AMD SERVICES (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY

FISCAL APPEAL COURT
KUDYA J
HARARE 13 November 2018 & 29 May 2020

Value Added Tax Appeal

D Erasmus and *Ms F. Louw***,** for the appellant
*T Magwaliba***,** for the respondent

KUDYA J: The real question for determination is whether the Export Processing Zone, EPZ, licence issued to the appellant, a locally registered cutrag tobacco processing company, initially on 24 August 2001, which was replaced on 30 August 2005 and finally renewed on 4 May 2010 was abolished by the repeal of the Export Processing Zones Act *[Chapter 14:07*], the EPZ Act, by s 34 of the Zimbabwe Investment Authority Act *[Chapter 14:30*]. An affirmative answer will necessitate determination of the appropriate penalty chargeable against the appellant for failing to charge and withhold output value added tax on the supplies made to its local customers and remit it to the respondent.

The appellant was incorporated as a wholly owned subsidiary of a local entity. It was in the business of cutting, processing and blending tobacco, otherwise known as the cutrag business, at its Harare premises, measuring 1 225 hectares, which were declared an export processing zone in terms of s 20 (1) of the EPZ Act by the Minister of Commerce and Industry and the Minister responsible for Finance in the Expert Processing Zones (Declaration of Export Processing Zones) (No. 6) SI 7 of 2002 in the Government Gazette of 11 January 2002[1]. The appellant had already been issued with a 10 year EPZ investment licence by the EPZ Authority on 24 August 2001. The licence was issued in terms of s 23 of the EPZ Act. The EPZ licence gave efficacy to the EPZ status. In other words, the EPZ Act benefits could only accrue to the appellant if it was in possession of an EPZ investment licence. The EPZ Act benefits that accrued to the appellant, which were characterised by the appellant as "the acquired privileges" and by the respondent as "the statute given privileges",

[1] Exhibit 2.

were two. The first was that, even though it was physically based in Zimbabwe, it was regarded as a foreign territory. The second was that it was accorded the right to carry on approved activities in the EPZ. There were, however, other statutes such as the VAT Act, the Income Tax Act and the Customs and Excise Act that accorded tax related incentives to the approved business activities of a declared EPZ, which held an EPZ investment licence. Some of them were enumerated by the respondent in paras 3 and 4 of the Commissioner's case. These incentives were not accorded to other local business entities.

The VAT benefits, which accrued to the appellant because of its deemed status, were that, unlike other local business entities, it was not liable for voluntary or compulsory registration as a VAT registered operator in Zimbabwe. The cutrag services rendered and the goods manufactured by the appellant in the EPZ were, therefore, not liable for VAT in Zimbabwe. There were two exceptions to this rule. The first, prescribed in s 6 (1) (b) of the VAT Act was that, the goods and services that the appellant produced in the EPZ and exported to Zimbabwe were regarded as imports made into Zimbabwe by the appellant. The appellant, unlike intra country trade between local companies, was required to raise a bill of entry to import the goods or services into Zimbabwe, pay the requisite duty to the Zimra station manager based on its premises and thereafter pay output VAT on the imports to the respondent. The second was that, in terms of s 19 (1) of the Value Added Tax (General) Regulations, SI 273 of 2001, which came into operation together with the VAT Act on 1 January 2004, as read with s 44 (9) and para (c) of the VAT Act, as an EPZ licensee, it was entitled to recoup any input VAT paid for the taxable supplies it received from local companies within 12 months from the date of the input tax invoice. The appellant was required to complete a VAT 10 form and attach its EPZ licence and the relevant input tax invoice to access the refund. The refund was only eligible if the acquired goods or service were to be used by the appellant to produce goods and services for export.

On 12 May 2015, the respondent's officers issued 14 notices of VAT assessments to the appellant for the months of January to December 2009 in the cumulative sum of US$209 520.86 consisting of the principal sum of US$139 680.58 and penalties of 50% in the sum of US$69 840.28, on the ground that it failed to charge VAT on local sales of US$ 931 466.15. The appellant filed objection on 10 June 2015. The Commissioner did not make determination within the prescribed 3 month period. He, however, did so some 6 months later, on 18 December 2015. He allowed objection to the assessments for the months of

January, February and March, which had prescribed and reduced the penalties to 10%. He also correctly found that the April 2009 VAT had not prescribed as the VAT return was, in terms of s 28 (1) of the VAT Act, due on 25 May 2009. On 26 February 2016, the appellant filed its belated notice of appeal in respect of the reduced claim of the principal amount of US$95 269.72 and consequent penalty of US$ 9 526.99. The belated notice was filed by agreement between the parties and was thereafter condoned by this Court at the pre-trial hearing**.** The respondent filed the Commissioner's case on 4 April 2016. A pre-trial hearing was held on 21 September 2018 and two issues were referred for determination at the appeal hearing.

The facts

The material facts, which emerged from the oral evidence of the appellant's Finance Director and the pleadings filed of record, were generally common cause. The appellant supplied services of cutting, processing and blending different grades of tobacco, the cutrag service, in accordance with the recipes provided by Zimbabwean and offshore cigarrete manufacturers based in South Africa, Malawi, Lesotho, Sudan, Dubai and Jordan. It also did so on its own behalf and physically exported the products to both types of customers.

On 24 August 2001, the appellant was issued with an EPZA investment licence to conduct approved activities as a licenced investor in an EPZ. At that time it was controlled by a single local corporate shareholder. The licence was replaced on 30 August 2005 after a Swiss corporate shareholder subscribed for 25 per cent of the appellant's equity. The replacement licence subsumed the prevailing tenure and terms and conditions of the initial licence. The Finance Director, stated in his oral evidence that the appellant was oblivious of the repeal of the EPZ Act and continued to operate and conduct its tax obligations as an EPZ. The appellant became aware of the repeal in February 2010, when it was compulsorily registered as a VAT operator by the Commissioner and directed to charge and remit output VAT on all its local supplies. While it did not protest the Commissioner's actions, it, however, sought clarification from the Zimbabwe Investment Authority, which responded by furnishing it with an application form for an investment licence. A two year licence was issued on 4 May 2010, after an inspection of the premises by a ZIA official. It purported to be a replacement of the EPZA licence that had been issued on 24 August 2001.

In tandem with all EPZ companies, which were treated as foreign based entities, the appellant could not be registered as VAT operator nor charge and remit output VAT in

respect of goods manufactured in the EPZ and supplied outside the customs territory. It was, however, liable for output VAT on supplies made to the customs territory. It was entitled by s 19 of the Value Added Tax (General) Regulations, SI 273 of 2003, to claim back input VAT on purchases made in the customs territory[2]. The appellant never made any such claims until February 2010.

The Commissioner assessed the appellant for VAT for the tax period in issue on the basis that the repeal of the EPZ Act, effected on 1 January 2007, abolished the VAT statutory given privileges accorded to the appellant by the definition of an "export country" in s 2 of the VAT Act *[Chapter 23:06*]. This assertion was vehemently disputed by the appellant; hence the present appeal.

The Issues

The two issues that were referred for appeal at the pre-trial hearing of 21 September 2018 were:

1. Whether the repeal of the Export Processing Zones Act *[Chapter 14:07]* the EPZ Act, abolished existing exporting processing zones?
2. Whether or not the penalty imposed was appropriate?

Whether the repeal of the Export Processing Zones Act [Chapter 14:07] the EPZ Act, in January 2007 abolished existing exporting processing zones?

The Export Processing Zones Act, [*Chapter 14:07]*

The Export Processing Zones Act [*Chapter 14:07],* the repealed Act, became operational on 4 August 1995. The preamble sets out the purposes of the Act. It provides for the establishment of the Zimbabwe Export Processing Zone Authority and its functions; the establishment of export processing zones and their administration; the constitution and functions of the Zimbabwe Export Processing Zone Board; and for matters incidental to or connected with these purposes. An EPZ is defined as "any part of Zimbabwe declared in terms of subsection (1) of section twenty to be an export processing zone" while a "customs territory" "means any part of Zimbabwe excluding an EPZ". An "approved activity" is defined as "any business or activity which is carried on by a licenced investor in an EPZ and which is authorised by his investment licence". An "investment licence" pertains to an

[2] A summary of the application of the repealed Act to the VAT Act and its attendant regulations on pp14 and 49 of r 5 documents was faxed to the appellant in 2004 by the Commissioner.

investment licence issued in terms of section twenty-six while a "licenced investor" refers to "the holder of an investment licence".

The Export Processing Zone Authority was established in terms of s 3 and was managed and controlled by a Board established in terms of s 4 of the EPZ Act. The functions and powers of the Authority were enshrined in Part III, from section 18 to 22 and in the Schedule to the Act. The functions that related to EPZs concerned, *inter alia*, the establishment of export-oriented industrial activities involved in the manufacturing, processing or assembling of goods and provision of services in these zones; the administration, control, regulation, evaluation and monitoring of activities, granting investment licences for investing in these zones and inspecting the premises, financial statements, books and other documents to ensure compliance with any conditions governing the licence. In addition, it would, in terms of s 52 of the Act, receive returns on statistical data on the sales and purchases of the EPZ. In terms if s 20 (1) of the Act, the EPZs were to be established by the Authority in consultation with the Minister of Industry and Commerce and the Minister responsible for finance, by a declaration of any defined area or premises in the Government Gazette. And in terms of s 20 (2) thereof, the Authority was imbued with the power, at any time, to amend, add, or abolish any EPZ established in terms of subsection (1) thereof.

The applications for the approval of investment in an EPZ were prescribed in Part IV of the Act. In terms of s 23, any person who wished to either obtain approval to invest in an EPZ or his business activity to be approved as an EPZ was required to "submit an application to the Authority in the prescribed form for an investment licence" accompanied by the prescribed fee and any documents requested by the Authority. The Authority's decision was to be based on the five conjunctive considerations stipulated in s 25. It was to be guided by the opportunities for employment creation and human resources development, the degree of export-orientation, the environmental assessment of the activity and technology transfer. It was empowered by section 26 to approve or refuse approval of the application and impose any appropriate conditions on any investment licence issued in the prescribed format, which conditions it could vary. Every licence had a tenure of 10 years and was in terms of s 28 subject to renewal before its expiration, which could however be suspended or cancelled if the conditions prescribed in s 33 (1) were met.

Part V of the Act prescribed the operations that were permitted in the EPZs. The licensed investor was entitled to import capital goods, consumer goods, raw materials, components and articles to be used in the approved activity, including for the construction and maintenance of physical structures and for the welfare of employees. Retail trade within the EPZ was undertaken with the prior written approval of the Commissioner of Customs and Excise and the Authority. In terms of Part VI, the licensed investor did not require Exchange Control Authority to move funds necessary for his approved activity into and out of the EPZ but could not borrow from the customs territory without such approval. In terms of s 56 of the Act, the provisions of the Labour Act *[Chapter 28:01*] did not apply in the EPZ. Employees could be paid in foreign currency and payments for goods and services supplied in the customs territory were to be in foreign currency.

The Zimbabwe Investment Act [*Chapter 14:30]*

The Zimbabwe Investment Authority Act *[Chapter 14:30],* the repealing Act or new Act, was published on 8 September 2006 and came into force on 1 January 2007. It was enacted "to provide for the establishment of the Zimbabwe Investment Authority and its functions, to provide for the promotion and co-ordination of investment, to repeal the Zimbabwe Investment Centre Act *[Chapter 24:16*] and the Export Processing Zones Act [*Chapter 14:07*] and to provide for matters incidental to or connected with the foregoing."

It defined an "approved activity" as any business activity carried on by a licenced investor and authorised by his investment licence. An investment was synonymous with an actual or proposed investment that required expenditure of convertible foreign currency or any like investments specified in a statutory instrument by the Minister of Industry and International Trade. An investment licence was one issued in terms of s 15 while a licenced investor was one who held an investment licence. These definitions were antonymous to similarly worded definitions in the repealed Act. The functions and powers of Authority were set out in Part III and the Second Schedule of the Act. These were, i*nter alia*, to deal with applications for investment licences, plan and implement promotion strategies for attracting foreign and domestic investors, to identify sectors for investment by such investors and supervise, monitor and evaluate the implementation of approved investment projects and in terms of s 21 of the Act, inspect premises and financial statements, books and other documents to assess compliance with the prescribed conditions.

Applications for and the approval or refusal of investment licences are enshrined in Part IV of the Act. The applications related to both new and existing investments, which wished to be regarded as foreign investments. The approval or refusal was guided by such considerations as skills and technology transfer to locals, creation of employment and human resource development, beneficiation of local materials, the value of the convertible currency transferred to Zimbabwe, impact on the environment and existing local industries. It had the power to impose conditions and to amend or vary them and could, in terms of s 22, suspend or cancel any investment licence. The content of the investment licence provided in s 15 (3) of the Act replicated the provisions of s 26 (3) of the repealed Act.

The Act did not make provision for both, general and specific incentives that would be applicable to licenced investors, who fell into the categories of primary producers, exporters, beneficiation and import substitution. In terms of s 24, the Minister of Industry and International Trade, in consultation with the Minister responsible for finance was tasked to publish guidelines for investment, which would cover these areas. The Act did not contain any provisions analogous to Part V and VI of the repealed Act, which dealt with the operations within the export processing zones and the provisions of banking and insurance services in these zones.

Section 34 repealed both the Zimbabwe Investment Act *[Chapter 24:16*] and the EPZ Act *[Chapter 14:07]*, while section 35 and 36 transferred their assets, rights, obligations and employees to the Zimbabwe Investment Authority. Lastly, s 37 dealt with the treatment of the licences and certificates issued under the two repealed Acts.

The basis of the present appeal is set out in para 4.1 of the appellant's case. It pleaded that, "whilst it is accepted that the Export Processing Zones Act was repealed by the Zimbabwe Investment Act *[Chapter 14:30*], section 34 and 37 of that Act preserved the status and privileges of every holder of a certificate, subsequently and properly obtained, by the appellant. Consequently, the appellant was not liable for VAT on the amounts claimed." To which the respondent maintained the position it adopted during the investigation, assessment and determination to the objection that, the repeal of the EPZ Act terminated the EPZ status conferred on the appellant on 11 January 2002 by SI 7/2002 and any consequential statutory given EPZA and VAT privileges. In the result, the Commissioner assessed the appellant to output VAT on the local supplies it made to three local companies during the period from April 2009 to December 2009.

