DELTA BEVERAGES (PRIVATE) LIMITED
versus
ZIMBABWE REVENUE AUTHORITY

THE HIGH COURT OF ZIMBABWE
MAVANGIRA J
HARARE, 4 September 2013 and 7 May 2014

Opposed Application

A.P. deBourbon SC, for the applicant
I Magwaliba, for the respondent

MAVANGIRA J: At the time that the applicant filed this application it sought an order in the following terms:

> "IT IS DECLARED THAT:
>
> 1. The applicant's Belmont Plant in Bulawayo is a licensed premises that is not a warehouse nor a licenced premises deemed to be a warehouse;
>
> 2. Section 71 of the act, ss 91 and Article IV of the Customs and Excise (General) Regulations 2001 do not apply to the losses at the Belmont plant as it is neither a warehouse nor a premises deemed to be a warehouse;
>
> 3. Section 146(2) of the Customs and Excise Act [*Cap 23:02*] is applicable to the matter and the losses incurred at the plant; and
>
> 4. Applicant has taken every reasonable effort and every precaution to prevent loss of beer in terms of section 146(2) (a) of the Act.
>
> 5. Respondent shall bear the costs of the application."

By the time of the hearing on 4 September 2013 and due to concessions made by the respondent in its papers the applicant was only seeking the relief sought in para 4 of the draft order insofar as substantive relief is concerned, the relief in paras 1,2 and 3 no longer being pursued.

Section 146 of the Customs and Excise Act, [*Cap 23:02*] provides:

> "146 Duty to be paid in respect of deficiency in stock, etc.
>
> (1) When a deficiency is found on licensed premises in the stock of goods

liable to excise duty, or surtax the manufacturer shall, subject to the provisions of this Act, forthwith pay duty on the amount of the deficiency less any allowance which may be granted in accordance with the provisions of this Act.

(2) If the Commissioner is satisfied that –

(a) goods liable to duty were –

(i) lost in the course of and by reason of the process of their manufacture; or
(ii) destroyed by accident, or lost by accident without going into consumption, in the course of manufacture; or
(iii) destroyed by accident or lost, by accident or otherwise, without going into consumption, in the course of manipulation;

in or at a place on licensed premises which is not a place deemed to be a warehouse in terms of subs (5) of section seventy–one; or

(b) …..
(c) …..
(d) …..

and that every reasonable effort was made and precaution taken to prevent their loss or destruction, the Commissioner shall remit the duty or the excise duty or surtax, as the case may be, payable on the food." (emphasis added)

The applicant challenges the refusal of the respondent to grant a rebate of excise duty in respect of losses of beer in the manufacturing process at the plant operated by the applicant in Belmont, Bulawayo. The applicant contends that by virtue of s 146(2) of the Customs and Excise Act, the Commissioner was obligated to remit the excise duty claimed. Hence the declaratory order sought by the applicant in para 4 of the draft order to the effect that it made every reasonable effort and took every precaution to prevent the losses of beer in the manufacturing process.

The applicant avers that it is the owner of a beer processing plant in Belmont, Bulawayo and that the plant is a licensed premises in terms of s 128 of the Customs and Excise Act, [Cap 23:02] and also in terms of the licence issued by the respondent and the manufacturers bond as required in terms of s 136 of the Act. It also avers that between the years 2007 and November 2010, significant product losses were being incurred at the

Belmont plant. The beer losses were incurred at the bottling and packaging stage of production and were made up of product spillages, under-filled bottles and quality rejections.

The applicant also avers that following a report on the losses, it conducted intensive investigations and discovered that the losses were caused by the use of deteriorated and antiquated equipment at the plant. Power outages also contributed significantly to inefficiencies during the pasteurising and bottling process carried on at the plant. The plant machinery, equipment and parts had been purchased by the applicant from the equipment manufacturer, KHS AG in Germany. It had thereafter always purchased all its equipment and spare parts in foreign currency from the said company through its South African Division. However, during the period 2008 and 2009 the applicant experienced critical foreign currency shortages which were the result of a hyper-inflationary environment and a volatile macro-economic climate during that period. The applicant, so it avers, failed to purchase new equipment or spare parts for the plant due to these challenges.

The applicant further avers that at the end of 2008, it sourced and obtained funding, part of which was allocated to conducting repairs and extensive maintenance work of the plant. In July 2009 an extensive audit by the manufacturers KHS AG engineers from Bevtek Engineering Company and consultants from SAB Miller culminated in a major refurbishment of the packaging lines. This, it is said, resulted in reduction in production losses from 10 to 15% to an average of 5% by October 2009. In an effort to further reduce losses, a decision was made to retire one of the two packaging lines by January 2010. In November 2010, a new packaging line was commissioned at a cost of US$16 million. This allegedly resulted in the reduction of production losses to below 2% despite the challenges that were still being faced with the remaining packaging line.

It is further stated that the applicant did and continues to take all possible measures to prevent beer losses at the plant. It is also stated that the applicant has always kept the respondent abreast with the challenges faced and all the efforts made to increase efficiency at the plant. Despite this on 7 September 2010, the applicant received a letter from the respondent informing it that it owed a total of $2 120 368,56 in excise duty calculated from February 2009 to July 2010. This included a 100% penalty of $1 060 184,28 for unpaid duty. It is avered that this came as a shock to the applicant as the respondent was aware of the challenges that the applicant was facing and the efforts that it had made to reduce losses as well as the fact the applicant had already paid a total US$15,8 million in excise duty for the period February 2009 to August 2010. The applicant further saw no justification for the

respondent to demand a 100% penalty for unpaid duty. The applicant accordingly wrote to the respondent on 16 September 2010 highlighting these concerns.

On 21 September 2010 the applicant further wrote to the respondent contending that s 9 of the Customs and Excise Regulations and the maximum allowable percentage losses in the schedule do not apply to the losses incurred at the Belmont Plant as it was neither a bonded warehouse nor part of a licenced premises deemed to be a warehouse and furthermore that s 146 of the Customs and Excise Act is applicable to the losses suffered at the plant. On 21 September 2010, the applicant wrote to the respondent seeking a recalculation of duty and appealing for a remission of duty in terms of s 146(2) of the Act.

The respondent's response reiterated that the excise duty stipulated was due and payable and maintained that the losses were covered by s 146 of the act as well as s 91 of the Customs and Excise Regulations S.I. 154 of 2001 as the licenced premises are deemed to be a warehouse. On 16 November 2010, the respondent wrote to the applicant outlining what was termed the respondent's "final position", this being that it was stated that the plant was a warehouse as defined in the Act and that the provisions of s 91 of the Regulations were being invoked as the most appropriate and specific provision dealing with losses encountered during production or bottling. This was at variance with an earlier stance to the effect that the plant was deemed to be a warehouse.

On 17 November 2010 the applicant lodged an appeal with the Commissioner highlighting that they had taken every precautionary measure to prevent loss and contending therein that it was entitled to remission in terms of s 146(2) of the Act. On 12 May 2011, the applicant was asked to demonstrate the measures it had taken to prevent losses. It furnished the information during the months of May and June 2011. On 16 February 2012 the applicant received a letter from the respondent. It stated inter alia:

> "Reference is made to your letters of appeal and meetings held with ZIMRA in connection with the above mentioned subject. The facts of the matter have been carefully considered but I cannot overlook the fact that an offence was committed in that you incurred excessive losses, failed to report the losses to ZIMRA and you also went on to treat them as adjustments to stock in the Beer Excise Returns.
>
> Having considered the provisions of s 146 (2) (a) (iii) I wish to advise you that you continued incurring beer losses in order to save employment and maintain your marker share. The effort you made did not help reduce the losses and as such I am not satisfied that every precaution was taken to prevent the loss. This disqualifies you from being granted a remission of duty on the beer losses.

> It should also be noted that while s 136(2) of the Customs and Excise Act requires you to render a truly and complete return, you did not disclose the losses that you incurred as required in terms of the law. The non-disclosure was only discovered during the audit period. Such non-disclosure is an offence and in terms of s 174 (1) (d) of the Customs and Excise Act. *(sic)*
>
> You are therefore required to discharge your obligations to the Regional Manager by paying the following:-
>
> | | |
> |---|---|
> | Excise duty | $966,996.00 |
> | Penalty | $2 000.00" |

The letter quoted above gives the impression that the Commissioner General's attitude was that the efforts made by the appellant did not help to reduce the losses. Furthermore, and curiously so, that the losses were deliberately incurred by the appellant in order to save employment and maintain its market share. In its opposing affidavit to this application, the Commissioner General states *inter alia*, that the only conclusion that can be drawn from the applicant's conduct is that no reasonable steps were taken to prevent the losses and that that is the reason why it did not want the respondent to know of the beer losses. It is stated:

> "If the applicant was indeed taking all the necessary steps to prevent the losses why was it not making correct excise beer returns to the respondent since it knew that it was entitled to a remission?"

The appellant's answering affidavit was sworn to by the one Alex Makamure, the appellant's Company Secretary. He states amongst other things, that the deponent to the respondent's opposing affidavit has no knowledge of matters as they occurred in Bulawayo or dealings between the appellant's officials in Bulawayo and the respondent's officials in Bulawayo. For the details he refers to the affidavit of Luke L.K. Matara which is annexed to his.

One Luke L.K. Matara deposed to an affidavit which is referred to in and attached to the applicant's answering affidavit deposed to by Alex Makamure. Luke L.K. Matara states that he is employed by the applicant as Finance Manager – Southern Region and based at the Belmont Plant in Bulawayo from April 2006 to March 2012. He states in the affidavit that during the relevant period from 2007 to 2010, the appellant had regular meetings with officials from ZIMRA on matters related to excise returns, excise duty payments and issues related thereto. The ZIMRA officials were involved in site audits, authorisations of beer

decants and transfers and matters related to the correct accounting and timely payment of excise duty.

He states that some queries were raised by the Station Manager of ZIMRA Bulawayo concerning excesses in beer losses incurred at the plant from January 2009 and that one of the issues that arose was whether the losses which were incurred at the bottling stage could be regarded as losses incurred during the process of manufacture. He also states that the Bulawayo station of the respondent and in particular the named officers whom they had regular meetings with were alive to the nature and quantum of the production beer losses recorded by the appellant at the Belmont plant and the reasons giving rise to the same. He further states that the losses were being shown as "adjustments to stock" on the excise returns in terms of the existing understanding with ZIMRA and as accepted by the ZIMRA offices over time. The underlying records such as the production records and stock sheets provided the supporting detail on the make-up and nature of the losses; which documents were always available to the ZIMRA officials and were in fact often examined by them to confirm the contents of the excise returns.

Matara further states that this dispute arises from an audit by ZIMRA's Technical Department on the operations of the Bulawayo Customs Port. The auditors challenged the station on why they were accepting remission of excise on the losses without limiting them to 2% as provided in the Excise Regulations (s 91 of S.I. 154/2001). The appellant's Bulawayo office, on the advice of the Company Secretary challenged this change in the application of the Excise regulations and maintained that the treatment of the beer losses on the excise returns was correct and that the purported limits arising from the Excise Regulations (S.I. 154/2001) did not apply to the Belmont Plant. He also states that current returns (as at March 2013 when he deposed to the affidavit) which are prepared in similar fashion are being accepted by the same office.

In essence the applicant's contention is that it took every reasonable effort and every precaution to prevent loss of beer and that in the circumstances, it is entitled to remission of duty. The respondent's contention on the other hand is to dispute that the applicant took reasonable steps and precautions to prevent the beer losses. In response to the respondent's opposing affidavit, the applicant in answering affidavits gave details of the respondent's officers who they had regular meetings with and who were aware of the beer losses and with whom it was agreed how these would be dealt with. The applicant also therein contends that the deponent to the opposing affidavit, the Acting Commissioner of Customs and Excise, was

not aware of the site audits, authorisation of beer decants, and transfers as well as matters relating to the correct accounting and timely payment of excise duty, which matters were dealt with by the respondent's named officials at the regular meetings.

It is unfortunate that the respondent did not seek leave to file further affidavits subsequent to the applicant's answering affidavit and attachments in order to respond to the specific details given therein relating to the respondent's previous involvement and attitude or approach to the applicant's situation. The specific details were raised in response to the averments in the opposing affidavit. In the result the applicant's said specific details have not been responded to. It is thus not possible for this court to make any findings as to the facts, even on a robust approach to the matter. The outstanding para 4 being the only relief now being sought by the applicant appears on the face of it to be a declaration of fact due to the manner in which it is couched. It appears however, that such fact has an impact on the respective rights of the parties depending on whether or not such is found to be a factual situation. If the applicant made every reasonable effort and took every precaution, then it will be entitled to remission of duty. If the applicant did not then the respondent will be entitled to payment of duty to it by the applicant.

It appears to me that the matter, besides involving huge amounts of money, is of such importance that full ventilation must be allowed in order for justice to be done. The matter being incapable of resolution without hearing evidence, it will be referred to trial.

In the result, the matter is referred to trial.

The papers filed will stand as the summons and declaration on the one hand and a notice of appearance to defend on the other. The respondent will file a plea within 10 days of service of this order on it. Thereafter the matter will proceed in terms of the rules.

Gill, Godlonton & Gerrans, applicant's legal practitioners
Zimbabwe Revenue Authority, Legal & Corporate Services Division, respondent's legal practitioners