IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Madan, Wambuzi & Law JJ A)

CIVIL APPEAL NO 32 OF 1977

Between

UNGA LTD.....APPELLANT

AND

COMMISSIONER-GENERAL OF

CUSTOMS AND EXCISE.....RESPONDENT

JUDGMENT

Wambuzi JA The appellant, a limited liability company, brought an action in the High Court against the respondent, the Commissioner-General of Customs and Excise, seeking a declaration that certain machinery imported into Kenya in 1973 by the appellant for the purposes of its mill at Nakuru was duty free. The appellant contended that the machinery, six wheat-movers and one dispatch-hopper used in the grain milling industry, fell under heading 84.29 of the First Schedule to the Customs Tariff Act and was, therefore, free of duty.

The respondent claimed that the machinery was for use in a silo and was classified under heading 84.22 and was accordingly liable to import duty at 30 per cent amounting to Shs 90,701 and also to sales tax at 10 per cent amounting to Shs 9,070; and counterclaimed the total sum of Shs 99,771. At the trial the following issues were agreed:

> 1.(a) Is the machinery classified under 84.29 as a 'machinery of a kind used in bread grain milling industry'?
>
> (b) If so, [the appellant] to have declaration.
>
> 2.(a) Is the machinery classifiable under 84.22 as lifting, handling machinery?
>
> (b) If so, [the respondent] to have judgment on his counter-action for Shs 90,701.
>
> 3. Is sales tax due and payable to [the respondent]?

Chanan Singh J answered the first issue in the negative, and the other two issues in the affirmative. It is against this decision that this appeal has been brought to this Court.

The main ground of appeal argued by Mr Le Pelley for the appellant is that the judgment erred in law and in fact in holding that the machinery was not bread grain milling machinery. The main issue before us, therefore, is whether the machinery in question should have been classified under heading 84.29 or heading 84.22.

The undisputed facts are that the appellant had a full functioning bread grain milling plant at Nakuru. Near this plant is a Government silo for the storage of wheat. To facilitate bulk handling of wheat the machinery in question was ordered and imported into Kenya and was placed somewhere between the Government silo and the appellant's own silo at Nakuru.

The purpose of the machinery was to convey wheat from the Government silo, and also wheat received from outside, to the appellant's own silo. Apparently the wheat is cleaned before storage in the appellant's silo from which it is taken as required into the mill for milling.

Mr Le Pelley argued that the classification of the machinery is a question of interpretation. He contended that the judge erred first in holding that the machinery was not milling machinery. Heading 84.29 in the First Schedule to the Customs Tariff Act reads: "Machinery of a kind used in the bread milling industry ...". This does not require the machinery to be actual milling machinery. The qualification would be if it is such machinery as is used in the industry. Counsel argued that the evidence in the case showed that the machinery in question was ordered to specifications and was fitted together with the actual milling machinery which existed before on a common base and formed one complex, the principal function which was grain milling. Further, counsel submitted that the judge erred in relying on section 2(3)(c)(i) of the Customs Tariff Act which states that the heading which provides the most specific description shall be preferred to the heading providing more general description. Counsel submitted that that paragraph must be read subject to section 2(3)(a) which provides:

> The interpretation of the First Schedule shall begoverned by the following principles:
>
> (a)the titles of Sections, Chapters and Sub-Chapters are provided for ease of reference only; and for legal purposes classification shall be determined according to the terms of the headings and any relative Section or Chapter notes and (provided such headings or notes do not otherwise require) according to the following provisions of this sub-section;

Section 2(3)(c)(i) is one of the provisions which follow and, therefore, the heading and notes must be looked at before that sub-paragraph. Counsel then referred to notes 3, 4 and 5 of section XVI which provide:

> 3. Unless the headings otherwise require, composite machines consisting of two or more machines fitted together to form a whole and other machines adapted for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.
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> 4. Motors and transmission, conveyor or elevator belts, for machinery or appliances to which they are fitted, ... are to be classified under the same heading as such machinery or appliances.
>
> 5. For purposes of these notes the expression 'machine' means any machine, apparatus or appliance of a kind falling within section XVI.

Mr Wekesa, for the respondent, argued in support of the decision of the judge. He referred to heading 84.22 which provides:

> Lifting, handling, loading or unloading machinery telphers and conveyors ... not being machinery falling within heading No 84.23.

In his submission, the machinery in question was installed solely for the purpose of handling wheat in bulk and not for milling purposes in respect of which the machinery was only an addition to the existing

plant. Mr Wekesa referred to a letter dated 11th February 1975 by the group technical director of the appellant company, giving the background to, and the use of, the machinery. The relevant part reads:

> We would first of all like to give you the background of the decision to erect a wheat silo at Nakuru. With the projected Government silo, next to the mill and the change-over by farmers to bulk-handling and transport of this crop, it became obvious that flat bag storage would have to be augmented by silo storage to meet these changes; following a request from the Government Wheat Board it was agreed that we would build a 5000- ton silo at the Nakuru mill.
>
> This silo consists of eight concrete bins in one nest, with a plant house in the centre. Wheat is accepted by road and rail in addition to the main supply from the Government 20,000-ton silo situated some 200 yards away.
>
> This wheat is conveyed by drag chain from the various intake points, elevated, weighted and cleaned and then stored in one of the eight bins. This wheat is then transferred to the mill again by drag chain for milling.
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> The whole of the wheat movement is controlled from a central electric control panel in the plant house, all machinery being run in sequence and inter-locked through this panel, top centre and bottom detectors sited in the silo bins regulate the flow and stop and start the required equipment. It is this control within the concrete bins that in our opinion made this silo equipment a common base complex.
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> We would confirm that the silo would not operate as a unit without either the bins or equipment, again the bins would be of no value without the equipment which is special to this particular installation ...

Mr Wekesa also relied on a copy of a document issued by the Customs Co-operation Council in Brussels which, by virtue of section 167(h) of the East African Customs and Transfer Tax Management Act, is "*prima facie* evidence of the matters contained therein".

I am unable to draw much assistance from this last-mentioned document.

First, because it is not quite clear what evidence it is supposed to be and secondly, if it is intended to assist in the interpretation of the various headings in the Customs Tariff Act, the Act itself must be looked at in the first instance. I must say I find considerable difficulty in resolving the issue before us. But I think, following the interpretation laid down in section 2(3) of the Customs Tariff Act, classification for legal purposes is to be determined according to the terms of the headings and any relative section or chapter notes in the first instance and where this is not possible then according to the provisions of paragraphs (b) to (j) of section 2(3) of the Customs Tariff Act, provided that the resulting classification is not contrary to the terms of the headings, relative section or chapter notes. In my view this is the meaning of section 2(3)(a) of the Act.

The question then is: are these conveyors machinery of a kind used in the bread grain milling industry as claimed by the appellant? The evidence shows that there was an existing milling plant at Nakuru. The machinery in question was, in the words of Mr Lloyd, the only witness for the appellant:

> Designed by Henry Simons Ltd, of Manchester, as a unit. They are specialised milling engineers. This was designed for us. The concrete and steel work was designed with it by Gordon Melvin & Partners, Nairobi ...

In cross-examination he said:

> The machinery was six wheat movers and one dispatch hopper ... Re six-wheat movers: these are installed on the intake system between the Government silo and company's silo ... All these perform the function of transferring wheat. They are bag chain conveyors. These facilitate the

> handling of wheat. The dispatch hopper: I do not know to which hopper this refers but there is actually a hopper from each conveyor ...

The witness had said earlier in his evidence that the Government silo is situated 250 to 300 yards from the Nakuru mill.

It would appear that there are two sets of machinery: firstly, that in the mill itself, including that from the appellant's silo (in respect of which it is common ground that it is machinery used in the bread grain milling industry); and, secondly, the machinery comprising the conveyor system between the Government silo and the appellant's silo. The appellant claims, and Mr Le Pelley argued, that the whole system is designed as one unit and the conveyor system cannot work without the rest of the system. I do not agree with this argument. The evidence shows the machinery in question transfers and cleans wheat from the Government silo to the appellant's own silo where it is stored and fed into the mill as and when required. The machinery can therefore work independently for storage purposes. In this connection it is worthy of mention that the Government silo does not appear to be part of any milling complex. It is arguable that the machinery forms part of a composite machine consisting of two machines fitted together to form one whole or that the conveyor system is adapted for the purpose of performing a complementary function within the meaning of note 3 of section XVI of the First Schedule to the Customs Tariff Act and must therefore be classified as that machine which performs the principle function of bread grain milling. This note, however, opens with the word "Unless the headings otherwise require ...". In my view this means that for classification purposes one has to look at the terms of the headings first. A comparison of the two headings in question, that is heading 84.22 and heading 84.29, shows in my view that such machinery as falls under the former heading would not be classified under the latter.

