IN THE HIGH COURT OF SOUTH AFRICA /ES

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 33367/98

DATE:

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~.

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~.

(3) REVISED. ✓

7.6.2002 H.C.K&C

DATE SIGNATURE

IN THE MATTER BETWEEN:

UNILEVER SOUTH AFRICA (PTY) LTD 1ST APPELLANT

OLA SOUTH AFRICA (PTY) LTD 2ND APPELLANT

AND

THE COMMISSIONER FOR CUSTOMS AND EXCISE RESPONDENT
(now THE COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICE)

JUDGMENT

KIRK-COHEN, J

The second appellant is a subsidiary company of the first appellant and, *inter alia*, they are purveyors of ice-cream imported into this country and sold under the trade mark Solero. The respondent, in terms of section 47(9) of the Customs and Excise Act, 91 of 1964, as amended ("the Act") determined that the appropriate tariff heading in respect of the imported product is tariff subheading 2105.00.20, attracting a 25% rate of duty.

This appeal by the appellants is against that tariff determination pursuant to the provisions of section 47(9)(e) of the Act.

The tariff heading and subheadings read as follows:

21.05	2105.00	**Ice Cream and other Edible Ice, Whether or Not Containing Cocoa:**	
	.10	-Ice cream not containing cocoa or added sugar	kg 10%
	.20	-Ice cream containing cocoa or added sugar	kg 25%
	.90	-Other	kg 20%

The first and second appellants have, in the past, imported a considerable quantity of Solero ice-cream from Israel which was classified under the tariff subheading 21.05.00.10 (ice-cream not containing cocoa or added sugar), the rate of duty being assessed at 10%. Latterly they have imported Solero ice-cream which has been classified under tariff subheading 21.05.00.20 (ice-cream containing cocoa or added sugar) attracting a rate of duty of 25%. This is an appeal against the latter determination.

It is common cause that the imported product is "ice-cream" as set out in tariff heading 21.05.

This appeal turns upon two questions:

1. the proper interpretation of tariff subheadings 2105.00.10 and 2105.00.20; and

2. determining whether the imported product is correctly classified as "ice-cream containing added sugar" rather than "ice-cream not containing added sugar".

It is common cause that Solero ice-cream contains sugar as an ingredient in its manufacture.

Counsel were *ad idem* that the first six digits are determined in terms of the Brussels tariff nomenclature, renamed in 1974 as the Customs Co-operation Council Nomenclature ("CCCN"). The history of this determination is to be found in the Brussels Convention on the nomenclature of the classification of goods in customs tariffs which came into force on 11 September 1959. It was followed by the adoption on 1 July 1995 of a protocol of amendment establishing a revised version. This revised version is the CCCN. This country is a contracting party to the Brussels Convention and is thus required to frame its customs tariffs in accordance with the provisions of the CCCN. The CCCN comprises 1 011 headings and incorporates explanatory notes, an alphabetical list of goods and a compendium of classifications.

As some countries, including the United States of America, adhered to their own classification systems, and, because of differences in classifications locally, a so-called harmonised commodity description and coding system (hereinafter referred to as "the harmonised system") became open for signature in 1984 and has been adopted and signed by many countries including South Africa. The harmonised system is designed to facilitate uniform interpretation and application throughout the world of customs tariffs. The explanatory notes to the harmonised system constitute the official interpretation of that system (the explanatory notes). South Africa has incorporated the harmonised system for the purpose of Schedule 1 of the Act which came into effect on 1 January 1988 pursuant to notice no R2228 published in the *Government Gazette* no 10865 of 6 November 1987. In terms of *Government Notice* R2569, published in *Government Notice* 11037 on 20 November 1987, the explanatory notes became effective in the Republic of South Africa on 1 January 1988 for the purpose of section 47(8) of the Act.

Section 47(1) of the Act provides that:

> "Subject to the provisions of this Act duty shall be paid for the benefit of the State Revenue Fund on all imported goods, all excisable goods, all surcharge goods and all fuel levy goods in accordance with the provisions of Schedule no 1 at the time of entry for home consumption of such goods."