In both his oral and written submissions, Mr *Erasmus*, for the appellant, raised three arguments in support of the appellant's position. The first was that, the declaration of the appellant's premises as an EPZ was separate and distinct from the approval and award of the EPZ investment licence to the appellant. The second was that, both section 17 and 18 of the Interpretation Act *[Chapter1:01]* preserved the statutory acquired privileges conferred on the appellant by the declaration made on 11 January 2002. The third was that, the doctrine of incorporation by reference, which he described as a rule of construction and interpretation through which the provisions of one statute are incorporated by reference in another, supported the appellant's position that the mere repeal of the EPZ Act did not abolish the appellant's status as an EPZ. He further contended that the Commissioner was estopped from relying on the appellant's belated application for the renewal of the EPZA investment licence to deny it the VAT benefits derived from its status as an EPZ, on the ground that the issue had not been raised by the Commissioner prior to 4 April 2016.

<u>The separate and distinct argument</u>

It is correct that the issuance of the EPZ investment licence on 24 August 2001 preceded the declaration of 11 January 2002 by a period in excess of 4 months. The separate and distinct argument advanced by the appellant is both fallacious and disingenuous. It ignores the symbiotic and inseparable relationship between the declaration and the licence. An EPZ investment licence could not exist outside the EPZ. In the same way, an EPZ without an EPZ investment licence would merely be an empty shell. The contents which breathed life into this empty shell were the approved business activities which were conducted by the licenced investor in that empty shell. The approved business activities could only be lawfully conducted in the empty shell after by a licenced investor, who was defined as a holder of an investment licence issued in terms of s 26 of the repealed Act. The mere declaration of the appellant's premises as an EPZ on its own, without an approved activity, would not be sufficient to attract any VAT liability. The definition of an "approved activity" in the repealed Act links an EPZ and an EPZ investment licence issued by the EPZ Authority. The separate and distinct dates between the issuance of the initial investment licence and the declaration of the appellant's premises did not suggest, as advanced by the appellant, that the application of VAT in an EPZ was divorced from an EPZ investment licence. The text of s 23 suggests that a licence could, as happened in the present case, precede the declaration if the

prospective licenced investor either intended to invest in an EPZ, or wanted an existing business activity designated as an activity in an area, which would be declared as an EPZ.

The ss 17 and 18 of the Interpretation Act argument

Mr *Erasmus* further relied on the provisions of s 17 (1) (b) and (c) and s 18 in support of his contention that, the appellant was not liable to charge and collect output VAT on supplies made into the customs territory and remit it to the Commissioner because the EPZ status of the appellant was preserved by s 34 (2) as read with s 37 of the repealing Act. He submitted that the designation of the premises as an EPZ in the Export Processing Zones (Declaration of Export Processing Zones) No (6) SI 7/2002, which was never abolished or amended by the EPZ Authority, was extant and preserved by s 17 (1) (b) and (c) of the Interpretation Act, which in turn preserved both, completed and incomplete transactions and any rights acquired under the EPZ Act.

S 17 (1) (b) and (c) provides:

"**17 Effect of repeal of enactment**

(1) Where an enactment repeals another enactment, the repeal shall not—

(*a*) ……

(*b*) affect the previous operation of any enactment repealed or anything duly done or suffered under the enactment so repealed; or

(*c*) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment so repealed; or

While it is correct that, in terms of s 3 (c) of the Interpretation Act [*Chapter 1:01]* a statutory instrument constitutes an enactment, I, however, agree with Mr *Magwaliba* that its efficacy is nullified by s 17 (2) of the same Act, which states:

"(2) Nothing in subsection (1) shall be taken to authorize the continuance in force, after the repeal of an enactment, of any statutory instrument made under that enactment."

And also in terms of subs (5) of the same section which prescribes that:

"(5) Where at any time an enactment expires, lapses or otherwise ceases to have effect, this section shall apply as if that enactment had then been repealed".

Both subs (2) and (5) of s 17 of the Interpretation Act, in my view, would serve to terminate the efficacy of SI 7/20002. The reliance by Mr *Erasmus* on the provisions of s 17 of the Interpretation Act must, therefore, fail.

Mr Erasmus further contended that the declaration was preserved by the provisions of s 18 of the Interpretation Act, which provide:

"**18 Effect of substituted provisions**

Where an enactment repeals and re-enacts, with or without modification, any provision of another enactment, the references in any other enactment to the provisions so repealed or to

> any person, authority or matter mentioned in such repealed provisions, shall be construed as references to the provisions, person, authority or matter respectively substituted therefor."

He submitted that s 20 (1) of the repealed Act, referred to in the definition of export country in s 2 of the VAT Act was repealed and re-enacted in the repealing Act and was therefore preserved by the substitution. The submission, however, is not borne out by the provisions of the repealing Act. Section 20 (1) of the EPZ Act was not re-enacted in any form or shape in the Zimbabwe Investment Act. In my view, while references in s 34 (2) to "anything done or commenced or any decision made in terms of in terms of the EPZ Act [*Chapter 14:07*] which, immediately before the fixed date, had effect….. shall continue to have… effect as if it had been done, issued, commenced or made in terms of this Act" refers to the continued efficacy of all the acts and decisions made under the repealed Act. It does not substitute or re-enact s 20 (1) of the repealed Act, which constitutes a necessary pre-condition for the adoption of s 20 (1) by the s 2 of the VAT Act. Again, the reliance by the appellant on s 18 of the interpretation Act must fail.

Mr *Erasmus* further submitted that the definition of "export country" in the VAT Act incorporated by reference the declaration of an EPZ made in terms of s 20 (1) of the repealed Act, which had in turn been incorporated by reference by the saving provisions of s 34 (2) of the repealing Act. He, therefore, contended that the incorporation by reference of the EPZ status of the appellant's premises preserved the appellant's statutory given VAT benefits even after the EPZ Act had been repealed by s 34 (1) of the Zimbabwe Investment Authority Act. Mr *Magwaliba* made the contrary contention that the repeal of the EPZ Act on 1 January 2007, terminated the declaration of the premises of the appellant as an EPZ and the consequent VAT benefits arising therefrom with effect from that date. He, therefore, submitted that the VAT benefits arising from the declaration were no longer available to the appellant in 2009.

The English law doctrine of incorporation by reference was introduced into our common law by INNES CJ in *Solicitor-General* v *Malgas* 1918 AD 489. He held at page 491 that:

> "It is no doubt a rule of interpretation in England that where the provisions of one Statute are incorporated by reference in another, the repeal of the earlier measure does not operate to repeal the incorporated provisions. That, of course, is logical and correct whenever the intention to incorporate by reference is clear, because the

provisions referred to become part of the second Statute. They have in effect been enacted twice as separate Acts, and the repeal of the one does not affect the operation of the other."

These sentiments were approved by the Federal Supreme Court, in the local case of *Commissioner of Taxes* v *Pan African Roadways Ltd* 1957 (2) SA 539(FSC) at 542G- 543A. CLAYDEN FJ underscored at page 543A that:

"The provisions of the pre-existing law derive their force from having been made part of the new law for certain purposes. From the time of the repeal the preserved parts of the Territorial Tax Act were law because they were part of a Federal Act".

The definition and effect of the doctrine, which were espoused in the *Malgas* case, were further endorsed by the South African Constitutional Court, in *Khohliso v S & Anor* [2014] ZACC 33; 2015 (1) SACR 319 at para[32]. VAN DER WESTHUIZEN J, who delivered the unanimous decision of the Court stated that:

"The doctrine of incorporation by reference finds application in many areas of the law. It refers to the situation where one document supplements its terms by embodying the terms of another. There is a difference between incorporation by reference and mere reference though. It is not enough to mention another document, simply to point the reader to it in order to find the meaning of a term. More is needed. In the context of statutory incorporation, the intention to re-enact what is being referred to is required."

The reason why the Legislature resorts to the doctrine were set out by ELOFF JP in the *End Conscription Campaign* case, *supra,* at page 252, where he said:

"It will be recalled that s 2 (1) (b) of the Defence Act refers to "white persons as defined in Section 1 of the Population Registration Act". Parliament presumably found the definition of whites in section 1 of the Population Registration Act adequate for its purposes at that time. Rather than to repeat the substance of that definition in the Defence Act, the legislature adopted the definition in the Population Registration Act. That is a style of Parliamentary drafting which is frequently adopted. As Francis Benyon, an English Parliamentary authority, says in his book *Statutory Interpretation (*London Butterworths 1984) at page 600:

> "The method saves space and time and also attracts the case law and other learning attached to the earlier provisions."

Other authors have commented on this method of drafting. In *Legislative Drafting,* GC Thornton, 3rd ed., discusses the advantages of the method. In *Groeschel* v *Groeschel* 1938 (SWA) 9 at 11 VAN DEN HEEVER J, as he then was, described the method as: "a short cut in practical legislation." Mr *Cameron* argued that section 2 (1) (b) of the Defence Act merely refers to the Population Registration Act. I do not agree. The former Act, in so many words, adopts the definition of "white person" in the definition section and makes it its own. The adoption of the definition gives the force and content to section 2 (1) (b) which it would, but for such incorporation, probably not have had." [Underlining my own for emphasis].

The doctrine has been applied to the construction of statutes, wills and contracts over the years. See *Moses* v *Abinader* [1951] 4 All SA 323 (A) at 327, *Commissioner of Taxes* v *Pan African Roadways Ltd* 1957 (2) SA 539(FSC) at 542G-H, *Hartland Implemente (Edms) Bpk* v *Enal Eiendomme BK en Andere* 2002 (3) SA 653 (NC) at 670-671, *End Conscription Campaign and Another* v *Minister of Defence & Others* [1993] 1 All SA 249 (T) at 253[3], *Weare and Another* v *Ndebele NO and Others* 2009 (1) SA 600 (CC) at and *Khohliso* v *S and Another* [2014] ZACC 33; 2015 (1) SACR 319 at paras[32] and [33].

The doctrine is, however, merely a rule of construction used by the Courts to ascertain the intention of the Legislature and must perforce yield to the text and context of the legislation under consideration. See *Walmer Municipality* v *Glover and Port Elizabeth Liquor Licensing Board* 1952 (2) SA 38 (E) at 43**.**

Para [33] of the *Khohliso* case emphasized that the reference by incorporation applies where the Legislature "intended to create a coherent regulatory framework, which included the continued application of the repealed statute". In the present case, the appellant failed to demonstrate the coherent regulatory framework that was created in the Zimbabwe Investment Act for the continued application of the EPZ Act. It was only able to demonstrate that, the reference to s 20 (1) of the repealed Act in the definition of export country in s 2 of the VAT Act fell into the ambit of what VAN DER WESTHUIZEN J characterized as "mere reference for clarification or definitional purposes." In my view, the reference to s 20 (1) of the repealed Act in the VAT Act hangs on air and bears no efficacy because that section was repealed by s 34 (1) of the ZIA Act and not re-enacted or even incorporated by reference by s 34 (2).

Section 34 and 37 of the repealing Act provide that:

> "**34 Repeal of Caps. 24:16 and 14:07 and savings**
>
> (1) Subject to subsection (2), the Zimbabwe Investment Centre Act [*Chapter 24:16*] and the Export Processing Zones Act [*Chapter 14:07*] are repealed
> (2) Notwithstanding subsection (1), but subject to section 37, any certificate or licence issued or anything done or commenced or any decision made in terms of the Zimbabwe Investment Centre Act [*Chapter 24:16*] or the Export Processing Zones

[3] Where ELOFF JP enumerated the cases and literature in which the *Malgas* case was applied with approval of *R v Van Vuuren* 1954 (3) SA 619 (E) at 622C-G, *Rex v Crancko & Another* 1955 (2) SA 635 (O) at 639D-E, *Rubies Cash Store (Pty) Ltd v Estate Marks and Another* 1961 (3) SA 118 (T) at 124D, *the Commissioner of Taxes v Pan African Roadways* 1957 (2) SA 539 (FSC) at 542G-543A. See also Steyn *Die Uitleg van Wette*, 5th Ed. At page 175 and LR Caney *Statute Law and Subordinate Legislation* page 126.

Act [*Chapter 14:07*] which, immediately before the fixed date, had or was capable of acquiring effect shall continue to have or be capable of acquiring, as the case may be, effect as if it had been done, issued, commenced or made in terms of this Act."

37 Persons licensed or certified under repealed Acts

(1) Every holder of a licence issued in terms of the Export Processing Zones Act [*Chapter 14:07*] and every holder of a certificate issued in terms of the Zimbabwe Investment Centre Act [*Chapter 24:16*] shall, no later than six months after the fixed date, apply to the Authority for an investment licence in terms of this Act.

(2) The Authority shall grant an investment licence to every applicant under subsection (1) on the same terms as those granted to the applicant under its previous licence or certificate, unless the Authority is satisfied that the applicant has not complied with the terms of its previous licence or certificate.

I agree with Mr *Erasmus* that s 34 (2) constitutes the saving provision of the repealing Act. The preservation is embodied in the commencing and closing phrases of this subsection, that is "notwithstanding subsection (1)" "and shall continue to have or be capable of acquiring, as the case may be, effect as if it had been done, issued, commenced or made in terms of this Act." The relevant key words, which identify what was saved in respect of the appellant, as presented by Mr *Erasmus*, which operate consecutively are:

(i) "but subject to s 37",
(ii) (a) any certificate or licence issued under the repealed Act, or
(b) anything done under the repealed Act or
(c) any decision made under the repealed Act,
(iii) which immediately before the fixed date, had or was capable of acquiring effect.

The appellant wrongly contended that the respondent could not rely on the conceded failure of the appellant to apply for the s 37 (1) of the repealing Act licence within the prescribe period of 6 months. The contention was based on the fact that this point had only been raised by the respondent for the first time in the Commissioner's case of 4 August 2016. I would dismiss that contention for three reasons. The first is that, it is a point of law, which can be raised at any time before judgment. Indeed, a point of law can even be raised for the first time on appeal as long as it does not prejudice the other party. The appellant did not identify the prejudice that it suffered. The second is that, as the point was raised by the appellant in para 4.1 of its case, which I have already quoted in the preceding pages, the respondent was obliged by our rules of procedure to respond to it. The last point is that, section 37 is a critical section for determining whether any licence, acts or decisions made in terms of the repealed Act were saved.

The sole witness called by the appellant conceded that the appellant did not comply with the provisions set out in s 37 (1). It did not apply for the contemplated licence within the

mandatory period of 6 months of the commencement of the repealing Act. The effect of such a failure, notwithstanding the reasons thereof, was that the licence that sought to be saved in s 34 (2) was not preserved. That a mandatory prescribed period cannot be condoned is clearly set out in the many electoral cases such as *Pio v Smith* 1986 (3) SA 145 (ZH) at 165I, *Chabvamuperu & Ors v Jacobs & Ors* 2008 (1) ZLR 354 (H) at 364C and *Muzenda v Kombayi & Others* 2008 (1) ZLR 366 (H) at 372C. So whatever licence was issued by the Zimbabwe Investment Authority on 4 May 2010, was not the type of licence that was contemplated in s 37 (1) and (2) of the repealing. It is clear to me the contemplated licence was an essential document, which gave the appellant access to the statute given VAT rights. In my view, the contention made by Mr *Erasmus* in para 24 of his written heads of argument that "the effect of the ZIA investment licence was to prolong the acquired privileges under the EPZ Act, pending the new guidelines" contemplated in s 24 of the repealing Act constituted an implicit concession that a valid ZIA investment licence was a necessary prerequisite for the acquired privileges to be prolonged. In view of my finding that the appellant did not have such a licence, I hold that it was required to charge, collect VAT on the cutrag services rendered to the local customers and remit VAT to the respondent.

The appellant pinned its case on the words "anything done in terms of the Export Processing Zone Act *[Chapter 14:06*]". Mr *Erasmus* contended that, these words covered the declaration of the appellant's premises as an EPZ. Mr *Magwaliba* did not directly contradict this contention but relied on my finding in *ST (Pvt) Ltd v Commissioner- General Zimra* 2016 (2) ZLR 133 (FAC) at 147H-148A that the repeal of EPZ Act abolished export processing zones. Mr *Erasmus* correctly contended that when I made that decision, the doctrine of incorporation by reference and the provisions of s 17 (1) (b) and (c) of the Interpretation Act were not considered. He also correctly contended that my decisions in the Fiscal Appeal Court do not constitute binding precedent. He submitted that my finding on the abolition of export processing zones was wrong. I am, accordingly, obliged to reconsider the finding in the *ST* case in the light of the submissions advanced by Mr *Erasmus* and correct the position if I was wrong. I must hasten to say that even if I was wrong in making that finding, the decision dismissing the appeal in the *ST* case would still hold. This is because I also found against *ST* at page 145B-F that, even if the export zone status was preserved, it could not escape VAT liability in the 2009 assessed period because it had imported the goods in question into Zimbabwe, which in turn invoked the operation of s 6 (1) (b) of the VAT Act.

The only case that I was able to access, which rendered the meaning of "anything done" was the South African case of *Walmer Municipality v Glover and Port Elizabeth Liquor Licensing Board, supra***,** where REYNOLDS J said at p 43**:**

> **"**But issuing of the War Measure or the *Government Notice* 263 of 1945, cannot be regarded as "anything done". The rule that when an empowering Act is repealed the regulations made under it fall away unless preserved in the repealing Act, admits of no doubt. To say that the issue by the Governor-General of any War Measure is an 'act done' and therefore preserved under s 13 (2) would be completely to negative this rule, and indeed Mr. *Back* fully recognised this. Nor is the case of *Queen v Justices of West Riding* 1QBD 220, any authority to the contrary for there a notice issued under the repealed Act, before repeal, was held to be 'anything duly done' under the repealing Act, which substantially re-enacted the provisions of the repealed Act and expressly preserved the validity of anything done."

He held that "anything done" would not cover subsidiary legislation made under a repealed Act, unless that subsidiary legislation was expressly preserved and substantially re-enacted in the repealing Act. However, it seems to me that the words "anything done" are of wide ambit. Indeed, I held in the *ST* case at 146 H-147A that:

> "The declaration of the premises on which the appellant operated as an export processing zone followed by the issuing of a 10 year licence to the appellant on 10 September 2002 were Acts done by the Export Processing Zone Authority in terms of s18 (a) and (b) as read with s 27 of the EPZ Act. The type of investment and the value of the investment were decisions made by the appellant in terms of the Act. The goods imported into the EPZ, which were in transit, and the requisite exemptions from import and export permits for such goods, the operation of foreign currency accounts outside Zimbabwe, in the EPZ or in Zimbabwe would all constitute actions and decisions that had commenced or had been completed that could be made in terms of ss 39, 41 and 44 of the EPZ Act. <u>All these acts and decisions were saved by s 34 (2) as read with s 37 (1) and (2) of the Zimbabwe Investment Authority Act</u>." (Underlining for emphasis)

That "anything done" covers the promulgation of subsidiary legislation under an enabling parent Act is also apparent from the wording of s 15A of the Interpretation Act, which reads:

> "**15A References to things done by notice in the *Gazette* or by statutory instrument**
> Where an enactment requires or permits anything to be done--
> (*a*) by notice in the *Gazette*, the thing may be done by statutory instrument published as a supplement to the *Gazette*;
> (*b*) by statutory instrument, the instrument may be published as a notice in the *Gazette* rather than as a supplement to the *Gazette*."

The similarity of wording and the import of that section is that the enactment of the of SI 7/2002 and the designation of the premises of the appellant as an export processing zone fell into the ambit of "anything done".

I, accordingly, agree with Mr *Erasmus* that the declaration of the appellant's premises was preserved by s 34 (2) of the repealing Act and that my decision that export processing zones were abolished by s 34 (1) in the *ST* case was erroneous. In view of this finding, (ii) (b) of my formulation of the key phrases for determining what was saved is resolved in the appellant's favour.

The last key phrase, "which immediately before the fixed date, had or was capable of acquiring effect", in my view, covers the effects of the declaration of the appellant's premises as an export processing zone under the repealing Act only. S 34 (2), therefore preserved the effect of s 20 (1) of the repealed Act but did not preserve s 20 (1). An export country is defined as follows:

> ""export country" means any country other than Zimbabwe and includes any part of Zimbabwe declared in terms of subsection (1) of section 20 of the Export Processing Zones Act [*Chapter 14:07*]"

Thus, immediately, before the fixed date, that is 1 January 2007, the appellant, as an export country, could access the VAT privileges designated in the VAT Act. This was because the VAT Act, which took effect after the EPZ Act incorporated s 20 (1) of the EPZ Act by reference.

I will assume without deciding that, notwithstanding that s 20 (1) was not saved in s 34 (2) of the ZIA Act, the saving of the declaration by s 34 (2) was implicitly, though not explicitly, grafted into the definition of export country in s 2 of the VAT Act and was in application in 2009 when the assessments were issued. It will be recalled that liability to VAT in Zimbabwe, is based on the supply of goods and services. The non-liability claimed by the appellant in the period April to December 2009 related to the services that it admittedly supplied into the customs territory of Zimbabwe. In order for the appellant to access the VAT privileges, it had to adhere to the full regulatory framework embodied in the repealed Act. The first was the declaration as an export country, which it had. The second was the acquisition of a valid licence, issued in terms of s 37 (1) and (2), which it did not have. The absence of a valid Zimbabwe Investment licence issued under the provisions of s 37 (1) of the repealing Act, disentitled the appellant from accessing the statute given VAT benefits that it would have been entitled to where it in possession of such a licence. The absence of the s 37 (1) licence precluded the appellant from appropriating the duly availed right provided to an EPZ by s 34 (2) of the repealing Act. See *Mahomed NO v Union Government (Minister of the Interior)* 1911 AD 1 at 9**,** where though the 1906 Act had preserved the permanent residence

rights that the appellant had in 1902, his appeal failed because he had not appropriated those rights before the repeal.

The effect of the appellant's failure to apply for the s 37 (1) replacement licence timeously was that the 10 year EPZA licence, which was originallly issued on 24 August 2001 and replaced on 30 August 2005 lapsed. The appellant did not have an EPZA licence to operate in the EPZ with the result that its business activities fell into the same category as those of any other company operating in the customs territory. Its exports became zero rated just like those of any local company. It was no longer required to submit an import bill of entry and pay import duties and output VAT on imports or claim input refunds, in terms of s 19 (1) of the VAT (General) Regulations SI 273/2003. It, however, became liable for voluntary or compulsory registration as a VAT registered operator and to pay output VAT on local supplies and claim input VAT on local purchases. The net effect of the failure to procure the s 37 (1) replacement licence timeously was that the appellant could not derive any VAT benefits from its preserved EPZ status.

Thus, even though the appellant established that its EPZ status was preserved by s 34 (2), it failed to establish that it had a valid licence that entitled it to access the statute accorded VAT benefits during the period April to December 2009. Accordingly, I find that the Commissioner correctly assessed it to VAT during that period.

Penalties

The Commissioner reduced the penalty from 50% to 10% in his determination to the objection. The Commissioner did not impose the maximum penalty of 100% because he was satisfied that the appellant did not intend to postpone his VAT liability. He took into account that the cooperation exhibited by the appellant during the investigations including the "voluntary" payment of VAT from February 2010. The failure by the appellant to claim input VAT prescribed in s 19 (1) of the VAT (General Regulations) SI 273 of 2003 in the period under appeal was not in any way mitigatory, as the appellant was not an EPZ licensee at the time. In any event, in terms of s 44 (9) as read with para (c) of the definition of exported in the VAT Act, the appellant was required to establish that the local purchases would contribute towards exports before it could be entitled to input VAT refunds. It failed to do so. The appellant's failure to claim input VAT during the period in question was, therefore, not mitigatory. The appellant did not proffer any explanation for not charging, collecting and remitting output VAT for the supply of the cutrag services rendered to the 3 local customers

in question. The failure constituted culpable ignorance, which raised the moral turpitude of the appellant. The fiscus requires revenue to meet its varied social and economic obligations. The appellant deprived it of the fiscus of its fair share of such revenue. These aggravating features negated a complete waiver of the penalty on appeal. The reduced penalty imposed by the Commissioner was most appropriate and is, therefore, confirmed.

Costs

The appellant raised interesting points of law, which resulted in the alteration of my finding in the *ST* case. I do not find the grounds of appeal to have been frivolous and would not impose an adverse order for costs against the appellant.

Disposition

Accordingly, it is ordered that:

1. The appeal is dismissed in its entirety.
2. The VAT assessments issued by the Commissioner against the appellant on 15 May 2015, for the period April 2009 to December 2009, are confirmed.
3. Each party shall bear its own costs.

Atherstone and Cook, the appellant's legal practitioners.