**CIV/APN/172/97**

# IN THE HIGH COURT OF LESOTHO

In the matter between:

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| FIMPEX LESOTHO (PTY) LTD | APPLICANT |
| and | |
| COMMISSIONER OF SALES TAX | 1ST RESPONDENT |
| ATTORNEY GENERAL | 2ND RESPONDENT |

## JUDGMENT

**Delivered by the Honourable Mr. Justice T. Monapathi on the 4th day of February 2000**

This application which was filed on the 20th May 1997 sought for the following orders:

1. That the decision of the Respondent dated the 15th July 1996, that the goods imported by the Applicant into Lesotho for re-export should not be regarded as temporary imports and that the Sales Tax paid thereon by the Applicant, should be reviewed be set aside.

2. The Respondent should be directed to immediately pay the amount of R99 734.48 together with interest thereon at the rate of 18.25% per annum from the 15th day of July 1996 to the Applicant.

3. The Respondent should be directed to pay the costs of this application.

The background to this proceedings showed that the Applicant had been granted a licence to carry on the business of a broker on the 7th December 1995. The Applicant said that its business was to import and export goods from South Africa into Lesotho and thereafter re-export them to other African countries. Applicant had later applied for import permit on the 21st March 1996. The application showed the goods that the Applicant sought to import and re-export to African countries. It was at page 18 of the proceedings. It was common cause that there had never been an import/export licence in favour of the Applicant even at the time when this application was launched.

In its founding affidavit the Applicant said it approached the Department of Customs and Excise (Customs) to establish what was required of it when goods were brought into Lesotho and were temporarily in Lesotho intended for re-export. In that regard a meeting was held between Customs, the Ministry of Finance, the Sales Tax Department and the Applicant. Customs advised the Applicant as to what was required of it for imports to be considered as temporarily held in Lesotho for export. The annexure marked "D" to the proceedings was a copy of a letter from Customs dated the 26th April 1996. I noted that as the Applicant itself said in paragraph 7 that the letter was in response to what would (as a matter of procedure) be required in the future. This meant that no specific goods had as at that time been imported.

It was common cause that certain goods had later been imported into Lesotho by the Applicant and sales tax was charged thereon. Applicant was claiming refund of the sales tax paid by it on the ground that the goods were temporarily imported into Lesotho to be exported at the same time. The real issue before Court was therefore more than whether the goods were imported into Lesotho by the Applicant were exempted from payment of sales tax. It was whether the Applicant as a vendor was certified for exemption.

The Applicant stated at paragraph 8 of its founding affidavit that resulting from the meeting where the requirements of the Department of Customs and Excise were stated the First Respondent's office became involved in the matter and carried out certain investigations. I noted that these investigations were not specified as to their nature. Applicant said that some meetings and discussions were held between the First Respondent and the Applicant as a result of which it was ruled by the Respondent that the Applicant should pay Sales Tax on all the goods imported into Lesotho. Significantly it was not stated when the meetings were held. This assumed importance in my view because the absence of any attempt to mention the dates upon which certain events took place. This included the contents of all the paragraphs until the paragraph 15 in which annexure "E" dated the 15th July 1996 is spoken about and which letter make reference to Applicant's letter dated the 29th April 1996. It must have been at these meetings about which oblique reference was at which the Applicant said that:

> "The Respondent further held that it wanted to satisfy (himself) that the goods were imported into Lesotho temporarily and that they were exported <u>from Lesotho again</u>." (My underlining)

So that by the Applicant's owned admission leaving aside the description of the

goods which the Applicant never vouchsafed, the Respondent would have wanted to satisfy itself that the goods were imported into Lesotho temporarily and that they were exported from Lesotho again.

It was concerning the further requirement that the Applicant complained most about and which appeared to be found to be the gravamen of its complaint. It was what was to be found in paragraph 10 of the founding affidavit which read:

> "The Respondent agreed with the Applicant that in the event of (he) being satisfied that the goods being imported were regarded by customs as being temporary imports under the provision of the Act then sales tax would be refunded."

So that it became clear as early as the time contemplated by the Applicant that Customs would have to be satisfied that the goods were temporary imports. In order for the First Respondent to form an opinion and make its own decision he would have made investigations from the Customs department. It had been already decided that the goods were not exempted. It may have not been clear what the reason put forward by the Customs people were.

It was said that the First Respondent failed to exercise her decision judicially and it in fact erred. The difficulty that one immediately came across was that in paragraph 8 of the founding affidavit the Applicant said that it had already been ruled by the Respondent that the Applicant should pay sales tax on all the goods imported into Lesotho. Applicant did not tell the Court why it had then agreed to pay and what the reasons were. It could be the reasons were different from these that it later complained of or it could be the circumstances were different. One of the things that could have influenced the Applicant would be that:

> If the returns could show that all the goods imported were thereafter exported, it would end up not paying tax as imports are exempted from tax."

(See paragraph 8.3 of Mampho Hlaoli's affidavit).

Meaning that the Applicant remained to prove that the goods were in fact exported then it would claim.

It came from the mouth of the Applicant itself that there was agreement between the parties that in event of the Customs Department being satisfied that the goods being imported were temporary imports under the provision of the Act, then sales tax would be refunded. The Applicant seeks to base its reasons for review on this agreement alone. It sought to narrow the compass by saying it should remain the only issue for consideration. By so saying it sought that any other reasons for refusal to refund the Applicant should be disregarded. This I found difficult to accept.

Annexure "E" to which the Court was referred to which was dated the 15th July 1996. It was addressed to the Applicant. It was a detailed response to a letter from the Applicant dated the 29th April 1996 (the discovered document). It was that annexure "E" which provided a basis for which the decision of the Respondent was being attacked. Annexure "E" contains many things other than whether there was in fact re-exporting of the goods out of Lesotho or not. The latter had been what I considered to be the main reason or defence to the Applicant's claim. It said goods are accepted if the vendor was registered with the Commissioner of Sales Tax. In that regard it was recorded that the Applicant was not registered. The background to annexure "E" can only be fairly understood by culling the very

salient aspects from the discovered document.

Firstly the discovered documents which was written by Mrs Mia Pereira records that the Customs office had registered an exception to the Applicant's goods being "regarded as temporary imports." Applicant approached the Sales Tax Department due to the fact that it did not resell its products in Lesotho and would therefore have no way of recovery to 10% sales tax paid.

Secondly two meetings were held with Mr. Zwane and Lephcane and again with Mrs Hlaoli at Maseru section of the Respondent's department. The Applicant was urged to have its company registered for sales tax (certificate) purposes. It said it duly submitted all documentation after getting a trading licence from the Department of Trade and Industry. The Applicant was issued with a brokers licence because it had been alleged that one Monaheng had said that:

> "There are no import/export licence facilities in Lesotho due to the fact that we only import/export, we have no need for wholesalers licence ....."

Applicant was told that it could not register for sales tax with a broker's licence. An application was submitted to Mr. Mapetla of the Respondent. He said he would review the application with Mr. Jesse and would respond later. It became clear that as at the time the Applicant had not been issued with a certificate.

Again in the discovered document it was stated that in February 1996 a second and third loads of goods were imported into Lesotho by Applicant. Sales tax was paid therefor. Mr. Mapetla was fortunately met along with Mr. Jesse and Mr. Donegan at Maseru Hotel. I noted that:

"All these agreed to a meeting in which we could sit down with all the documentation and a decision would then be taken."

It was not clear whether a meeting was held following this other than the one of 22nd March 1996. It appeared before the said "chance" meeting the Applicant had already told that:

"we could not register for sales tax with a broker is licence."

It meant that the Applicant was still without a sales tax certificate.

According to the discovered document on the 22nd March 1996 there was yet another meeting at the office of the Respondent. Then there seems to have been a verbal agreement ,that the goods were in fact exported to Malawi, with all proper documents then sales tax would be refunded. Thereafter a letter exempting Applicants from payment of sales tax in the future would be issued.

The Applicant said it was able on the 24th May 1996 in the presence of Customs officials from the State Warehouse to hand over all documentation proving exports to Malawi with all the copies of receipts for sales tax paid to the Respondent's office. Still the Applicants were advised to pay sales tax on the two loads that were currently in Lesotho and to return to the Sales Tax Department for the compliance with set procedures.

According to Mia Pereira of the Applicant Company still on the 21st May 1996 no refund had been made, despite the presentation of the documentation, brought to the attention of the Respondent. This was despite proof that the goods were exported to Malawi. Mr. Mapetla of the Respondent's office was reminded

of the agreement of the previous meeting. His response was that according to new legislation, there was no ways that a refund could be claimed.

The situation became that no refund was ever made because there was no legislation for one exceptional case. I noted (see annexure "E") that Applicant had not been registered for sales tax purposes because the explanation of the Respondent was that contrary to section 11(2) of the Sales Tax Act 1982 (as amended) the Applicant was found to have no fixed place of abode or business and had not established a presence in Lesotho and ensure that:

> "the business is actually being conducted in Lesotho as this does not appear to be the case as at present."

The Respondent therefore persisted in refusing to have Applicant refunded tax that it had already paid.

I did not understand why the case before me had to be complicated at all. It was a simple case. I may have had to decide whether as a matter of fact the Applicant's goods were exported. I may have had to make a finding that:

> "Applicant has not taken the Court into its confidence by telling the Court whether the goods were actually imported into Lesotho to decide whether the goods fall under the category of exception as provided under Section 7 of the Act and the schedule thereon."

The latter aspect being the nature of or type of goods allegedly imported. It was submitted that there was nothing in the papers to assist the Court in coming to a proper decision in the matter. I may have even decided then in favour of the

Applicant on a balance of probabilities. But I did not have to decide that.

Respondent itself may have unfairly caused confusion and misled the Applicant. It is because a continuous thread is to be found where the Respondent said there was to be proof that the goods were in fact exported.

Applicant may have actually been misled by the Respondents in seeking for decision of Customs whether the goods were temporary imports under the provisions of the Customs Act 1982 "or whether tax paid would be refunded." It may perhaps be that the decision of Customs was not necessary where the only necessary and relevant discretion was that of the Respondent. I have already said that on strict interpretation it may be that the Sales Tax Act does not in respect of imported goods provide for a payment of tax and a refund. It was submitted that the goods were exports having been temporarily brought into Lesotho.

As has clearly been shown the gravamen of the Applicant's complaint was that there had been no fairness in the exercise of its discretion by the Respondent in having relied on the advice of the Customs Department whose grounds were not divulged. That furthermore it was not disclosed why and in which way the document handed to the Respondents to prove that there had been exports alleged did not satisfy the Respondent. This argument was a mere red herring . It was intended to downplay the real issue which was whether the Applicant qualified in terms of Section 11 of the Sales Tax Act as a registered vendor with the Respondent for exemption from paying tax upon goods entering Lesotho.

It having been common cause that the Applicant was not registered and certified for exemption as such, it was not therefore exempted. It was not entitled to a refund. It would have been arguable if the Applicant had questioned the

grounds upon which it was not registered as an exempted vendor or why it was not granted an exporters licence.

The application was dismissed with costs.

T MONAPATHI
JUDGE

4th February 2000

For the Applicant : Mr. Buys - Du Preez, Liebetrau & Co

For Respondents : Mr. Putsoane - Office of the Attorney General