BENCHMAN INVESTMENTS (PRIVATE) LIMITED
and
THE COMMISSIONER GENERAL
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
HLATSHWAYO J
HARARE, 7 April, 2004

Stated Case

Mrs. *J B Wood*, for the applicant.
Mr. *A Chinake*, for the respondent.

HLATSHWAYO J: The parties submitted the following stated case for determination:

1. On the 18th June 2002, the Applicant purchased 30 motor vehicles from Japan. The vehicles were immediately shipped to Durban where they arrived on the 29th July 2002.
2. On the 2nd August 2002, the Minister of Finance, Economic Planning and Development published General Notice 359A of 2002 and Statutory Instrument 225 of 2002, which designated the rate of Z$300.00 to US$1.00 as the selling rate for certain imported goods, including motor vehicles, for the purposes of s.115 of the Customs and Excise Act [*Chapter 23:02*) ("the Act"). The rate fixed in terms of that section is used to determine the value in local currency of goods purchased in foreign currency.
3. The vehicles purchased by the applicants were imported into Zimbabwe on the 5th August 2002. When the applicant tried to clear the vehicles, its agent was informed that there value would be assessed using the "selling rate" fixed by General Notice 359A of 2002 as read with Statutory Instrument 225 of 2002. This would have resulted in a huge and unexpected increase in the customs duty payable in respect of the items covered by GN 359A of 2002.

4. The applicant filed an urgent application challenging the validity of the increase. At the hearing the parties agreed to submit the case as a stated one, and heads of argument had to be filed before the matter could be determined.

5. The applicant contends that:

   (1) No selling rate has in fact been fixed in terms of s.115 of the Act because GN 359A of 2002 was not made by the Commissioner after consultation with the Reserve Bank, as provided in that section.

   (2) In any event, the fixing of a selling rate is a discretionary power, which has to be exercised reasonably, and the sudden change in the rate by such a huge percentage was grossly unreasonable.

6. The respondent contends that GN 359 of 2002 as read with SI 225 of 2002 validly fixes the selling rate for the purposes of s.115 of the said Act and that the applicant must comply with it.

7. Accordingly, the question for determination is whether the General Notice 359 of 2002 as read with SI 225 of 2002 validly fixes a selling rate for the purposes of s.115 of the Customs and Excise Act, or whether that notice is invalid, either because it was not made in accordance with s. 115 of the Act or by reason of alleged gross unreasonableness.

Section 115 of the Customs and Excise Act reads thus:

> "When the value or cost of any imported goods, or any element that is required to be included in such value or cost, is expressed in the currency of a foreign country, it shall be converted to the currency of Zimbabwe at the selling rate for that foreign currency, as designated by the Director in consultation with the Reserve Bank of Zimbabwe, applicable as a customs rate at the time the goods concerned were entered in terms of this Act."

The applicant's counsel Mrs *Wood* submitted that the above section clearly requires the "selling rate" to be designated, not by the minister, but by the respondent or the commissioner for customs in consultation with the Reserve Bank. Mr *Chinake* for the applicant then appears to accept this, but submitted that the commissioner of customs adopted the rate fixed by the minister. He further contended that:

> "Via an internal administrative process, the Commissioner of Customs designated the rate of ZWD 300.00 to USD 1.00 as the selling rate for customs purposes".

In my view, it is not necessary to attempt to disentangle counsel for respondent's convoluted reasoning here. More light can easily be gained by a quick reference to the actual order issued by the minister concerned. General Notice 359A of 2nd August 2002 reads in the preamble as follows:

> "It is hereby notified, for public information, that the Minister of Finance and Economic Development, in terms of subsection (2) of section 3 of Exchange Control (Exchange Rate Management) Order, 2001, designates the rate of 300 Zimbabwean dollars to one United States dollar as the selling rate for the purposes of section 115 of the Customs and Excise Act *[Chapter 23:02]*, in respect of the imported goods specified in the schedule with effect from the 2nd August, 2002."

It is quite clear, therefore, that GN 359 constitutes an attempt by the minister to designate the selling rate for the purposes of section 115 of the Act, which power is indisputably conferred on the respondent by the Act. On this basis alone, the applicants are entitled to succeed. I note in passing though, that the section 3(2) upon which the minister purported to act appears to have been repealed by section 2 of the Exchange Control (Exchange Rate Management)(Amendment) Order, 2001 (No. 1).

The further contention made on behalf of the respondent that the general notice was enacted in terms of SI 225 of 2002 has no basis in either fact or law. As shown already, the general notice was enacted in terms of an apparently repealed provision of the Exchange Control Order. SI 225 of 2002, which is made by the Reserve Bank, merely authorizes the commissioner of customs to designate a selling price in excess of that specified if permitted to do so in writing by the Minister after consultation with the Reserve Bank. But even that piece of legislation does not permit the minister to designate the selling rate himself as he has purported to do by GN 359A of 2002.

The respondent's case could possibly have been bolstered through an examination of the interactions and apparently conflicting competencies of the relevant authorities under the Customs and Excise and the Exchange Control Acts. This elementary step was not taken, making the respondent's case extremely weak, and therefore not meriting a departure from the rule that the costs should follow the outcome.

Accordingly, the stated question is answered as follows:

1. General Notice 359A of 2002 as read with Statutory Instrument 225 of 2002 validly fix a selling rate for the purposes of s.115 of the Customs and Excise Act.
2. General Notice 359A of 2002 is invalid because it was not made in accordance with s.115 of the Act.
3. The respondent shall pay the costs of this application.

Applicant's Legal Practitioners, Byron Venturas & Partners
Respondent's Legal Practitioners, Kantor and Immerman