IN THE HIGH COURT OF SOUTH AFRICA /SG

(TRANSVAAL PROVINCIAL DIVISION)

DATE:

CASE NO: A35/2002

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

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

(3) REVISED.

3/12/2003
DATE

SIGNATURE

In the matter between:

LEVER PONDS (PTY) LIMITED 1ST APPELLANT

ELIDA PONDS (PTY) LIMITED 2ND APPELLANT

and

THE COMMISSIONER FOR CUSTOMS AND EXCISE RESPONDENT

JUDGMENT

MYNHARDT, J

Introduction

[1] This is an appeal, with the leave of the court *a quo*, against the judgment and order of COETZEE, J, dismissing the appellants' appeal against the tariff determination made by the respondent on 5 May 1997 in relation to the appellants' Vaseline Lip-Ice and their perfumed Vaseline Petroleum Jelly products in terms of the provisions of the Customs and Excise Act, 1964, Act 91 of 1964 ("the Act").

Background

[2] The appellants conduct business as purveyors of pharmaceutical and healthcare products. They manufacture, *inter alia*, vaseline lip-ice and perfumed vaseline petroleum jelly.

[3] These two products attracted ordinary excise duty prior to 5 May 1997. Since then the lip-ice product and the perfumed vaseline petroleum jelly product attract *ad valorem* excise duty in terms of Item 118.20 of Section B of Part 2 of Schedule 1 of the Act ("Item 118.20"). This resulted from a determination that was made by the respondent that the two products fall within the ambit of Item 118.20.

[4] The appellants disputed the correctness of the aforesaid determination. In terms of section 47(8)(e) of the Act the appellants appealed to this court against the determination. The appeal was brought by way of notice of motion in which the following relief was sought:

> "(1) Setting aside the tariff determination made by the Respondent on the 5th day of May 1997 in relation to the Appellants' VASELINE LIP ICE products in terms of the provisions of the Customs and Excise Act No 91 of 1964 (hereinafter referred to as the Act).
>
> (2) Setting aside the tariff determination made by the Respondent on the 5th of May 1997 in relation to the Appellants' thus perfumed

VASELINE PETROLEUM JELLY product in terms of the provisions of the Act.

(3) Declaring that VASELINE LIP ICE falls outside the scope of Item 118.20 of the schedule to the Act.

(4) Declaring that VASELINE PERFUMED JELLY falls outside the scope Item 118.20 of the schedule to the Act.

(5) Ordering the Respondent to pay the Appellants' costs, including the costs of two Counsel."

In the founding papers of the appellants it was contended that both the aforesaid products do not fall within Item 118.20 because they are to be classified as "medicaments" in terms of the Act and not as "preparations for the care of the skin" as was determined by the respondent. I shall deal with these concepts later in the judgment.

The respondent contested the allegations of the appellants. In support of its stance three affidavits which were deposed to by three experts were filed. These experts were Prof Ackermann, Dr Duvenhage and Dr Erasmus. Prof Ackermann holds a D.Sc degree in pharmaceutics and she was also the managing director of a company which, in conjunction with Ackermann Laboratories, has been formulating and manufacturing skincare products for eleven years by the time that she deposed to her affidavit. She was also the founder of Ackermann Laboratories which conducted business as a technical consultant to the cosmetic

and pharmaceutical industries. Dr Duvenhage is a medical specialist and practices as a dermatologist. Dr Erasmus is also a medical specialist and practices as a paediatrician.

The appellants in due course filed their replying affidavit. In support of their case they relied upon the opinions of two highly qualified and experienced experts namely Dr Gordon and Prof Van Oudtshoorn. Dr Gordon had also deposed to a supporting affidavit to the appellants' founding affidavit. He is a qualified medical practitioner who holds a MD (Medicine) degree of the University of Maryland, Baltimore, in the United States of America. He has been in practice for many years. Prof Van Oudtshoorn holds a D.Sc degree and has been a professor and head of the department of pharmacy at the Potchefstroom University for ten years. He has also studied, and lectured, at the University of Leiden.

[5] Because of the disputes on the papers between the two camps of expert witnesses about the question whether or not vaseline petroleum jelly has medicinal qualities so that it can be regarded as a "medicament" in terms of the Act, the matter was referred for the hearing of oral evidence. The two issues which had to be determined, in so far as the present appeal is concerned, were formulated as follows:

> "1.2 Whether Vaseline Petroleum Jelly and Vaseline Lip-Ice are medicaments within the meaning of that term as set out in

item 118.20 of Part 2B of Schedule I of the Customs and Excise Act, number 91 of 1964.

...

1.4 Whether Vaseline Lip-Ice is unperfumed petroleum jelly as intended in item 118.20 of Part 2B of Schedule I to the said Act."

The matter came before COETZEE, J. The appellants called only Prof Van Oudtshoorn to give evidence. The respondent called only Prof Ackermann.

