

REPORTABLE

(24)

ECONET WIRELESS (PRIVATE) LIMITED
v
(1) ZIMBABWE REVENUE AUTHORITY (2) COMMISSIONER
GENERAL

SUPREME COURT OF ZIMBABWE
MALABA DCJ, GOWORA JA & MAVANGIRA JA
HARARE, MAY 10, 2016 & FEBRUARY 28, 2019

T Nyambirai, for the appellant

L Mazonde, for the respondents

MAVANGIRA JA: This is an appeal against part of the judgment of the High Court which decided against the appellant on several issues on which the parties had failed to reach agreement in an urgent chamber application. The part appealed against is fully set out at page 10 of this judgment.

BACKGROUND

During the period extending from January 2009 to July 2013 the appellant imported and declared goods which were then classified as base stations. On 3 December 2013, the second respondent wrote a letter to the appellant informing it that the respondents had carried out a post-clearance audit of the ‘base station importations’ by the appellant during the stated period. The audit had revealed anomalies which the second respondent attributed to

misclassification of single components or parts of base stations as complete base stations by the appellant. The second respondent stated in the same letter that the appellant ought to have been, and was aware, that all importations of base stations were to be moved into bond and warehoused and the final consumption entries of the base stations would be done inland. The conclusion was therefore that the first respondent had been prejudiced in the sum of \$15 884 943.45 in customs duty and value added tax. The appellant was as a consequence requested, in the said letter, to pay the tax as well as a 300 percent penalty on the tax due bringing the amount due to \$63, 539 773.84.

On 9 December 2013, the respondents placed a garnishee order against the appellant's CBZ bank account for the amount of \$63, 539 773.84. A similar process was done on the appellant's Steward Bank account in the sum of \$62, 909 433.11. Both garnishee orders were placed in terms of the Income Tax Act [*Chapter 23:06*]. In response, the appellant filed an urgent chamber application with the High Court of Zimbabwe on the 10 December 2013. It sought an interim order in the following terms:

TERMS OF INTERIM RELIEF GRANTED

PENDING THE FINAL DETERMINATION OF THIS MATTER IT IS ORDERED THAT:

1. The garnishee orders placed by the respondents on 9 December 2013 on the applicant's accounts with Steward Bank Limited in the amount of US\$62,909,433.11 and CBZ Bank Limited in the amount of US\$63,539,733.84 be and are hereby set aside.
2. The respondents be and are hereby interdicted from placing any garnishee orders on applicant's accounts with any other person or bank on the same, similar or related grounds as in this case.

The final order it sought was couched:

TERMS OF THE FINAL ORDER SOUGHT

IT IS ORDERED THAT:

1. The respondents' claim against the applicant for payment of duty and Value Added Tax amounting to US\$ 15, 884 943.46 in respect of the importation of base station components by the applicant during the period January 2009 to June 2013 be and is hereby set aside and dismissed.
2. The penalty of 300 percent amounting to US\$47,654 830.38 imposed on the applicant by the respondents be and is hereby set aside and dismissed.

The appellant sought this interim order on three bases. The first was that the garnishee orders were unprocedural as they were made in terms of s 58 of the Income Tax Act despite the fact that the tax claimed was due under the Customs and Excise Act [*Chapter 23:02*]. It argued that such a procedure for customs duty is provided in terms of s 201A of the Customs and Excise Act. It contended that assuming that the procedure for appointing a representative taxpayer does apply to disputed tax liabilities, the appellant had a right to object to an assessment in terms of s 62 of the Income Tax Act. The appellant contended that Part IIIA of the Revenue Authority Act [*Chapter 23:11*] which provides for the procedure for the recovery of outstanding taxes safeguards the appellant's rights to object to assessments and to be heard in the determination of any tax claims. The same applies to s 201A of the Customs and Excise Act, (*Chapter 23:02*), it argued.

The second basis was that there was no anomaly in the clearance of the appellant's base station components. It made reference to a letter from the Department of Customs and

Excise which was written in 1998 in response to a letter from the appellant seeking guidance on classification of base station components. In the letter dated 5 October 1998, the Department of Customs and Excise responded and stated:

“I confirm that the goods on the lists that you have submitted can be imported by your company duty free under tariff 8525.2020 as components that make up a base station. The Collectors of Customs and Excise at Beitbridge, Harare, Bulawayo and Plumtree have been advised and the list circulated to them.”

The same position was restated by the second respondent in a subsequent letter on 24 February 2010. In this letter, the second respondent took the position that components of a base station can be cleared under tariff 8517 6100 in the quantities specified therein. The appellant argued that the duty to classify lay with the respondents and their duty assessments constituted *pactum de non petendo* as between them and the appellant. The third issue was that the 300 percent penalty was irregular and excessive and could only have been levied in terms of s 200 of the Customs and Excise Act against a party who admits to an alleged fiscal offence or if the respondents had gone to court to obtain an order to that effect.

The respondents opposed the application. Regarding the irregularity of the use of the garnishee notice with references to the Income Tax Act, the respondents attributed this to an error on the part of the first respondent’s officers mainly due, allegedly, to the fact that the forms for customs and excise are ‘virtually identical’ to those for the Income Tax Act. It was averred that the garnishee notices had since been withdrawn and that it was intended to issue the correct documents in terms of the Customs and Excise Act. The respondents denied issuing an advance tax ruling as contemplated by the law. They contended that the appellant could not rely on administrative correspondence between it and managers of the first respondent. They therefore denied that the requirements of estoppel were established. They also challenged the

argument that the respondents were *functus officio* in light of s 87 of the Customs and Excise Act which provides:

87 Classification of goods for customs purposes

(1) For the purpose of determining the customs duty payable in respect of any goods that are imported, **the Commissioner or an officer shall classify such goods into the appropriate tariff headings, subheadings or codes** in accordance with any rules set out in the customs tariff, paying due regard to—

(a) the explanatory notes to the Harmonised Commodity Description and Coding System, issued from time to time by the World Customs Organisation in Brussels; and

(b) decisions of the Harmonised Commodity Description and Coding System Committee.

(2) The Commissioner shall vary or set aside a classification of goods made in terms of subsection (1) if he is satisfied, whether on appeal by the importer of the goods or otherwise, that the classification was incorrect.

(3) Any classification of goods made in terms of this section shall be binding on the importer of the goods, subject to an appeal—

(a) to the Commissioner, where the classification was made by an officer; or

(b) to the Fiscal Appeal Court in terms of the Fiscal Appeal Court Act [Chapter 23:05], where the classification was made, varied or confirmed by the Commissioner.

(4) The Commissioner shall ensure that at least one copy of—

(a) the publications referred to in paragraph (a) of subsection (1); and

(b) any decision referred to in paragraph (b) of subsection (1) on which he has relied for the purpose of classifying any goods;

is kept available for public inspection during normal business hours in his offices and at such other offices of the Department as he considers appropriate.

(5) If the classification of goods for the purposes of this Act is an issue in any proceedings before any court, a document purporting to be a copy of a publication or decision referred to in subsection (1), and purporting to be certified as correct by the Commissioner, shall be admissible in the proceedings as prima facie proof of its contents upon its production by any person. **(emphasis added)**

In respect of the penalty, the respondents justified it on the basis that the appellant's agents had allegedly displayed flagrant disregard for the Customs and Excise Act. Additionally, the respondents argued that the appellant had alternative remedies including an appeal to the Fiscal Appeals Court. The appellant could also lodge security under the Customs and Excise Act as well as payment of the capital and interest claimed pending the determination of the penalty. The respondents also argued that the correct forum for the ventilation of the dispute was the Fiscal Appeal Court and not the High Court.

The court *a quo* narrowed down five issues that it had to determine in respect of the urgent chamber application before it. These were:

- a. Whether the importation of the base stations by the applicant during the period January 2009 to July 2013 was conducted within the law.
- b. Whether the respondents were prevented from reviewing the classification for customs duty purposes of base station components imported by the applicant during the relevant period, by the doctrines of estoppel, waiver or *functus officio*.
- c. Whether the second respondent was entitled at law to impose and collect a fine without the agreement of the appellant or a fine of the magnitude imposed on the appellant
- d. Whether it was competent for the second respondent to collect the fine imposed on the applicant through the garnishee procedure provided for under s 201A of the Customs and Excise Act.
- e. Whether the launching of an appeal or other challenge to the classification of goods for customs purposes under s 87 of the Customs and Excise Act precludes the respondents from collecting customs duty under challenge under s 201A of the Act pending the determination of the appeal or other challenge.

