IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 8 OF 2021**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN

HENRED FRUEHAUF ZAMBIA LIMITED **APPELLANT**

AND

ZAMBIA REVENUE AUTHORITY **RESPONDENT**

Coram : Musonda Act.CJ, Wood and Mutuna JJS

On 2nd November 2021 and 15th December 2021

For the Appellant : Mr. J. A Jalasi and Ms M. Undi of Messrs Eric Silwamba Jalasi and Linyama

For the Respondent : Mr. F. Chibwe and Mrs. W. S. Mundia, Legal Managers, Zambia Revenue Authority

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J U D G M E N T

Mutuna JS delivered the judgment of the court.

Cases referred to:

1) **Justice Mathew M.S.W. Ngulube v Zambia Revenue Authority (2003) RAT 29**
2) **Chibuluma Mines Plc v Zambia Revenue Authority (2001) RAT 16**
3) **CELTEL Zambia Limited (T/A ZAIN Zambia) v Zambia Revenue Authority 2010/HPC/668**
4) **Zambia Revenue Authority v Balmoral Farms Limited SCZ judgment number 34 of 2019**
5) **Zambia Revenue Authority v Professional Insurance Corporation (Z) Limited Appeal number 34 of 2017**

Legislation referred to:

1) **Customs and Excise Act, Cap 322**
2) **Customs and Excise (General) Regulations, SI No. 54 of 2000**
3) **Protocol On Trade In the Southern African Development Community (SADC) Region**

Introduction

1) Zambia and South Africa are members of the Southern African Development Community (SADC), a regional economic grouping established in 1992. It is committed to regional integration and development of trade and investment in the SADC region through cross border trade. Ultimately, SADC's aim is to eliminate trade barriers in the region.

2) To achieve the objectives of SADC, the Member States have entered into various protocols, one of which is the SADC Protocol On Trade (the Protocol) signed in 1996 and amended in 2010. This is an agreement by Member States to, *inter alia*, eliminate duties on imported products and other trade barriers among SADC Member States.

3) Annex 1 to the Protocol, is intended to achieve these objectives through the rules of origin which set out the

categories of goods eligible for preferential treatment when traded between Member States and the conditions which should be met to be entitled to such preferential treatment.

4) This appeal hinges on the interpretation of Rules 2(1) and 4(1) of Annex 1 to the Protocol and also issues that surround the principle of legitimate expectation. It contests a decision of the Tax Appeals Tribunal (the Tribunal) delivered on 30th April 2021 that imported second hand trailers are not entitled to preferential treatment under the Protocol unless they are imported for the sole purpose of extraction of raw materials.

Background

5) The Appellant, an entity engaged in the business of consigning goods, imported six second hand trailers (the trailers) into Zambia, from South Africa, in 2019. When the trailers arrived at the Zambian border accompanied by SADC certificates of origin issued from South Africa, the Appellant's agent claimed that they were entitled to

preferential treatment because they were partially produced in a Member State.

6) On 23rd and 24th June and 1st July 2019, the Respondent's officers at the border of entry denied the trailers entry into Zambia with preferential treatment alleging that the trailers did not satisfy the provisions of rule 4(1)(h) of Annex 1 to the Protocol. It was contended that, since the trailers were being imported to be used for the consignment of goods and not for recovery of raw materials, they were subject to customs duty.

7) Prior to this, in 2016, the Respondent had written to the Appellant's agent, in response to a letter of appeal, indicating that the second hand trailers it had imported at the time, in similar circumstances, were eligible for preferential treatment under the Protocol, notwithstanding the fact that they were imported for use in its business of consigning goods.

8) Following the Respondent's decision declining to grant the trailers preferential treatment under the Protocol, the Appellant appealed through the chain of command and

finally to the Commissioner General of the Respondent. He confirmed the decision of his subordinates that the trailers were not eligible for preferential treatment but extended the preferential treatment nonetheless, for the last time, as a gesture of good will due to the assurance given to the Appellant in 2016 that such goods were eligible for preferential treatment.

9) The Appellant was aggrieved by the decision of the Commissioner General and launched an appeal to the Tribunal.

Grounds of Appeal before the Tribunal and arguments by counsel

10) The Appellant advanced two grounds of appeal before the tribunal which contested the decision by the Respondent denying the Appellant preferential treatment on the trailers. It was contended that the trailers were entitled to preferential treatment because the certificates of origin stated that they were partially produced in South Africa, as such, satisfied the conditions under the rules of origin. The grounds also challenged the Respondent's reversal of

its decision made in 2016, that imported second hand trailers were entitled to preferential treatment. The Appellant contended that as a consequence of the decision in 2016 granting preferential treatment to imported second hand trailers, the Respondent had created a legitimate expectation in the mind of the Appellant that such treatment would continue.

11) In response, the Respondent contended that in arriving at its decision declining to give the trailers preferential treatment, it acted in accordance with the provisions of the ***Customs and Excise Act***, ***Customs and Excise (General) Regulations*** and the Protocol. It contended further that there was nothing wrong in the action it now took of reversing its earlier decision of 2016 to extend preferential treatment to those particular second hand trailers as there was a change in circumstances.

12) At the hearing before the Tribunal, the gist of the arguments by the Appellant was that the Respondent's reliance on the provisions of Section 73(1) (a) of the ***Customs and Excise Act*** as a basis for denying

preferential treatment was erroneous. It contended that the relevant provision was Section 73(1)(b) because, the trailers which it had imported were not wholly but partially produced in South Africa.

13) Section 73(1)(a) and (b) of the ***Customs and Excise Act*** states as follows:

> **"For the purposes of this Act, the country of origin of any manufactured goods shall be deemed to be-**
>
> **a) The country in which the goods are wholly produced: or**
>
> **b) The country in which the value added to the goods as a result of the process of production accounts for at least thirty-five per centum of the ex-factory cost."**

According to the Appellant, the trailers were subject to section 73(1)(b) because it imported them on the basis that they were partially produced in a Member State and the certificates of origin which accompanied them stipulated as such. For this reason, it was argued that, the Respondent failed to take into account the provisions of Rule 2(1)(b) of the Protocol and regulation 69(c) of ***Customs and Excise (General) Regulations*** which

prescribe that eligibility for preferential treatment shall be determined in accordance with the rules of origin.

14) Rule (2)(1) of Annex 1 by and large mirrors section 73(1) of the ***Customs and Excise Act*** and states as follows:

> **"1 General requirements**
>
> **For the purpose of implementing this protocol, goods shall be accepted as originating in a Member State if they are consigned directly from a Member State to a consignee in another Member State and;**
>
> **(a) They have been wholly produced in a Member State as provided in Rule 4 of this Annex; or**
>
> **(b) They have been obtained in any Member State incorporating materials which have not been wholly produced there, provided that such material has undergone sufficient working or processing in any Member State within the meaning of paragraph 2 of this rule."**

The Appellant argued further that the interpretation given to the Protocol by the Respondent created uncertainty in the law on preferential treatment. Therefore, as is the case with regard to interpretation of fiscal laws, the Appellant should not have been taxed due to the ambiguity in the law.

15) The Appellant concluded that the Respondent's actions, in 2016, of allowing its imported second hand trailers to enjoy preferential treatment had created a legitimate expectation that the treatment would continue.

16) In response, the Respondent contended that the rules of origin explain the effect of the Protocol and they are enshrined in our local legislation by virtue of section 73(1) of the ***Customs and Excise Act*** as read with the ***Customs and Excise (General) Regulations***. The regulations, under 69c, designate Annex 1 and Appendix 1 to the Protocol as the criteria for determining the origin of goods.

17) According to the Respondent, in terms of rule 2(1) of Annex 1 to the Protocol, goods qualify for preferential treatment if they are either wholly produced or sufficiently worked or processed in a Member State. Further, rule 4(1)(h) of Annex 1 to the Protocol defines the phrase *"wholly produced in a Member State"* as including used articles collected from a Member State for the sole purpose of recovering raw materials from them. These two rules, the Respondent argued further, must be read together.

18) The Respondent concluded arguments on this issue by stating that since the six trailers were imported into the country for use in the consignment of goods and not recovery of raw materials, they did not qualify for preferential treatment.

19) On the issue of legitimate expectation, the Respondent denied that its actions had created such expectation. It set out the form which legitimate expectation takes and said that the situation in this case did not qualify as legitimate expectation. It argued that there was a change in circumstances or policy which justified it as a public body to depart from its previous decision. Lastly, it was contended that adequate notice was served upon the Appellant by way of the letter dated 11th June 2020 on the changed circumstances which negated the claim for legitimate expectation.

Consideration by the Tribunal and decision

20) The Tribunal began by making findings of fact that the goods which are the subject of the dispute are second

hand goods and were intended for use in Zambia in the Appellant's transport business. It then considered the provisions of rules 2(1) and 4(1) of Annex 1 to the Protocol and concluded that the six trailers would only qualify for preferential treatment if they were imported into the country for purposes of recovering raw materials. It rejected the Appellant's contention that rule 4(1)(h) of the Protocol does not apply to the six trailers because they were imported on the basis of being partially produced in South Africa. The reasoning of the Tribunal was that the rules of origin which are the subject of the appeal must be read together and that rule 4(1)(h) is the only provision which applies to used articles.

21) The Tribunal also refused to accept the Appellant's argument that the two rules are ambiguous hence, the contradiction in their interpretation as revealed by the Respondent's letters of 13th July 2016 and 11th June 2020. While it acknowledged that the two letters were contradictory, it held that by letter dated 11th June 2020, the Respondent was correcting the erroneous position

taken earlier. The Tribunal accordingly refused to accept that its earlier decisions in the cases of ***Justice Mathew M.S.W. Ngulube v Zambia Revenue Authority***[1] and ***Chibuluma Mines Plc v Zambia Revenue Authority***[2] were applicable to this case. In those cases, the Tribunal held that any ambiguity in fiscal legislation should be resolved in favour of the tax payer.

22) By way of conclusion, the Tribunal discussed in detail the law relating to legitimate expectation by reference to a number of cases. It held that even assuming the Appellant's claim could be sustained on this basis, the prejudice it would have suffered was negated by the fact that the trailers were eventually allowed entry into the country under the preferential treatment, notwithstanding the law being to the contrary. It accordingly dismissed the appeal.

Grounds of appeal to this court and arguments by counsel

23) The Appellant is unhappy with the decision of the Tribunal and has escalated the matter to this court fronting two

grounds of appeal. These grounds of appeal contend that the Tribunal misdirected itself when it upheld the Respondent's interpretation of the provisions of the Protocol and found that the relevant rules are clear, as regards the importation of second hand trailers. It also contended that the Tribunal misdirected itself when it held that the six trailers were not entitled to preferential treatment despite the finding that the Respondent did infact create a legitimate expectation that second hand trailers were entitled to preferential treatment.

24) The parties filed heads of argument which they supplemented with *viva voce* arguments at the hearing. The heads of argument are lengthy and we do not find it appropriate to reproduce them in detail because they more or less mirror the arguments advanced before the Tribunal. In our consideration of the appeal we have decided that the best approach is to identify the central issues in the dispute and determine them with reference to the arguments advanced by the parties.

25) The first issue which falls for consideration is whether or not there is uncertainty in the law regarding the treatment of used or second hand goods. The Appellant has been motivated to raise this issue by arguing that if we accept its argument, then we should hold that the uncertainty should be resolved in its favour as a tax payer. The issues therefore, calls for the interpretation of rules 2(1) and 4(1) of Annex 1 to the Protocol.

26) Counsel for the Appellant, Ms Undi and Mr. Jalasi argued that the certificates of origin which accompanied the trailers stated that the trailers were being imported into Zambia as goods partially produced in a Member State incorporating material which had not been wholly produced in a Member State. For this reason, the certificates of origin were marked with the symbol *"S"* and not *"P"* which is the designation given by the Protocol to goods which are partially produced in a Member State. As a consequence of this, counsel argued, the applicable provision of rule 2 of Annex 1 to the Protocol is sub-rule (1)(b) and not (1)(a).

27) The second limb of counsel's argument was that since the applicable sub-rule is (1)(b) of rule 2, the provisions of rule 4(1)(h) do not apply to the trailers because it applies to goods wholly produced in a Member State in accordance with sub-rule (1) (a) of rule 2. They argued further that it was a misdirection on the part of the Tribunal to hold that rule 2(1)(b) cannot be read in isolation from rule 4(1) because the latter rule relates only to goods wholly produced in a Member State. This, they argued, is clear from rule 4(1) which expressly states that it applies only to rule 2(1)(a). Concluding arguments on this point, counsel contended that under rule 2(1)(b), the trailers qualify for preferential treatment.

28) The alternative argument advanced by counsel was that if we do not accept their interpretation of the two rules, we must hold that Annex 1 is unclear and ambiguous. As such, the Appellant should not suffer prejudice, in the consequence. They relied on their submissions before the Tribunal to the effect that a tax should only be imposed on an individual if a tax law specifically prescribes for the

charging of such tax. Further, any ambiguity in a tax law should be construed in favour of the tax payer.

29) The thrust of Ms Undi's *viva voce* arguments was a repetition of the written arguments that the trailers were entitled to preferential treatment because they were partially produced in a Member State and the certificate of origins stated as much. Further, the Respondent's previous conduct revealed that goods of a similar nature were granted preferential treatment. The Respondent had thus created a legitimate expectation in the mind of the Appellant.

30) Following a query from the court on the contention that the trailers were partially produced in South Africa, counsel did concede that the Appellant did not lay before the Tribunal any evidence to show what percentage of the composition of the trailers was partially produced in South Africa. She also conceded that section 73(1)(b) of the ***Customs and Excise Act*** specified the percentage of value addition which is required for goods to be categorized as partially produced in a Member State in order for them to

qualify for preferential treatment. In addition, she conceded that there is need for the Respondent to verify that the goods conform to what is stated in a certificate of origin where the Respondent is in doubt. However, she argued that the Respondent ought to have attached more weight to the certificates of origin than it did.

31) Ms Undi argued further that, while she conceded that the Respondent is entitled to verify that imported goods are as described in a certificate of origin, it is obliged to explain why it has classified the goods differently from what appears on the certificate of origin. In this case, she argued, the Respondent did not give an acceptable explanation regarding its classification of the trailers as wholly produced as opposed to partially produced in a Member State.

32) The other concession by counsel was that rule 2(1)(a) of Annex 1 merely prescribes the rules of origin and does not stipulate what constitutes goods which are wholly produced in a Member State. She argued that the definition of such goods, is in rule 4(1). Counsel also

agreed that the trailers were imported into Zambia for use in the consignment of goods and not for purposes of stripping them for raw materials.

33) As regards the issue of legitimate expectation, Ms Undi confirmed that despite the Respondent's decision that the trailers were not entitled to preferential treatment it still extended such treatment to them. As a result, the Appellant did not suffer any prejudice arising from the Respondent classifying the trailers as wholly produced in South Africa. She explained that the Appellant's claim for legitimate expectation is based on future imports of similar goods by the Appellant. Counsel explained that importation of second hand trailers represents the Appellant's business model. As such, the removal of the preferential treatment on such imports will have a significant impact on its business.

34) In response to a query by the court, Ms Undi clarified that if the decision made by the Respondent in 2016 was based on wrong principles of law, it was not compelled to continue abiding by it. She, however, argued that the

Respondent was obliged to give a justifiable explanation for departing from its earlier course.

35) Counsel did, however, concede that the Respondent was magnanimous in allowing the six trailers to be brought into the country tax free and that, if indeed the Appellant in future imports more trailers of a like nature, and tax is levied, it can be taken to have had sufficient notice.

36) In support of the *viva voce* arguments by Ms Undi, Mr. Jalasi urged us to consider the preamble to the Protocol in the interpretation of Articles 2(1) and 4. He argued that the intention of the Protocol is to promote trade among Member States and that it does not discriminate between brand new and used goods. For this reason, he argued further, that to the extent that section 73 of the ***Customs and Excise Act*** refers to used articles it is discriminatory and is against the spirit of the Protocol.

37) We engaged counsel on his contention that section 73 is discriminatory and he conceded that domestic law is superior to international Protocols. He also conceded that Article 9(j) of the Protocol does allow a Member State to

take any measure necessary to deter the importation or exportation of second-hand goods into or from its territory under the Protocol.

38) We were urged to allow the appeal.

39) The response by Mrs. Mundia and Mr. Chibwe, counsel for the Respondent, focused on interpreting rules 2(1)(a) and (b) and 4 of Annex 1. Counsel argued that the Tribunal was on firm ground when it held that the two rules are to be read together. According to counsel, goods that have acquired a *'used'* status in a Member State are regarded as wholly produced in a Member State regardless of the process they may have undergone in the Member State. This, they argued, is in accordance with provisions of the SADC Secretariate (2008) Procedure's Manual on The Implementation of Rules of Origin.

40) Counsel argued further that used goods are not entitled to preferential treatment unless they are being imported for purposes of recovery of raw materials. They contended that these goods cannot be classified under rule 2(1)(a) because the goods envisaged under that rule are goods

which have undergone value addition in a Member State. Here, counsel argued, that although the Appellant has contended that the provisions of rule 2(1)(a) are applicable to the six trailers, it had not proved that they had undergone value addition in South Africa prior to being exported to Zambia.

41) Counsel also agreed with the finding by the Tribunal that the mere fact that the Appellant purported to import the trailers pursuant to rule 2(1)(a) and they arrived with certificates of origin to that effect, did not make them eligible under that rule. Regard should be had to their nature. Concluding arguments on this point, they stated that the Protocol under the general exceptions allows a Member State to adopt or enforce any measure which is necessary to prohibit or control the importation or exportation of second hand goods into or out of its territory.

42) In regard to the contention that there is uncertainty in the provisions of the law, counsel agreed with the finding by the Tribunal that there is no such uncertainty.

43) Mr. Chibwe's *viva voce* arguments focused on the Appellant's claim that the ambiguity in the rules should be resolved in its favour. The view he took was that courts in Zambia have put the matter beyond doubt that where a fiscal law seeks to grant an exemption it must be interpreted strictly against the tax payer. The onus rests upon the tax payer to prove that he or she is entitled to the exemption. He drew our attention to a decision by one of our number, Wood J (as he then was) in the case of ***Celtel Zambia Limited (T/A ZAIN ZAMBIA) v Zambia Revenue Authority***[3] and our decisions in the cases of ***Zambia Revenue Authority v Balmoral Farms Limited***[4] and ***Zambia Revenue Authority v Professional Insurance Corporation (Z) Limited***[5]. In these two cases, we acknowledge the cardinal interpretational principles of tax legislation, that a charging section in tax legislation must be clear in its intention to levy a charge, and secondly, a court must strictly assess any claim to entitlement by a tax payer to tax exemptions, waivers or reliefs.

44) Counsel argued that to the extent that the intention of the Protocol is to grant preferential treatment or duty free status, it is in nature, a tax exemption which must be interpreted strictly against the tax payer.

45) In amplifying the argument by her counterpart, Mrs. Mundia submitted that the trailers cannot be classified as partially produced in South Africa because no evidence had been adduced before the Tribunal below to show that they were sufficiently worked on in South Africa prior to being imported into Zambia, in accordance with Appendix 1 of Annex 1. She argued that preferential treatment will only be given to goods where they have been sufficiently worked on in accordance with the said Appendix of Annex 1 which gives them originating status.

46) We were urged to dismiss the appeal.

Consideration and decision by this court

47) We would like to begin our consideration of this appeal by dispelling the myth created by counsel for the Appellant that by virtue of the fact that the trailers were

accompanied by certificates of origin suggesting that they were partially produced in South Africa (a Member State), the Respondent was obliged to accept them as such without question. The rule in the Protocol which governs the effect of a certificate of origin is Rule 9 which is titled *'Documentary Evidence'*.

48) For completeness, it is important that we set out the relevant portions of the rule as follows:

> **"9(1) The claim that goods shall be accepted as originating from a Member State in accordance with the provision of this Annex shall be supported by a certificate given by the exporter or their authorized representative in the form prescribed in Appendix II of this Annex. The certificate shall be authenticated with a seal by an authority designated for this purpose by each Member State.**
> **9(2) Every producer, where such producer is not the exporter, shall, in respect of goods intended for export, furnish the exporter with a written declaration in conformity with Appendix (iv) of this Annex to the effect that the goods qualify as originating in the Member State under the provisions of rule 2 of this Annex."**

49) At first glance one can conclude that by virtue of these two provisions, the production of a certificate of origin is acceptable proof, without question, of the origin of the

imported goods and their status, i.e., wholly produced or partially produced in a Member States, and thus entitled to preferential treatment. The rationale for this is to ensure that trade between Member State is undertaken with ease and without hinderance by the usual trade barriers. However, rule 9(3) does permit an importing Member State, in exceptional circumstances or in case of doubt, to verify the nature of the goods against the certificate of origin. The sub-rule states as follows:

> **"The competent authority designated by an importing Member State may in exceptional circumstances and notwithstanding the presentation of a certificate issued in accordance with the provisions of this rule, require, in case of doubt, further verification of the statement contained in the certificate. Member States, through their competent authorities, shall assist each other in this process. Such further verification should be within three months of the request being made by a competent authority designated by the importing Member State."**

50) The competent authority in our case is the Respondent which, according to Rule 9(3), is authorized, as it did in this case, to verify if indeed the trailers were partially produced in a Member State as alleged by the certificates

of origin. To this extent, we do not accept the argument by Mr. Jalasi that the Respondent was obliged to accept the trailers as partially produced in South Africa without question as declared by the certificates of origin.

51) Coming now to the interpretation of the two rules. The first is rule 2(1) which is titled *"general requirements"* and sets out the criteria which qualifies goods for acceptance as originating in a Member State. We have quoted it in paragraph 14 of this judgment. This rule is enhanced by our section 73(1) of the ***Customs and Excise Act*** which is at paragraph 13 of this judgment, a domestication of the rule by our local legislation. It specifically states the percentage of value addition which will make goods eligible for preferential treatment on the basis of being partially produced in a Member State.

52) A point to be noted here is that neither the rule nor the section specifically define what goods qualify as *'wholly produced'* or *'partially produced'*. They merely, as we have stated, set the parameters for acquisition of originating status by goods imported from and into Member States.

This is in accordance with Regulation 69(c) which counsel for the Respondent referred us to which states as follows:

> **"The origin of goods shall be determined in accordance with the rules of origin set out in Annex 1 and Appendix 1 of Annex 1 of the SADC Trade Protocol and an importer of qualifying goods who wishes to claim such suspended duty rates shall lodge, with the entry, a certificate of origin."**

Another important point to note is that the section and the rule do not also state the fate of second hand goods.

53) As for Rule 4, it defines or lists the goods that qualify in the category of wholly produced in a Member State. To the list is added second hand or used articles. The rule states as follows:

> **"(1) For the purposes of paragraph 1(a) of Rule 2 of this Annex, the following shall be regarded as wholly produced in a Member State:**
>
> **(a) Mineral products extracted from their ground or seabed;**
>
> **(b) Vegetable products harvested there;**
>
> **(c) Live animals born and raised there;**
>
> **(d) Products contained there from live animals;**
>
> **(e) Products obtained by hunting or fishing conducted there;**
>
> **(f) Products of sea fishing and other products taken from the sea by their vessels;**

(g) Products made on board their factory ships exclusively from products referred to in subparagraph (f);

(h) Used articles collected there fit only for the recovery of raw materials;

(i) Waste and scrap resulting from manufacturing operations conducted there;

(j) Products produced there exclusively

(i) Products specified in subparagraphs (a) to (i)

(ii) Minerals containing no element imported from outside the Member States or of undetermined origin."

54) Our understanding of the foregoing rule is that it defines what goods are to be considered as *'wholly produced'* in a Member State. It is, therefore, an extension of rule 2(1)(a) of the Annex which prescribes the criteria for qualification of originating status. The reference, therefore, to rule 2(1)(a) in the rule is not intended to limit its operation exclusively to that rule and not any other rules, but an indication of where the phrase *'wholly produced'* which is being defined originates from. Therefore, in their proper or

correct appreciation the two rules must, as argued by the Respondent and held by the Tribunal, be read together.

55) As for rule 4(1)(h) the interpretation we have given it is that second hand or used articles or goods, irrespective of where they were manufactured, are categorized as wholly produced in a Member State for as long as they are exported from a Member State into a Member State. Further, to be entitled to preferential treatment such goods should be imported into a Member State for the sole purpose of recovery of raw material. Consequently, since the trailers were imported for purposes of use in the consignment of goods, they do not qualify for preferential treatment.

56) Mr. Jalasi urged us to refer to the Preamble to the Protocol in interpreting the two rules arguing that the Preamble points to the fact that goods must be accepted into an importing Member State, without question, in accordance with their description in the certificate of origin. In the introduction to this judgment we have set out the intention of the SADC Member States when they signed the Protocol.

This intention is amplified by the Preamble, which, in no way, aids in the interpretation of the two rules or the effect of a certificate or origin. The two rules are self-explanatory and are conditions upon which the intention of Members of SADC as reflected in the Preamble are achieved.

57) In answer therefore to the first issue, we hold that there is no ambiguity in the rules. Ground 1 must, therefore, fail.

58) The Appellant's fate is compounded by the fact that, although it claimed that it was importing the trailers on the basis of being partially produced in a Member State, no evidence was led before the Tribunal to show the percentage of value addition in the Member State of origin in accordance with section 73(1)(b) of the ***Customs and Excise Act*** which we have set out at paragraph 14 of this judgment. This section, specifically sets out the test for qualification of goods as being partially produced in a Member State by setting the percentage of value addition.

59) Coming now to the issue of legitimate expectation, the authorities which counsel have referred us to set out the test as follows:

59.1 the law does not protect every expectation but only those which are legitimate;

59.2 the representation underlying the expectation must be clear, unambiguous and devoid of relevant qualification;

59.3 the expectation must be reasonable;

59.4 the representation must have been induced by the decision matter;

59.5 the representation must be one which it was competent and lawful for the decision maker to make without which the reliance cannot be legitimate.

We agree with these principles.

60) At the heart of the Appellant's contention under this issue is the letter from the Respondent to the Appellant's agent dated 13th July 2016. The letter was a response to an appeal lodged on behalf of the Appellant to the Respondent after the latter declined to give preferential treatment to the trailers. The letter reads in part as follows:

> **"We wish to advise that your appeal has been successful and preference under SADC South African origin has been granted.**

> **In arriving at this decision, it was noted that the certificates were duly issued in line with Appendix III to Annex 1 of the SADC Protocol, and the fact that the goods are second hand does not disqualify them to be originating from a Member State. In addition, it was noted that the certificates of origin were issued by a competent authority as was verified on the specimen signature and stamp."**

According to the Appellant, this decision by the Respondent created in its mind a legitimate expectation that all its future imports of second hand trailers would enjoy preferential treatment. The Respondent has, by its subsequent letter dated 11th June 2020 reversing the earlier position on the status of used goods, breached the said legitimate expectation.

61) In our consideration of this issue, we have looked at the context in which the letter of 11th June 2020 was written. That letter was written as the final decision on the appeal by the Appellant and it clarified that the letter of 13th July 2016 contained a misinterpretation of the rules of origin. It was preceded by an earlier letter dated 11th September 2019 by the Respondent's Deputy Commissioner –

Support to the Appellant's Advocates, explaining the effect of rule 4(1)(h) of Annex 1 in detail and the instances in which used goods are entitled to preferential treatment under the Protocol. The letters do not in any way contradict each other but rather the latter two retract an error made by the Respondent in its interpretation of the rules of origin.

62) To the extent that the last two letters, by and large, are in line with the interpretation we have given to rule 4(1)(h) and explain when used goods will enjoy preferential treatment, they were on firm ground and represent the correct position of the law on the matter. Further, the Respondent is at liberty, like any other entity to correct any misinterpretation of the law and is not compelled to labour under a mistake in perpetuity. Ms Undi was magnanimous enough to concede in this regard but argued spiritedly that the explanations given by the Respondent were not satisfactory. We must disagree with her because the Respondent could not have made the point clearer than it did.

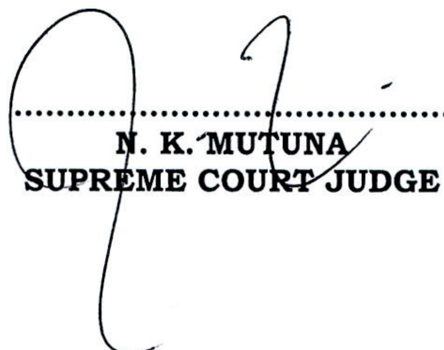
63) Having held that the Respondent was labouring under a misinterpretation of the law in the 2016 letter, the legitimate expectation claim cannot stand because it was not based on a legitimate act as the Respondent was not lawfully empowered to make it. There can be no legitimate expectation founded on an unlawful or unauthorized act and the principles set out in paragraphs 59.1 and 59.5 attest to this fact. Further, there is no or no legitimate prejudice which the Appellant has suffered as a result of the Respondent rescinding its earlier decision in light of the fact that it allowed the trailers to be imported into the country duty free. With regard to the letter dated 11th June 2020 our considered view is that it served as sufficient notice to the Appellant of what to expect in future when it imports goods similar in nature to the trailers to negate any claim for legitimate expectation. Consequently, ground 2 of the appeal also fails.

Conclusion

64) The two grounds of appeal having failed, the appeal is dismissed with costs. These will be taxed in default of agreement.

M. MUSONDA
ACT. CHIEF JUSTICE

A. M. WOOD
SUPREME COURT JUDGE



N. K. MUTUNA
SUPREME COURT JUDGE