The court *a quo* found that perfumed petroleum jelly is not a "medicament" in terms of the Act and that the Vaseline Lip-Ice product is not petroleum jelly in terms of the Act and that it is therefore not excluded from the provisions and ambit of Item 118.20. The appellants' appeal was consequently dismissed with costs including the costs of two counsel. The learned judge later granted leave to the appellants to appeal to this court.

The relevant statutory provisions and the interpretation thereof

[6] Section 47(1) of the Act provides that "duty" shall be paid on, *inter alia*, all excisable goods in accordance with the provisions of Schedule No 1 of the Act. In section 1 of the Act "duty" is defined to mean "any duty leviable under this Act ..."

It suffices for present purposes to say that Schedule 1 of the Act contains a classification of goods under various headings which appear in a number of chapters. These chapters and headings are elucidated by various notes. Section B of Part 2 of Schedule 1 of the Act deals with *ad valorem* excise duties and *ad valorem* customs duties. It does so by means of a number of "Items" which are in turn linked to headings and subheadings of Schedule 1. Next to the number of the Item appears the number of the particular heading of Schedule 1 to which the Item is linked and in the column next to that appears the number of the relevant subheading. A description of the relevant goods, or articles, is also given in a separate column.

The goods to which Item 118.20 relates are described as follows:

> "Beauty or make-up preparations and
> preparations for the care of the skin (other
> than medicaments) including sunscreen or
> suntan preparations: manicure or pedicure preparations:"

The relevant heading and subheading referred to in Item 118.20 for purposes of this appeal are 33.04 and 33.04.99. The description of the goods for purposes of this subheading reads as follows:

"Other (excluding pastes and other intermediate products not put up for sale by retail, barrier cream in packings of 5kg or more and unperfumed petroleum jelly)."

I shall refer to, and discuss, the relevant chapters, headings, subheadings and notes thereto later in this judgment.

Section 47(8)(a) of the Act provides as follows:

"(8)(a) The interpretation of:

(i) any tariff heading or tariff subheading in Part 1 of Schedule No 1;

(ii) (aa) Any tariff item or fuel levy item or items specified in Part 2, 5 or 6 of the said Schedule, and

(bb) Any item specified in Schedule No 2, 3, 4, 5 or 6;

(iii) the general rules for the interpretation of Schedule No 1; and

(iv) every section note and chapter note in Part 1 of Schedule No 1,

> shall be subject to the International Convention on the Harmonized Commodity Description and Coding System done in Brussels on 14 June, 1983 and to the Explanatory Notes to the Harmonized System issued by the Customs Co-operation Council, Brussels (now known as the World Customs Organization) from time to time: Provided that where the application of any part of such Notes or any addendum thereto or any explanation thereof is optional the application of such part, addendum or explanation shall be in the discretion of the Commissioner."

The provisions of section 47(8)(a) of the Act have been dealt with in a number of cases by our courts. In my view it is only necessary to refer to three of these.

In *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd* 1970 2 SA 660 (A) at 675F-676E TROLLIP, JA said the following:

> "It is clear that the above grouping and even the wording of the notes and the headings in Schedule 1 are very largely taken from the Nomenclature compiled and issued by the Customs Co-operation Council of Brussels. That is why the legislature in sec. 47(8)(a) has given statutory recognition to the Council's Explanatory Notes to that Nomenclature. These Notes are issued from time to time by the Council obviously, as their name

indicates, to explain the meaning and effect of the wording of the Nomenclature. By virtue of sec 47(8)(a) they can be used for the same purpose in respect of the wording in Schedule 1. It is of importance, however, to determine at the outset the correct approach to adopt in interpreting the provisions of the Schedule and in applying the explanations in the Brussels Notes.

Note VIII to Schedule 1 sets out the 'Rules for the Interpretation of this Schedule'. Para. 1 says: 'The titles of sections, chapters, and sub-chapters are provided for ease of reference only; for legal purposes, classification (as between headings) shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise indicate, according to paras. (2) to (5) below.'

That, I think, renders the relevant headings and section and chapter notes not only the first but the paramount consideration in determining which classification, as between headings, should apply in any particular case. Indeed, right at the beginning of the Brussels Notes, with reference to a similarly worded paragraph in the Nomenclature, that is made abundantly clear. It is there said: 'In the second provision, the expression "provided such headings or Notes do not otherwise require" (that is the corresponding wording

of the Nomenclature) is necessary to make it quite clear that the terms of the headings and any relative section or chapter notes are paramount, ie, they are the first consideration in determining classification.'

It can be gathered from all the aforegoing that the primary task in classifying particular goods is to ascertain the meaning of the relevant headings and section and chapter notes, but, in performing that task, one should also use the Brussels Notes for guidance especially in difficult and doubtful cases. But in using them one must bear in mind that they are merely intended to explain or perhaps supplement those headings and notes and not to override or contradict them. They are manifestly not designed for the latter purpose, for they are not worded with the linguistic precision usually characteristic of statutory precepts; on the contrary they consist mainly of discursive comment and illustrations. And, in any event, it is hardly likely that the Brussels Council intended that its Explanatory Notes should override or contradict its own Nomenclature. Consequently, I think that in using the Brussels Notes one must construe them so as to conform with and not to override or contradict the plain meaning of the headings and notes. If an irreconcilable conflict between the two should arise, which in my view is not the case here, then possibly the meaning of the

> headings and notes should prevail, because, although sec 47(8)(a) of the Act says that the interpretation of the Schedule 'shall be subject to' the Brussels Notes, the latter themselves say in effect that the headings and notes are paramount, that is, they must prevail. But it is not necessary to express a firm or final view on that aspect."

And at 679H-680B of the decision MILLER, AJA, as he then was, said the following in regard to the so-called Brussels Notes and their effect and use in interpreting the content of Schedule 1 of the Act:

> "It seems to be important, when a classification is being made 'subject to' the Brussels Notes, to distinguish between such of the Notes as include under or exclude from a particular heading, clearly identifiable objects, whether they are identified by name or description, and Notes which are explanatory and broadly indicative of the desired or intended classification. In the former class, where the exclusion or inclusion relates to clearly identified objects, difficulty might arise in the event of a direct and irreconcilable conflict between the inclusion or exclusion enjoined by the Notes, and the terms of the relevant headings. In such a case, despite the paramountcy of the headings and the section and chapter Notes, it might be that an express inclusion or exclusion in the Brussels Notes would prevail, on the ground that failure to obey it would be to disregard

> the statutory injunction to interpret the headings 'subject to' the Brussels Notes. It is not necessary to express a definite opinion on that question, which I do not think arises here. It is sufficient to say that, generally speaking, in all but those cases, the Brussels Notes appear to serve as guides and aids to the classification properly to be made in accordance with the terms of the headings read with the relevant section and chapter Notes."

In *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise* 1985 4 SA 852 (A) NICHOLAS AJA, as he then was, said the following at 863G-864C about the process of classification of goods in terms of Schedule 1 of the Act:

> "The process of classification
>
> 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 characteristics of those goods; and third, the selection of the heading which is most appropriate to such goods. ...

> All that section 47(8)(a) requires is that the interpretation of the relative headings and section and chapter notes shall be in conformity with, and not contrary to, the Brussels notes."

And at 874B-C of the decision the learned judge of appeal said the following in regard to the legal nature of the interpretation of a document such as Schedule 1 of the Act:

> "Under our system, questions of interpretation of the documents are matters of law, and belong exclusively to the Court. On such questions the opinions of witnesses, however eminent or highly qualified, are (except in regard to words which have a special or technical meaning) inadmissible. ... So, subject to the exception mentioned, the Courts do not receive opinion evidence, either as to the meaning of a statutory provision ... or a patent specification ... or any other document."

The question of classification of goods was also dealt with by SCHUTZ, JA in *Commissioner for Customs and Excise v Capital Meats CC (in liquidation) and Another* 1999 1 SA 570 (SCA). At 573A-D the learned judge of appeal said the following:

> "Schedule 1 of the Act sets out the rates of duty payable on the vast variety of goods which are the subject of international trade. Goods are

systematically grouped in sections, chapters and subchapters. The titles to these divisions are provided for ease of reference only. The interpretation of the Schedule for purposes of classification must be effected, first, with reference to the headings and their subheadings falling under the chapters and subchapters. These headings give brief descriptions of the goods. The second source of interpretation is the notes to each section or chapter. These notes are a guide to interpretation. The Schedule also includes some general rules and notes for the purposes of classification. What I have said about the process of classification may be derived from the Schedule itself, as also the lucid descriptions of it by TROLLIP JA and MILLER AJA in *Secretary for Customs and Excise v Thomas Barlow and Sons Ltd* 1970 2 SA 660 (A). Once a meaning has been given to the potentially relevant words, and the nature and characteristics of the goods have been considered the heading most appropriate to such goods must be selected: ..."

Against this background I now turn to the contents of Schedule 1 of the Act and Item 118.20.

Item 118.20 and Schedule 1 of the Act

[7] In terms of Item 118.20 Preparations for the care of the skin which are not "medicaments" fall under heading 33.04 of Schedule 1. With reference to

subheading 3304.99 the item provides that "unperfumed petroleum jelly" is excluded from heading 33.04.

It is common cause between the parties, and rightly so, that if the appellants' lip-ice product is "unperfumed petroleum jelly", no *ad valorem* excise duty would be payable to the respondent because of the exclusion of that substance by item 118.20. The respondent has determined that the lip-ice product attracts *ad valorem* excise duty in terms of subheading 3304.99.

The respondent has also determined that the appellants' perfumed Vaseline petroleum jelly product falls within item 118.20, subheading 3304.99. The appellants contend that that product is a "medicament" which does not fall within item 118.20, tariff heading 33.04, but that it falls within chapter 30 of Schedule 1, tariff heading 3004.90.0 and that it therefore does not attract *ad valorem* excise duty.

[8] The first comment that I would like to make is that item 118.20 seemingly includes the appellants' perfumed Vaseline petroleum jelly product. COETZEE, J said that if petroleum jelly products were not included in item 118.20, tariff subheading 3304.99, there would have been no reason to exclude "unperfumed petroleum jelly" from the ambit thereof. I agree with the learned judge. This is therefore an important indication that the respondent's determination in regard to the appellants' perfumed Vaseline petroleum jelly product is correct.

The second comment that I would like to make is that it seems that item 118.20 distinguishes between "Preparations for the care of the skin" which are not "medicaments" and which would fall under heading 33.04 of chapter 33 of Schedule 1, and those which are "medicaments" which would fall under chapter 30, tariff heading 30.04. There is therefore seemingly some overlapping between tariff headings 30.04 and 33.04. This will have to be borne in mind when one analyses these two tariff headings.

[9] Tariff heading 27.12 of chapter 27 of Schedule 1 of the Act deals with, *inter alia*, petroleum jelly. In terms of tariff subheading 2712.10.10 and 2712.10.20 petroleum jelly in immediate packings of a content not exceeding 5kg and that in excess of 5kg attract ordinary excise duty at varying rates.

Explanatory note (A) to tariff heading 27.12 describes what petroleum jelly is for the purposes of this tariff heading. The note provides as follows:

> "Petroleum jelly is unctuous to the touch. It is white, yellowish or dark brown in colour ... The heading includes the jelly, whether crude (sometimes called petrolatum) decolourised or refined ... This heading does not, however, include petroleum jelly, suitable for use for the care of the skin, put up in packings of a kind sold by retail for such use (heading 33.04)."

This note makes it clear that petroleum jelly which is suitable for the care of the skin and which is marketed for such use, falls under tariff heading 33.04 and not under tariff heading 27.12.

[10] Chapter 33 of Schedule 1 of the Act is the next relevant chapter to be considered.

Tariff heading 33.04 relates to the following articles or products:

> "Beauty or make-up Preparations and Preparations for the Care of the Skin (Excluding Medicaments), Including Sunscreen or Sun Tan Preparations; Manicure or Pedicure Preparations:"

Tariff subheading 3304.99.90 relates to "other" preparations that fall within heading 33.04 apart from those preparations that have been mentioned in the subheadings preceding this particular subheading.

Chapter note 3 (or chapter note 2 of the 1994 edition thereof) reads as follows:

> "Headings Nos 33.03 to 33.07 apply, *inter alia*, to products, whether or not mixed (other that aqueous distillates and aqueous solutions of essential oils), suitable for use as goods of these headings and put up in packings of a kind sold by retail for such use."

The relevant part, for present purposes, of the General explanatory notes to this chapter reads as follows:

> "Headings 33.03 to 33.07 include products, whether or not mixed (other than aqueous distillates and aqueous solutions of essential oils), suitable for use as goods of these headings and put up in packings of a kind sold by retail for such use (see Note 3 to this Chapter).
>
> The products of headings 33.03 to 33.07 remain in these headings whether or not they contain subsidiary pharmaceutical or disinfectant constituents, or are held out as having subsidiary therapeutic or prophylactic value [see Note 1(d) to Chapter 30] ..."

These notes further provide, perhaps *ex abundante cautela*, that:

> "This Chapter does not cover:
>
> (a) Petroleum jelly (other than that suitable for use for the care of the skin put up in packings of a kind sold by retail for such use (heading 27.12).
>
> (b) Medicinal preparations having a subsidiary use as perfumery, cosmetic or toilet preparations (heading 30.03 or 30.04).

(c) Soaps and paper, wadding, felt and nonwovens, impregnated, coated or covered with soap or detergent (heading 34.01)."

From these notes it is clear that petroleum jelly that is suitable for the care of the skin and marketed for such use, falls within chapter 33, tariff heading 33.04 even if they are held out as having subsidiary therapeutic or prophylactic value.

Petroleum jelly which does not have those qualities does not fall within tariff heading 33.04 but falls under tariff heading 27.12. Chapter 33 also does not apply to medicinal preparations which have a subsidiary use as perfumery, cosmetic or toilet preparations. Those products fall within chapter 30, tariff heading 30.03 or 30.04.

One thing is clear from these notes and tariff heading 33.04 and that is that a distinction is drawn between petroleum jelly as such and petroleum jelly which is suitable for the care of the skin and, thirdly, medicinal preparations, even if they have a subsidiary use as perfumery, cosmetic or toilet preparations. These three products or substances fall within tariff headings 27.12, 33.04 and 30.03, or 30.04, respectively.

Explanatory note (A) to tariff heading 33.04 is of the utmost importance against this background. This note relates to, *inter alia* "preparations for the care of the skin". The relevant part thereof reads as follows:

"This part covers:

(1) ...

(2) ...

(3) Other beauty or make-up preparations and preparations for the care of the skin (other than medicaments), such as: ... petroleum jelly, put up in packings of a kind sold by retail for the care of the skin; ... "

The effect of this note, in my view, is to rule out any possibility of it being held that petroleum jelly which is marketed as a skin care product, or substance, falls under any other tariff heading than tariff heading 33.04. If this is seen in the context of item 118.20 there can be no doubt that such petroleum jelly falls within the item and that *ad valorem* excise duty is payable thereon. Such petroleum jelly would only be excluded from item 118.20 if it can be said that it is a medicament which would fall within chapter 30. That chapter therefore needs to be considered now.

[11] Chapter 30 of Schedule 1 of the Act relates to Pharmaceutical products. In terms of chapter note 1(d) the chapter does not cover "Preparations of headings Nos 33.03 to 33.07, even if they have therapeutic or prophylactic properties." This note is unqualified. It does not provide for inclusion of skin care products, which fall under tariff heading 33.04, only if those products have a subsidiary use as a pharmaceutical product, or, in the language of tariff

heading 30.04, as a medicament. It would therefore seem, at least *prima facie*, that the effect of this note is precisely the same as that of Explanatory note (A) 3 to heading 33.04 which I have quoted in paragraph 10 above, namely, that a skin care product, perfumed Vaseline petroleum jelly in the instant case, is excluded from chapter 30 and that it falls within tariff heading 33.04.

The explanatory notes to tariff heading 30.04 throws further light on the question whether or not skin care products can be seen, and classified, as falling within tariff heading 30.04. This tariff heading relates to the following products or substances:

> "Medicaments (Excluding Goods of Heading No 30.02, 30.05 or 30.06) Consisting of Mixed or Unmixed Products for Therapeutic or Prophylactic Uses, put up in Measured Doses or in Forms or Packings for Retail Sale:"

The tariff heading contains ten subheadings of which the second last one, 3004.90, relates to "Other" with effect from 27 January 1995. The products, or substances, to which these subheadings relate do not attract excise duty.

The relevant part of the explanatory note to this tariff heading, 30.04, reads as follows:

"This heading covers medicaments consisting of mixed or unmixed products, provided they are:

(a) Put up in measured doses or in forms such as tablets ... for use either for the direct treatment of certain diseases, eg alcoholism, diabetic coma or as a solvent for the preparation of injectible medicinal solutions), ... ready for taking as single doses for therapeutic or prophylactic use.

The heading applies to such single doses whether in bulk, in packings for retail sale, etc;

or

(b) In packings for retail sale for therapeutic or prophylactic use. This refers to products (for example, sodium bicarbonate and tamarind powder) which, because of their packing and, in particular, the presence of appropriate indications (statement of disease or condition for which they are to be used, method of use or application, statement of dose, etc) are clearly intended for sale directly to users (private persons, hospitals, etc) without repacking, for the above purposes.

These indications (in any language) may be given by label, literature or otherwise. ...

Medicaments consisting of mixed products for therapeutic or prophylactic uses and not put up in measured doses or in forms or packings for retail sale are classified in heading 30.03 ..."

[12] Mr Vorster, who together with Ms Kooverjie appeared for the respondent, submitted that the proviso has the effect to limit the range of medicaments to which the tariff heading refers. I agree with that submission. There is, furthermore, a further inference to be drawn from the terms of this note. If the contents of paragraph (a) is read in context with paragraph (b) it strikes one that the note refers to medicaments which have the qualities, or characteristics, of being suitable to be used in the treatment, either therapeutically or prophylactically, of diseases or conditions. This means, in my view, that the medicaments to which the note refers must have the intrinsic quality of being suitable for the treatment of diseases.

If regard is had to the dictionary meaning of the word "medicament" the aforesaid conclusion is borne out thereby. The *Oxford English Dictionary* gives the following meaning of the word "medicament":

"A substance used in curative treatment."

This meaning of the word "medicament" should also be seen in the context of the meaning of the word "medicamental" which is, according to the same dictionary, the following:

> "Having the nature of a medicament, medicinal."

The appropriate meaning of the word "medicinal" is, according to the same dictionary, the following:

> "1. Having healing or curative properties or attributes; adapted to medical uses."

These words and the meanings thereof can be linked, in my view, to the concept "Medicinal preparations" which one finds in the General Notes to chapter 33. It is provided in those notes that that chapter does not cover, *inter alia*, "Medicinal preparations having a subsidiary use as perfumery, cosmetic or toilet preparations."

[13] In paragraph [10] hereof I have already stated that it is clear from tariff heading 33.04 and the notes relevant to the interpretation thereof, that a distinction is drawn between petroleum jelly products which fall under either tariff headings 27.12 and 33.04, on the one hand and medicinal preparations

which fall within tariff heading 30.03 or 30.04. That distinction is also to be found in tariff heading 30.04 and the notes thereto. Medicinal preparations, or medicaments, are therefore clearly products or substances which differ greatly from skin care products. That difference, or distinction, in my view, is to be found, I repeat, in the inherent "healing or curative properties or attributes" of medicaments or medicinal preparations.

This conclusion leads to a further one, namely that note (A)3 to tariff heading 33.04 which specifically mentions petroleum jelly which is marketed as a skin care product, as a product which falls within tariff heading 33.04, is correct and that it rests on a sound basis. The same can be said about note 1(d) to chapter 30 which provides that that chapter does not cover the preparations mentioned in tariff headings 33.03 to 33.07 "even if they have therapeutic or prophylactic properties". I have already commented on this note in paragraph [11] hereof.

[14] In the light of the aforegoing my conclusion is that petroleum jelly which is suitable for use as a skin care product, does not fall within tariff heading 30.04. It falls under tariff heading 33.04. This conclusion is reached merely on the wording and specific provisions of the various tariff headings, and notes thereto, that I have discussed in the preceding paragraphs.

The appellants' argument in regard to perfumed vaseline petroleum jelly

[15] Mr Puckrin, who together with Mr Cullabine appeared for the appellants, argued that paragraph (b) of the proviso to the explanatory note to tariff heading 30.04, which I have quoted in paragraph [11] above, read with the relevant General Note to chapter 33, which I have quoted in paragraph [10] above, should be construed to mean that a product remains in tariff headings 33.03 to 33.07 only if it has a "subsidiary therapeutic or prophylactic value". It would follow, therefore, submitted counsel, that if the primary use of a product which would otherwise fall within tariff heading 33.04, is for therapeutic or prophylactic purposes, that that product would fall outside heading 33.04; it would then fall within tariff heading 30.04. On this basis, submitted counsel, ought it to be held by this court that COETZEE, J was wrong in finding that perfumed vaseline petroleum jelly is not a medicament that falls under tariff heading 30.04.

In support of this argument Mr Puckrin, in his oral argument, submitted that it would be permissible for the court to have regard to the intention of the manufacturer of the product. Mr Puckrin conceded that it would normally not be permissible for a court to refer to the intention of the manufacturer of a product when interpreting the provisions of a tariff heading or an explanatory note, but, he submitted, in particular circumstances a court would be justified in doing that. As authority for

this proposition Mr Puckrin relied upon *Autoware (Pty) Ltd v Secretary for Customs and Excise* 1975 4 SA 318 (W) 321D–322B and *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd, supra,* 677B–E.

In the present case the wording of paragraph (b) of the proviso to the explanatory note to tariff heading 30.04 expressly refers to the packing of the substance or product and the presence of appropriate indications for which the product is to be used, which would indicate that the product is "clearly intended for sale directly to users, ... for the above purposes" ie "for therapeutic or prophylactic use".

This is therefore a case where the express wording of the relevant provision would entitle a court to have regard to the intention of the manufacturer. See also *Department of Customs and Excise v Maybaker (SA) (Pty) Ltd* 1982 3 SA 809 (A) 816H *in fin*; 818G–H.

The intention of the manufacturer of perfumed vaseline petroleum jelly, and its main, or primary, use, appears clearly from the label on the product. It is clear from the label that the product is meant to be used to prevent nappy rash, ie for prophylactic use. That indeed, argued Mr Puckrin, is its primary use. The product therefore falls outside the ambit of tariff heading 33.04, submitted counsel; it falls within tariff heading 30.04.

On its face value this argument is attractive. COETZEE, J was, however, not impressed thereby. The learned judge referred to, and analysed, tariff headings 30.04 and 33.04 and the notes thereto, and came to the conclusion that the appellants' product falls within tariff heading 33.04. I agree with this reasoning of the learned judge. Furthermore, as I have demonstrated in the preceding paragraphs hereof, the argument of counsel is without merit. On a proper interpretation of the relevant tariff headings and the notes thereto, perfumed vaseline petroleum jelly is not a medicament.

In any event, it is clear from the terms of the explanatory note to tariff heading 30.04 that the intention of the manufacturer of the substance or the use to which the product can be put, whether primary or not, cannot have an effect on its classification under either tariff heading 30.04 or 33.04. The provisions of subparagraph (b) or, for that matter, subparagraph (a), do not determine the classification of the product as a medicament. The explanatory note proceeds from the premise that the substance, packed as it is for (primary) use by the user thereof for either therapeutic or prophylactic purposes, is a medicament. The crucial question to be determined is therefore whether or not the substance is a medicament and that question has to be answered without reference to the provisions of subparagraphs (a) or (b) of the explanatory note. The

manner in which the product is packed or put up [subparagraphs (a) or (b)] merely determines its classification under tariff heading 33.04 instead of tariff heading 33.03 which is the tariff heading for classification of the same product which is not put up in measured doses [subparagraph (a)] or not packed for retail sale to the user thereof [subparagraph (b)].

Counsel for the appellants also relied upon the fact that the appellants' product was registered in terms of the Medicines and Related Substances Control Act, 1965, Act 101 of 1965. Counsel submitted that that is at least an indication that the medicinal claim made by the manufacturer, that perfumed vaseline petroleum jelly is an emollient, has been approved as being true and that the product is efficacious as a medicine. COETZEE, J held that the provisions of Act 101 of 1965 can have no bearing on the interpretation of the concepts used in Schedule 1 to the Act because the purpose and objectives of Act 101 of 1965 are different to those of the Customs and Excise Act, 1964. I agree with this reasoning of the learned judge.

The argument advanced on appellants' behalf cannot, therefore, be accepted.

The nature and characteristics of the appellants' perfumed vaseline petroleum jelly

[16] In the event of my conclusion that the appellants' product does not fall within tariff heading 30.04 on a mere interpretation and analysis of the relevant tariff headings and the notes thereto, being held to be wrong, I deem it appropriate to deal with the nature of the product. The purpose hereof is to determine whether or not it falls under heading 30.04 because it is a medicament.

[17] It is common cause on the papers that the product consists of 99.9% white petroleum jelly and that it is refined and free of impurities. It further consists of 0,1% perfume.

[18] It is also common cause on the papers that the product is widely used, not only by members of the public, but also by medical practitioners and by hospitals for the treatment of various ailments like wounds caused by burns. It is also used for the treatment of so-called nappy rash, or diaper dermatitis, which babies contract and from which they suffer. This condition is described by Dr Erasmus in paragraph 3 of his affidavit as follows:

> "As a paediatrician I have treated many cases of diaper dermatitis, which I regard to be a disease. In medical terms it is described as the prototype of irritant contact dermatitis, which is defined as a reaction to over-hydration of the skin, friction, maceration and prolonged contact with urine and faeces, retained diaper soaps and topical preparations. ..."

The experts differ on the question whether or not nappy rash is a disease or merely a "condition". In my view it is not necessary to resolve this dispute. For purposes hereof I am prepared to accept in appellants' favour that it is a disease. According to Prof Van Oudtshoorn it is at least "a condition".

[19] The dispute between the experts, those on the appellants' side on the one hand, and those on the respondent's side on the other hand, relates to the question whether or not petroleum jelly has medicinal qualities in itself and whether or not the use thereof can be seen as therapeutic or prophylactic.

Dr Erasmus is of the view, in regard to nappy rash, that petroleum jelly merely creates "a barrier between the contact irritant, namely faeces and urine, and the skin, thus preventing contact between the causative agent and the skin. Vaseline petroleum jelly may therefore be classified in the category of a barrier cream." According to him petroleum jelly does not penetrate the skin; it merely creates "a situation which makes it easier for the skin to heal itself from within". He flatly denies that "it is appropriate to classify this product as a medicament".

Prof Ackermann, both in her affidavit and in her evidence, was adamant that petroleum jelly is an inert substance "which does not change the anatomy or physiology of the skin". She was further of the view that petroleum jelly merely creates an "occlusive barrier" between the skin and external agencies like air or

bacteria. She too was of the view that it is not correct to state that petroleum jelly "has a prophylactic use in the true sense of that word". The reason for this is that it cannot "prevent a fungus from developing and cannot as such prevent disease". According to her affidavit petroleum jelly "is not a medicament as an inert substance can have no medicinal action".

Dr Duvehage is also of the opinion that petroleum jelly has "no medicinal properties. Vaseline petroleum jelly ... can best be classified as skin care products." She further said that "petroleum jelly has no therapeutic or medicinal action and is simply an inert innocuous vehicle which may be used to conduct allergy tests and the like." She further agreed with the view of one of the experts on the appellants' side, Dr Gordon, "that the role of vaseline petroleum jelly and perfumed petroleum jelly is that it acts as an occlusive barrier which allows the skin to retain its natural moisture and prevents further injury to the skin". According to her petroleum jelly products "merely act as a facilitator in that they keep the skin moist and in this way allows the skin to heal itself more rapidly".

[20] I do not think that it is necessary to refer extensively to the opinions expressed by Dr Gordon and Prof Van Oudtshoorn. It suffices for present purposes to say that they are also of the view that petroleum jelly, when applied to the skin, forms an occlusive barrier between the skin and external agencies. Prof Van Oudtshoorn, for instance, said in his affidavit that petroleum jelly, or soft paraffin, "is widely used in modern therapeutics as an emollient, a protective in surgical dressings and

especially an adjuvant or auxiliary therapy". He further said in his affidavit that the "emollient and occlusive nature of petroleum jelly increases the hydration status of the *stratum corneum*, if applied to the skin. That in itself would be therapeutic and remedial if required. It will 'assist in creating a situation which makes it easier for the skin to heal itself from within'." He further said in his affidavit that "it is indeed prophylactic to use petroleum jelly as an emollient or an occlusive barrier to prevent the skin from drying up".

In his oral evidence Prof Van Oudtshoorn adhered to those views. Under cross-examination he conceded that the appellants' product, perfumed vaseline petroleum jelly, is suitable for use for the care of the skin. He also conceded under cross-examination, that petroleum jelly in itself has no effect on fungi or infections. He further conceded that it does not inhibit the growth of a fungus if there were a fungus present and that in order to treat fungi or infections one would require fungicides and antibiotics which are medicaments. According to his evidence the main function of vaseline petroleum jelly is a prophylactic one and not a therapeutic one.

Prof Van Oudtshoorn also made it clear in his evidence that in regard to nappy rash in particular, and also in a more general sense, his view and opinion is that the mere fact that petroleum jelly acts as a protectant to the skin by creating an occlusive barrier, renders the use thereof prophylactic.

[21] The reason why the experts hold different views is to be found, in my view, in the fact that Dr Gordon and Prof Van Oudtshoorn hold a more liberal view about treatment of a disease or ailment with petroleum jelly than the three experts of the respondent. This is borne out, for instance, by what Dr Gordon said in paragraph 1.6 of his supporting affidavit which forms part of the appellants' founding papers. In that paragraph of his affidavit he said the following:

> "1.6 The action of VASELINE PETROLEUM JELLY and PERFUMED VASELINE PETROLEUM JELLY is twofold:
>
> 1.6.1 It provides a good occlusive barrier, holds in natural moisture and allows for repair of the damaged skin;
>
> and
>
> 1.6.2 The same barrier prevents further injury to the damaged area by excretory material.
>
> The abovementioned uses of the product constitute treatment mitigation, prevention and restoring to normal condition, and corrects abnormalities in skin."

[22] In paragraphs 4 and 5 of her affidavit Dr Duvenhage responded to these statements of Dr Gordon. She agreed that vaseline petroleum jelly and perfumed

vaseline petroleum jelly act as an occlusive barrier and that they prevent further injury to the skin. She said, however, that:

> "These products do not repair the damaged skin, nor do they correct abnormalities in the skin. They merely act as a facilitator in that they keep the skin moist and in this way allows the skin to heal itself more rapidly. "

Prof Van Oudtshoorn agreed when giving evidence, with these statements of Dr Duvenhage. Yet he said that she was "Describing a prophylaxis."

[23] Prof Ackermann was cross-examined on her view that vaseline petroleum jelly has no therapeutic or medicinal action in respect of the lips or skin to which the product is applied. The relevant part of her evidence reads as follows:

> "So what you are saying here it has no therapeutic or medicinal action in the sense of either treating a disease or condition or preventing ... (intervenes) --- A disease.
>
> A disease or condition? --- Yes
>
> Now let me ask you this. I happen to know that you are a mother too apart from being an academic. If you forgive me for asking you a personal question, did you ever use petroleum jelly with your children? --- Yes, I did

You did, why did you use it? --- To protect the skin from the urine and the faeces

To protect a condition which could develop? --- I beg your pardon?

To protect the skin from a condition which could develop? --- Yes."

[24] These excerpts from the evidence show that the respondent's experts only regard a substance, or product, as a medicament, which has a therapeutic or prophylactic effect, if the substance itself has the inherent qualities or attributes or characteristics of having an effect on the disease for which it is taken or applied. A substance which does not have those inherent qualities cannot be labelled a medicament or a substance which has medicinal action.

[25] It is clear from the papers that Dr Gordon and Prof Van Oudtshoorn hold a more liberal view. The mere fact that (perfumed) vaseline petroleum jelly facilitates the healing of a wound or disease, nappy rash for instance, or protects the skin from further injury because it seals it off and acts as a sealant, is sufficient to let it qualify as a medicament although it is otherwise an inert substance.

[26] In paragraph 12 hereof I have said that the explanatory note to tariff heading 30.04 indicates that a substance, in order to qualify as a medicament, must have the inherent qualities or attributes or characteristics to, in itself, have an effect on the disease or condition for which it is taken or applied. It is evident that the views of Dr Gordon and Prof Van Oudtshoorn do not accord with this. The

views of the respondent's experts do fall within the ambit of the explanatory note and are in accordance therewith.

It therefore follows that the appellants have not succeeded in showing, the *onus* being on them, that perfumed vaseline petroleum jelly is a medicament in terms of tariff heading 30.04.

[22] The appeal in respect of perfumed vaseline petroleum jelly cannot, therefore, succeed.

Vaseline Lip-Ice

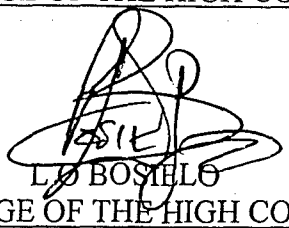
[23] At the commencement of the hearing of the appeal appellants' counsel informed the court from the Bar that the appellants have abandoned their appeal against the finding of the court *a quo* in respect of the appellants' lip-ice product.

Order

[24] The appeal is dismissed with costs including the costs of two counsel.

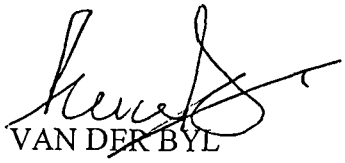
S J MYNHARDT
JUDGE OF THE HIGH COURT

I agree



L Ø BOSIELO
JUDGE OF THE HIGH COURT

I agree



P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT