

710 615 9

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSCVAAL PROVINCIAL DIVISION)

In the matter between:

Case no. 26465/2004

FAURECIA AUTOPLASTICS (PTY) LTD.
[previously known as SAI AUTOMOTIVE
AUTOPLASTICS (PTY) LTD

Applicant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICE

Respondent

JUDGMENT

HARTZENBERG J:

[1] This is an appeal in terms of the provisions of section 47(9)(e) of the Customs and Excise Act, no. 91 of 1964 (*the Act*) against a tariff classification made by the respondent (*the Commissioner*). On 10 October 2001 the Commissioner determined that "Lignoflex mats" (*the mats or the goods*) are classifiable under tariff heading 4421.90.90 of Part 1 of the Schedule to the Act as "Other Articles of Wood: Other: Other". The applicant at all relevant times contended that the mats are to be classified under tariff heading 44.11.99 as "Fibreboard of Wood: Other : Other"

[2] The imported goods are sheets or mats of fibreboard made from ligneous material. Wood chips are defibred and the wood fibres are mixed with synthetic fibres, compressed and bonded by felt and by their own adhesive properties. A paraffin-based solution is added to assist in creating impermeability to water, and organic resins are added to assist in achieving effective bonding. The sheet is cut into rectangular lengths to be palletized and has a density between 0.2 to 0.4 g/cm³. The imported goods are

exported by the manufacturer under Tariff Heading 44.11. The imported goods are, after importation, subjected to further processes to be used as motor-vehicle door panels. The composition of the goods is approximately 71.5% wood fibres, 14% polyester fibres, 6% polyester BiKo fibres, 8% phenolic resin and 0.5% hydrophobing agent (paraffin), having an area weight of 2100 g/m² and a density of approximately 0.2 g/cm³.

[3] An example of the product, which has to be classified, was handed to the court by the respondent in order to augment its argument. The handing up occurred after Mr. Meyer had stressed the point that the articles are mats and had contended that if one sees something that looks like a frog, croaks like a frog and jumps like a frog, it may just be that it is a frog. When I unrolled the "mat" it so happened that it did not recede into one flat mat. One of the sides, which had been folded in that way when it was rolled up and bound, formed an angle with the rest of the "mat" that lay flat on the bench. It prompted me to bend up to ninety degrees the two narrower sides of the "mat". The outcome was that those two angles remained in exactly the same position for the rest of the argument. When the experiment was repeated in my chambers they remained for twenty four hours without the slightest indication that the sides would sag and that the specimen would take on the appearance of an ordinary flaccid mat. There was a definite non-negligible degree of rigidity in the specimen.

[4] The parties are ad idem that the correct approach as to how classification is to be determined was set out in the matter of *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd* 1970 (2) SA 660 (A) at 675D-676F and 679C-680C. It entails that the headings and section and chapter notes are the first and paramount consideration to determine which heading is applicable. For the purposes of this case it is not necessary to get involved in any further aids of interpretation.

[5] Tariff Heading 44.11. is:

**"Fireboard of Wood or Other Ligneous Materials, Whether or Not
Bonded with Resins or Other Organic Substances:**

4411.1 Fireboard with a density exceeding 0.8 g/cm³

- 4411.11 = Not mechanically worked or surface covered
- 4411.19 = Other
- 4411.2 Fireboard of a density exceeding 0.5 g/cm³ but not exceeding 0.8 g/cm³
- 4411.21 = Not mechanically worked or surface covered.
- 4411.29 = Other
- 4411.3 Fireboard of a density exceeding 0.35 g/cm³ but not exceeding 0.5 g/cm³
- 4411.31 = Not mechanically worked or surface covered.
- 4411.39 = Other
- 4411.9 Other
- 4411.91 = Not mechanically worked or surface covered
- 4411.99 = Other

[5] It is evident that Tariff Heading 44.11 distinguishes between four different types of fibreboard comprised of wood or other ligneous materials i.e. with a density exceeding 0.8g/cm³, between 0.5 and 0.8 g/cm³, between 0.35 and 0.5 g/cm³ and with a density below 0.35 g/cm³. The explanatory notes refer only to three categories of fibreboard i.e "hardboard" with a density in excess of 0.8 g/cm³, "mediumboard" with a density between 0.8 and 0.35 g/cm³ and "softboard" with a density below 0.35 g/cm³. From the mere use of the words "hardboard", "mediumboard" and "softboard" it is only logical that the rigidity of the fibreboard decreases as the density decreases.

[6] The respondent's argument is that the rigidity of the "board" is determined by the density of the fibres. Of the category of which the density is below 0.35 g/cm³ it must of necessity happen that the lower the density the more flaccid the object. There must be a stage where the object ceases to be a "board" and becomes a "mat". According to the argument the objects in question have ceased to be "boards" and are "mats". The respondent states that it has come across dictionary definitions of board which emphasize the fact that a "board" is rigid. Mr. Strais has referred to other dictionary definitions of "fibreboard" which do not emphasize the rigidity of the object.

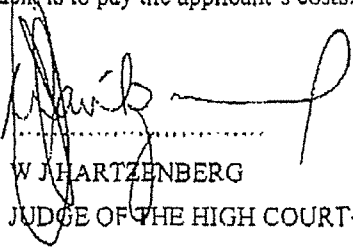
[7]In this particular case it is unnecessary to try to give a definition of "fibreboard". On the assumption, which I do not support, that a measure of rigidity is a requirement for an object to be classified as "fibreboard" the position is that the objects in question were empirically proved to possess quite a degree of rigidity. They are more identifiable with "boards" than with "mats". That in my view puts paid to Mr. Meyer's argument. The application must succeed.

The following order is made:

1.The applicant's appeal in terms of section 47(9)(e) of the Customs and Excise Act, 1964 against the respondent's determination expressed in letters dated 10 October 2001, 11 December 2002 and 18 June 2003 that certain lignoflex mats ("the imported goods") imported by the applicant from SAI Automotive AG, Germany ("the exporter") are classifiable within Tariff Sub-heading 4421.90.90 succeeds and it is ordered that the imported goods are to be classified within Tariff Sub-heading 4411.99 of Part 1 of Schedule 1 to the aforesaid Act.

2.In terms of the provisions of the Promotion of Administrative Justice Act the Appeals Committee's decision, conveyed in a letter of 4 June 2004, that the imported goods fall to be classified within Tariff Sub-heading 4421.90.90 is reviewed and set aside and hereby substituted with a finding that the imported goods fall to be classified within Tariff Sub-heading 4411.99 of Part 1 of Schedule 1 of the aforesaid Act.

3. The respondent is to pay the applicant's costs.



W J HARTZENBERG
JUDGE OF THE HIGH COURT-

Representation:

For applicant: Adv. P Stais and attorneys Bell, Dewar & Hall, Johannesburg and
Spoor & Fisher C/O Van Zyl le Roux & Hurter, Pretoria.

For the respondent: Adv. J A Meyer and the State Attorney

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Case no. 26465/2004

In the matter between:-

COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICE

Applicant (Respondent in the main
application)

and

FAURECIA AUTOPLASTICS SOUTH AFRICA
(PTY) LTD

[previously known as SAI AUTOMOTIVE
AUTOPLASTICS (PTY) LTD]

Respondent

APPLICATION FOR LEAVE TO APPEAL

KINDLY TAKE NOTICE that an application for leave to appeal will be made on behalf of the abovementioned Applicant (Respondent in the main application) on a date to be arranged by the Registrar of the above Honourable Court against the whole of the judgment, including the order for costs, delivered on 8 December 2006 by the Honourable Mr Justice Hartzenberg, and on the following grounds:

1

The learned Court erred in allowing the appeal with costs; the learned Court should have dismissed the appeal with costs.

2

The learned Judge erred in not applying the approach to classification as between headings, as enunciated by the then Appellate Division in the case of International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise 1985 4 SA 852

(A) at 863G, where it was said:

"Classification as between headings is a three-stage process: first, interpretation - ascertainment of the meaning of the words used in the headings (and relative section and chapter Notes) which may be relevant to the classification of the goods concerned, second, consideration of the nature and characteristics of those goods, and third, the selection of the heading which is most appropriate to those goods"

3.

In amplification of the above and concerning the first stage, namely the interpretation or ascertainment of the meaning of the words used in the headings, the above Honourable Court erred in.

3 1 Declining to ascertain the meaning of the word "*fibrebord*" as found in tariff heading ("TH") 44 11;

See para 7 of the judgment, at p. 4

In so doing, the learned Court:

3 1 1 Failed to accord the word "*fibrebord*" its ordinary meaning, namely something that possesses the characteristic of some degree of rigidity or stiffness;

3 1.2 Erred further in equating "*fibrebord*" with an article composed of wood fibre

3 2 Failing to consider whether TH 44 11 referred to "*Fibreboard of Wood or Other Ligneous Materials*" or whether it referred to "*Fibreboard of Wood or Other Ligneous Materials*";

3 3 Failing to interpret and/or ascertain the meaning of the expression "*articles of wood*" as found in TH 44 21,

Concerning the second stage of classification, the learned Court erred in failing to correctly consider the nature and characteristics of the article in question, more especially in that.

4 1 The failure of the article to flatten out works against the importer's contentions as much as it works against the Commissioner's argument, more particularly in that a "board" would of necessity also have to remain flat, and not curl up;

4 2 The mere turning over of the article would have caused it to remain flat or flatten out

Regarding the third stage, the learned Judge erred in failing to select the heading that is most appropriate to the goods, more particularly in failing to identify where one draws the line as to the density of articles permitted by TH 44 11.

In so doing the Honourable Court failed to consider that a **mat** may consist of wood chips or wood fibre, which does not change its essential character to being one of a **board**

6

The learned Court erred also in failing to take into account the terms of the Explanatory Notes to TH 44 11, namely that although the Notes distinguished between hard-, medium- and softboard, the term "*board*" was used throughout the Notes and no provision was made for a mat or some other textile that was composed of wood fibre.

The ordinary meaning of "*board*" remains something of some degree of rigidity



7.

The above Honourable Court erred further by inadvertently taking into account what the article was destined to become after importation, more particularly in that, objectively determined as presented at the time of importation, the article is no more than a mat

8.

It is further submitted that another court could reasonably arrive at a different decision



WHEREFORE it is prayed that leave to appeal be granted to the Full Bench of the above Honourable Court, alternatively, to the Supreme Court of Appeal

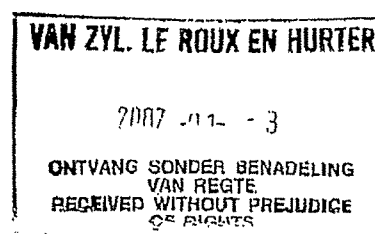
DATED at PRETORIA on this the 3rd day of JANUARY 2007



Mr Dirk du Toit
 OFFICE OF THE STATE ATTORNEY
 Attorney for the Respondent
 8th Floor
 Old Mutual Building
 167 Andries Street
 PRETORIA
 Ref. 3748/04/Z30

To: The Registrar of the High Court
 PRETORIA

And to: BELL DEWAR HALL
 Attorneys for Applicant
 c/o SPOOR & FISHER
 c/o VAN ZYL LE ROUX & HURTER
 13th floor, SAAU Building
 cnr Schoeman and Andries Streets
 PRETORIA
 Your ref. Mr L van Wyk



03/01/07 11/2

325

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

In the matter between:

CASE NO: 26465/2004
2007-03-19

THE COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICE

Applicant (Respondent in
the main application).

and

FAURECIA AUTOPLASTIC SOUTH AFRICA (PTY) Ltd
(previously known as
SAI AUTOMOTIVE AUTOPLASTICS (PTY) LTD

Respondent

**NOTICE OF WITHDRAWAL OF APPLICATION
FOR LEAVE TO APPEAL**

TAKE NOTICE THAT the applicant (respondent in the main application) hereby withdraws the application for leave to appeal and tender the costs, on a party and party scale, of the respondent (applicant in the main application) to date hereof.

DATED at PRETORIA on this 19th day of MARCH 2007.



APPLICANT (RESPONDENT'S
IN MAIN APPLICATION)
STATE ATTORNEY
OLD MUTUAL CENTRE
8TH FLOOR
167 ANDRIES STREET
PRIVATE BAG X91
PRETORIA

Ref: 3748/2006/Z30/SN
Enq: D C DU TOIT
Tel: (012) 309 1513

- 2 -

TO: THE REGISTRAR OF THE
HIGH COURT
PRETORIA

AND
TO: RESPONDENT'S ATTORNEYS
MESSRS BELL DEWAR HALL
JOHANNESBURG
Tel: (011) 710 6035
Fax: (011) 710 6185
Ref: **ALLISON WOOD**
C/O SPOOR & FISHER
C/O VAN ZYL LE FOUX & HURTER
13TH FLOOR, SAAU BUILDING
CNR SCHOEMAN & ANDRIES STREET
PRETORIA
Tel: (012) 673 1204
Ref: MR L VAN WYK

VAN ZYL, LE FOUX EN HURTER
2007-03-19
ONTVANGS SONDER BENADELING
VAN RECHT
RECEIVED WITHOUT PREJUDICE
OF RIGHTS

Received copy hereof on this the
day of MARCH 2007.

Deputy 11:55
APPLICANT'S ATTORNEY