The court *a quo* found in respect of the first issue that the importations were not done lawfully but through false declarations. It found further, that the appellant's agents had made such declarations and that their transgressions lay squarely on the appellant as the principal. In respect of the second issue, the court *a quo* found that the doctrine of estoppel did not preclude the respondents from acting as they did especially in light of s 87 (2) of the Customs and Excise Act. The court equally found the doctrine of waiver not applicable as it found that an error in classification did not amount to waiver of the duty payable. Regarding the fourth issue, the court *a quo* found that the respondents could not levy a fine without the appellant admitting to the fiscal offence or where the court so orders. The fifth issue was also

resolved in favour of the appellant on the basis that s 201A relates to the placing of a garnishee for duty only and not for a fine.

The court made the following order therefore:

1. “The declarations made by the applicant amounted to a contravention of the law
 2. The respondents were entitled to reclassify good arising from the post-clearance audit.
 3. The respondents could not waive a duty to correctly classify the goods.
 4. The noting of the appeal to the Fiscal Appeal Court did not suspend the decision of the second respondent
 5. The second respondent could not impose a penalty without the consent of the applicant
 6. The second respondent could not collect the penalty by way of garnishee.
- None of the parties completely succeeded in the arguments advanced. It is ordered that each party shall bear their costs.”

THIS APPEAL

The appellant filed an appeal against part of the judgment of the court *a quo*. The part to which this appeal relates was stated in the notice of appeal as:

The part of the judgment appealed against is the part whereby the court *a quo* held that:

1. The declarations made by the applicant in the court *a quo* amounted to a contravention of the law
2. The first and second respondents were entitled to reclassify goods imported by applicant in the Court *a quo* in its post clearance audit
3. The noting of an appeal by applicant in the court *a quo* against a decision made by second respondent under the Customs and Excise Act did not suspend the decision of the second Respondent.
4. Each party shall bear its own costs.

GROUNDS OF APPEAL

The appellant attacked this part of the judgment by raising the following grounds of appeal:

1. The court *a quo* erred in fact and at law in finding that appellant made false declarations in the absence of a finding by second respondent that appellant had made false declarations, or an allegation by second respondent that appellant had made false declarations or sufficient proof that appellant had made false declarations.
2. The court *a quo* erred both in fact and at law in finding that second respondent was not estopped from changing the classification for duty purposes of the base station components imported by appellant from a duty free tariff that had been applied by second respondent for more than 15 years to a tariff that attracted duty.
3. The court *a quo* erred at law in finding that s 14 of the Fiscal Appeal Court Act [*Chapter 23:05*] does not suspend the decision appealed against when it in fact does, unless second respondent orders otherwise, which he did not do in the present case.
4. In any event, the court *a quo* erred in finding that S 14 of the Fiscal Appeal Court Act applies to the present case when in fact the Section only applies to Stamp Duties and Sales tax, and does not apply to appeals relating to Customs and Excise which are governed by Part IV of the same Act, which part gives appellant an option to either pay the duty, or to furnish security acceptable to second respondent as was done by appellant in this matter.
5. In the circumstances, the court *a quo* erred at law in not allowing the appellant's claim for costs of suit.

At the commencement of the hearing of this appeal, the appellant abandoned the third and fourth grounds of appeal. Mr *Nyambirai*, for the appellant, argued the appeal on the basis of the first, second and fifth grounds of appeal.

APPELLANT'S SUBMISSIONS BEFORE THIS COURT

Mr *Nyambirai* urged this Court to find that the starting point is to define a base station. He pointed to the definition of 'base station' in s 87 of the Customs and Excise Act [*Chapter 23:02*] which incorporates the Harmonised Commodity Description and Coding System issued from time to time by the World Customs Organisation in Brussels as well as decisions of the Harmonised Commodity Description and Coding System Committee. He argued that a letter by the Postal and Telecommunications Regulatory Authority of Zimbabwe (POTRAZ) listed what constitutes a base station. He contended that this is consistent with the letter written by the Department of Customs and Excise on 5 October 1998 to the effect that the specified components of a base station be imported by the appellant duty free.

A letter dated 24 February 2010 was referred to, where the respondents wrote to the appellant and indicated that components of base stations could be cleared under Tariff 8517 6100. The rider was that the importations of listed components would have to correspond with the number of base stations to be installed.

Mr *Nyambirai* made reference to the letter dated 3 December 2013 and highlighted that the allegation therein was that of the appellant having made a misclassification as opposed to making a false declaration.

He argued that issues of false declarations were not part of the respondents' case against the appellant as stated in their letter and that that issue was therefore not properly before the court *a quo*. Mr *Nyambirai* further argued that the classification done by the respondents was correct as it is consistent with r 2 (a) of the Explanatory Notes to the Harmonised Commodity Description and Coding System.

Mr *Nyambirai* further argued that as a bonded warehouse facility is intended for goods that are classified under a dutiable tariff it followed logically therefore, that goods that are classified under a duty-free tariff did not need to be put in a bonded warehouse.

He submitted that the base stations in issue were imported as unassembled or disassembled components because of the impossibility of importing an assembled base station. He argued that the rule applicable in terms of s 87 of the Customs and Excise Act is Rule 2(a) of Statutory Instrument 245/2002. Mr *Nyambirai* argued that the second respondent did not carry out a reconciliation of the unassembled components imported by the appellant to establish whether they were in excess of the requirements for a base station. He further argued that the court *a quo*'s finding that the appellant made false declarations was wrong as the issue was not before the court *a quo* and the finding was in any event incorrect.

It was also argued on behalf of the appellant that the court *a quo* erred both in fact and at law in not finding that the second respondent was estopped from changing classification of the imported base station components.

He submitted that the classifications during the period extending from October 1998 to 24 February 2010 had been done by the second respondent's predecessor under the letter of 5 October 1998 and the second respondent under his letter dated 24 February 2010, respectively. Both letters classified the components of a base station which are unassembled or disassembled under the tariff heading "Base Stations".

Mr *Nyambirai* argued that the classifications during the period extending from October 1998 to 24 February 2010 were done by the second respondent's predecessor under the letter of 5 October 1998 and the second respondent under his letter dated 24 February 2010, respectively. Both letters classified the components of a base station which are unassembled and disassembled under the tariff heading 'Base stations'. Both letters, it was argued, were authored by officers who had ostensible authority to write them on behalf of the second respondent and that the respondents ought therefore to be estopped from varying or setting aside the given classifications with retrospective effect. The second respondent thus became *functus officio* when the classification decisions were made.

In motivating the fifth ground of appeal relating to costs, the argument was that as a result of the foregoing, the court *a quo* ought to have granted the appellant's application with costs.

RESPONDENTS' ARGUMENTS

Mr *Mazonde*, for the respondents, submitted that the appellant purported to import base stations but it did not. It imported various components and items of telecommunications

equipment under the guise of importing base stations thereby benefitting from improper classification. He contended that this resulted in the number of base stations allegedly imported by the appellant to exceed 491 142 base stations compared to the number given by POTRAZ that the appellant has set up 2440 base stations.

He argued that these so called components were not imported in compliance with r 3 (b) of Classification rules which states that composite goods made up of different components shall be classified as if they consist of a component which gives them their essential character. As a result, for the various components imported in 'complete knock down form' to be deemed as a base station, all parts should be imported at the same time to constitute the essential character of a base station. He argued therefore that the components in this case were not imported or cleared at the same time meaning they did not constitute the essential character of a base station. Therefore the respondents were correct in levying tax on each individual component.

He submitted additionally that base station batteries are excluded from the tariff heading 8517 in terms of the Explanatory Notes, 5th Edition, 2012, volume 5. The point he sought to make was that not all components are duty free. He further stated that the appellant's clearing agents therefore violated the law in the manner in which they imported the base stations for the appellant. He submitted that the agents admitted to the same and were suspended from operating and further that the appellant itself admitted to these anomalies arising from the conduct of these agents and paid the assessed duty and penalty. The classification from 2009 to 2013 was carried out by various clearing agents, some lodging correct declarations and others misclassifying the components. He argued that the finding of

the court *a quo* that the importation had been irregular, unlawful and illegal was a factual finding which this appellate court cannot set aside in the absence of a finding that there has been a grave misdirection on the part of the court *a quo*. He argued that the appeal must fail on this point.

On the question of estoppel, Mr *Mazonde* submitted that the court *a quo* was correct in finding that the respondents are entitled to carry out post-clearance audits in terms of the law. He submitted that in terms of s 87 (2) of the Customs and Excise Act, the second respondents can set aside or vary his or her own classifications. He argued that estoppel does not arise in matters relating to statutory obligations or rights. Furthermore, that such power was also reposed in the second respondent in terms of s 223A (4) of the Customs and Excise Act. Mr *Mazonde* argued that *in casu* there was no dispute that the post clearance audit took place within the prescribed time limits. He also submitted that the respondents are entitled to take remedial action where anomalies arise after an audit. He argued therefore that estoppel has no application in the circumstances.

Mr *Mazonde* argued that reliance on the letters referred to was misplaced as the letters did not constitute a 'revenue advance tax ruling', no formalities or procedure having been followed by the appellant to acquire such an advance tax ruling.

He also submitted that the requirement for the bonded warehouse was to ease the appellant's plight of having to source the components from different suppliers across the world and hence being unable to present the components for classification as per r 2 (a) at the time of

importation. He underscored that it was a suggestion made for the convenience of the appellant. He argued that r 2 (a) deals with the classification of incomplete or unfinished articles presented unassembled or disassembled and that base station components imported separately are liable for duty in accordance with the tariffs that apply to such separate components.

He contended that the appellant cannot benefit from the zero duty applicable to a base station importation. He argued that the simple issue for determination was whether the cleared components made up a complete base station and if not, they could not be classified as base stations. He reiterated that the respondents' position is that the Commodity Code 8517.6100 does not include unassembled or disassembled parts or components. On these bases, he prayed for the dismissal of the appeal with costs as the decision of the court *a quo* was correct.

ISSUES

Three issues arise for determination before this Court. These are:

1. Whether the issue regarding false declarations was an issue that was properly before the court *a quo* and on which it was required to make a determination.
2. Whether the classification was done in terms of the law.
3. Whether the order of costs made by the court *a quo* ought to be interfered with.

THE LAW AND THE FACTS

- 1. Whether the issue regarding false declarations was properly before the court *a quo*.**

It is the appellant's argument before this court that the court *a quo* determined an issue which was not properly before it by finding that the appellant's declarations had contravened the law. In determining this issue the starting point is the letter of 3 December 2013. This is the letter which triggered the litigation that has culminated in this appeal. This letter from the respondents to the appellant alleged that there were anomalies in the clearances of 'base station' importations and that "(T)he anomalies arose as a result of the fact that **Econet Wireless was misclassifying** single components/units or parts of Base Stations as complete base stations." (emphasis added) The respondents further arrogated an error on the appellant of failing to move all the base station importations in bond.

In the founding affidavit of its application in the court *a quo* the appellant contended that the duty to classify did not lie with it. This was in response to the case which the respondents laid at its door in the said letter. Put differently, the decision which was being reviewed by the court *a quo* was the decision embodied in that letter. It was never the respondents' case in that letter that the appellant had falsely declared its importations.

In opposing the application in the court *a quo*, the respondents sought to argue that its post clearance audits had shown that the declarations by the appellant and its agents had been irregular. This was not the case that the respondents had laid against the appellant when it wrote the letter of 3 December 2013 and subsequently garnished the appellant's bank accounts. The issue that culminated in the litigation in this matter was that of alleged misclassification and not one of false declarations.

If the respondents had changed their case to one of false declarations, it ought to have informed the appellants accordingly and set aside its initial position. The fact stands that these proceedings were set in motion by the letter alleging misclassification. Proceedings ought to be disposed of on the basis on which they are brought. It is unclear how the proceedings mutated from being based on classification to being based on false declarations. The court *a quo* ought to have decided the matter without losing sight of the root or trigger of the litigation which was the letter of 3 December 2013.

No evidence was brought before the court *a quo* to justify the finding that false declarations had been made by the appellant. In *Ruturi v Heritage Clothing (Pvt) Ltd* 1994 (2) ZLR 374 (S), this Court found that to make any finding in the absence of evidence is to err. In the absence of evidence of false declarations being made, the court *a quo* ought not to have made that finding. The respondents made these allegations in the court *a quo* and the various agents that they mentioned in their notice of opposition as having acted on the appellant's behalf were not party to the proceedings for proper findings to be made on whether the declarations had been false. In any event, the issue ought not to have been related to by the court *a quo* as it was not properly before it.

2. Whether the classification was done in terms of the law.

As argument progressed before us it became very clear, from both counsel's submissions, that the dispute between the parties was not about the description of the imported goods but their classification. Classification is generally dealt with by s 87 of the Customs and Excise Act. For ease of reference the relevant portion of the section is quoted again below:

87 Classification of goods for customs purposes

- (1) For the purpose of determining the customs duty payable in respect of any goods that are imported, the Commissioner or an officer shall classify such goods into the appropriate tariff headings, subheadings or codes in accordance with any rules set out in the customs tariff, paying due regard to—
- (a) the explanatory notes to the Harmonised Commodity Description and Coding System, issued from time to time by the World Customs Organisation in Brussels; and
 - (b) decisions of the Harmonised Commodity Description and Coding System Committee.
- (2) The Commissioner shall vary or set aside a classification of goods made in terms of subsection (1) if he is satisfied, whether on appeal by the importer of the goods or otherwise, that the classification was incorrect.

From the foregoing, it is clear that the duty and obligation to classify goods for customs purposes lies with the ‘Commissioner or an officer’. The Customs and Excise Act defines ‘Commissioner’ as:

“Commissioner” means—

- (a) the Commissioner in charge of the department of the Zimbabwe Revenue Authority which is declared in terms of the Revenue Authority Act [*Chapter 23:11*] to be responsible for assessing, collecting and enforcing the payment of duties in terms of this Act; or
- (b) the Commissioner-General of the Zimbabwe Revenue Authority, in relation to any function which he has been authorised under the Revenue Authority Act [*Chapter 23:11*] to exercise;

It defines an ‘officer’ thus:

“officer”—

- (a) means an officer of the department of the Zimbabwe Revenue Authority which is declared in terms of the Revenue Authority Act [*Chapter 23:11*] to be responsible for assessing, Collecting and enforcing the payment of duties in terms of this Act;
- (b) includes a person exercising the powers or performing the duties of an officer conferred or imposed upon him in terms of subsection (4) of section *three*;

Whatever else these two terms may mean definitely excludes the taxpayer. It is not the duty of a taxpayer to classify his, her or its own imports for the purposes of customs duty

assessments. In *casu*, the respondents classified the components of base stations as base stations. Technically, the matter could be disposed of at this juncture because the letter which led to all this litigation was premised on the contention that the appellant misclassified its own imports. There was not and cannot be such an obligation on a taxpayer and thus on the appellant. It thus cannot be alleged to have classified its own goods for custom purposes. The legal syllogism upon which the respondents' case rested fell.

It was also Mr *Nyambirai's* unchallenged submission that the exercise of that duty by the respondents is reflected and therefore confirmed by the Bills of Entry that were processed by the second respondent and his officers.

In addition, the fact that the respondents have the duty to reclassify in terms of s 87 (2), presupposes, as also specifically stated in s 87 (1), that they are the ones who would have made the classification in the first place.

In the letter of 3 December 2013 and in the proceedings in the court *a quo*, the respondents contended that for the appellant to import the components as base stations, the components had to be moved in bond. They have since changed their position and now state that that earlier position had been suggested for the ease or convenience of the appellant and not as a strict rule of law. In other words, there was no requirement at law that the imported components be moved into bond. Mr *Mazonde's* earlier submission that all the components had to be imported at once for the components to be taxed as a base station and not disparately at different times was thus effectively retracted.

Even if it existed, such a requirement would be impracticable. This is so given the appellant's unchallenged submission that the components are imported from different countries and through different modes of transport and therefore entering the country at different ports of entry. The said submission is thus not supported by the reality of the situation on the ground. It is not tenable. In any event, there does not appear to be any wrongdoing on the part of the appellant. Even if it had certain components in excess of the base stations that it has already set up, that would not detract from the impracticability of the alleged requirement for all components to be imported and brought into the country at the same time.

The letter of 24 February 2010 states in part:

“Reference is made to your letter dated 18 February 2010 and several subsequent meetings held in connection with the abovementioned subject.

Please be advised that the components and quantities listed below constitute a base station and can be cleared under tariff 8517.6100.

ONE BASE STATION CONSISTS OF THE FOLLOWING COMPONENTS:

Description	Quantity
1.1 Container	1
1.2 Airconditioning	2
1.3 Power equipment (rectifiers)	1
1.4 Batteries	48
1.5 Battery rack	2
1.5 Cellular radio equipment (cabinet) (sic)	1
1.6 Transmission radio equipment (indoor)	4
1.7 Connectors	48
2.0 GSM antennae	6
3.0 WCDMA (3G) antennae	6
4.0 Microwave antennae and outdoor unit	3
5.0 Waveguides cables	150m

6.0 Feeder cables (mtrs)/ connectors (unit)	600m
7.0 Tower	1
8.0 Cables trays – metres	16
9.0 Cable clamps (mtrs)/ installation equipment (unit)/accessories unit	1

This means that the listed components constitute one base station and it is important that your importations correspond with the number of base stations to be installed.”

The appellant has not stopped operating. Thus, even if there were to be extra components of base stations in addition to the set-up or operative or active base stations, there is no indication that there is a bar to how many base stations it is to import and set up or install. Those extra components may be for more base stations to be set up in the future when all necessary components have been gathered or when it finds it necessary or economic to set them up. The respondents’ contention is not convincing. There appears to be no law that that the appellant has broken.

The submission was made by Mr *Nyambirai* that the respondents appear to be disowning the letters that emanated from their offices and have been referred to earlier in this judgment, by stating that they were not advance tax rulings nor tariff rulings. This, as well as Mr *Nyambirai*’s further submission that the letters have never been said to have been issued in error nor have the respondents stated what other purpose the letters sought to achieve, remained unchallenged.

That the classifications done from October 1998 to 24 February 2010 were done by the second respondent’s predecessor under the letter of 5 October 1998 and the second respondent under his letter dated 24 February 2010 respectively, also stands unchallenged. It

is clear that in terms of s 87 of the Customs and Excise Act, these decisions by the second respondent and his officers lawfully stand as such and do not need to be related to or compared with an advance tax ruling.

Another submission by Mr *Nyambirai* that also remained unchallenged was that in order to discharge his duties of classification as required by s 87 of the Customs and Excise Act, the second respondent did not need the powers under s 34D of the Revenue Act [*Chapter 23:11*] that relate to the making of an advance tax ruling. A classification done under s 87 has no connection to an advance tax ruling under s 34D and must therefore not be confused with the same.

It follows that the letters under discussion were therefore competent as they were written by agents of the second respondent. The case of *Gwafa v Small Enterprises Development Corporation & Anor* 1999 (2) ZLR 261 (SC) at pages 263-264¹ that was referred to by the appellant's counsel sheds some light on this aspect. On the reasoning therein, the

¹ The principles on which a seller can be bound by the ostensible authority of his agent have been set out in a number of cases which have come before this Court. In *Stewart Zagreb Properties (Pvt) Ltd* 1971 1 RLR 180 (RA) at 184C-F; 1971 (2) SA 346 (RA) at 349 F-H, BEADLE CJ said:

'The principles on which a seller or a principle can be bound by the ostensible authority of an agent have been set out recently by this Court in the case of *Reed NO v Sager's Motors (Pvt) Ltd* 1970 (1) SA 521 (RA). The headnote to that case, which accurately sets out the judgment, is as follows:

'If a principle employs a servant or agent in a certain capacity, and it is generally recognized that servants or agents employed in this capacity have authority to do certain acts, then any of those acts performed by such servant or agent will bind the principle because they are within the scope of his 'apparent' authority. The principle is bound even though he never expressly or impliedly authorized the servant or agent to do these acts, nor had he by any special act (other than the act of appointing him in his capacity) held the servant out as having this authority. The agent's authority flows from the fact that persons employed in the particular capacity in which he is employed normally have authority to do what he did. Whether an act is or is not within the scope of the apparent authority of an agent is essentially a question of fact.' ' "

authors of the letters related to had the ostensible authority to write them on behalf of the second respondent.

The letters did not require that the components be presented together at the same time nor did they require that the components be moved in bond to earn their classification. As observed earlier, it would be impossible for these components to be presented at the same time or to be presented after being assembled as they are manufactured by different suppliers from different countries at different times and moved from different ports of entry into the country.

The impracticability of the respondents' stance lends credence to the contention by the appellants that the respondents can only be taken to have misunderstood their schedules thereby creating the misconception that the appellant imported 491 142 base stations whereas the schedules in fact show the various components and not complete base stations.

A reconciliation by the respondents of the base station components that were imported by the appellant would have revealed the correct number of base stations imported as the base stations that have been installed by the appellant are *in situ*. This was not done hence the misconception that the number was 491 142 base stations, which arose from counting base station components as base stations.

For the appellant to succeed in proving estoppel, it has to prove, and the authority for this proposition is the case of *Andrew Phillips (Pvt) Ltd v GDR Pneumatics (Pvt) Ltd 1986* (2) ZLR 65 (SC) 67, that the respondents or their officers made a representation in word or

deed which might have reasonably misled the appellant; that the appellant was misled and that the representation induced the appellant to act as it did.

In *casu* the two letters, the conduct of the second respondent and his officers in classifying the base station components as ‘base stations’ and the passage of time before the respondents sought to set aside the classification, all tend to buttress the appellant’s case. The appellant cannot, in the circumstances, be faulted for believing that the base station components that it imported were correctly classified as base stations and were therefore duty-free. This was an administrative decision by the respondents which decision is neither ultra-vires nor unlawful. The submission that in these circumstances there is no barrier to the application of the doctrine of estoppel thus finds favour with this Court.

The fact that the respondents had been making the same classification in the same way for fifteen years and now sought to reverse the classification at this stage was not satisfactorily explained away by the respondents. The respondents sought to take refuge in s 87 of the Customs and Excise Act which states that the Commissioner shall vary or set aside a classification of goods made in terms of subs (1) if he is satisfied that the classification was incorrect.

It also appears that s 87 (2) does not avail any rescue to the respondents’ conduct and that it would only do so on clear proof that the classification was incorrect. This, the respondents have not shown to be the case.

It is for these reasons that the respondents ought to be estopped from varying or setting aside the classification of the components as ‘base stations’ with retrospective effect.

Section 87 requires the second respondent to classify goods in accordance with any rules set out in the customs tariff, paying due regard to the Explanatory Notes to the Harmonised Commodity Description and Coding System issued from time to time by the World Customs Organisation in Brussels and to decisions of the Harmonised Commodity Description and Coding System Committee. It was the unchallenged contention of the appellants that regard being had to these, it is clear that base stations under Commodity Code 8517.6100 include unassembled or disassembled parts or components of base stations.

The conclusion must therefore be made that the classification was done in terms of the law.

The third and fourth grounds of appeal having been abandoned, the appeal must succeed, as it does, on the first and second grounds of appeal only. No justification has been laid before this Court to depart from the legal position that costs will follow the cause.

3. Whether the order of costs made by the court *a quo* ought to be interfered with

The appellant contends that the court *a quo* erred in not awarding it costs of suit. It is trite that costs are in the discretion of the court seized with a matter. When mounting a challenge to the exercise of discretionary power, the law has set a threshold for a litigant to achieve in order to succeed. This Court has made pronouncements on this issue in various cases

and the position is well settled that the exercise of discretion may only be interfered with on limited grounds. See *Mackintosh v Chairman, Environmental Management Committee of the City of Harare & Anor* SC 12-14 and also *Barros & Anor v Chimphondah* 1999 (1) ZLR 58 (S).

In *Gasela v Constituency Elections Officer for Gweru Rural Constituency & Ors* SC 54-05, this Court held that since costs are a discretionary matter for the court, this Court can only interfere with the exercise of such a discretion if there has been a misdirection or the order is so unreasonable that no reasonable court applying its mind to the facts of the case could have made such an order.

No basis has been laid for interference by this Court with that discretion as exercised by the court *a quo*. The appellant's fifth ground of appeal thus fails. The order of the court *a quo* on costs will not be interfered with.

DISPOSITION

Accordingly, it is ordered as follows:

1. That the appeal succeeds in respect of the first and second grounds of appeal.
2. The appeal fails in respect of the fifth ground of appeal.
3. The judgement of the court *a quo* is set aside and is substituted with the following order:
 - a. The importation of base stations by the appellant was done according to law

- b. The respondents are estopped from reclassifying for duty purposes, the base station components imported by the appellant and classified by the second respondent under a duty free tariff.
4. The respondents shall pay the costs of this appeal.

MALABA CJ: I agree

GOWORA JA: I agree

Mtewa & Nyambirai, applicant's legal practitioners

Kantor & Immerman, first and second respondents' legal practitioners