

THE COURT OF APPEAL, ADJUDICATING COMMERCIAL MATTERS, DECIDES IN PUBLIC HEARING CASE No. RCOM AA 0014/2018/CA ON 21/06/2019, AS FOLLOWS:

PARTIES DETAILS

- **Appellant: Silversands Investments Ltd.** For and on behalf of its Managing Director, with registered address in Gasharu Village, Bwiza Cell, Ndera Sector, Gasabo District, City of Kigali, represented by Me NSENGIYUMVA Abel.
- **Respondent: Rwanda Revenue Authority (RRA),** B.P. 3987, for and on behalf of its Commissioner General, with registered address in Kimihurura Cell, Kimihurura Sector, Gasabo District, City of Kigali, represented by Me KARASIRA S. Théogène.

MATTER OF LITIGATION: Taxes and customs duties equivalent to RwF 359,251,439 and counsel fees worth RwF 5% of the subject in litigation.

SUBJECT MATTER: Appeal against Case No. RCOMA 00735/2016/CHC/HCC decided by the Commercial High Court on 19/09/2017.

I. CASE SUMMARY

1. In the Commercial Court of Nyarugenge, Silversands Investments Ltd filed a claim against Rwanda Revenue Authority (RRA), arguing that on 22/04/2014, it purchased cement from Africa Logistics Ltd of Tanzania at a price of 60 USD/Ton, and declared same price and related Customs taxes, but Customs Authority requested it to rectify the tax declaration and indicate 72 USD/Ton, later it was surprised by a letter dated 29/03/2016 from Rwanda Revenue Authority requiring it to pay a tax equivalent to RwF 359,251,439 alleging cement should have been declared at a price of 92 USD/Ton, but did not explain how that price value had been assessed and its grounds in rejecting the price value of 60 USD/Ton, and requested that the purchase price for cement should serve as the basis in accordance with the provisions of the Appendix 4 to Law governing East African Community Customs Management Authority (EACCMA), and be granted compensation.
2. In Case RCOM 00950/2016/TC/NYGE decided on 16/11/2016, the Commercial Court of Nyarugenge ruled that the claim filed by Silversands Investments Ltd has no legal grounds, that the declared cement price should not be granted credibility, instead it must pay duties as determined by Rwanda Revenue Authority (RRA) taking reference to the estimated price it determined, and ordered it to pay to Rwanda Revenue Authority (RRA) RwF 150,000 as procedural fees, with no refund of court fees deposited.

3. Silversands Investments Ltd lodged appeal to the Commercial High Court arguing that the Commercial Court of Nyarugenge declared it could not base on proofs exhibited by Rwanda Revenue Authority accessed on Common Websites of Pakistani Customs, but later based on those proofs. This Court decided Case No. RCOMA 00735/2016/CHC/HCC on 19/09/2017, clarifying that the Commercial Court of Nyarugenge disclosed supporting elements in deciding this case, that it never said it based on supporting evidence accessed on that website, this allegation that Court invalidated elements of evidence and later based on them is a baseless statement, and then ruled that decision in the case appealed against remains unchanged and orders Silversands Investments Ltd to pay to Rwanda Revenue Authority RwF 200,000 of expenses incurred during case processing.
4. Silversands Investments Ltd lodged appeal to the Supreme Court, Case was docketed as No. RCOMAA 00067/2018//SC, but review of laws governing competence of Courts was implemented before examination of the appeal, was transferred to the Court of Appeal pursuant to provisions of article 105 of Law No. 30/2018 of 02/06/2018 determining the competence of Courts and was docketed as RCOMAA 00014/2018/CA.
5. In its appeal, Silversands Investments Ltd argues that the initial Judge discovered that the prices on which Rwanda Revenue Authority based in determining the reference value for tax were not available on the website of Pakistani Customs (www.customstoday.com.pk) suggested by Rwanda Revenue Authority, saying these prices did not serve as a basis for tax, and ended up deciding that the tax imposed based on those prices remains unchanged, nevertheless tax equivalent to RwF 359,252,439 was calculated on 92 USD/Ton whereas such was the price which the initial Judge said should not serve as a reference, therefore Court should decide that tax be calculated at a lower price of 72 USD/Ton which Rwanda Revenue Authority had earlier come up with.
6. Rwanda Revenue Authority, in turn, argues that this ground for appeal seeks to mislead Court because it is clear that Silversands Investments Ltd orally reports facts in a language not used by the Judge, because at the first instance it did not say the price of 92 USD/Ton should not serve as a reference price, and that its claim in appeal seeking assessment of whether the value for calculating tax should be 92 USD /Ton or 72 USD/Ton is a new claim not considered in the Commercial High Court and is quite synonymous to seeking clarification on a decided case, and requests for its rejection.
7. Case was heard in public on 12/12/2018, with Silversands Investments Ltd represented by Me NSENGIYUMVA Abel, while Rwanda Revenue Authority (RRA) was represented by KARASIRA SOREZO Théogène, first considered was the objection of

inadmissibility of the appeal filed by Counsel representing Rwanda Revenue Authority arguing that the appeal is a new claim introduced at the appeal level, Court determines that it cannot be an objection, instead, it can be a ground for defence on the merits of the case. In a previous judgment rendered on 25/01/2019, Court found out that there are other explanations to be given by parties, case hearing resumed on 23/04/2019 both parties represented same counsels.

II. LEGAL ISSUES AND THEIR ANALYSIS

a. Determining whether Silversands Investments Ltd should pay tax calculated at a price of 72 USD /Ton of cement instead of 92 USD

8. Me NSENGIYUMVA Abel, representing Silversands Investments Ltd, argues that Court should remove tax equivalent to RwF 359,252.439 calculated by Rwanda Revenue Authority basing on the price of 92 USD/Ton of cement and confirmed by initial Courts for failure to prove where the price came from, and therefore should not serve as a basis in calculating tax, instead the price of 72 USD/Ton which Rwanda Revenue Authority had earlier suggested should apply as the lowest possible among those prices availed by the research conducted, and submitted electronically and accessible even today in the system used by Customs, and to date, Rwanda Revenue Authority never denied it.
9. As regards the origin of the price of 92 USD/Ton Rwanda Revenue Authority used to calculate tax, Me NSENGIYUMVA Abel argues that its position is there is some place he sourced the price other than from the website of Pakistan, but that it cannot produce invoice indicating this price. Therefore, he notes that, as Rwanda Revenue Authority mentioned in its pleadings at the first instance, when determining taxable price, basis should be the provisions in the Law governing Customs of East African Community, Appendix 4, Paragraph 8: *'Fall back value'* in point 8 (1) there is a provision that when the value of goods in a bonded warehouse is obtained in accordance with the provisions in paragraphs 2,3,4,5,6 and 7, that value is obtained through application of a value computing system recognized by the principles and general provisions contained in this Appendix 4, while point (2) of that paragraph 8 contains the system (method) restricted from use when trying to determine taxable price, and it is within this framework that under point (b) there is restriction from choosing the highest price among those available.
10. He states that such was the principle which had served as a reference for Rwanda Revenue Authority in determining the price of 92 USD/Ton, though this was not the

lowest price, as the lowest price is 72 USD/Ton as highlighted in its pleadings at the first instance, on Folio 7, paragraph 2.

11. Me KARASIRA SOREZO Théogène, representing Rwanda Revenue Authority, states that the fact that Silversands Investments Ltd requests assessment of whether the tax and customs duties charged equivalent to Rwf 359,252,439 were calculated based on the price of 72 USD/Ton or 92 USD/Ton is a new claim lodged at the appeal level, because nowhere was this element ever raised in the first two instances, for Court to rule thereon thus paving way for appeal, and should therefore not be admitted pursuant to the provisions of article 154 of Law No. 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure.
12. He explains that at the first instance, Silversands Investments Ltd filed case seeking clarification whether there were circumstances provided for by law likely to cause Rwanda Revenue Authority to reject the price of 60 USD/Ton which served as a basis when paying taxes, and to determine whether the circumstances on which it based to adjust the cement price provided for by Law, while at the second instance of appeal it argued that the Judge rejected the prices Rwanda Revenue Authority used as a basis in determining the tax as available on the Pakistani Customs Website suggested by Rwanda Revenue Authority, holding that they should not serve as a basis, but ended up ruling that the tax was charged based on those prices, that the decision taken on these provisions has been final, and are not susceptible of any further discussion before this Court.
13. Regarding the value of 72 USD /Ton, Silversands Investments Ltd which, as of now, accepts as a basis for paying its taxes because such value was suggested by Rwanda Revenue Authority, Me KARASIRA SOREZO Théogène argues that when goods enter bonded warehouses, there must be a value to serve as a basis for tax payment; for this to be possible, Silversands Investments Ltd disclosed the price of 60 USD/Ton which Customs found was not in line with the actual value, and was requested to pay 72 USD /Ton pending results of in-deep research to determine the actual taxable value, after an audit and research, Rwanda Revenue Authority found that cement imported by Silversands Investments Ltd should pay taxes at a value of 92 USD/Ton.
14. He notes therefore that the fact that Rwanda Revenue Authority suggested to Silversands Investments Ltd a value of 72 USD/Ton is no surprise, and no contradiction, because that value was determined with reference to information available then, but audit and research continued to determine the actual taxable value for cement and that its post clearance audit is provided for in Appendix 4 to Law governing the East African Community Customs management (compliance and

enforcement) regulations, 2012), as long as prescription period provided for under its Article 135, section, has not lapsed.

15. He further said that when audit reveals that lower tax was paid, the amount embezzled is recovered as provided for by Article 135, paragraph 1 of Law governing the East African Community Customs management above mentioned, that when low amount of tax is collected, any person who shall have declared lower tax must, when required by a competent officer, pay the outstanding amount and that such amount must be recovered as if it were customs duties related to goods to which lower taxes were applied.

COURT FINDINGS

16. The appeal filed by Silversands Investments Ltd seeks to prove that the price of 92 USD/Ton is not the lowest price on which Rwanda Revenue Authority should base when calculating the tax equivalent to RwF 359,251,439 charged as taxes, because there is another price of 72 USD/Ton also found by RRA, and is therefore not a new claim lodged at the appeal level as alleged by the counsel representing Rwanda Revenue Authority, because even though it keeps being critical of how the tax charged has been treated ever since case hearing until its calculation to date.
17. Case file indicates that in the Commercial Court of Nyarugenge, Silversands Investments Ltd filed a claim seeking to explain how the price of 60 USD /Ton of cement imported from Tanzania and declared to the Customs is the true price, while Rwanda Revenue Authority denies it. In its explanations, Rwanda Revenue Authority argued that basis was the information accessed on the website www.customstoday.co.pk of Pakistan Customs Export Data from Lucky Cement Ltd dated July 2014, cement was imported by dealers in Tanzania was purchased at a price of 55.5 USD/Ton and 58.93 USD/Ton, that the FOB value available on that website was 37 USD/Ton, therefore is basis is the provision in Appendix 4, paragraph 8(1), of Law governing East African Community Customs, which provides that when the value of goods in a bonded warehouse is not obtained in accordance with the provisions in paragraphs 2,3,4,5,6 and 7, said value shall be obtained in accordance with the method of calculating value as recognized by the principles and general provisions contained in this appendix and data available in EAC member country, Rwanda Revenue Authority used the method of reasonable value assessment stipulated in that provision, and determined the taxable value based on the lowest value of 55 USD/Ton FOB and the price of 37 USD /Ton, the CIF determined reached 92 USD/Ton.

18. Further, it is clear that in the case decided by the Commercial Court of Nyarugenge, Court noted that Silversands Investments Ltd fails to give evidence of what it alleges, adding that the prices declared at the Customs as those on which he purchased cement raise doubts, and should not be confirmed for lack of accuracy.
19. Regarding comparison of cement prices of Ordinary Portland Cement 42.5 grade, Court based on Article 3 (1) (a) of Appendix 4 of Law governing EAC Customs which provides that the price of imported goods may base on the price for identical goods imported and sold in one of EAC member countries, and article 3 (1) (b) which provides that the price of imported goods may base on identical goods taking into account the business level of their sale and their size, and noted that cement imported by Silversands Investments Ltd is Ordinary Portland Cement, 42.5 grade, Rwanda Revenue Authority, in turn, indicates that Africa Cement Ltd of Kenya also purchased same type from Pakistan at a price of 55.97 USD/Ton FOB and 83.5 USD/Ton when cement reached Mombasa, adding such price may be taken as a reference in determining the price of cement imported by Silversands Investments Ltd, and higher than that of 60 USD/Ton it declared as claimed and that of 72 USD/ton determined for it by Rwanda Revenue Authority.
20. Court further noted that for those identical goods, some proofs were furnished by Rwanda Revenue Authority including *Twiga* cement of 42.5 grade brought CIF to Kigali from Tanzania at a price of 100 USD/ton and that of *Simba* of 42.5 grade also at a price of 120 USD/ton in Kigali, this pointing to a bigger difference from that of cement imported by Silversands Investments Ltd, therefore the fact that Rwanda Revenue Authority took reference on these prices to determine an average price but lower of 92 USD/ton is no injustice directed against it.
21. Court, pursuant to Article 135 of Law on EACCMA grants power to authorized officer to require taxpayer to pay customs duties not paid in case lower amount was paid, found out that Silversands Investments Ltd had paid Customs duties basing on the lower price declared, and ruled that the price for cement as declared should not be approved, that should instead pay customs duties determined by Rwanda Revenue Authority basing on the determined average price.
22. Silversands Investments Ltd never saw any irregularity in those explanations but instead lodged appeal to the Commercial High Court arguing that Court based on proof it had already invalidated; seized Court found the allegation baseless and ruled in favour of keeping unchanged the earlier judgment in the case appealed against.

23. Court notes that allegations of Silvesands Investments Ltd before this Court that the tax payable should be calculated at a price of 72 USD/ton, lowest price Rwanda Revenue Authority found after conducting research, are not legally substantiated , because that price available on ‘*Query notification for customs declaration*’ of 19/08/2014 is FOB price not based on any research a Customs officer who suggested it may have conducted in a manner as provided for in Appendix 4, paragraph 8 of Law on EACCMA.
24. Court notes, instead, that the price of 92 USD/ton is the lowest price found, after comparison of cement imported from Pakistan purchased by dealers in Tanzania where Silversands Investments Ltd says it purchased cement, at prices of identical cement purchased and imported from Tanzania into Rwanda by dealers, that price being the price that should prevail.
25. Based on the explanations detailed above, Court notes that the appeal lodged by Silversands Investments Ltd is not legally grounded, therefore, Case No. RCOMA 00735/2016/CHC/HCC decided on 19/09/2017 by the Commercial High Court, appealed against, should be upheld.

b. Cross appeal lodged by Rwanda Revenue Authority

26. Me KARASIRA SOREZO Théogène, representing Rwanda Revenue Authority declares that RRA is increasingly being involved in unjustified Court proceedings, and requests Court to order Silversands Investments Ltd to pay RwF 1,500,000 in compensation for all expenses on this case, both in its preparation and pleadings, plus Counsel fees.
27. Me NSENGIYUMVA Abel, representing Silversands Investments Ltd states that this cross appeal lodged by Rwanda Revenue Authority is not legally grounded and that, should Court determine otherwise, it would then determine these fees at its discretion.

Court Findings

28. Article 111 of Law No. 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, provides that the claim for representation fees is an incidental claim to the principal claim aiming to repay expenses incurred and is adjudicated simultaneously with the principal claim.
29. Court notes that expenses incurred on case Rwanda Revenue Authority requests from Silversands Investments Ltd are legally substantiated, because its appeal is not legally

grounded as highlighted above, and hired the services of a lawyer, and ensured representation, attended pre-trial sessions and case hearings on all dates they were held, but fails to prove that RwF 1,500,000 requested was spent at this level, and is therefore granted RwF 800.000 as representation fees and counsel fees, additional to RwF 150,000 granted by the Commercial Court of Nyarugenge and RwF 200,000 granted by the Commercial High Court, totalling RwF 1,500,000.

DECISION OF THE COURT

30. **Declares** the appeal lodged by Silversands Investments Ltd not legally grounded;
31. **Declares** the cross appeal lodged by Rwanda Revenue Authority to be legally grounded;
32. **Decides** in favour of keeping unchanged the judgment in Case appealed against docketed as No. RCOMA 00735/2016/CHC/HCC rendered on 19/09/2017 by the Commercial High Court, except for representation fees and counsel fees.
33. **Orders** Silversands Investments Ltd to pay to Rwanda Revenue Authority RwF 1,150,000 as procedural fees and counsel fees as outlined above;
34. **Rules** that Court fees deposited by Silversands Investments Ltd are equivalent to expenses incurred in the proceedings.

SO ORDERED AND PRONOUNCED IN THE PUBLIC HEARING ON 21/06/2019.

Sé
MUKANYUNDO Patricie
Presiding Judge

Sé
MUKANDAMAGE M.-Josée
Judge

Sé
KANYANGE Fidélité
Judge

Sé
MUSABIYINEMA Agnès Clémentine
Court registrar