The specific description in heading 84.22 requires removal of the machinery specifically described or named from any other general heading under which the same machinery might fall to be classified. I should have thought that, if it were intended to include in heading 84.29 those machines described as lifting, handling, loading or unloading machinery, telphers and conveyors falling within heading 84.22 which are in fact used in the bread grain milling industry, the Legislature would have said so. One does not have far to go for an example; for under the same heading 84.22 (set out earlier in this judgment), machinery falling within heading 84.23 is specifically excepted from being classified under that heading.

I do not think note 4 is of any assistance in this case as the conveyors formed no part of the milling machinery to which they could be said to be fitted. They were ordered, manufactured and delivered separately. In the end-result I find that, considering all the provisions relative to interpretation, the judge was right when he relied on section 2(3)(c)(i) of the Customs Tariff Act by preferring heading 84.22 providing the more specific description. Conveyors are specifically named in this heading. I think that he arrived at the correct decision on the issue of classification of the machinery in question.

I now turn to the last ground of appeal which is that the trial judge erred in holding that sales tax was due and payable to the respondent and in not holding that it was due to the Commissioner for Sales Tax. I think for practical purposes this point is of academic interest. The appellant remains liable to pay tax and it makes little difference, if any, that it is payable to one or the other. Be that as it may, it is common ground that under section 20 of the Sales Tax Act the Commissioner for Sales Tax is empowered to recover any tax due under the Sales Tax Act as a civil debt due to the Government. Section 19 of that Act provides that any tax due under the Act is payable to him. Mr Le Pelley argues, therefore, that only the Commissioner for Sales Tax can sue for the tax and the Commissioner- General may sue only in the name of the Commissioner for Sales Tax. At first sight this sounds very plausible. However, we were referred by Mr Wekesa to section 43 of the Sales Tax Act which gives the Minister power to make regulations, *inter alia*, for "carrying out or giving effect to the purposes" of the Act. Pursuant to this section, the Sales Tax Regulations 1973 as amended by the Sales Tax (Amendment) Regulations 1977 provide in regulation 24 as follows:

> By virtue of section 42 of the Act (a) the Commissioner -General of Customs and Excise appointed under section 3 of the Customs Act shall be responsible for the collection of tax chargeable in respect of imported taxable goods and shall account for such tax to the

> Commissioner; and (b) The said Commissioner-General of Customs and Excise and other proper officers of Customs appointed under the Customs Act shall, subject to the Act and the Customs Act, have and exercise in respect of imported taxable goods all the powers and duties conferred or imposed on each of them by the Customs Act.

We were also referred to section 114 of the East African Customs and Transfer Tax Management Act which provided, at the material time, as follows:

> Where any goods are liable to duty, then such duty, shall constitute a debt due to the Community and be charged on the goods in respect of which the duty is payable; and such duty shall be payable by the owner of such goods and may, without prejudice to any other means of recovery, be recovered by legal proceedings brought by the Commissioner-General by the name of the Commissioner-General of Customs and Excise.

If the Commissioner-General has power to recover customs duties by legal proceedings, then regulation 24(b) confers the same powers upon him in respect of sales tax. I do not think that there is any conflict between that regulation and section 20 of the Sales Tax Act. It would appear that sales tax may be recovered by legal proceedings instituted either by the Commissioner-General or by the Commissioner for Sales Tax. I would dismiss the appeal with costs.

Madan, JA. This appeal arises out of refusal by the Court to grant a declaration in a suit instituted by the appellant against the respondent that certain machinery described as six wheat-movers and one dischargehopper imported into Kenya by the appellant was free from import duty under heading 84.29 of the First Schedule to the Customs Tariff Act, instead of being chargeable with duty under heading 84.22 as contended by the respondent. The High Court further upheld the respondent's counterclaim that, in addition to paying the import duty, the appellant was also liable to pay sales tax to the respondent in respect of the machinery under the Sales Tax Act. The appellant, while not contesting that sales tax would be payable if customs duty is chargeable on the machinery imported by it, contends that it is recoverable only by the Commissioner of Sales Tax himself or in his name by another person; but not in the name of the respondent who is merely an agent appointed for the collection of sales tax on behalf of the Commissioner of Sales Tax.

The appellant is engaged in the wheat milling industry in Kenya. It had a wheat mill operating at Nakuru. The new machinery which was imported did not form part of the appellant's original milling machinery; it did not exist when the mill was installed, it was imported after being specifically designed recently by a firm in Manchester, the concrete and steelwork for it being designed by another firm in Nairobi, to meet the requirements of a change-over to bulk handling of wheat and to increase the existing capacity of the mill. The respondent built a silo to receive wheat for milling from the Government's silo which is about 200 to 300 yards away from the appellant's mill, and others. The machinery in question delivers wheat to certain bins from where it is removed by an auger and elevated to a conveyor which delivers it to the mill. What was imported was conveyors and elevators. Mr Lloyd, the appellant's group technical director and the only witness for the appellant, agreed in his evidence in Court that the six wheat-movers and one discharge-hopper are installed on the intake system between the Government silo and the appellant's silo, they all perform the function of transferring wheat, and they are bag chain conveyors which facilitates the handling of wheat. Mr Lloyd also agreed that its mill operated as an independent entity before the machinery in question was installed; he added, it is again an independent entity. In addition, in his letter dated 11th February 1975 Mr Lloyd set out the following information:

> We would first of all like to give you the background of the decision to erect a wheat silo at Nakuru. With the projected Government silo next to the mill and the change-over by farmers to bulk handling and transport of this crop, it became obvious that flat bags storage would have to be augmented by silo storage to meet these changes: following a request from the Government Wheat Board it was agreed that we would build a 5000- ton silo at Nakuru mill.

Headings 84.22 and 84.29 of the First Schedule to the Customs Tariff Act are as follows:

> 84.22 Lifting, handling or unloading machinery, telphers and conveyors (for example, lifts, hoists, winches, cranes, transporter cranes, jacks, pulley tackle, belt conveyor, and teleferics), not being machinery falling within heading No 84.23.
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> 84.29 Machinery of a kind used in the bread grain milling industry, and other machinery (other than farm-type machinery) for the working of cereals or dried leguminous vegetables.

Chanan Singh J referred to section 2(3)(c)(i) of the Customs Tariff Act which provides:

> (c)where, for any reason, goods are *prima facie* classified under two or more headings classification shall be effected as follows – (i) the heading which provides the most specific description shall be preferred to headings providing a more general description (subheadings being disregarded).

The judge said that the machinery after it had been installed became part of the wheat milling complex but not milling machinery; that it handled, or transported, wheat before it entered the mill which was already there; that, before it was installed, it could be used in other establishments as conveyors are used; and held that heading 84.22 was more specific in relation to the machinery in question than heading 84.29. In my opinion he was right. I think the machinery in question falls under the heading 84.22 being "handling ... machinery ... and conveyors"; it was not a part of the original grain milling machinery and it became no more so after it was installed. It is an adjunct which was conceived and specifically designed later to meet a changed situation not really being machinery of a kind used in the bread grain milling industry. If the legislature intended this type of machinery to be imported free of duty into the country it could easily have enacted the legislation accordingly, as it did in respect of the type of machinery mentioned, for example, in headings 84.23, 54.24, 84.25, 84.26 and 84.27.

The judge's omission in not expressly referring to section 2(3)(a) of the Customs Tariff Act does not in my opinion in any way detract from the conclusion he reached as has been said to us. The judge had the provisions of section 2(3) in mind, as is clearly indicated by his reference to section 2(3)(c)(i).

We have been referred to Section XVI, note 3, of the Customs Tariff Act which reads:

> Unless the headings otherwise require, composite machines consisting of two or more machines fitted together to form a whole and other machines adapted for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principle function.

It has been submitted that the old and the new machines are fitted together to form one whole unit, that it is still one whole unit though a different whole. The point really is that the existing mill and the new machinery was not one whole unit from the very beginning which I think is what note 3 contemplates. They each had their separate identity. It is not as if the new machinery was a part of the mill originally; it arrived and was fitted to the mill later. It did not exist until it was specifically designed and constructed to be added to the existing mill at a subsequent date to meet a changed situation, as I have said. It was also not a part or replacement of existing parts of the mill which was a complete unit by itself; of course, the mill became an independent entity after the new machinery was installed as it will become so again each time any replacement or new machinery is added to it; but the machinery in question is as much a part of the original mill as an artificial leg is an original part of a human body.