Section 47(8)(a) of the same Act provides:

"The interpretation of Part 1 of Schedule 1 shall be subject to the explanatory notes to the harmonised system and to the Customs Co-operation Council Nomenclature issued by the Customs Co-operation Council, Brussels, from time to time; Provided that where the application of any part of such notes or addendum thereto or explanation thereof is optional the application of such part addendum or explanation shall be in the discretion of the Commissioner."

The process of classification has been defined in the following terms:

"Classification as between headings is a three stage process; first, interpretation - the 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 characteristic of those goods; and third the selection of the heading which is most appropriate to such goods."

See *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise* 1985 4 SA 852 (A) at 863G-H.

On the question of interpretation the following was stated in the *IBM* case, *supra*, at 874B-C:

> "Under our system, questions of interpretation of the documents are matters of law and belong exclusively to the court. On such questions the opinion of witnesses, however eminent or highly qualified, are (except in regard to words which have a special or technical meaning) inadmissible (see *Phipson on Evidence*, 13th Ed, ss 27-47). So, subject to the exception mentioned, the courts do not receive opinion evidence, either as to the meaning of a statutory provision [see *Camden (Marquis) v England Revenue Commissioner* [1914] 1 KB 641 (CA) at 649-50], or a patent specification [see *Centiruco AG v Firestone SA (Pty) Ltd* 1972 1 SA 589 (A) at 617-18] or any other document."

Compare: *Association of Amusement and Novelty Machine Operators and Another v Minister of Justice and Another* 1980 2 SA 636 (A) at 641H-642C; *Kommissaris van Doeane en Aksyns v Mincer Motors Bpk* 1959 1 SA 114 (A) at 121C-D.

However, a court is entitled to have regard to the evidence of experts "... to the extent that such evidence may help to explain technical matters on which I require technical assistance". See *Autoware (Pty) Ltd v Secretary for Customs and Excise* 1975 4 SA 318 (W) at 321E-F.

The harmonised system regulates the first six digits of the tariff heading and subheading ie 2105.00. That tariff heading and subheading refers to "ice-cream and other edible ice, whether or not containing cocoa". Neither counsel raised any difficulty with this heading apart from the meaning of "ice-cream". Therefore the harmonised system and its application is not in dispute. What is in dispute are the last two digits ie the 21.05.00.10 and 21.05.00.20. Thus the .10 and the .20 must be decided, in the words of Mr Puckrin for the two appellants, by national legislation and the principles of interpretation applicable thereto.

The crux of Mr Puckrin's argument is to be found in para 15 of his heads which I quote:

> "Ice-cream by definition contains sugar and consequently, where any tariff subheading requires the addition of sugar, that must mean something other than the sugar which is inherently contained in the ice-cream product."

Taken to its logical argument this submission includes the following:

1. ice-cream by definition contains sugar; and
2. therefore if there is no sugar in the product it is not ice-cream.

This submission is supported by an expert in chemistry and microbiology who is the technical manager of the second appellant. His view is that ice-cream "includes, in its ordinary form, a certain amount of sugar. I point out that glucose, dextrose, sucrose and invert sugar are all forms of sugar."

The respondent has placed before this court the evidence of a certificated engineer who is the factory manager of Dairy Maid-Nestlé (Pty) Ltd ice-cream factory. He sets out that the product he manufactures is "the market leader" in South Africa and that his firm not only manufactures ice-cream, but also imports it. 99% of the ice-cream manufactured by his firm contains sugar varying between 13% and 16%. He also states the following:

> "Many kinds of sugars can be used in ice-cream. They include, *inter alia*, cane and beet sugar (sucrose or table sugar as it is known), corn sweeteners, maple sugar, honey, invert sugar, fructose, molasses, malt syrup, lactose and refined sugar.
>
> It is commonly agreed that the best ice-cream is made from sucrose. Approximately 45% of the sucrose can be replaced by corn sugar for economic handling and storage reasons."
>
> "Looking at the recipe for the product in issue [the appellant's product] between the parties, it is my opinion that it is clearly an ice-cream with added sugar.

