REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

HCT-00-CC-CA-0008-2005
(On appeal from a decision of the Tax Appeals Tribunal in TAT No. TAT 5 of 2004 dated 12th April 2005)

Uganda Revenue Authority Appellant

Versus

Remegious Patrick Paul Respondent

BEFORE: THE HON. MR. JUSTICE FMS EGONDA-NTENDE

JUDGMENT

1. Remegious Patrick Paul, the respondent in this matter, imported goods from Dubai to Bukoba, Tanzania, and the said goods were transiting through Uganda. When the said goods arrived in Nakawa for clearance, a customs official demanded a bribe. A trap was set for him, and he was nabbed. Following this incident, the Uganda Revenue Authority officials opened the container and found some uncustomed items. The uncustomed goods were impounded and a notice of seizure issued dated 16th June 2004. The rest of the goods were cleared for transit purposes.
2. The Commissioner General of Uganda Revenue Authority decided to order forfeiture of the uncustomed goods in a decision communicated to the respondent in a letter dated 23rd July 2004 to the respondent. Following this decision the respondent brought proceedings before the Tax Appeals Tribunal challenging the order of forfeiture.
3. At the hearing before the Tax Appeals Tribunal two issues were framed by the parties. These are: 1. Whether the forfeiture of the goods of the Applicant by the Respondent was proper. 2. Costs and Remedies. Each party called one witness and after filing of written submissions the tribunal below found for the respondent. The tribunal found that much as the Commissioner General had purported to act under Section 174 of the East African Customs and Management Act, he had failed to comply with the requirements of that

section and the unchallenged value of goods exceeded the value within which the Commissioner General could take the decision he purported to have made. In addition the Commissioner General had ignored Section 161 of the East African Customs Management Act.

4. The appellant appealed to this court against the decision of the tribunal and set forth 9 grounds of appeal many of which are repetitious. But before I turn to the grounds of the appeal it will be useful to examine the law and facts in question.
5. We shall start with Section 132 of the Act which provides the power under which the goods in question came to the attention of the Commissioner General. It provides, in part,

> "(1) Any officer may, if he has reasonable grounds to believe that any vehicle is conveying any uncustomed goods, or goods in transit through partner states or being transferred from one Partner State to another, top and search any such vehicle; and for the purposes of such search, such officer may require any goods in such vehicle to be unloaded at the expense of the owner of such vehicle.
> (2)….. (3)……
> (4) Where, on the search of any vehicle under this section, ***any goods are found in relation to which any offence under this Act has been committed,*** then such goods shall be liable to forfeiture."

6. Section 132 or rather the provisions thereof, and in particular subsection 4 do not create any offence as such but do provide for a sanction in case any offence under the Act has been committed in relation to the goods found in the search carried out under subsection 1 of the same section. Forfeiture is just one possible or additional punishment for the offence committed in relation to the goods found as a result of the search carried out under Section 132 (1) of the Act. There are offences under the Act created in Sections 140 to 153 of the Act. If any of the said offences is found to have been committed, and the goods discovered under Section 132 of the Act, are in relation to such offence, then such goods are liable to forfeiture under Section 132 of the Act.
7. For example possession of uncustomed goods is an offence under Section 146(d)(iii) of the Act is an offence. Likewise making a false or incorrect entry in any matter relating to customs is an offence under Section 148(a) of the Act. If any of these offences are committed, and a search carried out under Section 132 of the Act, and goods in relation to the said offences are discovered, then such goods would be liable to forfeiture, as one possible sanction, under Section 132(4) of the Act.
8. Section 159 of the Act provides for the procedure after seizure which includes the giving of notice in certain instances to the owner of the goods and requiring him/her to take

action to challenge the seizure, and the owner may claim the goods seized from the Commissioner General. However, under the proviso to sub section 1 thereof, there is provision for dealing with the same, as if no notice had been given under Part XV of the Act. It is this procedure under Part XV of the Act that the Appellant contends the Commissioner General adopted in relation to the respondent's goods.

9. Part XV has only two sections and it is headed Settlement of Cases by the Commissioner-General. Section 173 deals with cases where the offenders agree with the Commissioner General to compound offences. Section 174 is in respect of cases where there is no agreement. It provides,

> "(1) The Commissioner-General may, where he is satisfied that any person has committed any offence under this Act in respect of which a fine is provided or in respect of which any thing is liable to forfeiture, compound such offence and may summarily order such person to pay such sum of money, not exceeding five million shillings, as he may think fit; and he may summarily order any thing liable to forfeiture in connexion therewith and which does not exceed fifty million shillings in value to be condemned.
> (2) Where the Commissioner-General makes any summary order under this section then— (a) such order shall be put into writing; and (b)such order shall specify the offence which such person committed and the penalty imposed by the Commissioner-General; and (c) a copy of such order shall be given to such person if he so requests; and
> (d) such person shall not be liable to any further prosecution in respect of such offence; and if any such prosecution is brought it shall be a good defence for such person to prove that the offence with which he is charged has been compounded under this section; and (e) such order shall be final and shall not be subject to appeal and may be enforced in the same manner as if it were an order of a subordinate Court of the first class."

10. The Commissioner-General is given awesome power in which he is in effect the investigator, prosecutor and the judge. The Commissioner-General is a judge in his own cause. No appeals are allowed against this decision of the Commissioner-General. Whether this provision passes constitutional muster is a matter that I will not deal with here, except to note with satisfaction that it has been omitted in the new East African Community Customs Management Act, No.1 of 2005.
11. Applying the provisions of Section 174 of the Act, the Commissioner-General must be satisfied that a person has committed an offence and such offence must either carry the possible punishment of a fine or in respect of which some thing may be liable to forfeiture. This presupposes that that an offence under the Act is identified, and made known, and the relevant provision cited, including the criminal sanction it attracts, to bring it within this provision. For the Commissioner-General to be satisfied that an

offence has been committed, he must have evidence before him that shows that an offence has been committed in the first place. If no such evidence was before the Commissioner-General, obviously there would be no basis for the Commissioner-General to be satisfied that an offence has been committed. Or if no offence in the first place is cited to have been committed, the Commissioner-General cannot be satisfied, as he is required by the law to be, that an offence has been committed, a condition precedent to bringing into play Section 174 of the Act.

12. On being satisfied as above, the Commissioner-General then can compound the offence in question and may order the payment of a fine not exceeding Shs.5,000,000.00 and may order summary forfeiture anything liable to forfeiture if it does not exceed Shs.50,000,000.00. Before compounding the offence in question, the Commissioner-General must ascertain the value of the thing liable to forfeiture to be not more than Shs.50,000,000.00. In case it is more than Shs.50,000,000.00, then it is outside the purview of Section 174 of the Act, and cannot be dealt with summarily, unless there is agreement that brings it within Section 173 of the Act. Where the value has not been ascertained, the thing liable to forfeiture cannot be the subject of the summary order for forfeiture by the Commissioner-General until such time as its value has been ascertained, and thus determined to either fall within or without the provisions of Section 174 of the Act.
13. Thirdly, after the foregoing the order must be put in writing specifying the offence which such person committed and the penalty imposed by the Commissioner-General. The foregoing three elements are essential components of the exercise of the power under Section 174 of the Act by the Commissioner-General, and in the absence of any one of the three, the purported exercise by the Commissioner-General of the said power is vitiated.
14. The facts of this case are simple and not substantially in dispute. A notice of seizure was issued, and served on the respondent, under the provisions of Section 159 on 16th June 2004. However, notwithstanding that notice and the procedure that could have been pursued in the terms provided in the notice, and Sections 159, 160, 161 and 162, of the Act, the Commissioner-General then purported to apply Section 132 and ordered forfeiture of the goods in question by his letter dated 23rd July 2004. I set it out in full.

"July 23, 20004
Mr. Remegious Patrick Paul
Po Box 881
BUKOBA Tanzania
Dear Sir,
RE: CLAIM FOR SEIZED CONSIGNMENT OFF-LOADED AT NIP NAKAWA FROM CONTAINER NO. MSCU 838899/0-DESTINED ON TRANSIT TO TANZANIA Further reference is made to your letter CUE/GEN/018/06 of 25th June 2004 regarding the above subject. This is to inform you that in accordance with Sub-section 4 of Section 132 of the East African Customs Management Act Cap 77 of 1970, which states: "where in the search of any vehicle under this section any goods are found in relation to which any offence under this Act has been committed, then such goods shall be liable to forfeiture."
The following uncustomed goods:

S/ No.	Goods	Quantity
1	Tiger Head Batteries R 20	500 ctns.x.24 dozens
2	Motor Vehicle Tyres: 6.50 —14-8PR	300 Sets
	U850,31 x 10.5 R15	4 pieces
3	Motorcycle Tyres	
	2.75 x 21	60 pieces
	2.50 x 17	10 pieces
4	Motorcycle Tubes	200 pieces
5	Motorcycle Plastic Mudguards	10 pieces
6	Motorcycle Mufflers (CG 125)	4 pieces
7	Motorcycle Chains (428-120C)	25 pieces
8	Motor Cycle Helmets (AP 30)	18 pieces
9	Assorted Motor Cycle spares	01 Box
10	Satelite Dishes	05 sets
11	Canon Photocopier NP7161	01 piece
12	Canon Photocopier IR 1600	01 piece
13	Air Conditioner NWAC-9	01 piece
14	Panasonic Fax Machines KX-FP342 BX	10 pieces
15	Panasonic Telphone Handsets KX-TS 500MX	100 pieces
16	Panaster Digital Colour Television TC-3468	01 piece

Have been forfeited to the state.
Yours Sincerely
Stephen Akabway
AG. Commissioner General"

15. If I can understand the arguments of the appellant in the tribunal below, it was to the effect that the respondent had committed an offence under Section 132 of the Act, and the goods were summarily forfeited under Section 174 of the Act. As I have noted above Section 132 (4) of the Act creates no offence. It is clear from the aforesaid letter ordering

forfeiture the Commissioner-General purported to act under Section 132(4) of the Act, and ordered forfeiture pursuant to the same.

16. It also evident that the Commissioner-General did not purport to apply part XV of the Act, and in particular Section 174 of the same. Clearly in making his decision to order forfeiture the Commissioner-General did not apply either of the possible procedures that the Act allowed him to follow. Either he could have proceeded under Section 159 to 162 of the Act, or summarily compound the offence committed under Section 174 of the Act. He did neither. He proceeded without authority of the Act. The letter communicating his decision does not state what offence he was satisfied was committed. It does not set out the penalty for the offence. No finding is made of the value of the goods seized to determine whether or not they come within the provisions of Article 174 of the Act. It is not a decision taken under Section 174 of the Act.
17. The words of *Sir Charles Newbold, P., in Bhagwanji v Commissioner for Customs and Excise [1969] E.A. 184 at Page 188* (quoted by the tribunal in its decision) could not be more pertinent.

> "In my view, the courts should be slow indeed to accord a government officer any right to interfere with the liberty or property of an individual unless it is manifest that such right is given by Statute or the Common law and even then such interference should only be permitted in accordance with the requirement of the Statute or the common law conferring such a right."

18. Ground No.1 in this appeal was to the effect that the tribunal erred in law in erroneously relying on its observation that the Customs Management Act is obsolete to render its provisions inapplicable to the case in issue whereas the said law has never been repealed and is therefore applicable to date. It is true that the tribunal was critical of the certain provisions of the East African Customs Management Act. Nevertheless the tribunal applied those provisions and came to the conclusion that forfeiture was not in accordance with those provisions, and set it aside accordingly.
19. I have examined the provisions in question and by somewhat a different route came to the same conclusion that forfeiture in question was not in accordance with the provisions of the East African Customs Management Act. Ground No.1 therefore fails.
20. Before taking of leave of this point, perhaps, I need to point out that the criticism of the Act by the tribunal was not misplaced. In fact the provisions of Section 174 have been abandoned in the new East African Community Customs Management Act, allowing the

Commissioner to compound offences only in case of agreement with or at the express request of the offender only. See Section 219 thereof.

21. Ground No.2 is to the effect the Tribunal erred in law in shifting the burden of proof onto the appellant. The appellant before the tribunal contended that the Commissioner-General had applied the provisions of Section 174 for summary forfeiture. Under those provisions as we have seen above, it is for the Commissioner-General to be satisfied that there was an offence committed. It was the Commissioner-General to have the evidence of the commission of the offence. If any proceedings such as those before the tribunal this is in issue, as it was in issue in these proceedings vide agreed issue no.1, then indeed an evidential burden arose upon the Commissioner-General to show that he had been satisfied that an offence was committed, and it was the kind of offence that could be compounded under Section 174 of the Act. It is only the Commissioner-General who would have the evidence in question. It is only proper that in such circumstances the Commissioner-General bears that evidential burden.
22. Ground No.3 was to the effect that the tribunal erred in law in ignoring the importance and implications of a Bill of Lading and Kenya Transit Entry to the whole transaction in issue. It is not necessary to consider this ground in light of the finding already made that forfeiture ordered by the Commissioner-General was not in accordance with the law.
23. Ground No. 4 was to the effect that the tribunal erred in law in holding as it did that the seizure and forfeiture of the respondent's undeclared/uncustomed goods was unlawful and harsh after finding that an offence was committed. The order for forfeiture by the Commissioner-General did not specify any offence committed. For the same reasons as in the preceding paragraph I am satisfied that the decision for forfeiture was not supported in law. This ground too fails.
24. Grounds 5, 7 and 9 are all about the value of the goods and may be taken together. Basically all the three grounds complain that the tribunal erred in law to accept the value of the goods to be US$61,245.00. It was the duty of the Commissioner-General under Section 174 of the Act to ascertain the value of the goods to determine if the same could be the subject of Section 174 of the Act. He did not do so. This was a fatal error, especially where there is a claim that the goods were of a certain value that removed the same from the application of Section 174 of the Act. I am not prepared to fault the

Tribunal for accepting the only value availed by one party, the respondent. These three grounds fail.

25. Ground No.6 is to the effect that the tribunal erred in law and fact in holding that Dolophine Freight & Tours Ltd were not authorised agents when this was not raised as an issue at the hearing and therefore no evidence adduced to support the holding. The issue was originally whether or not the forfeiture of goods of the applicant by the respondent was proper. In its written submissions the respondent's counsel (at the time the applicant's counsel) divided this issue in two sub issues, starting with whether the clearing agent was a duly authorised representative of the applicant.
26. The tribunal responded, in part, thus,

> "Nevertheless the argument by Counsel for the Applicant that the agent at Malaba Uganda was not dully authorised agent as he was not appointed in accordance with Section 125 of the Customs Management Act is quite valid but not the crux of the matter. ……
> Fourthly, the Applicant did not lead evidence or plead that the agent was unauthorised. This was a somewhat fall back position to create a defence which the Tribunal has disregarded. The Tribunal's decision in The Hair Cure Centre vs Uganda Revenue Authority, TAT 24 of 2000 cannot be followed. "

27. Clearly from the foregoing the Tribunal did not make the holding ascribed to it in this ground. It is disingenuous of counsel for the appellant to prosecute this appeal by setting forth imaginary holdings of the tribunal below, and present a ground of appeal against the same, as in this ground. This ground fails.
28. In the result I find that this appeal has no merit and it is dismissed with costs here and below. The orders of the tribunal are affirmed.

Dated at Kampala this 1st day of August 2005

FMS Egonda-Ntende
Judge