IN THE HIGH COURT OF SWAZILAND

Held at Mbabane   Case No. 1131/15

In the matter between:

TSEMBEKA BOBHUTI INVESTMENTS (PTY) LTD   **Applicant**

and

SWAZILAND REVENUE AUTHORITY   **Respondent**

Neutral citation: *Tsembeka Bobhuti Investments (PTY) LTD Vs Swaziland Revenue Authority (1131/15) 2015 SZHC140(21st August 2015)*

Coram: Hlophe J

For Plaintiff: Mr. M. Z. Mkhwanazi

For Defendants: Mr. N. Manzini

Date Heard: 30 July 2015

Date Handed Down: 21 August 2015

Summary

Application proceedings – Review proceedings – Respondent takes decision to cause Applicant's goods forfeited to the state for failure to pay amounts assessed to be due and owing for goods imported into the country including certain penalties – Applicant seeks to have decision reviewed and set aside – Grounds for review are an alleged irrationality and failure to consider relevant issues – Interdict also sought to prevent forfeiture of goods – Whether a case made for the review – Whether case made for an interdict – Case made for the review of the initial decision – This decision signals end of the matter and no need to determine whether to grant the interdict sought which in any event it was conceded a case for it had not been made – Application succeeds partly – Each party to bear its case therefore.

JUDGMENT

[1] The Applicant imported certain goods from China. To meet the requirements of the Respondent with regards the declaration of goods for the payment of customs and related duties; the Applicant filled in the declaration form stating that the goods in question, which it is common cause comprised bales of blankets, were imported from Hong Kong. The Applicant, in line with its declaration, paid a sum of E46000.00 as customs duties.

[2] It would appear that the Respondent went on to assess the declaration concerned and came to the conclusion that there had been falsity in the Applicant's declaration. In fact it found that the Applicant had intentionally omitted to specify the country of origin of the goods in its declaration in order to avoid the anti-dumping duties. This was because instead of declaring that the goods had been imported from China, the Applicant had declared in the relevant form that the goods in question had been imported from Hong Kong. The Applicant, it is alleged by so doing had made a false declaration. As a result of this alleged false declaration, a wrong code was implemented which meant that the duties collected were less than they would have been had a correct declaration been made. In fact goods imported from China, unlike those from Hong Kong, it is alleged, attract what is known as anti-dumping duties over and above the usual customs duties.

[3] Having found that the Applicant had made a false declaration, the Respondent demanded over and above the paid customs duties amounting to around E46000.00, payment of an assessed amount referred to as anti-dumping duties in the sum of E138 586.82 together with penalties for the alleged false declaration also in the sum of E138 586.82.

[4] I need to point out that there was no evidence led to determine whether the Applicant by so doing really intended to defraud the Respondent of the anti-dumping duties as opposed to it innocently committing an error in its said declaration. I say this because of what was said by the Respondent in its decision to impose the penalties it did against the Applicant for an alleged intentional omission to disclose or specify the country of origin for the goods, as captured in paragraph 3 of the Respondent's letter of the 8th April 2015, annexure C to the application, set out in full herein below. This problem becomes even more clearer when one juxtaposes the Respondent's version on the Applicant's declaration of the goods against that of the Applicant itself, which repeatedly states in various annexed correspondence or letters that it declared in the manner it did because of an innocent belief that China and Hong Kong were the same thing – the latter allegedly being a city in the former according to the Applicant. I must say at this stage it becomes difficult for one to appreciate how the Respondent was convinced, in the face of such a dispute, that the Applicant had intentionally omitted to disclose or specify the country of origin of the goods in question in order to avoid the payment of the anti-dumping duties in the absence of a hearing and even specific evidence in that regard.

[5] Otherwise the various engagements between the Applicant and the Respondent explaining how the declaration came about failed to move the latter to review its decision to charge penalties over and above the customs duties and the anti-dumping duties. These included ignoring representations by the Applicant that it did not falsely declared in the manner it did, but instead that it innocently and erroneously did so. This it said was a result of an erroneous belief by it that China and Hong Kong were the same thing or country; in fact as it puts it, it was of the view Hong Kong and China was "one thing". This belief it said, was compounded by the fact that the company it dealt with in the purchase of the goods had mentioned on its address Hong Kong.

[6] The upshot of the various engagements between the parties was an offer by the Applicant that it be allowed to pay the customs duties and the anti-dumping duties only and not the penalties for an alleged false declaration. The duties that Applicant offered to pay were meant to be paid in four equal monthly instalments. The Respondent declined the Applicant's offer concerned and insisted that the Applicant paid the amounts for the customs duties, anti-dumping duties and penalties in full and at once.

[7] At some stage after the Respondent had indicated that there was a need to pay not only what has often been referred to as customs duties fixed at E46000.00, but the anti-dumping duties and penalties as well, the goods concerned were seized or were placed under seizure even though they remained in the possession of the Applicant. In one of the correspondences exchanged between the parties, the Applicant was given a form to sign a certain acknowledgment whose effect it was said would be to divest the Applicant of the right to challenge the Respondent's decision in Court. The correspondence concerned, which the Applicant's counsel submitted was at the heart of this matter is annexure 'G' which was issued by the Respondent on its letter heads. Given that the said letter goes to the core of this matter, I have decided to reproduce it herein. It reads as follows:

> *"8th April, 2015*
> *The Director*
> *Tsembeka Bobhuti Investments (PTY) LTD*
> *t/a Reliable General Dealer*
> *P. O. Box 4223*
>
> *Dear Sir,*
>
> *Notice of Seizure SRA 10/6/502 – Ex-Notice of Embargo; REF SRA/CUS/H3 Dated 02 April 2015: 79 Bales of Blankets and 20 Loose Blankets*

I refer to your letter dated the 27th March 2015 in which you requested me to consider waiving the anti-dumping duty levied on the clearance of Eighty One (81) bales of blankets imported by you from China. I also refer to our subsequent meeting where it was agreed that a sample of one blanket should be pulled out for inspection and confirmation that the anti-dumping duty applies.

I have inspected the sample of the mink blanket submitted to this office for purposes of verifying the classification used in the declaration of the blankets. I have also reviewed literature defining the materials from which the mink blanket is made and confirm that it is a blanket classifiable under HS Code 6301.40 because it is made of Polyester which is a synthetic fibre. Accordingly the blankets attract a 30% rate of duty, anti-dumping duty at 2834C/kg and Vat at 14%.

I have further noted that you intentionally omitted to specify the country of origin in your declaration in order to avoid the anti-dumping duty. You have therefore committed an offence in terms of Section 13 (1), 38 as read with Section 86 (b) of the Customs and Excise Act, 1971 (hereinafter referred to as the "Act"). In terms of Section 87 (1) of the Act, the above mentioned goods are therefore liable to forfeiture.

This letter serves as a notice that the above stated goods are placed under seizure at your premises, (situated at Sandla, Mbabane) in terms of Section 88 (1) (c) of the Act. Accordingly they must be held at the above mentioned premises and should not

be moved, offered for sale, advertised for sale, sold, given away, exchanged or otherwise disposed of without my written authority.

I must bring your attention to the provisions of Section 89 of the Act under which you are required to give notice of your intention to claim the blankets. Should you fail to give such notice within 30 days of the date of this notice you will, thereafter, be precluded from instituting legal proceedings to make such a claim.

I must also bring to your attention the provisions of Section 91 of the Act under which I can summarily determine this matter provided you voluntarily elect to be bound by my decision. You need to know, however, that electing to avoid legal proceedings in this way means foregoing your right to challenge my decision in court".

[8] It shall be noted that the letter as annexed to the application looks incomplete as one cannot see on it, the ending and signature. There is however revealed and annexed as annexure "I", the acknowldgement referred to in the letter. It is couched as follows:-

"Acknowledgement of Receipt of Notice of Seizure

(Ref: SRA 10/6/502 dated 8th April 2015

I/We MAUSIM BHAGUBHAI (hand written) being the Director and the duly authorized signatory of Reliable Gen. Dealer (hand written) hereby acknowledge receipt of the above mentioned Notice of Seizure.

Further, I hereby elect to have the matter referred to in the said Notice of Seizure summarily determined by the Commissioner General of the Swaziland revenue Authority in terms of Section 91 of the Customs and Excise Act, 1971.

I understand the consequences of this election and confirm that I accept to be bound by the Commissioner General's decision.

Signed *(Signature)*
Date *(Date inserted as 14/04/2015)*

[9] Further to the acknowledgment referred to above, it was contended by the Respondent that the Applicant consented to the forfeiture of, and at times that its surrendered the goods concerned through certain letters exchanged between the parties such as annexures "SRA1", "P" and "Q". "SRA1" is a letter from the applicant dated the 21st May 2015 while annexure "P" is another letter again from the Applicant dated the 2nd June 2015. Annexure "Q" on the other hand is a letter from the Respondent dated the 16th June 2015.

[10] In annexure "SRA 1", the Applicant places on record its denial that it had intentionally omitted the country of origin of the goods in the declaration form and therefore denies being liable to pay the penalty determined by the Respondent. Applicant further negotiated to be allowed to pay the

customs duties and the anti-dumping duties but not the penalties. These it proposed to pay in instalments. It then said the following which, because of the Respondent's contentions in court that Applicant surrendered the goods to forfeiture. It is significant I quote the relevant paragraph verbatim:-

> *"Kindly note that if you are still of the view that we omitted to state the origin of the goods in our declaration and are therefore liable to pay the penalty of E138 586.82, you are at liberty to take whatever action you deem appropriate since we are not in a position to pay that money. In particular you may take the goods. Our rights however shall remain expressly reserved". (Underlining is mine).*

[11] In annexure "P" the Applicant once again denied liability for the penalty resulting from its alleged falsifying of the country of origin of the goods. It then said the following regarding the goods, which in my view goes to the heart of the question whether the goods were surrendered to forfeiture as alleged by the Respondent:-

> *"Since you insist that we did commit an offence and that you have lawfully attached the goods, please remove them from our premises and deal with them as you deem appropriate. We need the space occupied by the goods.*

Again we wish to make it clear that we do not concede that we committed any offence in relation to the goods, in fact we deny that we [b] reached any law in the importation of the goods. Whatever action you take therefore please note that our rights remain expressly reserved". (Emphasis are mine)

[12] By means of annexure "Q", dated the 16th June 2015, the Respondent after clarifying certain misconceptions raised per the Applicant's correspondence under reply, had the following to say with regards Applicant's alleged concession that the goods be removed from it or that it was allowing them to be forfeited to the state:-

> *"I have accepted your decision to surrender the consignment to the state because you cannot afford to pay the amount of duties and taxes levied on them. Under the circumstances I have no alternative but to render the goods forfeited to the State in terms of Section 87 (1) of the Act. The goods will thereafter be removed from your premises to the state warehouse and will be disposed in terms of Section 90 of the Act". (Emphasis are mine).*

[13] In this annexure one sees how the Respondent concludes or comes to the conclusion that the Applicant had, in terms of annexure "SRA1" and "P" surrendered the goods to forfeiture or that Applicant had consented to their removal. It should now be clear whether in reality the facts as set out above do support that and whether therefore the Respondent's conclusion can realistically be said to be rational.

[14] It was further contended by the Respondent that the application was ill-conceived because the Applicant had accepted to pay the duties it was found to be owing together with the penalties when considering what it had said in one of the letters. In fact in a letter dated the 7th July 2015 annexure "R", the Applicant wrote to the Respondent in response to annexure "Q" and said the following which is relevant to the enquiry whether Applicant had realistically accepted to pay the customs duties, the anti-dumping duties and the penalties in law. The Applicant expressed itself in the following words in the said letter:-

> *"Further to your letter of the 16th June 2015, we wish to inform you that we have since decided to pay the duty and penalties on the goods.*
>
> *However, we can only afford to pay this amount in instalments of E20 000.00 (Twenty Thousand Emalangeni) per month. We are paying these charges on a purely without prejudice basics (sic) and without admitting liability for the penalties". (Underlining is mine).*

[15] The Respondent responded to this letter by that of the 15th July, in which it rejected the proposal made by the Applicant to pay the duties and penalties in instalments of E20 000.00 per month, claiming to be having no resources with which to manage payments over lengthy periods. Of significance is the following paragraphs from the said letter:-

"You will agree with me that the matter cannot be allowed to drag on indefinitely and all your suggestions towards finalizing this matter were given consideration. However you have insisted in not paying the debt and this has been accepted and the goods were declared forfeited to the state in terms of Section 87 (1) of the Customs and Excise Act".

I am not prepared to withdraw the forfeiture of these goods as adequate time and possible options were availed to you but you refused to conform. Please note that no further negotiations can be entertained and the goods should be surrendered to the State warehouse".

[16] Whereas the Respondent contends that the Applicant cannot bring these proceedings because it accepted its seizure of the goods, including giving it the right to determine the matter, as well as that it surrendered the goods to be forfeited to the state and even conceded to pay the penalties imposed over and above the customs duties and the anti-dumping duties which is said to be confirmed by the above cited letters annexed to the papers before court, I must say I cannot agree. My reading of the letters referred to in the foregoing paragraphs does not support what is said by the Respondent.

[17] As concerns the acknowledgment referred to, the only thing clear from the papers themselves is that the applicant acknowledged receipt of the letter confirming the seizure of the goods or declaring the goods seized and nothing more. It is otherwise unclear and there is neither allegation nor evidence supporting what the Applicant says in the acknowledgment concerned. What dispute it is that was to be determined by the Respondent so as to result in Applicant not being able to challenge the decision of the Respondent in court is totally unclear. My reading of the letter in question as well as Section 91 of the Customs and Excise Act has not assisted in shedding light in this regard.

[18] It seems to me that for the said document (the acknowledgment) to be construed in the manner suggested by the Respondent, that is, that it amounts to a waiver of certain rights, then that document must unequivocally speak for itself and must be clear on what these rights which are being waived are. In other words a waiver of rights should be unequivocal on what rights it waives for it to have such an effect. I cannot say that the acknowledgement signed by the Applicant in this matter meets that standard.

[19] Mr. Mkhwanazi for the Applicant attacked the acknowledgment in question differently. He contended that it was of no force or effect because for it to have such an effect, it should have met all the requirements of Section 91 of Act 21 of 1971. He submitted that, the alleged acknowledgment did not comply particularly with Section 91 (b) and (c) in so far as the Applicant was not caused to deposit a sum of money not exceeding a maximum fine as may be imposed upon conviction of the Applicant nor were any arrangements to secure the payment of such amounts as the commissioner may direct, made.

[20] It is even arguable in the circumstances if the Applicant admitted to having contravened any provisions of the Act given that it appears to have maintained throughout the correspondence exchanged between the parties that it did not violate any provisions of the Act because it took Hong Kong and China to be "one thing" or one country at the time it declared which would suggest an error which I have no hesitation is different from a party who deliberately and intentionally declares China to be the same thing as Hong Kong in order to benefit therefrom. It was therefore in my view never established if the Applicant had deliberately and or intentionally declared China to be Hong Kong in order to benefit which would then attract the application of Section 91 as well as the penalties referred to. It could be that there was a strong suspicion by the

Respondent that the Applicant had intentionally declared in the said manner in order to avoid paying the anti-dumping dues but a suspicion cannot be enough. It actually does not even seem to be the only reasonable inference to draw from the said facts in my view. I therefore agree with Mr. Mkhwanazi that the acknowledgment concerned does not meet the requirements of Section 91 of the Act and that the acknowledgment in question is not unequivocal.

[21] On the contention that the Applicant surrendered the goods and or conceded to their forfeiture as recorded in annexures “SRA1”, “P” and “Q”, it is difficult for this court to agree with the Respondent’s interpretation of the excerpts referred to above particularly that they amounted to the surrender of the goods to forfeiture as alleged. I am convinced that the alleged surrender by the Applicant was no surrender at all. It was clearly not unequivocal or unconditional. No sooner would the Applicant use phrases like “since you insist that we have committed an offence and that you have lawfully attached the goods” then the goods may be removed, than it turned around to say as that is done it should be borne in mind that “its rights were being reserved”, which is clearly not consistent with an exercise of volition. A surrender of goods in such a way that they are being forfeited to the state should in my view and in this context be voluntary.

[22] Given such epithets as those suggesting that the Applicant doubts that the Respondent was entitled to remove the goods together with those reserving Applicant’s rights on the said exercise, it seems to me to have been preposterous for the Respondent to have concluded in the manner stated in annexure “Q”, as contained in the extract referred to above at paragraph 12, that Applicant had surrendered the goods.

[23] This tends to confirm that the forfeiture of the goods to the state was based on a wrong conclusion or interpretation or inference that the Applicant had surrendered its goods to be forfeited to the state, when in reality all it had said was that if the Respondent believed it was entitled to what it said it was, it could go ahead and remove the goods. I have no hesitation that since this is the reason for the declaration of the goods as having been forfeited, this renders the decision of the Respondent reviewable on this point alone, particularly on the grounds of lack of rationality. In other words since the Applicant concluded that the Applicant was surrendering it’s goods to forfeiture in circumstances where it had realistically not done so, then, that conclusion is not supported by the facts and was therefore not rational which entitles this court to review same and set it aside.

[24] It was argued as well that this Applicant's application cannot succeed because it had accepted the Respondent's decision and had undertaken to pay all the duties and penalties. This it was argued could be seen from annexure "R" to the application in which as quoted in the foregoing paragraphs. It cannot be said in my view that the Applicant stated unequivocally that it was prepared to pay the duties and penalties. Mr. Mkhwanzi pointed out in his response that the Respondent's argument in this regard was a result of reading the first paragraph of the letter concerned in isolation because the second paragraph was very clear that it was an offer made in negotiations and was qualified by the assertion that same was done or made on a without prejudice basis.

[25] Having read the document in question closely I agree with Mr. Mkhwanazi that the offer to pay the "duties and penalties" was clearly a negotiation measure and was qualified in the letter's second paragraph where it was stated that same was done on a "without prejudice" basis. It is now a settled principle of our law that contents of letters prompted by genuine negotiations between parties cannot be held against each other particularly where same are qualified with the words "Without Prejudice". In their book, **The South African Law of Evidence, Hoffman and Zeffert, the 4th Edition Butterworths**, had the following to say at page 196-197 which is apposite:

> *"The words "without prejudice" mean without prejudice to the rights of the person making the offer if it should be refused, but this condition carries with it the consequence that the offer cannot subsequently be relied upon as a tender…The exclusion of statements made without prejudice is based upon the tacit consent of the parties and the public policy allowing people to try to settle their disputes without the fear that what they have said will be held against them if the negotiations should break down.*
>
> *There is no particular magic in the use of the words "Without Prejudice" as introduction to a statement or as a heading to a letter. If the statement forms part of genuine negotiations for the compromise of a dispute it will be "privileged" even if the words have not been used".*

[26] I am therefore convinced that what Applicant said at paragraph 1 of annexure "R" cannot be held against it as that was clearly said in negotiations to settle an outstanding dispute between the parties. Contrary to what the Respondent said in this regard I am convinced the application cannot fail on this point.

[27] There is in my view a more fundamental reason why the review of the Respondent's decision causing the goods to be forfeited to the state should succeed. The genesis of the dispute between the Applicant and the Respondent in this matter is the decision of the Respondent as

expressed in the letter of 8th April 2015, annexure "G" to the application, which is the letter quoted *in extenso* in paragraph 7 herein-above, particularly where the Respondent found that the applicant had "intentionally omitted to specify the country of origin in your declaration in order to avoid the anti-dumping duty" which no doubt formed the basis for the penalty which has obviously caused so much disagreement between the parties herein and is at the heart of these proceedings considering the correspondence exchanged between them.

[28] The problem with this decision is that it was reached without the Applicant having been heard on why he had declared that the country of origin for the goods was Hong Kong instead of China and therefore that he had by so doing omitted to disclose the country of origin. In my view the Respondent's approach in this regard was a violation of the right of a party to be heard prior to a prejudicial decision to his rights was reached. The right to be heard, also referred to as the *Audi Alteram Parterm,* is a fundamental one both at common law and under the constitution of this country.

[29] In ***Administrator Transvaal vs Traub 1989 (4) SA 731 (A)*** the common law position was expressed as follows:-

> *"…when a statute empowers a public official or body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter has a right to be heard before the decision is taken…unless the statute expressly or by necessary interpretation indicates the contrary".*

[30] It cannot be gainsaid that the decision taken by the Respondent in this matter that the Applicant had not declared the goods as coming from China in furtherance of a design to avoid paying anti-dumping duties, and was therefore required to pay penalties over and above the payment of all the duties was one prejudicial to the Applicant. I cannot say that the statute provides for the contrary to a hearing be it expressly or by necessary interpretation. It follows in my view that the Applicant should therefore have been heard before the said decision was reached.

[31] Section 33 of our Constitution confirms this approach as it creates or emphasizes the duty on offices or bodies exercising quasi-judicial power to hear any person affected by an administration decision. The local case of ***Sikhatsi Dlamini and Others Vs The Minister of Housing and Development*** is authority for this principle.

[32] The situation is complicated more against the Respondent in this matter by the conclusion it reached without having called for evidence to be led because it presumed that the Applicant had intentionally decided to declare the goods as coming from China in order to avoid paying the anti-dumping duties. I have already stated that there was no evidence to support such a finding before the Respondent. This I say because the Respondent seems to have, without any material to base this conclusion on, been convinced that the Applicant had omitted to disclose the country of origin of the goods in order to avoid paying the anti-dumping duties.

[33] When it got to hear of this decision the Applicant raised a very serious dispute which it is very hard if not impossible in my view, for the Respondent to resolve as it contends that to it China and Hong Kong, where the company that sold it the goods was based, are one and the same thing the latter being allegedly a city of the former. To confirm that it may have been innocent in declaring in the manner it did, whereas the declaration form reflected Hong Kong as the country of origin of the goods, the invoice accompanying it reflected that the goods were transported to this country from the Port of Ningbo in China. The question becomes that if there is a possibility that Applicant's story is true (on having innocently and erroneously declared) that the goods were from Hong Kong, can a prejudicial decision that it had declared in the

manner it had in order to avoid the payment of anti-dumping duties be reached. In fact if it was to be inferred from the facts, was that the only reasonable inference to reach, from the facts. Such a decision could not in my view be made lightly and had to have evidential material supporting it in order for it to be made or it must be the only reasonable inference to be drawn from the set of facts.

[34] It was therefore irregular for the Respondent to conclude as it did without material information supporting its decision or even without such a decision being the only one that could be drawn from the facts. Such an irregularity would in my view, justify this court in reviewing and setting aside the decision of the Respondent. Such a decision would not however signal the end of a matter like this one when considering whether or not it would be sufficient to set aside such a decision and refer the matter back to the Respondent or it is such a matter as the one in which this court is itself required to make appropriate decision so as to substitute that of the administrative body such as the Respondent herein.

[35] Our law is settled that whereas the general rule is that after reviewing the decision of an earlier body or official, this court should revert the matter to the body or official whose decision was being reviewed, there are instances in befitting cases, where the reviewing court can or should

make the appropriate decision itself after reviewing and setting aside that of the entity being reviewed. This court would, as the reviewing legal structure, be entitled to do so in those instances among others where the end result is a foregone conclusion and reference of the matter to the administrative body or official exercising administrative power will only be a waste of time or when there are cogent reasons why the court should exercise its discretion in favour of the Applicant and substitute the decision of the Respondent with that of its own. See in this regard **Herbestein and Van Winsen's The civil Practice of the Supreme Court of South Africa, 4th Edition, Juta and Company at page 959**.

[36] I am convinced that in the present matter, there is no need for me to refer the matter back to the Respondent because I have fully investigated all the facts which were placed before me and I am convinced there are cogent reasons for me to make the order I should make. Besides this I am convinced that in this matter there is only one decision to give which means that referring it back would be tantamount to a waste of time. I will therefore have to substitute my decision for that of the Respondent.

[37] Before pronouncing the order I need to make herein, I must make the following observations which will have to affect or shape the decision I am required to make herein. It is clear that the Applicant should have

declared that the goods in question were imported from China instead of Hong Kong. It is not in dispute that China and Hong Kong attract different duties. For instance it is, at least according to the papers, not in dispute that goods from China attract what are known as anti-dumping duties over and above the normal customs duties, which is not the same thing with those from Hong Kong.

[38] I noted during the hearing of the matter that Mr. Mkhwanazi for the Applicant tried to argue that there was no proof in the form of a Government Gazette that indeed goods from china attracted anti-dumping duties unlike those from Hong Kong including that even if they did, there was no evidence of the specific nature or category of the anti-dumping duties it attracted as the Act enumerates various such Categories of duties. I found that the case advanced by Mr. Mkhwanazi in argument was not the one that had been pleaded on behalf of the Applicant, so as to enable the other side appreciate fully the case it was to meet. The situation I must say was further complicated by the fact that the matter had been enrolled as an urgent application in which Mr. Mkhwanazi for the Applicant had failed to file his client's Replying Affidavit and Heads of Argument in line with the directive given by this court when the hearing date and time limits for filing were allocated. This means that the case prepared for and expected to be met by the other side was different

from the one he tried to advance in court. The parties were thus directed to deal with the case as initially pleaded and as prepared for.

[39] It is now clear that with the goods having been imported from China which attracts anti-dumping duties, there is no gainsaying that the Applicant should pay the anti-dumping duties over and above what has been referred to as normal or customs duties.

[40] It transpired during the hearing of the matter that the penalties were imposed as a punishment for the Applicant's having allegedly falsified its declaration in order to avoid paying the anti-dumping duties. I have found that that decision cannot stand because it was reached without the Applicant having been heard and without evidence proving same having been adduced, which in my view was a sign of irrationality. I also have no doubt the decision reached by the Respondent was not the only reasonable one to infer from the facts. If that decision could not stand, it follows that the penalties as well cannot stand. This means that the Applicant's application succeeds to the extent that the decision of the Respondent resulting in the imposition of the penalties concerned has to be set aside.

[41] Although the Applicant had sought certain interdicts and an order that the amounts paid as customs duties be refunded it, such reliefs cannot be granted because the Applicant's counsel conceded as much that they could not be sustained on the basis of the material before me.

[42] As a result, and on the basis of the foregoing considerations, I make the following order:-

[42.1] The decision of the Respondent causing the Applicant's goods to be forfeited to the State as well as imposing penalties against the Applicant be and is hereby reviewed, corrected and set aside.

[42.2] The Applicant be and is hereby ordered to pay to the Respondent the anti-dumping duties as determined by the Respondent to be owing and due in the papers over and above the customs duties in the sum of E46 000.00 already paid.

[42.3] This being a matter of a partial success and partial loss to the parties, each party is to bear its costs.

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N. J. HLOPHE
JUDGE - HIGH COURT