The phrase 'added sugar' indicates the existence of sugar in the product whilst the phrase 'no added sugar' indicates that the product contains no sugar as part of the ingredients of the ice-cream. This is the meaning that we in the ice-cream trade ascribe to the aforesaid phrases. As pointed out hereunder, products to which no sugar is added are marketed on the basis of 'no sugar added'. It should also be noted that in the trade some ice-creams state on the packaging that 'no added sugar' is present. This is a clear indication that the term 'added sugar' is common parlance in the ice-cream trade, for when sugar is added in the manufacturing process as part of the ingredients."

I warn myself that these are the opinions of experts and this court must apply the normal canons of construction.

In *Crown Chickens (Pty) Ltd v Minister of Finance and Others* 1996 4 SA 384 (E) JONES, J in dealing with the provisions of the Customs and Excise Act, said the following at 394I:

"But the Customs and Excise Act is an Act of general application across an extremely wide spectrum of commodities. It is not the sort of legislation which has limited technical application or which requires a special understanding of technical language and usage."

I am of the view that the present issue does not require a special understanding of technical language and its usage. The heading deals with ice-cream. Mr Puckrin's argument that ice-cream of necessity includes sugar in its manufacture, failing which it is not ice-cream, is, in his submission, borne out by dictionary definitions. I refer to the following definitions:

Webster's International Dictionary; 2nd De Luxe edition;

> "A food consisting of cream, butter fat or milk and sometimes eggs, sweetened flavoured beaten to a uniform consistency and frozen."

In *Webster's 3rd New International Dictionary* the definition has been altered as follows:

> "A frozen food containing cream or butter fat, flavouring, sweetening and usually eggs; such a food made smooth by stirring during freezing - distinguished from moose and parfait.

The *Oxford English Dictionary* (compact edition)"

> "A compound of flavoured and sweetened cream or custard, congealed by being stirred or revolved in a vessel surrounded by a freezing mixture."

Shorter Oxford English Dictionary (3rd edition):

> "Cream or custard flavoured, sweetened and congealed." (1769)

The dictionary definitions therefore contain as an ingredient sweetening. Sugar may also be described as sucrose which is defined by *Webster's 2nd ed, supra*, as:

"A crystalline sugar found in sugar cane, sugar beet, etc."

The *Shorter Oxford Dictionary, supra*, defines sucrose as:

"Anyone of the sugars having the composition C_{12} H_{22} 0_{11} and properties of cane sugar."

Mr Puckrin submitted that the subheading .10 refers to ice-cream in its normally accepted form without extra sugar added to it, ie it would only contain its normal quantity of sugar. In regard to subheading .20, he submitted that there is no problem with the words "containing cocoa". He submitted, however, that "added sugar" can only mean an extra amount of sugar added to the sugar already forming a necessary ingredient of ice-cream. He did concede in argument that, had the word "added" not been used in subheading .20, there would be no merit in this appeal. The wording then would be clear, namely "ice-cream containing cocoa or sugar". The argument proceeded that full weight must be given to the word "added". The submission was that the difference between the words "ice-cream containing cocoa" and "ice-cream containing ... added sugar" demonstrates that a different meaning must be ascribed to the latter. In other words, one cannot ignore the use of the word "added" in respect of sugar where it is not used in respect of cocoa.

This analysis leads to an illogical result. It postulates an additional amount of sugar added to the essential ingredient but it does not state what the sugar content representing the essential ingredient is (in percentage or otherwise) and it does not state whether the additional sugar is added into the mixture during the course of preparation or added to the finished product.

On this interpretation it follows that the subheading, in respect of "added sugar", is ambiguous or void for vagueness and is meaningless. This was conceded by Mr Puckrin but he submitted that this was as a result of the use of the word "added" in conjunction with the words "ice-cream" and "sugar". His submission was that, this being the result, the words must be interpreted *contra fiscum* and the subheading be read as *pro non scripto*.

In the founding affidavit and also in heads of argument the appellants relied on certain regulations promulgated in terms of Act 13 of 1929 (Foodstuffs, Cosmetics and Disinfectants Act) where a definition of ice-cream is contained; in the founding affidavit the statement is made that this definition is accepted by a body known as the South African Ice-Cream Association. Mr Puckrin, in my view correctly, did not pursue that argument as the definition in the 1929 regulations is not an authoritative definition of ice-cream. I say nothing further in regard to those regulations.

The "article description" contained in subheading 2105.00 is, as I have mentioned, noncommittal as to the ingredients or necessary ingredients of ice-cream. It is noteworthy, as pointed out by Mr Puckrin, that the said description does not contain the words "whether or not containing cocoa or sugar". Therefore the harmonised system and/or the CCCN take the matter no further. The definitions of ice-cream to which I have referred use the word "sweetened" as opposed to sugar or sucrose. Mr Louw, on behalf of the respondent, criticises the reasoning to which I have referred on the basis that the appellants postulate the same product in the two subheadings except that the one contains more sugar than the other and the only criteria of distinction is the quantity of sugar contained in the ice-cream. Mr Louw has argued that, to adopt the appellants' approach, leads to an impossible and unacceptable position.

The explanatory note to tariff heading 21.05 provides as follows in respect of the term "ice-cream" contained in the heading:

> "This heading covers ice-cream, which is usually prepared with a basis of milk or cream, ... whether or not containing cocoa in any proportion. However, the heading excludes mixes and bases for ice-cream which are classified according to their essential constituents."

As already stated the nomenclature therefore does not refer to sugar as a necessary ingredient. Mr Louw has submitted that, having regard to the aforegoing, and especially the dictionary definitions, sugar need not be the only sweetening agent nor is sugar necessarily an ingredient of ice-cream.

The papers filed in this matter establish that there is a "sugar free" product produced for the diabetic and slimming niche-markets. The expert, Mr Winter, testifies that the company for whom he works manufactures ice-cream in other countries which is sugar-free and is produced for the health conscious and/or diabetic niche-markets. He points out that a competitor's product, by name 0 + 0, is ice-cream which is sugar free.

Another expert, Mr Booysen, who is the production manager of Avondale Ice Creams, agrees with the evidence of Mr Winter and says at p145:

> "On the question whether there are ice-creams which contain no added sugar, I point out that there are products which do not contain sugar and are thus sugar-free and are produced for the diabetic/health conscious niche-markets. When I joined Avondale Ice Cream, some six years ago, the company started to produce ice-cream for this niche-market."

This evidence is not contested but it does not dispose of the argument on behalf of the appellants that the word "added" in combination with the word "sugar" refers to a product which does contain sugar and to which extra sugar is added. As already mentioned, Mr Puckrin conceded that if the word "added" did not appear in subheading .20 there would be no merit in the appeal.

One may have regard to the history of the appearance of the word "added" and the word "sugar" as it appears in South African customs legislation. The Customs Act, 51 of 1961, mentioned ice-cream by name for the first time:

- Under tariff item 14 dealing with confectionary (excluding medicated confectionary properly classified as medicinal preparations) ("suikergoed") ice-cream is made dutiable under tariff item 14(b) in the following terms:

  "Ice-cream and ice-cream mixes, compounded, made or preserved with sugar."

- Under this item a minimum of 25% duty was prescribed.

- In another tariff item, namely item 27(2), a lower duty of 10% was prescribed in respect of "ice-cream and ice-cream mixes "nee" (meaning not elsewhere enumerated).

The inference is therefore justified that the legislature then provided that, in respect of ice-cream and ice-cream mixes that have not been compounded, made or preserved with sugar, a lower duty was payable. A distinction was thus drawn between ice-cream containing sugar and ice-cream not containing sugar.

When the present Act was promulgated (on 27 January 1964) the phrase "added sugar" was first used. At that stage the schedule provided as follows:

"21.07.50 Ice-cream and ice-cream mixtures, with added sugar" a rate of duty of 25% or 250c per 100 pounds; and

"21.07.55 Ice-cream and ice-cream mixtures without added sugar" a duty of 10%.

Later the schedule was updated in terms of the harmonised system and the heading appeared with the two subheadings now under discussion (with effect from 1 January 1998 by virtue of the provisions of the Customs and Excise Act 69 of 1988).

It cannot be denied that there is an ice-cream which does not contain sugar or sucrose. Once this finding is made, the contention of the appellants that all ice-cream contains sugar as a necessary ingredient is not correct. On behalf of the respondent it is submitted that the words "added sugar" refer to a product which does not of necessity contain sugar as an

ingredient but to which sugar is added as an optional and extra ingredient. In this respect I refer to tariff heading 04.01 (p230/231) as contained in the harmonised system:

"MILK AND CREAM, NOT CONCENTRATED NOR CONTAINING ADDED SUGAR OR OTHER SWEETENING MATTER"

The next category is 04.02:

"MILK AND CREAM, CONCENTRATED OR CONTAINING ADDED SUGAR OR OTHER SWEETENING MATTER (+)"

04.03:

"BUTTERMILK, CURDLED MILK AND CREAM, YOGURT, KEPHIR AND OTHER FERMENTED OR ACIDIFIED MILK AND CREAM, WHETHER OR NOT CONCENTRATED OR CONTAINING ADDED SUGAR OR OTHER SWEETENING MATTER OR FLAVOURED OR CONTAINING ADDED FRUIT, NUTS OR COCOA."

04.04:

"WHEY, WHETHER OR NOT CONCENTRATED OR CONTAINING ADDED SUGAR OR OTHER SWEETENING MATTER; PRODUCTS CONSISTING OF NATURAL MILK CONSTITUENTS, WHETHER OR NOT CONTAINING

ADDED SUGAR OR OTHER SWEETENING MATTER, NOT ELSEWHERE SPECIFIED OR INCLUDED."

All these headings demonstrate that the word "added" refers to an item not otherwise existing in the product. This becomes all the more plain when one refers to tariff heading 04.08 (p235):

"BIRDS' EGGS, NOT IN SHELL, AND EGG YOLKS, FRESH, DRIED, COOKED BY STEAMING OR BY BOILING IN WATER, MOULDED, FROZEN OR OTHERWISE PRESERVED, WHETHER OR NOT CONTAINING ADDED SUGAR OR OTHER SWEETENING MATTER."

It could hardly be argued that birds' eggs and egg yolks have, as a necessary admixture, sugar or other sweetening matter.

The aforegoing demonstrates a pattern of use of the words "added sugar" ie sugar added to a product not necessarily containing sugar as an essential ingredient. The argument on behalf of the appellants that the same effect would have been obtained by a description "ice-cream not containing cocoa or sugar" or "ice-cream containing cocoa or sugar" is correct. But the golden rule of interpretation must be applied ie that the words used should reflect the intention of the legislature. The application of this aid to interpretation leads one

to the conclusion that the words "added sugar" do not presuppose and apply only to a situation where there is already sugar in the product. The argument on behalf of the appellants leads to an ambiguous interpretation and a result which is unacceptable. Had the legislature so intended, it would have provided for a certain percentage or quantity of sugar in the product which was defined by percentage or weight to which additional sugar was to be added over and above that volume, percentage or weight.

Interpreted in the light of all the surrounding circumstances, the interpretation contended for by the appellants leads to a patent absurdity. Legislation and schedules to an Act should be so interpreted as to be meaningful and unambiguous, and certainly an interpretation which does not lead to a situation impossible to be put into effect.

In Steyn *Die Uitleg van Wette* 5th ed the authors point out that it is a canon of interpretation that the intention of the legislature is to be deduced from the words used (p22-24). If the purely literal meaning leads to an absurdity a court should have regard to the object and policy of the legislature as a whole and, if, on consideration of these aspects, a court is satisfied that to accept the literal sense of the word would obviously defeat the intention of the legislature, the court should interpret the words to bear the meaning clearly intended by the use of the language. As authority the authors refer to the well-known case of *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 554.

My conclusion is that the words "added sugar" refer to and mean sugar not present in subheading .10 and, in .20 the reference is to all ice-cream where one of the ingredients is sugar. "Added sugar" is a reference to sugar being added to the admixture or compound from which ice-cream is made and forming an integral part of the composition thereof. I conclude therefore that there is no semantic difference between the use of the phrase "ice-cream containing cocoa or added sugar" and "ice-cream containing cocoa or ... sugar"

Despite an able argument on behalf of the appellants, the appeal fails.

In regard to costs, an issue was heard before my brother VAN DER WALT who reserved costs and also by my brother SMIT who made costs in the cause. It was agreed that all costs be costs in the cause and are covered by the order I now make.

The appeal is dismissed with costs.

F C KIRK-COHEN
JUDGE OF THE HIGH COURT