

DISTRIBUTABLE (8)

Judgment No. SC. 11/06

Civil Appeal No. 367/05

ZIMBABWE REVENUE AUTHORITY v
BORDER TIMBERS LIMITED

SUPREME COURT OF ZIMBABWE
CHIDYAUŠIKU CJ, SANDURA JA & GWAUNZA JA
HARARE, FEBRUARY 27 & APRIL 7, 2006

L Mazonde, for the appellant

T Biti, for the respondent

SANDURA JA: This appeal arose out of a dispute between the appellant (“Zimra”) and the respondent (“the company”) with regard to the appropriate classification, for duty purposes, of a commodity imported by the company from Norway. The dispute was decided in favour of the company by the High Court on 9 November 2005. Aggrieved by that decision, Zimra appealed to this Court.

The background facts are as follows. At the relevant time the company was a manufacturer of wooden doors. The process of manufacturing the doors required large quantities of glue, which the company made by mixing a substance called urea resin, which was imported in powder form from Norway or Saudi Arabia, a hardener, also imported from Norway or Saudi Arabia, and water.

The trade name for the urea resin manufactured in Norway was Aerolite FFD, and that for the urea resin manufactured in Saudi Arabia was Dynorit L-530. The chemical name for urea resin was *urea formaldehyde polymer*.

For more than eleven years the company imported urea resin and, in terms of the Customs and Excise (Tariff) Notice, 2002, published in Statutory Instrument 245 of 2002 ("the Tariff Notice"), Zimra classified the product under Commodity Code 3909:1000, in terms of which duty was payable at the rate of 5%.

Subsequently, in December 2004 the company imported urea resin from Norway. The urea resin, which was in four containers, arrived in the country in January 2005. Zimra again classified the product under Commodity Code 3909:1000. Allen Wack & Shepherd (Pvt) Ltd, the company's clearing agent, cleared all the containers with Zimra and paid duty at the rate of 5%. The total amount of duty paid in respect of the containers was \$162 896 291.18.

Thereafter, in February 2005, before the containers were released, Zimra informed the company, through its clearing agent, that the duty payable in respect of the product should have been calculated at the rate of 25% because urea resin was classified under Commodity Code 3214:9000. Zimra, therefore, demanded from the company payment of additional duty and provisional fines in respect of each container, which altogether totalled \$284 851 991.00.

Following that demand, the company filed an urgent chamber application in the High Court seeking an order declaring that the duty payable in

respect of urea resin was 5%, and directing Zimra to release the containers.

After an order granted in chambers with the consent of the parties on 25 March 2005, in terms of which the containers were released to the company, the matter was subsequently heard on 9 July 2005 as an ordinary court application for a declaration to the effect that the duty payable in respect of urea resin was 5%. The application was later granted with costs. The correctness of that decision has now been challenged in this Court by Zimra.

Before considering the main issue in this appeal, I wish to state that the point *in limine* set out in the heads of argument filed on behalf of Zimra was not persisted with by Mr *Mazonde*, who appeared for Zimra. The point taken in the heads of argument was that the High Court did not have the jurisdiction to hear the application filed by the company because the matter should have been brought before the Fiscal Appeal Court in terms of s 87(3) of the Customs and Excise Act [*Chapter 23:02*]. However, as the point was abandoned I need not consider it.

Having said that, I proceed to consider the main issue in this appeal, which is whether the correct classification of urea resin, for duty purposes, was Commodity Code 3909:1000, as found by the learned Judge in the court *a quo*, or Commodity Code 3506:9900, as contended by Zimra. I have no doubt in my mind that the learned Judge correctly determined the issue.

It was common cause that the products at the centre of the dispute were Aerolite FFD and Dynorit L-530. As already stated, at the relevant time the two

products were one and the same, urea resin in powder form, whose chemical name was *urea formaldehyde polymer* in powder form.

In my view, the argument that as the urea resin was in powder form it was no longer in its primary form after undergoing the process of manufacture was unfounded, because it overlooked the fact that the only change in the product was the physical removal of water, which did not alter the chemistry of the product.

In terms of the Tariff Notice, urea resin is classified under Commodity Code 3909:1000, attracting duty at the rate of 5%. See p 185 of the Tariff Notice. There is, therefore, no basis on which the classification of the urea resin imported by the company could be said to have been erroneous.

In addition, I am satisfied that it would be incorrect to classify urea resin under Commodity Code 3506:9900. I say so because it is clear from the Tariff Notice that the products which fall under Tariff Heading 35:06 would not include the urea resin imported by the company in four large containers. The products which fall under the heading in question are described as follows at p 168 of the Tariff Notice:

“Prepared glues and other prepared adhesives, not elsewhere specified or included; products suitable for use as glues or adhesives, put up for retail sale as glues or adhesives, not exceeding a net weight of one kg.”

The above description is significant in at least two respects. Firstly, it only covers prepared glues and other prepared adhesives not specified or included elsewhere in the Tariff Notice. In the present case, the urea resin imported by the

company was not “prepared glue or other prepared adhesive”. It only became glue after it was mixed with a hardener and with water. In addition, urea resin is specified elsewhere in the Tariff Notice, i.e. under Commodity Code 3909:1000.

And, secondly, the description only covers “products suitable for use as glues or adhesives, put up for retail sale as glues or adhesives, not exceeding a net weight of one kg”. The urea resin imported by the company does not fall within this description. It was not put up for retail sale as a glue or adhesive, and each container exceeded a net weight of one kilogram.

In any event, the record indicates a high degree of uncertainty on the part of Zimra as to the appropriate classification of urea resin. For over eleven years Zimra classified the product under Commodity Code 3909:1000, which attracted duty at the rate of 5%. Then in January 2005 it first classified the product under Commodity Code 3909:1000, but later on in February 2005 informed the company that that classification was erroneous, and that the correct classification was Commodity Code 3214:9000, which attracted duty at the rate of 25%.

However, in its opposing affidavit Zimra abandoned that classification in favour of the classification of urea resin under Commodity Code 3901:3914. That, too, was later abandoned in favour of the classification of urea resin under Commodity Code 3506:9900.

In the circumstances, the appeal is devoid of merit and is, therefore, dismissed with costs.

CHIDYAUSIKU CJ: I agree.

GWAUNZA JA: I agree.

Kantor & Immerman, appellant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners