THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 165/2001

In the matter between :

DE BEERS MARINE (PTY) LTD APPELLANT
First applicant in the Court *a quo*

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE RESPONDENT
First respondent in the Court *a quo*

CORAM : NIENABER, ZULMAN JJA and LEWIS AJA
HEARD : 3 MAY 2002
DELIVERED : 20 MAY 2002

Summary: Section 20(4) of the Customs and Excise Act 92 of 1964 - supply of bunker fuel as stores to South African vessels on the high seas - vessels exploring for off-shore diamonds off the coast of Namibia - whether such supply qualifies as 'export' and hence not dutiable - delivery of fuel over the South African continental shelf, as defined in the Maritime Zones Act 15 of 1994 - whether for purposes of s 5(b) of the Customs and Excise Act that is 'deemed to be part of the Republic' - whether consumption of fuel over the Namibian continental shelf qualifies as 'home consumption' for purposes of s 20(4) of the Customs and Excise Act, inasmuch as Namibia forms part of the 'common customs area' with South Africa.

JUDGMENT

NIENABER JA/

NIENABER JA :

[1] What does the word 'export' mean in the context of s 20(4)(d) of the Customs and Excise Act 92 of 1964 ('the Customs Act')? Does it simply mean 'take out of the Republic of South Africa' (as the appellant (('DBM')) contends) or does it rather mean 'take out of the Republic of South Africa for import into another country' (as the respondent (('the Commissioner')) contends? Delivery from a warehouse, as defined, and entered for the purpose of 'export', does *not* attract excise duties and fuel levies in terms of the charging provisions of the Customs Act. But if the latter of the two interpretations is the correct one there was in fact no export, and hence such duties and levies *were* duly payable, when bunker fuel, although entered for export, was supplied on the high seas by a tanker ex Cape Town to a number of specially equipped marine vessels as stores. These vessels belonged to DBM and were engaged in

the exploration for, and the recovery of, diamonds from the seabed off the coast of Namibia. That, whether a supply of this sort was a form of 'export', was the principal dispute between the parties before the High Court of the Cape Provincial Division. The Court *a quo* (Duminy AJ) decided the matter in favour of the Commissioner. Hence this appeal, brought with its leave.

[2] The factual setting to the problem is unusual and its statutory setting complex. The facts, somewhat simplified, are these:

2.1 DBM is a company duly registered in South Africa with its principal place of business in Cape Town. That business consists of providing contracting and consulting services in the exploration, evaluation, mining and management of underwater diamond deposits. For that purpose DBM owns five vessels, described as mining vessels, carrying vertical drilling equipment for

the recovery of diamond-bearing gravels from the seabed. One of the vessels uses a seabed crawler for horizontal mining. An airlift suction conveys diamond-bearing gravels from the crawler to the vessel. A sixth vessel, a geosurvey vessel, is engaged primarily in the collection of technical information by means of side scan sonar, seismics, coring grab sampling and visual survey. The data collected by this vehicle is used to produce geological maps of the seabed. All six vessels are conventional ships in the sense that they have hulls, are self-propelled, and are designed for navigation. They move under their own power, to and from and within the areas where they operate.

2.2 The mining operations of these vessels are conducted in what are termed ‘blocks’ and ‘sub-blocks’. Marine concession areas are divided in a grid pattern of blocks. Each block is divided into sub-

blocks in extent 50m x 50m. A mining vessel will complete drilling operations in a sub-block before moving to the next sub-block. The vessel drops four anchors, two ahead and two astern. Drilling is done whilst the vessel is so positioned. In each sub-block a number of holes are drilled in overlapping patterns so as to ensure that the entire sub-block is covered. The vessel is moved within the sub-block into new positions by using its anchor chains and/or its own engines which are always kept running. Drilling of each hole in the normal course of events takes approximately 15 minutes whereafter the vessel is repositioned.

2.3 The vessels sometimes spend more than two years at sea before returning to Cape Town, their port of registration, for major refits. The refuelling of the vessels also takes place at sea.

2.4 The bunker fuel on which the excise duties and fuel levies

were raised by the Commissioner in this case were delivered to DBM's vessels by a tanker, the Argun, belonging to another party. The relevant deliveries, termed 'bunker drops', took place during three voyages in 1997. In each case the Argun sailed from Cape Town after obtaining the fuel from Caltex Oil (SA) (Pty) Ltd ('Caltex').

2.5 Prior to the delivery of the fuel by Caltex it was stored by Caltex at a site licensed by the Commissioner in terms of s 19 of the Customs Act as a 'customs warehouse'.

2.6 In the case of each of the relevant three voyages a Form DA25 was completed and submitted to the Controller (being the officer designated by the Commissioner to act on his behalf) in respect of the fuel removed from Caltex's warehouse. The bunkers were in each case entered 'for export' and the 'country of final destination'

was variously reflected as being the Congo or Gabon.

2.7 The bunker drops took place at sea. The location where such delivery took place, referred to in the papers as the 'rendezvous point', was deliberately chosen at a distance of approximately 50 nautical miles from the South African coast and at a depth of approximately 180 metres. The reason for this arrangement is explained in DBM's founding affidavit as follows:

'35.1 De Beers Marine has always had a good relationship with the South African Department of Transport. During 1993 De Beers Marine had extensive discussions with the Department regarding the re-fuelling of its vessels at sea. It was felt that if a pollution problem should arise during any bunker drop, it would be preferable for De Beers Marine to deal with the South African authorities, rather than the Namibian authorities.

35.2 Accordingly, in 1993 De Beers Marine chose the position 29º 28 min south and 15º 49 min east as a rendezvous point for bunkering at sea. The said co-ordinates were chosen because they were 50 miles offshore and thus outside the oil pollution zone and just south of the boundary line. This position was

also a point relatively close to where most of the De Beers Marine vessels were working.'

(Elsewhere in the founding affidavit the 'boundary line' is described as the boundary between the northern-most South African marine concessions and the southern-most Namibian marine concessions.)

2.9 Although the rendezvous point was south of the boundary line the vessels, other than the survey vessel, were not at the time operating south of the boundary line but in the Namibian concession areas. They crossed the boundary line specifically in order to receive the bunkers. After the bunker drops were complete (and these lasted from 16 to 56 hours) the vessels once again returned to the Namibian concession areas.

[3] The section of the Customs Act crucial for present purposes is s

20(4). It reads as follows:

> '(4) No goods which have been stored or manufactured in a customs and excise warehouse shall be taken or delivered from such warehouse except in accordance with the rules and upon due entry for one or other of the following purposes -
>
> (a) home consumption and payment of any duty due thereon;
>
> (b) rewarehousing in another customs and excise warehouse or removal in bond as provided in section 18;
>
> (c) …
>
> (d) export from customs and excise warehouse (including supply as stores for foreign-going ships or aircraft).'

[4] As mentioned earlier delivery from a warehouse for the purpose of export does not attract excise duties and fuel levies; but if the disclosed purpose is 'home consumption' it does (ss 37(1) and 45(1) of the Customs Act). 'Export' is not defined in the Customs Act but 'home consumption' is. Section 1 of the Customs Act defines 'home consumption' as 'consumption or use in the Republic'. Counsel on both sides were agreed first, that 'export' must at the very least include the removal of the excisable goods from South Africa and

secondly, that the two concepts (export and home consumption) are antithetical. If the declared and entered purpose was ‘export’ it excluded an intended home consumption and *vice versa*. Leaving aside s 20(4)(b) (which is neutral on the point) or supplies destined for a foreign-going vessel (which is a special case), that must clearly be so, as appears from the introductory words ‘for one or other of the following purposes’. The stress is on the purpose for which goods manufactured in a customs and excise warehouse (such as refined bunker fuel) are taken or delivered. Of course, what actually happens may not always correspond to what was declared to happen: goods may be entered for export and yet be consumed in the Republic - in which case, apart from any other consequences, duty remains payable in terms of s 18A (quoted in para [21] below); so too, goods entered for home consumption may in fact be consumed outside the borders of the country - as, for instance, where a non-foreign-going vessel, consuming fuel entered for ‘home consumption’, fishes in foreign waters before returning to its South African port of registration. In such a case the

prescribed duties and levies are nonetheless payable. This consequence is seemingly in conflict with the definition of 'home consumption' quoted earlier but in truth there is no anomaly for the initial emphasis in s 20(4) falls on the *purpose* of removal from the customs and excise warehouse and not on the *actual* use or consumption of the goods so removed.

[5] According to counsel for DBM 'export' in the context of s 20(4)(d) simply means: 'to take out of South Africa'. Counsel for the Commissioner on the other hand contended that there were additional elements to the notion of 'export' *viz,* 'to take out of South Africa for import into a foreign country for commercial purposes'. Both counsel sought support for their contentions from a selection of dictionary definitions of the word 'export'. So, for example, counsel for DBM referred to the definition by *Longmans Dictionary of English*: '1) to carry away; remove; 2) to carry or send (e g a commodity) abroad for purposes of trade'; whereas counsel for the

Commissioner referred to other definitions such as that of *The New Shorter OED*, defining export as 'send (especially goods) to another country'. 'Export' can be an elusive concept capable of several shades of meaning. I have consulted most of the dictionaries in the library of the Supreme Court of Appeal and I do not propose to list the various and varying definitions to be found therein. There can be little doubt that while 'export' in a general sense may mean 'to carry away' or 'remove', in a narrower commercial sense it bears one of the meanings attributed to it in *Black's Law Dictionary* (7th ed): 'to transport (merchandise) from one country to another in the course of trade'. That connotation is supportive of the Commissioner's case since it is likely that the Legislature had its ordinary commercial meaning in mind when using the word in a commercial context, and the supply in this case was not to another country. Even so, and like the Court *a quo,* I am hesitant to regard a meaning extracted from

a miscellany of dictionary definitions as conclusive of the entire issue (cf *Fundstrust (Pty)Ltd (in liquidation) v Van Deventer* 1997 (1) SA 710 (A)). The better approach, so it seems to me, is to bear that meaning in mind when examining the provisions of the Act itself in order to determine whether there is anything in the context in which the word is used that adds to or detracts from its ordinary commercial meaning.

[6] The same approach applies to case law. Counsel for DBM sought to gain some support for their contention from two old English cases *viz* *Muller v Baldwin* (1873) 9 QB 457 and *Fox v Kooman* (1919) LTR 575 (KB). In the first case 'export' was defined in the relevant Act as 'carried out of port'; as such it had a technical meaning. The second case simply followed the first and moreover stressed the fact that the goods in question (chamois leather) were due to be taken abroad. Not much guidance, I think, can be gleaned from either of these decisions. The recent decision

of this Court in *Engen Petroleum Ltd and Others v Commissioner of Customs and Excise and Another* 1999 (3) SA 690 (SCA) dealt with rebates and is thus only peripherally in point.

[7] 'Export' in s 20(4) of the Customs Act must in my opinion take its colour, like a chameleon, from its setting and surrounds in the Act. It is used in s 20(4) in contradistinction to 'home consumption' (cf the *Engen* case, *supra,* paras 7 and 12). Between them the two antipodes cover (save for s 20(4)(b)) all possible permutations of purpose. The purpose of the removal of manufactured goods from a warehouse can only be to use or consume it. Such use and consumption may take place either locally or abroad. What is intended to be used or consumed locally is (in respect of excise duty and fuel levy) taxed locally; conversely, what is intended to be exported is not to be taxed locally. Export from South Africa implies, according to counsel for the Commissioner, an import elsewhere where

such goods will likely be subjected to import charges. I agree. To require the local exporter to pay excise duty and a fuel levy on goods not destined to be used or consumed in this country but abroad would place an undue burden on him and may well discourage export. Conversely, if DBM is right in its interpretation of 'export', it would mean that no excise duties and fuel levies are payable at all in respect of the supplies of the bunker fuel to DBM's vessels on the high seas, to the benefit of DBM and to the ultimate detriment of the general body of taxpayers.

[8] The true antithesis of 'home consumption' is 'foreign consumption'. Foreign consumption (and hence 'export') has two sequential elements: (a) physical removal from South Africa; and (b) use or consumption *not* in South Africa. Foreign use or consumption postulates a foreign destination for further delivery of the goods taken from the warehouse in South Africa. The foreign destination will as a matter of probability

mostly be a foreign country but there is nothing in the actual wording of the Customs Act that ordains the introduction of such a further refinement to bring it in line with the ordinary commercial meaning of 'export' referred to in para [5]; and counsel for the Commissioner conceded in argument that 'a foreign-going ship' to which bunker fuel is supplied on the high seas, for use or consumption outside South Africa, either as cargo or as stores, cannot be ruled out as a foreign destination. DBM's vessels, it is common cause, were not foreign-going ships so that the somewhat unusual facts of this case pertinently highlight the issue whether the delivery of bunker fuel to a non-foreign-going ship beyond the territorial waters of South Africa qualifies as 'export' for purposes of s 20(4) of the Customs Act.

[9] Counsel for the Commissioner launched a subsidiary argument based on the words in parenthesis in s 20(4)(d). Inasmuch as the supply of stores

to a foreign-going ship in South Africa is regarded by the Legislature as 'export' it would follow, so it was contended, that the supply of stores to a non-foreign-going ship operating outside South Africa must likewise be a form of 'export'. I cannot agree. In my opinion this form of flip-side reasoning leads, as counsel for DBM rightly submitted, to a *non sequitur.*

[10] I return to the issue raised in para [8] above *viz,* whether the supply of bunker fuel beyond South African waters to a non-foreign-going ship qualifies as export for purposes of s 20(4) of the Customs Act. In my view the question answers itself. While supply to a foreign-going vessel may conceivably still be regarded as delivery to a foreign destination, the same can hardly be said of supplies on the high seas to a vessel belonging to a South African company and operating out of a South African port. Such delivery is not delivery to a foreign destination. It is not for present purposes necessary to characterize what precisely a foreign destination is.

It is sufficient that the vessels to which the deliveries were made were neither foreign nor foreign-going. The second of the two conceptual elements referred to in para [8] above have therefore not been satisfied. The question whether the goods were 'exported' must accordingly be answered in the negative and in the Commissioner's favour.

[11] That conclusion in effect disposes of the appeal. But since a large part of the argument in this Court was devoted to two further issues I propose to mention and discuss them.

[12] The first of these issues relates to the first of the two elements mentioned in para [8] above, *viz* whether the bunker fuel was physically removed from South Africa. If the rendezvous point where re-delivery of the bunker fuel took place is by statutory extension to be regarded as 'part of the Republic of South Africa' then the first element mentioned above would not have been satisfied and the fuel would not have been 'exported'.

To that issue I now turn.

[13] The question is whether the bunker drops took place within the Republic (as the Commissioner contends) or not (as DBM contends). The debate turns on the meaning of s 5 of the Customs Act. It reads as follows:

> '5. Application of Act. - Notwithstanding anything to the contrary in any other law contained, for the purposes of this Act -
>
> (a) …
>
> (b) the continental shelf as referred to in section 8 of the Maritime Zones Act, 1994 (Act No. 15 of 1994),
>
> shall be deemed to be part of the Republic.
>
> (c) Any installation or device of any kind whatever, including any floating or submersible drilling or production platform, constructed or operating upon, beneath or above the said continental shelf for the purpose of exploring it or exploiting its natural resources shall be deemed to be constructed or operating within the Republic.
>
> (d) Any goods mined or produced in the operation of such installation or device and conveyed therefrom to the shore whether by pipeline or otherwise and any person or other goods conveyed by any means to and from such installation or device shall be deemed to be so conveyed within the Republic.'

According to the Commissioner s 5(b) is conclusive of the issue: re-delivery, it is common cause, took place at the rendezvous point immediately above the continental shelf of South Africa and the continental shelf is, for purposes of the Customs Act, deemed to be part of the Republic. According to DBM this is an oversimplification of the problem: s 5(b) takes one to s 8 of the Maritime Zones Act 15 of 1994 ('the MZA') and s 8 of MZA takes one to article 76 of the United Nations Convention on the Law of the Sea ('LOSC'), and all these provisions must be taken into account, according to DBM, to determine what s 5(b) means when it refers to the continental shelf.

[14] The MZA legislates for an ever-widening but correspondingly ever-weakening sphere of South African influence. Section 4 defines the South African territorial waters, being 12 nautical miles from the baseline (which

corresponds broadly to the low-water line of the coast) to which all law in force in South Africa applies. Section 5 refers to the contiguous zone, 24 kms from the baseline, within which the Republic shall have the right to exercise certain preventative powers including, incidentally, the prevention of customs contraventions. Section 6 provides for a maritime cultural zone, between 12 and 24 nautical miles from the baseline, for the protection of objects of an archaeological or historical nature. Section 7 provides for an 'exclusive economic zone', 200 nautical miles from baseline, for the protection of 'all natural resources', which would include the regulation of commercial fishing within that zone. Finally, s 8 of the MZA provides as follows:

> '8. Continental shelf. - (1) The continental shelf as defined in Article 76 of the United Nations Convention on the Law of the Sea, 1982, adopted at Montego Bay on 10 December 1982, shall be the continental shelf of the Republic.
>
> (2) …

(3) For the purposes of -

(a) exploration and exploitation of natural resources, as defined in paragraph 4 of Article 77 of the United Nations Convention on the Law of the Sea, 1982; and

(b) any law relating to mining of precious stones, metals or minerals, including natural oil,

the continental shelf shall be deemed to be unalienated State land.'

[15] Section 8 of the MZA incorporates art 76 of LOSC. Article 76 provides as follows:

'1. The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.'

Article 76, according to DBM's argument, defines not only what but also where the continental shelf is; and since it refers specifically only to the seabed and its subsoil it does not extend to the sea above it and accordingly has no application to vessels floating on the surface. This, so it was

contended, is placed beyond doubt by art 78(1) and (2) of LOSC which read as follows:

> '1. The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters or of the air space above those waters.
> 2. The exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in this Convention.'

[16] Article 78, assuming it to have been incorporated into South African municipal law, is concerned with the legal status of the superjacent waters. Section 5(b) of the Customs Act does not purport to interfere with the legal status of the waters above the continental shelf. The article accordingly has no direct bearing on the present enquiry. What s 5(b) seeks to do is to extend the area of operation of appropriate provisions of the Customs Act to the continental shelf which, for that strictly limited purpose, is deemed to be part of South Africa.

[17] To seek to separate the sea surface from the seabed when applying the provisions of the Customs Act to the continental shelf does appear to be somewhat artificial. The continental shelf is, after all, described not only in relation to the seabed but also in terms of location and area. It is within that zone that the bunker drops took place. Since the place of delivery has relevance for purposes of s 20(4) of the Customs Act the deeming provision, so it could be said, is of application; and if the continental shelf is *pro hac vice* deemed to be part of the Republic, the further delivery of bunker fuel that took place above it was delivery within the Republic. On that approach the first of the two elements mentioned in para [8] above would also not have been satisfied; the bunker fuel would not have been 'exported'; and its subsequent consumption would accordingly have qualified as 'home consumption', even if it took place physically in Namibian waters. As such, the relevant entries should have

been for ‘home consumption’ and not for ‘export’. That in essence was the finding of the Court *a quo.*

[18] On the other hand, it is plain that the provisions of the MZA relating to the continental shelf are primarily concerned with giving South Africa exclusive rights in the exploration and exploitation, in their various forms, of the resources of the seabed and its subsoils on the continental shelf itself (cf Dugard, *International Law*, *A South African Perspective,* 2ed 298-304). Activities related to such exploration and exploitation (in contrast to the normal activities and traffic on the high seas) would have direct relevance to the Customs Act, as is pertinently demonstrated by ss 5(c) and (d) of the Customs Act. It is for that purpose, rather than for the purpose of s 20(4), that the continental shelf, so it seems to me, is deemed to be part of the Republic; and if that is so, it follows that the slant that the Commissioner now seeks to place on s 5(b) goes

beyond what the Legislature likely intended. Although it is, for the reasons stated in para [10] above, not necessary to express a firm view on the issue so formulated, I am disposed to agree with the arguments advanced by DBM in this regard. The conclusion suggested on its behalf is a more palatable one since it was purely coincidental, viewed from an excise perspective, that delivery of the fuel took place over the South African continental shelf.

[19] In passing it may be mentioned that s 5(c) is not helpful in the solution of the present problem. Even accepting (as the Court *a quo* for good reasons did) that the six vessels were 'devices' for purposes of subsection 5(c) and that the five mining vessels would also fall within the general meaning of 'installations' it does not help the Commissioner. The reason is that none of these vessels was 'operating' above the South African continental shelf when the bunker drops took place.

[20] Finally, there is the further submission on which the Commissioner relied and which also found favour with the Court *a quo*. That submission is based on s 18(A) of the Customs Act. It must be read with the definition of 'common customs area' in s 1 thereof *viz*, 'the combined area of the Republic and territories with the government of which customs union agreements have been concluded under s 51'.

[21] Section 18A(1) and (2) of the Customs Act provide as follows:

> '(1) Notwithstanding any liability for duty incurred thereby by any person in terms of any other provision of this Act, any person who exports any goods from a customs and excise warehouse to any place outside the common customs area shall, subject to the provisions of subsection (2), be liable for the duty on all goods which he so exports.
>
> (2) Subject to the provisions of subsection (3), any liability for duty in terms of subsection (1) shall cease when it is proved by the exporter that the said goods have been duly taken out of the common customs area.'

Section 18A(1) and (2) in substance provide that if excisable and leviable

goods are exported it is for the exporter to satisfy the Commissioner that delivery outside the borders of the Republic had in fact taken place. The clear implication is that if the excised goods are not proven to have been 'taken out' of the common customs area, excise duties and fuel levies remain payable in South Africa. It is common cause in this case (a) that Namibia is part of the common customs area; (b) that Namibia has a Customs Act in terms similar to that of South Africa, including a provision corresponding to s 5(d) thereof; and (c) that the fuel delivered to DBM's vessels was largely consumed by them above the continental shelf of Namibia. On the basis of those facts the Commissioner contended that excise duties and fuel levies were duly payable in South Africa: since the Namibian continental shelf, where the consumption took place, was deemed to form part of Namibia via its own equivalent section to our s 5(b) and since the common customs agreement made Namibia part of the

'combined area of the Republic', such consumption qualified, so the argument went, as 'consumption for use in the Republic' for purposes of the definition of 'home consumption'. DBM's counter-argument was that the Namibian continental shelf was not by this process of incorporation made part of the Republic; that the common customs area did not extend to the continental shelf but merely to the Namibian land plus, at most, its territorial waters; that the South African Customs Act did not purport to subsume the Namibian Customs Act; and consequently that it was not capable of being extrapolated in the manner contended for by the Commissioner. Although it is not necessary, in the light of my earlier conclusion, to resolve this particular aspect of the wider dispute between the parties, I find myself once again in general agreement with the submissions made on behalf of DBM.

[22] Having regard to the conclusion reached in para [10] above, the

following order is made:

The appeal is dismissed with costs, including the costs of two counsel.

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P M NIENABER
JUDGE OF APPEAL

Concur:
Zulman JA
Lewis AJA