is difficult at this point to agree with Applicant that the motor vehicles were brought into Swaziland for business purposes alone particularly the one registered in his name and delivered in Swaziland.

[10] In response to the letter referred to above, the Respondent stated the following, in a letter written on the same date:-

> "*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.*"

[11] It must be noted that the Respondent's response does not also seem to draw any distinction between the two cars; that is between the one registered in the name of a South African Company and delivered there against the one delivered in Swaziland to a Swazi which should be crucial in my view. The Applicant contends that this letter gave him an option to decide what to do about the motor vehicles in response – which was that he either pays the sales tax demanded or he exports the motor vehicles, which is the option he chose.

[12] Having exported the vehicles to the Republic of South Africa, the Applicant contends that he there sold them back to the dealerships from whom he had purchased them. He claims that the motor vehicles could not be purchased however from the dealerships, and that he then decided to buy them back from the said dealerships he had sold the cars to. This time around he says he bought the Mercedes for a sum of E300, 000.00 and the BMW for a sum R526 315.79. I must say I have no difficulty rejecting this story of selling back the vehicles and repurchasing them. There is no proof of this.

[13] He says by repurchasing the motor vehicles, he was clear in his mind that he was to import the said motor vehicles to Swaziland. In February 2012, he brought into Swaziland the Mercedes and paid the 14% Sales Tax of the new purchase price fixed at E42 000.00. In July 2012, he tried to bring into Swaziland the BMW. He had already paid what he says was the 14% sales tax amount based on its new purchase price for this car fixed at E73 712.24. The Respondent however rejected the sales tax amounts paid as resembling the full sales tax. Instead the Respondent insisted on the Applicant having to pay the 14% sales tax based on the initial purchase price for the BMW and later against the Mercedes Benz. Attempts by the Applicant to persuade the Respondent to accede to its having to fix the 14% sales tax on what the Applicant called new purchase prices for the two motor vehicles did not yield fruits.

[14] It was as a result of the failure to resolve this dispute amicably that the Respondent impounded both motor vehicles respectively in terms of section 88 (1) (c) and section 108 of the Customs and Excise Act

21/1971. This meant that the vehicles concerned could no longer be moved, offered or advertised for sale, given away, exchanged or otherwise disposed of without the Respondent's written authority. Although laid under attachment it is common cause the vehicles were not removed from the Applicants physical possession.

[15] It was in response to the impounding of the motor vehicles that the Applicant approached this court, seeking the following reliefs:-

(1) That the normal Rules pertaining to the launching of applications be dispensed with and that this matter be disposed of on an urgent basis in terms of the provisions of Rules 6 (25) (a) and (b)

(2) The Applicant he and is hereby granted interim relief on the following terms:-

(2.1) The seizure in terms of section 88 (1) (c) of the Customs and excise Act and the placement under embargo of a BMW 750i and Mercedes Benz ML 500 in terms of section 108 of the aforesaid Act be set aside pending finalization of this application;

(2.2) The seizure order and embargo as set out in prayer 2.1 above be set aside on condition that the Applicant be ordered not to sell and/or dispose of the BMW 750i motor vehicle and/or the Mercedes Benz ML 500 motor vehicle, pending the finalization of this application.

(2.3) The Applicant be entitled to utilize the BMW 750i and Mercedes Benz ML 500 motor vehicles as owner thereof on a daily basis pending finalization of the application.

(2.4) The Respondent be ordered to register the BMW 750i motor vehicle in the Kingdom of Swaziland, the 14% sales tax having been paid to the Respondent in the amount of E73 712. 24.

(3) A declaratory order be and is hereby entered in the following terms:-

(3.1) The seizure of the Applicant's two motor vehicles and placement of an embargo thereon in terms of section 88(1) (c) of the Customs and Excise Act is unlawful.

(3.2) The sales tax payable on the two motor vehicles is to be based on their respective prices as used vehicles.

(4) The Respondents be ordered to pay the costs of this application, including the costs of counsel as certified in terms of Rule 68 of the High Court Rules.

[16] In its opposition to the application, the Respondent denied that the Applicant had not imported the motor vehicles into Swaziland in October 2009 and January 2010. It was contended that the Applicant imported the said vehicles into Swaziland and that because of that, he

was bound to pay the 14% sales tax based on the initial purchase price per motor vehicle. It was denied that Applicant had any other intention when it brought the cars into Swaziland. Furthermore, it was contended that the Applicant's intention did not matter in terms of the law as the question was simply whether or not the motor vehicles concerned were imported in the sense contemplated by the Act in question.

[17] It was contended as well that the supposed repurchasing of the motor vehicles from their initial dealers in the Republic of South Africa was a fraudulent exercise or that the purported repurchasing of the cars was a simulated transaction.

[18] The Applicants it was contended was obliged to pay the 14% Sales Tax of the initial purchase price demanded and that the reliefs sought by the Applicant were not feasible in terms of the law as the Respondent had acted in exercise of the Powers granted it by the relevant legislations.

[19] Both parties were initially agreed that the matter turns on the question whether the goods were imported into Swaziland in October 2009 and in January 2010 respectively. The Applicant says they were not because the Applicant's intention was merely to use them for business purposes whilst the Respondent contends they were imported as they were brought into the country where they were kept. The Respondent further contends that the intention of the party bringing in goods does not matter.

[20] Both the Sales Tax Act 1983 and the Customs and Excise Act, 1969, do not define the word "import". They both define the word "importer"

which is defined as the person who owns any goods imported or carries on the risk of any goods imported or one who actually brings goods into Swaziland. Otherwise the dictionary meaning of the word import as set out in the "Compact Oxford English Dictionary" is "bring goods or services into a country from abroad". Whilst agreeing that to "import" is to bring goods into a country from abroad, it seems to me that not every bringing in of goods into a country from a foreign one amounts to "import" as used in the sense of the Sales Tax Act and the Customs and Exercise Act. In my view the term "import" as used in the said Acts connotes some permanence in the bringing into the country of the said goods or at least some permanent use. A good example would be a car brought into the count permanently against one that has been brought into the country either on holiday or for some specific project meant for a limited time. I would therefore agree in that sense that the intention of bringing in the goods is a factor if viewed from this angle and certainly not if it is meant for an indefinite period which connotes some permanence.

[21] In this sense I associate myself with what was stated by the court in ***The Queen vs Bull (1974 - 5) 131 CLR***, as cited in ***Photo Agencies (PTY) LTD vs The Commissioner of the Swaziland Royal Police and The Government of Swaziland 1970 -76 SLR - 398 at 403A – B***, which is expressed as follows:-

> "*However if the goods are brought into port with the intention of being discharged there, they are imported."*

[22] I am further supported in my said view by what was stated in Beckett & Co. LTD vs Union Government 1921 TPD 142 at page 149, where the position was expressed as follows:-

> "…*the intention of the person bringing the goods into the Republic as to their disposition also has a bearing upon whether or not the goods have been imported."*

[23] Whilst interpreting the South African Customs and Excise Act 91 of 1964 on the question as to the circumstances under which goods can be said to have been imported, the court per Goldstone JA said the following in ***Tieber vs Commissioner for Customs and Excise 1992 (4) SA 844***:-

> "*If regard is had to the scheme of the Act, it is clear that the Legislature intended the word "import" to have a restricted meaning."*

[24] Considering what I have said above and the purpose for bringing in the motor vehicles as revealed by the evidence in the matter, I cannot agree that the initial intention in bringing into the country the Mercedes was to merely use it for business in both countries. I am convinced whilst it may have been used as such, the intention was however to have it permanent in Swaziland, which is confirmed by the fact that it was purchased by a Swazi and delivered at his residential address in Swaziland. That it was meant for permanent use in Swaziland is further confirmed by what the Applicant disclosed as the reason for registering the motor vehicles in South Africa as recorded in paragraph 8 herein above and as extracted from his letter of the 14th October 2011, annexure "CMN3" to the founding affidavit.

[25] 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 Exercise 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.

[26] Whilst both counsel submitted with emphasis that the issue for decision in this matter was the intention of bringing the motor vehicles into Swaziland in October 2009 and January 2010, to which the foregoing paragraphs resemble my findings, I see the matter differently. In my view, whatever the reason for bringing into Swaziland the said motor vehicles at the times referred to above, the issue really is what the effect of the letter dated the 14th October 2011 from the Respondent was.

[27] The relevant paragraphs of the letter concerned are couched in the following words:-

> "*Your request to have (to) 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."

[28] Without boldly saying so, the Applicant suggested in its papers and even in argument through Applicant's Counsel, that it was not open to the Respondent to today cite the basis of its claim as the initial purchase price of the motor vehicles in Nelspruit and Pretoria, Republic of South Africa respectively, considering that they were later given an option to either pay the 14% Sales Tax or export the motor vehicles, the latter being what the Applicant chose.

[29] The Respondent through its counsel Mr. Manzini was emphatic however that the letter had no effect because it could not have amounted to a waiver because the Respondent was a statutory organization. I was not cited any authority for this assertion nor did I find any during my preparation of this judgment.

[30] I am of the view, in the absence of any such authority that the position taken by the Respondent as expressed in the above cited paragraph of his letter of the 14th October 2011, amounted to what is called an election or waiver. This is because the letter indirectly advised the Applicant that if he exported the motor vehicles in question then the Respondent was not going to pursue or to insist on the Applicant paying what it considered to be 14% Sales Tax of the initial purchase price. I am supported in this view by the undisputed fact that after exporting the said cars to the Republic of South Africa for periods ranging from six months onwards the Respondent never bothered the Applicant about wanting it to pay the 14% Sales Tax, contrary to what Mr. Manzini

submitted the Respondent was still going to do at the time the motor vehicles were further brought into the country with an intention of paying the 14% Sales Tax.

[31] 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 position was fully discussed in the case of the ***Administrator, Orange Free State and Others v Mokopanele and another 1990 (3) SA 780***. Although the principle there was applied in a labour setting, there is no reason why, in my view, it cannot apply with similar force in a matter like the present.

[32] A summary of the facts in the matter was that an employer issued an ultimatum to some employees who were on an illegal strike or work stoppage for two days namely the 25th and 26th August 1987, and informed them to return to work by the 27th August failing which they would be dismissed. The Respondents were among those employees who heeded the ultimatum and returned to work. The Appellant as the employer however went on to dismiss the employees concerned for the work stoppage of the 25th and 26th August 2007. When the matter got to court, it found that having exercised an election or having decided to waive its right to dismiss the employees by giving them an ultimatum, with which they complied, it was no longer open to the Respondent to dismiss such employees if they had complied with the ultimatum given them, by him.

[33] The court put the position as follows at page 787 E – H of the ***Administrator Orange Free State v Makopanele (supra):-***

"*The ultimatum was, I think, a clear intimation to the strikers that if they returned to work on 27th August the Administrator would waive its right of dismissal. Waiver is a form of contract. See Roodepoort – Maraisburg Town Council v Eastern Properties (PTY) Ltd 1933 WLD 224 per Greenberg J at 226. Before a party can be held to have surrendered his right, he must know his right. Here there can be no doubt that Mr. Rossouw fully appreciated the administration's right to dismiss striking workers.*

The legal doctrine here involved may perhaps best be described as that of election. But in a situation such as this the exact nomenclature is less important than a recognition of the fundamental principle that a contracting party who has once approbated cannot thereafter reprobate. The position is elucidated by De Villiers JA in the Judgment of this court in Hlatjwayo v Mare and Deas 1912 AD 242. The point in issue in that case was whether a litigant had by his conduct acquiesced in a judgment and had thereby lost the right to appeal against it."

[34] By giving the Applicant an ultimatum (as that is how I interpret that letter) to pay the 14% Sales Tax or to export the motor vehicles, the Respondent who was then fully aware of his right to insist on being paid 14% Sales Tax, particularly as regards the Mercedes Benz, or even the BMW if say my conclusion on its being brought into Swaziland was to be found to be wrong, was waiving or was electing not to pursue its right.

[35] As observed in the same case a party who elects a certain position is not allowed to turn around and adopt a contrary one. Put differently a party cannot approbate and reprobate at the same time; or cannot blow hot and cold.

[36] I am therefore of the view that since the Respondent gave Applicant an option to either pay the 14% Sales Tax based on the initial purchase price or export the motor vehicles to which the Applicant chose the latter, it can no longer be open to the Respondent to insist on the 14% Sales Tax of the initially purchase price because I find it to have waived and or made an election on how that dispute was to be resolved. It cannot in my view insist on the 14% Sales Tax based on the initial purchase price as it clearly approbates and reprobates by so doing

[37] The question now is; does this decision to which I have come, mean that I accept the story by the Applicant, that he had sold back his car to the dealerships from whom the cars had been purchased in the first place and therefore by extension that he is entitled to insist on paying 14% of what he calls the new purchase price?

[38] My response is in the negative herein. There is no proof that the motor vehicles concerned which Applicant clarifies he has since or he now intends to reimport into the country, were ever sold back to the dealerships concerned, and thereafter repurchased at the amounts alleged.

[39] I have no doubt that if the Respondent do not accept that the motor vehicles concerned were purchased for the amounts disclosed, it should have a way of ascertaining what the proper value of the said motor vehicles is and then levying 14% of such value. I agree that it seems odd that the value of the vehicles would have deteriorated that much within so short a period.

[40] I am therefore of the considered view that if the parties cannot agree on what the value of the motor vehicles, is or was as at the time of their being imported into the country on the dates alleged in 2012, then the 14% Sales Tax has to be based on the one as shall be determined by an independent and objective valuer as appointed in terms of the law (if any so provides) or as agreed upon between the parties.

[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 its costs.

Delivered in open Court on this the ……day of December2012.

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N. J. HLOPHE

JUDGE