

REPUBLIC OF SOUTH AFRICA

***IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA***

Reportable

Case number: 265/2000

In the matter between:

SAMCOR (MANUFACTURING) (PTY) LTD

Appellant

and

**THE COMMISSIONER FOR THE SOUTH
AFRICAN REVENUE SERVICE**

Respondent

CORAM: **HOWIE, MPATI JJA and HEHER AJA**

HEARD: **18 FEBRUARY 2002**

DELIVERED: **27 MARCH 2002**

**Determination under s 65 of Customs and Excise Act; Commissioner requested to amend;
whether restatement of the determination a new determination and appealable.**

JUDGMENT

MPATI JA:

[1] The Customs and Excise Act 91 of 1964 (the Act) provides, *inter alia*, for the levying of customs duty on goods that are imported into the Republic. The amount of duty to be paid depends mainly upon the value of the goods so imported. Section 65 (1) of the Act reads as follows:

“Subject to the provisions of this Act, the value for customs duty purposes of any imported goods shall, at the time of entry for home consumption, be the transaction value thereof, within the meaning of section 66.”

In terms of s 66 (1) the transaction value of any imported goods “shall be the price actually paid or payable for the goods when sold for export to the Republic, adjusted in terms of section 67”.

[2] This appeal concerns adjustments to the “price actually paid or payable” to an exporter in respect of imported goods as sanctioned by s 67 of the Act. Section 67(1)(c) is in the following terms:

“In ascertaining the transaction value of any imported goods in terms of s 66(1), there shall be added to the price actually paid or payable for the goods-

(a) ...

(b) ...

(c) royalties and licence fees in respect of the imported goods, including payments for patents, trade marks and copyright and for the right to distribute or resell the goods, due by the buyer, directly or indirectly, as a condition of sale of the goods for export to the Republic, to the extent that such royalties and fees are not included in the price actually paid or payable, but excluding charges for the right to reproduce the imported goods in the Republic.”

[3] The appellant unsuccessfully applied before Smit J in the Transvaal Provincial Division for an order declaring the fees and royalties paid or payable by the appellant to two Japanese motor vehicle companies in terms of certain agreements not dutiable in terms of s 67 (1) (c) of the Act, and setting aside a determination said to have been made by the respondent on 9 September 1997 to the effect that in ascertaining the transaction value of the relevant goods the said fees and royalties were to be added to

the price actually paid or payable. An application for leave to appeal was dismissed by Smit J but granted by this Court.

[4] The Samcor Group of Companies (Samcor), of which the appellant forms part, imports, assembles, manufactures, markets, sells and exports motor vehicles, motor vehicle parts and accessories. The appellant is the manufacturing arm of Samcor and manufactures Mazda and Ford motor vehicles from component parts which it imports from Japan together with other components parts sourced locally or elsewhere.

[5] The history of Samcor is the following: Ford Motor Company of SA Limited was incorporated on 29 December 1923. On 11 December 1980 it changed its name to Ford Motor Company of South Africa (Pty) Limited and operated under that name until 1985. Another motor vehicle company, Chrysler (SA) Pty Limited, was incorporated on 16 January 1959 and on 12 November 1976 changed its name to Sigma Motor Corporation (Proprietary) Limited (Sigma). On 1 September 1984 Sigma

changed its name to Amcor Motor Holdings (Proprietary) Limited. On 7 March 1985 the business operations of Amcor Motor Holdings (Pty) Ltd and Ford Motor Company of SA (Pty) Ltd were amalgamated and rationalised under a holding company, South African Motor Corporation (Pty) Ltd (Samcor). The manufacturing operations were taken over by Ford Motor Company of SA (Pty) Ltd, which thereafter changed its name on a further three occasions. It is presently registered as Samcor (Manufacturing) (Pty) Limited. That is the appellant. The marketing operations of Samcor were taken over by Amcor Motor Holdings (Pty) Ltd, which changed its name twice and is presently known as Samcor (Marketing) (Pty) Ltd.

[6] During 1977 Sigma took over a franchise agreement which another South African Company, Illings (Pty) Ltd, had with a Japanese company, Toyo Kogyo Co, Ltd, now known as Mazda Motor Corporation (Mazda).

[7] On 8 May 1979 Sigma concluded three related agreements with a Japanese

motor company, Mitsubishi Motor Corporation (Mitsubishi), viz a Manufacturing and Patent Licence and Technical Assistance Agreement, a Distribution and Supply Agreement and a Trade Mark Licence Agreement. In terms of the first-mentioned agreement Mitsubishi, *inter alia*, granted Sigma the exclusive licence to assemble and progressively manufacture in the Republic, for resale in the Republic and neighbouring territories under the Distribution and Supply Agreement, Mitsubishi Motor products, purchased from it in “Knocked Down” (unassembled) condition. Sigma was entitled to manufacture or purchase locally, component parts, referred to as “omissions”, which it used with the Knocked Down component parts to assemble or manufacture a complete motor vehicle. It would also be furnished with technical assistance and other benefits in consideration of which it agreed to pay to Mitsubishi,

“an amount of money as a fee determined for each and every MMC [Mitsubishi Motor Corporation] motor product and omission assembled and/or manufactured by or for Sigma as follows:”

The agreement then dealt with the manner of calculation of such fees. The Trade Mark Licence Agreement is not relevant for present purposes.

[8] On 31 October 1979 Sigma entered into three related agreements with two other Japanese motor companies, Mazda and C.Itoh & Co, Ltd (Itoh), viz a Technical Assistance Agreement, a Memorandum Agreement and a Distributorship Agreement for Mazda CKD Vehicles. In terms of the Technical Assistance Agreement Mazda, *inter alia*, granted Sigma “the exclusive licence to assemble and/or manufacture in Territory”, being the Republic and certain neighbouring States, certain Mazda motor vehicles as “CKD vehicles”. “CKD” stands for “Completely Knocked Down” and “CKD vehicles” was defined as

“the motor vehicles planned and designed by [Mazda] and assembled and/or manufactured by [Sigma] in Territory under the rights and technical assistance herein granted ...”.

The component parts supplied by Mazda for the assembly or manufacture of CKD vehicles came in the form of a kit known as a CKD kit, which did not contain all the component parts necessary for the assembly or manufacture of a complete vehicle.

Omissions were used with the component parts in the CKD kit in the assembly or manufacture of a completely built up vehicle. The exclusive right to import Mazda component parts, spare parts and accessories and for the resale and distribution of the CKD motor vehicles, spare parts and accessories was granted to Sigma in terms of the Distributorship Agreement.

[9] A Technical Assistance Agreement also provided for the use, by Sigma, of Mazda's intellectual property such as patent, trade mark and utility model design rights pertaining to the CKD vehicles. Mazda also undertook to furnish Sigma with technical assistance which included the making available of technical information and other data necessary for the assembly or manufacture of the CKD vehicles.

[10] In terms of article 19 of the Technical Assistance Agreement Sigma, in consideration of the licence granted to it by Mazda, would pay Mazda royalties calculated as a factor of 1.15% of the FOB (Free on Board) Japan price of “one set of all component parts necessary for one unit of completely built up vehicle corresponding to CKD vehicle except tyres, tubes, batteries and paint”. It will be noted that although Mazda did not supply Sigma with a full set of all the component parts necessary for one unit of completely built up vehicle, the royalty was calculated on the price of a full kit.

[11] Pursuant to these agreements Sigma embarked upon the assembly and manufacture of Mitsubishi and Mazda motor products, marketing and selling them. The agreements have been replaced over the years by virtually identical agreements between the Japanese companies and, after amalgamation and restructuring referred to in par 5 above, the relevant Samcor companies.

[12] During 1983 the respondent requested Sigma to furnish him with the amounts of its annual royalty payments as well as its “free on board” imports during the 1982 financial year. On 10 November 1983 the respondent dispatched a letter to Sigma, the first two paragraphs of which read as follows:

“VALUE FOR CUSTOMS PURPOSES OF GOODS SUPPLIED BY
MITSUBISHI MOTOR CORPORATION LTD. JAPAN.

With reference to your letter NR/JM of 3 October 1983 and the information supplied on form DA 55 you are informed that transactions between you and the above-named supplier are, from a customs viewpoint, not regarded as open market transactions. His prices to you cannot, therefore, be accepted as a basis for the value for customs purposes and must be uplifted by an average of 1%. This figure has been arrived at by using Customs Valuation Method 1 provided for in Section 66(1) of the Customs and Excise Act, 1964, and by adding the royalties provided for in Section 67(1)(c).

In calculating the value for customs purposes uplifts must be applied to prices after they have been adjusted to a free on board basis, i.e. after freight and insurance have been deducted in the case of CIF invoices. The costs, charges and expenses provided for in Section 67 of the Act

must be added after the uplift has been applied.”

A similar letter dated the previous day was written to Sigma in relation to goods supplied by Toyo Kogyo Co Ltd (now Mazda).

[13] It is common cause that the notifications of 9 and 10 November 1983 to Sigma constituted a determination, in terms of s 65(4) of the Act, of the transaction value of the goods respectively imported from Mitsubishi and Mazda. For convenience I shall refer to both determinations as the value determination of 9 November 1983. Section 65(4)(a), as it read prior to its substitution by s 59(a) of Act 53 of 1999, provided that:

“If the transaction value of any imported goods cannot be ascertained in terms of section 66 or has been incorrectly ascertained by the importer, the Commissioner may determine a value, which shall, subject to a right of appeal to the court, be deemed to be the value for customs duty purposes of the goods.”

Such determination may be amended or withdrawn by the commissioner, who may issue another determination in its stead in terms of s 65(5) of the Act. A determination

by the commissioner may be appealed against in terms of s 65(6) of the Act, which

reads:

“(a) An appeal against any such determination shall lie to the division of the High Court of South Africa having jurisdiction to hear appeals in the area wherein the determination was made, or the goods in question were entered for home consumption.

(b) Such appeal shall, subject to section 96(1), be prosecuted within a period of one year from the date of the determination.”

Sigma did not appeal against the determination of 9 November 1983.

[14] In 1983 a local content programme was in operation, which was one of various incentive schemes introduced by the Government over the years in an endeavour to encourage a South African motor industry, especially the use of local content in motor vehicles, parts and accessories and the concomitant reduction in foreign exchange expenditure. In terms of the programme motor vehicle manufacturers were entitled to a rebate of the excise duty payable on locally manufactured motor vehicles and

component parts. It is alleged in the founding affidavit that:

“In the circumstances the imposition by the Respondent of the 1% uplift was of little or no practical significance to Sigma since it applied only to occasional imports of specified items from Mitsubishi. Any appeal against the Respondent’s aforesaid directives would therefore have been of purely academic interest.”

The 1% uplift has been imposed in respect of all subsequent Manufacturing and Patent Licence and Technical Agreements and Technical Assistance Agreements between Samcor on the one hand and Mitsubishi and Mazda respectively on the other.

[15] Between June 1989 and May 1991 certain legislative developments took place in the country pertaining to the calculation of excise duty payable on imported motor vehicle parts. It is not necessary to detail them for present purposes. Suffice it to say that because of an error he had made in regard to the calculation of duty after an amendment to legislation introduced on 30 May 1991, the respondent, on 12 June 1996 and after he had been approached by an accounting and auditing firm on behalf of a

number of local motor manufacturers , gave a ruling in terms of which manufacturers were allowed to claim back duty which they had paid as a result of such error retrospectively from the date of the amendment. The respondent expressly excluded the fees and royalties paid to Mitsubishi and Mazda by the appellant from the benefit of the ruling.

[16] On 27 June 1996 the same auditing firm made representations to the respondent on behalf of the appellant, requesting the respondent to make a determination in respect of the royalty payments to Mazda. On 10 July 1996 similar representations were made in respect of the fees payable to Mitsubishi. It was stated in the representations that the appellant believed that the royalties and fees were not dutiable as they did not relate to any imported goods.

[17] After further correspondence between him and the appellant's representatives, the respondent eventually replied on 9 September 1997, in the following terms:

“SAMCOR MANUFACTURING (PTY) LTD : DUTIABILITY OF
ROYALTY PAYMENTS

Your representations regarding the abovementioned matter dated 13 June 1997 and 2 September 1997 refer.

After due consideration of the submissions on behalf of Samcor, the view is held that the provisions of section 67(1)(c) of the Customs and Excise Act, 1964, are applicable to the royalties and fees provided for in the relevant agreement and that the said royalties and fees must be added to the price actually paid or payable in ascertaining the transaction value of the relevant goods.”

A request for reasons for his view that the provisions of s 67(1)(c) were applicable to the royalties and fees in issue in ascertaining the transaction value of the imported goods drew no response from the respondent. The appellant, in line with advices it received before the respondent’s reply of 9 September 1997, then launched an application to the Transvaal Provincial Division for rectification of the clauses in the agreements which provided for the royalty payments and fees in issue. However, the

appellant withdrew the application when the respondent filed opposing papers. The reason for the withdrawal is stated in the founding affidavit as follows:

“38. In view of the Respondent’s unanticipated action in opposing the application and the fact that in terms of Section 65(6) [of the Act] the appeal against the determination in question had to be prosecuted within a year from the date of the determination viz by 8 September 1998, and as the Respondent was well aware, it would be pointless to pursue the application.”

Consequently the proceedings in the court *a quo* were instituted, which Martha Woolard, Samcor’s public officer, described in the founding affidavit as “an appeal in terms of sub-section 65(6) read with section 96(1) of the Customs and Excise Act 91 of 1964 ... against the determination by the Respondent on 9 September 1997 that fees and royalties paid or payable to two Japanese companies [Mitsubishi and Mazda] ... were dutiable in terms of section 67(1)(c) of the said Act”.

[18] Three defences were raised by the respondent before the court *a quo* apart from

contesting the merits of the matter. Two of those defences were repeated in the respondent's heads of argument in this Court. They are (1) that the respondent's letter of 9 September 1997 did not constitute a value determination in terms of s 65 of the Act, but was merely to the effect that the respondent stood by his value determination of 9 November 1983 and that the contents of the letter of 9 September 1997, therefore, are not susceptible of an appeal in terms of s 65(6) of the Act; and (2) that the purpose of the appeal was to enable the appellant to claim a refund of duties paid in respect of the period ending 31 August 1995; that such claim had in any event prescribed and that the relief sought would be purely of academic interest, were it to be granted. Smit J found it unnecessary to deal with these additional defences, having decided the matter in favour of the respondent on the merits. In this Court counsel for the respondent did not persist in the second defence.

[19] In giving judgment the court *a quo* said:

“On analysing the clauses of the agreement ... it is clear in my view, that the payment of royalties is inextricably linked to parts and components supplied to Samcor. It is also clear that the legislator, by inserting the words ‘directly or indirectly’ in section 67(1)(c) of the Act, intended to include not only royalties for which direct provision is made in an agreement but also to include royalties which in an indirect manner fall to be classified as being due as a condition of sale of the goods for export.”

The court *a quo* accordingly held that “the wording of the agreement clearly indicates that the royalties were at least indirectly due as a condition of sale” of the goods.

[20] Counsel for the appellant attacked the learned judge’s reasoning firstly on the basis that the words “directly or indirectly” in s 67(1)(c) of the Act do not qualify the words “as a condition of sale”, but rather the words “due by the buyer”. Secondly, counsel submitted that not only must the royalties and fees be due directly or indirectly by the buyer “as a condition of sale” to qualify to be added to the price actually paid or payable for the goods, but they must also be paid or payable “in respect of the goods”.

These are two distinct and separate requirements, so counsel argued. Counsel for the

respondent conceded, correctly so in my view, that this is indeed the position. The appellant's counsel further argued that for the royalties and fees in question to be due by the buyer "as a condition of sale", it must appear from the relevant agreement or agreements or otherwise that the seller would not sell the imported goods to the buyer unless the buyer undertook to pay such royalties and fees. Again counsel for respondent accepted this as the correct test.

[21] In the view I take of the matter it is not necessary to deal with these pertinent issues raised by counsel. Suffice it to say that it does not seem to me, at least from a reading of the agreements, that the fees and royalties were paid or payable "in respect of the goods". However, I express no firm view on the point.

[22] In this Court counsel for the appellant, in an attempt to counter the submissions on behalf of the respondent that the respondent's letter of 9 September 1997 was not a determination and thus not susceptible of an appeal in terms of s 65(6) of the Act,

commenced his argument by saying that the proceedings before the court *a quo* were not an appeal, but rather an application for a declarator that the royalties and fees do not fall within the ambit of s 67(1)(c) of the Act and therefore do not fall to be added to the price actually paid for the imported goods in ascertaining the value of the goods for customs duty purposes in terms of s 66(1).

[23] Although the appellant sought an order “declaring” the fees and royalties in issue not to have been dutiable in terms of s 67(1)(c) of the Act, the notice of motion commences by giving notice that appellant “intends to appeal and make application to this Court” for that order. It is then alleged in the founding affidavit:

“The present application is an appeal in terms of sub-section 65(6) read with section 96(1) of the Customs and Excise Act 91 of 1964 ... against the determination by the Respondent on 9 September 1997 that fees and royalties paid and payable to two Japanese Companies [Mitsubishi and Mazda] in terms of various agreements with those corporations were dutiable in terms of section 67(1)(c) of the said Act.”

Section 96(1) provides that no legal proceedings shall be instituted against, amongst others, the commissioner “for anything done in pursuance of” the Act “until one month after delivery of a notice in writing setting forth clearly and explicitly the cause of action” and other information. It is stated in the founding affidavit that due notice “of the appellant’s intention of prosecuting this appeal was given to the respondent on 7 August 1998 in terms of sub-section 96(1) of the Act”.

[24] In spite of these and other clear *indicia* that what was contemplated in the proceedings in the court *a quo* was an appeal in terms of s 65(6) of the Act, counsel for the appellant submitted that a statement in the founding affidavit that this “is an appeal” could not turn what is not an appeal into an appeal. In response to the respondent’s submission that the peremptory notice required by s 96(1) was lacking in respect of an application for a declarator, counsel for the appellant argued that the declarator was sought on the basis of a dispute between the commissioner and the

importer. The proceedings were thus not for anything done in pursuance of the Act and consequently no notice was required. Further, the question had to be asked whether the commissioner would have conducted the matter differently had such notice been given.

[25] In my view, and as counsel for the respondent pointed out, the entire proceedings were premised on the alleged value determination of 9 September 1997, and it is clear that that is the basis upon which the matter was conducted before the court *a quo*. This is evident from the judgement of Smit J, which commences with the words:

“This is an appeal in terms of the provisions of section 65(6) of the Customs and Excise Act 91 of 1964 ... by the appellant”

His order reads:

“The appeal is dismissed with costs.”

[26] This issue (that the proceedings before the court *a quo* were no appeal but in fact an application for a declarator) was not raised before the court *a quo*, nor in the papers. It was raised for the first time during argument in this Court. The fact that the order sought in the notice of motion includes a declaratory order does not change the position. What was before the court *a quo* was in substance an appeal in terms of s 65(6) of the Act.

[27] As to the question whether the respondent would have conducted the matter differently had a notice in terms of s 96(1) of the Act been given, an analogy may be drawn, in my view, from a judgment of this Court in *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) at 53 B-C, a case dealing, *inter alia*, with an amendment which was sought to be introduced at appeal stage. Nienaber JA said that one of the reasons why the amendment should not be granted was that “one cannot be confident that, if pleaded initially, it (the amendment) would not have had some bearing on the course of

the trial – in the sense of relevant matter not being explored in cross-examination nor led in evidence”. In the present matter the commissioner’s approach, in my view, may well have been otherwise if the point had been raised earlier.

[28] Were the appellant’s change of stance to be allowed, i.e. were the proceedings now to be treated as an application for a declaratory order, it would involve unfairness to the respondent (cf *Road Accident Fund v Mothupi*, *supra*, at 54 C-D; *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 230 D-H; *Bank of Lisbon and South Africa Ltd v The Master and Others* 1987 (1) SA 276 (A) at 290 E-H). The result would be to deprive the respondent of having the defence which he raised considered, viz that the appellant could not appeal against the letter of 9 September 1997. That was a legitimate defence taken in proceedings no one doubted was an appeal in terms of s 65(6) of the Act. I have expressed misgivings above as to the correctness of the decision of Smit J on the merits. Consequently the respondent is

entitled, as he would have been in the court *a quo* had the merits gone against him, to a consideration of that defence. I proceed to consider it.

[29] In the letter of 27 June 1996, in which the respondent was requested to make a determination in respect of the royalties paid and payable to Mazda, reference was made to the value determination of 9 November 1983. The respondent was requested “to amend the valuation determination”, which he was empowered to do in terms of s 65(5) of the Act, “with retrospective effect to the date of the original ruling”. In the letter of 10 July 1996 relating to the fees paid and payable to Mitsubishi, he was requested to “review the determination” (of a 1% uplift) and to “reverse the ruling with retrospective effect to 12 April 1985”. The significance of this date is not clear from the papers. In a letter to Samcor dated 22 March 1994 the respondent advised that the value determination of 9 November 1983 was still applicable. Clearly the requests in the letters of 27 June 1996 and 10 July 1996 “to amend” and “review” the value

determination could only have referred to the value determination of 9 November 1983. There had been no other determination.

[30] In my view, the respondent's reply of 9 September 1997 did not constitute a new determination. Nor did the respondent amend or withdraw the determinations which he had been asked to amend or review. There is no indication in the letter of the formality which one would expect to attach to an official determination (which is apparent from the determination made in November 1983) such as the attaching of a number to it for use on bills of entry and the specification of a date from which it is to take effect. The letter is clearly intended to convey his refusal to amend or review the determination which he had already made on 9 November 1983. It follows that the contents of his reply of 9 September 1997 were not susceptible of an appeal.

[31] Counsel for the appellant contended, however, that since the appellant sought declaratory orders before the court *a quo*, the issue as to whether or not the letter of 9

September 1997 constituted a value determination in terms of s 65 of the Act was academic, because the granting of the declaratory orders was not dependent upon it.

As has been mentioned in paragraph 3 above, in addition to the declaratory orders sought by the appellant an order setting aside “the respondent’s determination of 9 September 1997 ...” was also sought. In view of the fact that the letter of 9 September 1997 did not constitute a value determination, such an order could not be granted. This means that the value determination of 9 November 1993 still applies. Section 65(4)(c) of the Act provides that any determination made by the Commissioner “shall be deemed to be correct” and any amount due in terms of any such determination “shall remain payable as long as such determination remains in force”. The declaratory orders sought by the appellant would be contrary to the express provisions of the Act. They could not be granted.

[32] It was further argued on behalf of the appellant that the determination of 9

November 1983 pertained not to the appellant, but to Sigma; that the letter of 22 March 1994 was a confirmation of the earlier determination and thus not a determination binding it and that it is accordingly entitled to its own value determination. Not only were the determinations of November 1983 addressed to Sigma, but they were also in respect of different agreements, so counsel continued. The appellant's history is set out in paragraph 5 above. Counsel conceded that what were Sigma's undertakings in terms of the original agreements are now the appellant's. As has been already mentioned, the agreements which were originally between Sigma and the two Japanese companies have been replaced over the years by virtually identical agreements. Sigma's successors, including the appellant (even if the appellant is not strictly a successor in title), have throughout recognized the value determinations of November 1983. At no stage did the appellant, or its predecessors after Sigma, consider that because new agreements were concluded new

determinations should be made, until it saw an opportunity of reclaiming duty that it had paid. Even then it did not demand a new determination, but merely requested that the determination of 9 November 1983 be amended or reviewed. It clearly considered itself bound by such determination. In adopting that view it was in any event correct in law. Upon a proper construction of s 65 of the Act a value determination by the Commissioner is not a directive or ruling which pertains to the person of the importer but to the importation carried on. This is illustrated by the respondent's requirement in the letter conveying the value determination of 9 November 1983 that a particular determination number be inserted on bills of entry "in respect of importations from this supplier". It must follow that if the identity of the importer changes subsequent to such a determination this alone cannot render the determination ineffective if precisely the same importation of the same type of goods from the same foreign exporter continues to be carried out precisely as before but by someone else who has to all intents and

purposes taken over the importation business.

[33] It follows that the appellant was bound by the determination of 9 November 1983.

The appeal is accordingly dismissed with costs.

.....
L MPATI
JUDGE OF APPEAL

Concur:

HOWIE JA)
HEHER JA)