As Wambuzi JA points out in his judgment, which I have had the benefit of reading in draft form, powers have been delegated for the collection of sales tax and to account for such tax to the Commissioner of Sales Tax. I agree with what Wambuzi JA has to say on this subject.

This objection is of a highly technical nature which I consider, if need be, is easily remediable by an amendment to the respondent's pleading. If the power to collect sales tax on imported taxable goods does not include power to recover it in the respondent's name, I would in this particular instance grant an amendment, so that the respondent's pleading and the relevant paragraphs in the defence and

counterclaim to have been suitably amended to say that the respondent is suing on his own behalf and on behalf of the Commissioner of Sales Tax. It would be in the interest of justice to grant such an amendment in an appropriate case such as the present one and to read the record to have been amended accordingly.

I would dismiss this appeal with costs. As Wambuzi and Law JJ A agree, it is so ordered.

Law, JA. I have read in draft the judgment prepared by Wambuzi JA.

As regards the minor ground of appeal, which relates to sales tax, I agree that it fails. In respect of the collection of that tax on imported goods, the Commissioner-General of Customs and Excise is vested with "all the powers and duties" conferred on him by the Customs Act, by virtue of the provisions of the Sales Tax Regulations 1973 (as amended). These powers include the power to sue in his own name for the recovery of duty, and the Sales Tax Regulations 1973 in my opinion extend that power to the recovery of sales tax.

The main ground of appeal has caused me considerable difficulty. Is the machinery, the subject of this litigation, properly classifiable under heading 84.22 of the First Schedule to the Customs Tariff Act (in which case it is liable to duty), or does it fall within heading 84.29 (in which case it is not liable to duty)? The machinery, as I understand it, conveys wheat from the Government silo to the appellant's silo. It is the appellant's case that these conveyors, which are known as wheat-movers form an integral part of the milling complex, erected on the same common concrete base or raft, and that they are accordingly "Machinery of a kind used in the bread grain milling industry" as specified in heading 84.29. Mr Le Pelley, for the appellant, further submits that the machinery and the mill form a composite machine fitted together to form a whole, so that the machinery is to be classified as being the machine which performs the principle function, in this case the mill itself, as stated in note 3 to Section XVI of the First Schedule. As the actual milling machinery is admittedly free of import duty, it follows, in Mr Le Pelley's submission, that the conveying and lifting machinery, which is fitted together with the mill so as to form a whole, is likewise free of import duty. Mr Wekesa, for the respondent, correctly points out that note 3 begins with the words "unless the headings otherwise require", and submits that heading 84.22 makes all conveyors subject to duty, the only exception being if they are machinery falling within heading 84.23 (which relates to earth excavating machinery and the like). Mr Wekesa argues that if it had been intended to exclude conveyors which are used in connection with grain milling, heading 84.22 would have so provided. He also relies on the explanatory notes prepared by the Nomenclature Committee of the Customs Co-operation Council in Brussels, which are receivable in evidence under section 102(i) of the East African Excise Management Act. According to these notes, heading 84.29 does not cover conveyors and elevators. Like Wambuzi JA, I do not appreciate in what sense these notes can constitute evidence in any particular case. I think we can look at them as a guide in interpreting the Customs Tariff, but we are not bound by them.

I do not think that the machinery, the subject of this appeal, can be regarded as composite machinery in relation to the mill itself. The mill was fully operative before the machinery was imported, and the machinery was designed, imported and fitted to the mill to improve the supply of wheat to the mill. This being so, the machinery must be classified under the heading which provides the most specific description. It is not by itself milling machinery, as it does not perform a milling function. Its function is to convey and elevate wheat on its way to the mill. For these reasons I am of the opinion that Chanan Singh J correctly classified the machinery under heading 84.22 of the First Schedule, with the consequence that it is liable to duty. I would dismiss this appeal, and I concur in the order proposed.

Appeal dismissed with costs.

Dated and delivered at Nairobi this 6th day of January 1978.

C.B MADAN

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JUDGE OF APPEAL

S.W WAMBUZI

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JUDGE OF APPEAL

E.J.E LAW

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR