IN THE HIGH COURT OF SOUTH AFRICA /ES

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 44029/07

DATE:

DELETE WHICHEVER IS NOT APPLICABLE

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

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

(3) REVISED. ✓

2/10/2008 .....
DATE

.....
SIGNATURE

IN THE MATTER BETWEEN:

PLASMAVIEW TECHNOLOGIES (PTY) LTD	APPLICANT
AND	
THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	RESPONDENT

JUDGMENT

PRINSLOO, J

[1] This is an application flowing from the provisions of the Customs and Excise Act no 91 of 1964 ("the Act") and also from the Promotion of Administrative Justice Act no 3 of 2000 ("PAJA").

[2] Before me, Mr Vorster SC appeared for the applicant and Mr Puckrin SC assisted by Ms Khatri appeared for the respondent.

Background and synopsis

[3] At all relevant times the applicant was an importer and distributor of Liquid Crystal Display ("LCD") monitors (screens) and plasma monitors (screens).

[4] At all relevant times ordinary customs duty was payable upon the importation of reception apparatus for color television (commonly known as television sets) and color video monitors with screen size not exceeding 3m x 4m at the rate of 25% (together with a further 12% *ad valorem* customs duty).

The television sets and the video monitors are listed in Tariff Subheading 8528.12.30 (the TV) and 8528.21.20 (the video monitor) in Part 1 of Schedule 1 to the Act.

[5] However, in terms of rebate item 460.16 in Schedule 4 to the Act the full customs duty which would otherwise be payable was rebated in respect of video monitors of a particular quality as certified by the South African Bureau of Standards.

The extent of the rebate is the full duty and the rebate item reads as follows:

> "Video monitors: Provided that a certificate of the South African Bureau of Standards is presented at the time of entry that the video monitors have more than 600 resolution lines."

The Tariff Heading applicable is 85.28 and the rebate code is 02.04.

[6] On 9 November 2006 the Commissioner demanded an amount of R15 516 179,59 in unpaid customs duties, VAT and penalties from the applicant.

[7] The demand related, in the main, to LCD's and plasma screens which had been imported by the applicant during the period February to September 2006. The demand was based on the contention that the applicant had cleared the goods under the "incorrect Tariff Heading".

[8] While the importation of the products did attract the payment of customs duties and VAT in principle, the applicant entered the products under full rebate of duty (and VAT) in terms of the provisions of section 75 of the Act read with rebate item 460.16 in Schedule 4 to the Act.

[9] The entry of the imported goods under rebate of duty during the period February to September 2006 was preceded by the following events which are either common cause or not seriously disputed by the respondent:

1. On or about 12 December 2005, Mr Jean Pool ("Pool") who acted throughout as the duly authorised representative of the respondent, determined that eight consignments of LCD's which had previously been imported by the applicant were reception apparatus for television (television sets) which attracted the payment of customs duty. In so doing, Pool acted in accordance with section 47(9)(a)(i)(aa) of the Act which

empowers the respondent to determine, in writing, *inter alia*, the Tariff Subheadings of Schedule 1 to the Act under which any imported goods shall be classified. This determination is referred to in the founding affidavit as "the first determination". In the answering affidavit respondent refers to this determination as "the LCD determination". The latter reference will be adopted for purposes of this judgment.

2. Although the applicant had reservations regarding the correctness of the LCD determination and could have appealed against it to Court in terms of section 47(9)(e) of the Act, the applicant did not contest the LCD determination, as it was soon thereafter overtaken by the events summarised hereunder.

3. Having received the LCD determination, Mr Martin ("Martin"), a tariff consultant in the employ of the applicant's clearing agent, UTI, telephoned Pool. Pool advised Martin that the goods to be imported by the applicant should be cleared under Tariff Subheading 8528.12.30 (being reception apparatus for television) in which event the goods would qualify for a full rebate of customs duty in terms of rebate item 460.16 (video monitors).

4. Martin requested Pool to confirm the advice orally given over the telephone, in writing, which Pool did on 3 January 2006.

5. On 15 December 2005 the applicant's then attorneys, telefaxed a letter to Pool. It appears from this letter that the applicant's attorney and Pool had discussed the LCD determination telephonically on 15 December 2005. This letter confirms that Pool had advised the applicant's attorney that the determination of the applicant's goods as reception apparatus for television under Tariff Heading 8528.12.30 is rebatable due to the fact that the goods are considered as a type of video monitor. The letter further confirms that the applicant would be applying for a substitution of the bills of entry relating to the LCD's aforementioned (the eight consignments which had previously been imported by the applicant and in respect of which Pool notified the applicant that they were reception apparatus for television sets), which substitution would entitle the applicant to a full rebate of duty.

6. On 3 January 2006 Pool sent an e-mail message to Martin. This e-mail message contained a determination which Pool had made on 20 December 2005 in respect of certain plasma screens previously imported by the applicant. This e-mail also represented Pool's advice to Martin, at Martin's request, *supra*, that the goods to be imported by the applicant should be cleared under Tariff Subheading 8528.12.30 (television) in which event the goods would qualify for a full rebate.

This determination is referred to in the founding affidavit as "the second determination" and described by the respondent in the answering affidavit

as "the first plasma determination". For streamlining purposes I shall refer to this determination as "Plasma 1". Plasma 1 received a great deal of attention during the proceedings before me and, in my view, lies at the very heart of the dispute between the parties.

7. In Plasma 1, Pool determined that the plasma screens were video monitors as intended in Tariff heading 8528.21.20 which qualified for a full rebate of duty under rebate item 460.16.

8. One of the issues which was addressed in Plasma 1 was whether television sets (or reception apparatus for television) of Tariff Heading 8528.12.30 were video monitors as described in rebate item 460.16.

Under the heading "issue" the following is said in Plasma 1:

> "Does TH 8528.12.30 or TH 8528.21.20 apply?
>
> Are television sets of TH 8528.12.30 video monitors as described in rebate item 460.16?"

9. In the course of his reasoning in formulating and justifying Plasma 1, Pool said the following:

> "It should further be noted that it is in any event the position of this office ... that television monitors are video monitors and would qualify for entry under rebate item 460.16 ..." (Emphasis added.)

10. Mr Vorster submits, and I agree with him, that the effect of the above-quoted words and also the telephonic advice of Pool to Martin is that, for purposes of determining whether imported screens qualify for a full rebate of duty under rebate item 406.16 it does not matter whether the screens are classified as reception apparatus for television (or television sets) on the one hand or video monitors on the other hand within Tariff Heading 85.28 in Schedule 1 to the Act.

11. Having received Pool's advice and Plasma 1, the applicant started importing LCD's and plasma screens equipped with TV tuners (it is common cause that an LCD or plasma screen equipped with a TV tuner falls to be classified as a reception apparatus for television under Tariff Subheading 8528.12.30 in Schedule 1 to the Act).

[10] The respondent does not dispute the receipt by the applicant of the advice and Plasma 1 from Pool in December 2005 and January 2006, nor the fact that from February to September 2006 the applicant imported LCD's and plasma screens equipped with TV tuners, cleared as video monitors for purposes of rebate item 460.16. However, the respondent seeks to argue that reliance by the applicant on the advice by Pool and on the reasoning in Plasma 1 was "disingenuous", "misplaced and opportunistic".

[11] The respondent's case in the opposing affidavit is that "objectively considered, all the applicant's goods were always TV's and were cleared as computers or video monitors solely for the purpose of circumventing payment of the applicable duty and not because the goods were in fact computer or video monitors" (my emphasis).

[12] Mr Vorster argues, correctly in my view, that this proposition has to be rejected: in Plasma 1, the respondent determined that the PV4201S plasma monitors and PV4201 plasma screens imported by the applicant are video monitors (and not TV's) as intended in Tariff Subheading 8528.21.20.

Under the heading "holding:" Pool says the following at the end of Plasma 1:

> "TH 8528.21.20 applies to the goods at issue. They are admissible under rebate item 460.16 in so far as they comply with all the other requirements in this rebate item."

TH 8528.21.20, of course, relates to video monitors. The "goods at issue" are the goods imported by the applicant and particularly mentioned in Plasma 1. The name of the applicant also appears on Plasma 1.

The passage "in so far as they comply with all the other requirements of this rebate item" relates to the requirement in the rebate item, *supra*, that "provided that a certificate of the South African Bureau of Standards is presented at the time

of entry that the video monitors have more than 600 resolution lines". It is common cause that the applicant, without fail, complied with this requirement by presenting the necessary certificates from the SABS upon importation of the goods.

[13] The correctness of the determination that the goods imported by the applicant are video monitors and not TV's was not contested on the papers by either the respondent or the applicant. Moreover, the applicant has shown in reply that many of the LCD screens imported by it were used as computer or video monitors (and not TV's).

[14] In the latter regard, I consider it appropriate to make a few remarks about Tariff Heading 85.28 and the Explanatory Notes relating thereto, as intended by the so-called Harmonised System ("HS").

Tariff Heading 85.28 reads as follows:

> "Reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus; video monitors and video projectors."

According to the Explanatory Notes "this heading covers television receivers (including video monitors and video projectors) whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus".

According to the Explanatory Notes the heading includes:

(1) "Television receivers of the kind used in the home (table models, consoles etc) including coin-operated sets. They include LCD and plasma televisions."

(2) ...

(3) ...

(4) ...

(5) ...

(6) "Video monitors which are receivers connected directly to the video camera or recorder by means of co-axial cables, so that all the radio-frequency circuits are eliminated. ..."

It is not disputed on the papers that paragraph (6) of the Explanatory Notes to Tariff Heading 85.28 which provides valuable guidance with what is meant with the concept "video monitors", applies in all respects to the products imported by the applicant. The only point which the respondent makes in this regard is that it is common cause that the products as imported were fitted with TV tuners and that TV tuners are not listed in Explanatory Note (6). In this regard Mr Vorster submitted that the TV tuners are but one feature of the imported products whereas paragraph (6) lists a further seven characteristics of video monitors which are all complied with.

It is put as follows in the founding affidavit:

"44.3.2 Paragraph (6) of the Explanatory Notes specifically states that video monitors are included within Tariff Heading 85.28 and provides valuable guidance with what is meant with the concept 'video monitors'. The imported products comply with all the characteristics cited in note (6) as being characteristics of video monitors, in that:

(a) they are receivers which may be connected directly to a video camera or recorder by means of co-axial cables, so that all the radio frequency circuits are eliminated;

(b) they can be used by television companies or for closed circuit television at airports, railway stations, hospitals, etc;

(c) they consist essentially of devices which can generate a point of light and display it on a screen synchronously with the source signals."

The applicant then goes on to list four more compelling points of comparison between its imported products and the items listed in Explanatory Note (6). For the sake of brevity, I do not consider it necessary to quote all these additional points.

The applicant then concludes paragraph 44.3.2 of the founding affidavit in the following terms:

"It is accordingly submitted that further relevant considerations were ignored by the respondent in arriving at the third determination which render that determination susceptible to review and incorrect on the merits for purposes of an appeal."

[15] The "third determination" referred to by the applicant is the one under attack by the applicant in this review application alternatively appeal in terms of the Act. For streamlining purposes I refer to this third determination as "Plasma 2".

Plasma 2

[16] 0n 27 July 2006 Pool captured Plasma 2 on his system.

[17] For reasons which remained unexplained by the respondent, Plasma 2 was only brought to the applicant's attention on 4 0ctober 2006.

[18] Plasma 2 is headed "Tariff Determination" and emanates from Pool, the authorised representative of the respondent employed in the Tariff section at SARS, Pretoria head office.

[19] Plasma 2 represents a complete about turn on the part of the respondent on the question whether television receivers are the same as video monitors for purposes of qualifying for a rebate under rebate item 460.16.

[20] I have already quoted extracts from Plasma 1 in this regard. It is stated, *inter alia*, that "included under television receivers are video monitors and video projectors" and "TH 8528.21.20 applies to the goods at issue. They are admissible under rebate item 460.16 in so far as they comply with all the other requirements of this rebate item."

[21] I have mentioned the fact that Pool conveyed the same message to Martin in December 2005 and followed up Martin's request for written confirmation by e-mailing Plasma 1 to Martin.

[22] In Plasma 2, Pool now, *inter alia*, says the following:

> "This is an internal review and appropriate AMENDMENT of a part of the Law and Analysis Commentary to ELN 9/2001/1 dated 21 December 2005. This review does not affect the actual determination, the effective date of which also remains 21 December 2005."

The "Law and Analysis Commentary … dated 21 December 2005", is Plasma 1.

[23] From this passage appearing in Plasma 2, the following can be stated:

1. Pool considers Plasma 1 to be a "determination"; and
2. Pool decreed in Plasma 2 that it would be retrospectively in force from 21 December 2005.

[24] Pool also says the following in Plasma 2:

> "Therefore ... no commodity which is classifiable under TH 8528.1 [referring to reception apparatus for television] qualifies as a 'video monitor' under rebate item 460.16 ... Please inform the importer hereof as soon as possible."

[25] The applicant, being unaware of Plasma 2 prior to 4 0ctober 2006, continued to import LCD's and plasma screens under rebate of duty until September 2006.

[26] By ruling that the effective date of the determination remains 21 December 2005, Pool effectively amended Plasma 1 with retrospective effect some eight to ten months after it had initially been made.

[27] The practical effect of this retrospective amendment for the applicant was that the applicant became liable for the payment of some R15,5 million in respect of imports entered under full rebate of duty on the strength of Pool's oral advice in December 2005, followed up by Plasma 1 communicated to the applicant in January 2006.

[28] In a further lengthy affidavit filed by the respondent after the applicant's replying affidavit had been filed, the respondent submits that demands made by the respondent for payment of the R15,5 million (annexures "FA17" and "FA18" to the founding affidavit) "arose quite independently of any act by Pool".

[29] It is contended on behalf of the applicant, correctly in my view, that this contention does not bear scrutiny if regard is had to the following sequence of events, set out in the same affidavit:

1. The investigating officer whose investigations led to the schedules or demands, enquired from SARS head office whether TV's did indeed qualify under rebate item 460.16. The request was dated 8 August 2006. Mr Millar of head office replied in the negative and provided the investigating officer with an extract from Plasma 2, which is dated 27 July 2006.

2. On 15 August 2006 Millar again confirmed this view in response to a further query from the investigating officer.

3. It is only thereafter, on 29 September 2006, that the notice of intention to demand outstanding duties was delivered to the applicant.

[30] It is therefore clear that Plasma 2 played an important role in the decision to demand R15,5 million from the applicant. Had it not been for Plasma 2, Plasma 1 would have remained intact and the official position of the respondent would have been that television monitors are video monitors which qualify under rebate item 460.16.

[31] It is also during this time (6 0ctober 2006) that Pool wrote to the applicant's clearing agent, UTI, giving notice of the respondent's intention to revoke a substitution authorisation dated 13 March 2006.

It will be recalled, from what I stated above, that Martin telephoned Pool for clarification after the LCD determination was received. Pool then advised Martin that the goods to be imported by the applicant should be cleared under Tariff Subheading 8528.12.30 (reception apparatus for television) in which event the goods would qualify for a full rebate in terms of rebate item 460.16.

When Martin wrote to Pool on 15 December 2005, asking Pool to put his advice in writing, Martin also said the following:

> "3. We confirm your Mr Pool advising us that the determination of our client's goods under Tariff Heading 8528.12.30 is rebatable under the Tariff Heading due to the fact that the units are considered as a type of video monitor.
>
> 4. We further confirm that our client will be applying for a substitution of the Bills of Entry, which are subject to letters of authority from SABS and in accordance with Schedule 4.
>
> 5. We would like to take this opportunity in thanking you for your timeous delivery of the tariff determination and your co-operation in this regard."

Following on receipt of Plasma 1 (which Pool e-mailed to Martin as written confirmation of his telephonic advice) the applicant then applied for a substitution of the Bills of Entry relating to the earlier eight consignments of LCD's on which duties had been levied.

This permission to substitute was granted in writing by the respondent (the East London office) on 13 March 2006.

It is clear that the permission to substitute is a direct result of the application to substitute which flows from Pool's telephonic advice followed by Plasma 1.

Pool's notification of the intention to revoke the East London substitution, of 6 0ctober 2006, in turn, flows from Plasma 2. The "rationale" advanced by Pool in this proposal to revoke the substitution, is a clear reproduction of the motivation appearing in Plasma 2.

In my view, this is another manifestation of prejudice suffered by the applicant as a result of the volte-face by the respondent when reversing Plasma 1 with Plasma 2.

The Pool affidavit

[32] When the respondent prepared his opposing papers, his legal team consulted with Pool with a view to filing a supporting affidavit by the latter. A draft affidavit was submitted to Pool but he declined to sign it.

[33] Attached to the applicant's replying affidavit is an affidavit by Pool.

[34] Pool is now employed by UTI who is also the clearing agent of the applicant. The applicant's legal team did not consider consulting with Pool when the founding papers were drafted as it was anticipated that respondent would consult with Pool and file an affidavit by the latter.

[35] Neither the applicant nor UTI brought pressure to bear on Pool not to depose to an affidavit on behalf of the respondent. Martin, also of UTI, encouraged Pool to make an affidavit which may be placed before the court in which Pool sets out his recollections of the relevant events, whether this be in favour of the applicant or not.

[36] Pool did eventually depose to an affidavit which is annexed to the applicant's replying affidavit. This affidavit was drafted by Pool himself and neither the applicant nor its legal representatives consulted with Pool.

[37] It is not suggested by any of the parties that Pool acted in bad faith when making the LCD determination, Plasma 1 and/or Plasma 2. In fact, from submissions

made by the respondent in the answering affidavit, and confirmed by the applicant in the replying affidavit, it appears that it is common cause between the parties that, in making Plasma 1, Pool acted *bona fide*.

The respondent puts it as follows in his answering affidavit:

> "65.2 As far as a duty of care is concerned, Pool expressed his December 2005 opinion in the *bona fide* belief that he was correct. The very existence of *bona fide* dispute amongst various tariff specialists employed by the Commissioner indicates that it is a matter of opinion."

In its replying affidavit, when dealing with this contention, the applicant admits that Pool was *bona fide*.

[38] However, once the respondent had sight of Pool's affidavit, attached to the applicant's replying affidavit, the respondent's attitude towards Pool turned decidedly nasty. The respondent took the liberty to file a further, lengthy, affidavit aimed at dealing with Pool's submissions. The respondent puts it as follows:

> "2.1 I am advised that – in the normal course – the Commissioner is not entitled to file any further affidavits in this matter, save in exceptional circumstances and with the leave of the above honourable court.

2.2 I respectfully submit that such exceptional circumstances do exist in this matter, same having arisen from the affidavit of Mr Jean Pool ('Pool') on behalf of the applicant and filed together with the latter's replying affidavit ('Pool's affidavit')."

[39] An example of Pool's fall from grace with the respondent can be illustrated with the following extract from the additional affidavit filed by the respondent:

"10.4.1 The applicant claims that Pool informed Martin that 'the imported goods' (being both the LCD and plasma screens) should be cleared as TV's, in which event they would qualify for the rebate. Pool claims that Martin specifically asked him if the LCD screens would be admissible under the rebate to which he responded in the affirmative.

10.4.2 The applicant makes no mention of Martin enquiring whether a further determination should be sought in this regard, in line with the provisions of section 47(9)(a)(iii)(aa) of the Act. Pool, on the other hand, alleges that Martin did enquire into this aspect and that it was Pool himself, as the representative of the Commissioner, that answered in the negative and said he would include 'an affirmative reference thereto' (in respect of the LCD screens) in the first plasma determination.

10.4.3 I respectfully submit that Pool's explanation for this advice, namely that the Tariff office was too busy and that he did not

foresee the need for a separate determination, simply cannot be upheld in the circumstances. It is merely a ploy by Pool – on behalf of the applicant - to excuse its failure to comply with the relevant legislation by placing the blame at (*sic*) squarely at his own feet, thus attempting to paint Plasma View's shortcomings as the Commissioner's own doing." (Emphasis added.)

[40] Another example of the respondent's decided irritation with Pool is the following:

"20.2.4 As the Honourable Court will also note, it was once again Pool that came to the applicant's rescue, arguing vehemently in favour of granting the said authorisation to Plasma View, while this issue had nothing to do with tariff matters which is what Pool was employed by the Commissioner to do and did not fall under his purview of duties."

[41] It was never suggested, by any party, that Pool was not acting in the course and scope of his employment, and on the authority of the respondent when he made the three determinations and when he acted the way he did.

[42] Consequently, in the end, the rather unsavory situation prevails of the respondent fighting with himself.

The Pool affidavit put the cat amongst the pigeons. The long further affidavit of the respondent amounted to an attempt at damage control.

[43] The Pool affidavit was placed before me by agreement between the parties. It was fully dealt with by the respondent in the long further affidavit. Although it did not receive much attention from counsel during the proceedings before me, I see no reason why I should not pay regard thereto for purposes of adjudicating upon this dispute.

I am alive to the fact that I should perhaps do so with some caution because Pool is no longer employed by the respondent but by UTI. In that sense, Pool is now closer to the applicant's camp than to the respondent's camp.

[44] Nevertheless, there was a time when both parties agreed that Pool was *bona fide*. I deem it appropriate, and convenient, to quote extracts from his affidavit.

[45] When dealing with the LCD determination, and the way Plasma 1 came about as a result thereof, Pool says the following (bearing in mind that he prepared the affidavit himself without any input from either party):

> "In the first determination I classified an 81cm and 94cm LCD display lacking a television tuner, as a television set (Tariff Subheading 8528.12.30). The issue of rebate admissibility under item 460.16/85.28 never arose. Accordingly, I did not address it in this determination.

Following the first determination, I received a telephone call from the importer (for the purpose of this affidavit the 'importer' includes any of his representatives) enquiring whether the goods classified in the first determination, are admissible under rebate item 460.16/85.28. I said 'yes'. To the question of whether a determination should be sought in this regard, I responded that I would include an affirmative reference thereto in my commentary ('Law and Analysis') in the second determination. The reason for this decision, rather than advising that a separate determination should be sought, was that the Tariff Policy office always had more than enough tariff determination applications to contend with and I did not foresee the need for a separate determination."

[46] As to Plasma 1, Pool goes on to say the following:

"In the second determination dated 20 December 2005, I inserted the following paragraphs under 'Law and Analysis' clarifying the issue of rebate admissibility under item 460.16/85.28:

'It should further be noted that it is in any event the position of this office, in line with the Explanatory Note to heading 85.28, that television monitors are video monitors and would qualify for entry under rebate item 460.16, providing that they comply with all the other requirements of the rebate item. EN 85.28 reads in pertinent part: "This heading covers television receivers (including video monitors and video projectors) ..."

> The meaning of this syntax could hardly be plainer: included under television receivers are video monitors and video projectors.' ...
>
> In the sense that a video monitor is simply an electronic screen which displays animated images, both television receivers incorporating screens, as well as automatic data processing machine monitors, in any event qualify as 'video monitors' in terms of the ordinary, non-technical meaning of this term."

[47] Pool then goes on to make this rather significant disclosure:

> "This explanation offered in the 'Law and Analysis' field of the second determination was not my personal opinion, but the position of SARS Head Office, hence '... the position of this office ...' This explanation was opposed by a Mr Cecil Gaze of Durban Customs, senior national specialist and formerly Director of Tariff and Valuation, Customs Head Office. However, my supervisor, Mr Lester Millar, National Manager – Tariff Policy, did not oppose my explanation at that time and in fact formally approved it. Accordingly, it became the official 'SARS tariff policy'."

[48] Pool also says that he relied on Explanatory Note (6) to heading 85.28 of the 2002 Harmonised System to fortify his decision that the imported goods may be regarded as video monitors. He puts it as follows:

"In determining that 'television sets' are admissible under item 460.16/85.28 in the second determination, I also took note of inclusion (6) in the Explanatory Note to heading 85.28 of the 2002 Harmonised System, although I did not include this in my explanation. This Explanatory Note included under heading 85.28 by way of example: 'Video monitors which are receivers connected directly to the video camera or recorder by means of co-axial cables, so that all the radio-frequency circuits are eliminated.'

The significance of this Explanatory Note is that:

(a) a video monitor is a receiver;

(b) all the radio-frequency circuits are eliminated.

The LCD displays in the first determination were:

(a) receivers which could be directly connected to various types of apparatus, including digital video recorders having a DVI connector;

(b) all the radio-frequency circuits were eliminated: since they did not contain one or more TV tuners at time of import, they did not possess any radio-frequency circuits.

Accordingly, I concluded that they may be regarded as 'video monitors', notwithstanding the fact that I had concluded at the same time that they may also be regarded as 'incomplete reception apparatus for television'."

And further:

> "The import hereof is that although 'video monitors' are separated from 'reception apparatus for television' by a semi-colon in the terms of heading 85.28, implying that they are separate concepts, they are not separate under the terms of rebate item 460.16/85.28, within the context of Explanatory Note to heading 85.28, first paragraph, which reads in pertinent part:
>
> 'This heading covers television receivers, (including video monitors and video projectors) ...'
>
> According to this Explanatory Note, television receivers are video monitors."

[49] Pool then really puts the cat amongst the pigeons when he deals with Plasma 2:

> "0n 27 July 2007, without prior notice as required in terms of the Promotion of Administrative Justice Act, I amended the second determination. The reason for not giving notice is that I felt that the actual determination, which was in respect of certain plasma screens, remained unaltered. Nevertheless, the effect of the amendment of the 'Law and Analysis' field, constituted a complete departure from the previous classification policy, having an extremely destructive effect on the importer's business due to it opportunistically being applied retrospectively by SARS. This complete reversal of the previous SARS

classification policy was not my personal opinion. It was approved by my supervisor, Lester Millar, which then confirmed the new official SARS classification position, viz. that television sets were now regarded as being inadmissible under rebate item 460.16."

[50] Finally, when dealing with his decision, *supra*, to revoke the East London district office substitution authorisation, which I have referred to in some detail, Pool says the following:

"0n 5 0ctober 2006 I issued 'the notification', proposing to revoke a district office substitution authorisation, with complete retrospective effect. I was acting as Group Manager at the time, as Lester Millar was in Brussels, Belgium. Before issuing this letter, I e-mailed it for comment to:

(a) Mark Kingon, General Manager of SARS 0perations Support, who was my direct manager in Lester Millar's absence;

(b) Ilze Enslin, Manager: Customs Litigation;

(c) Marina van Twisk, in charge of Law Amendments.

None of these officers had any objection to the proposed letter, notwithstanding the fact that the SARS Head 0ffice Tariff Policy office had never before:

(a) revoked any district office substitution authorisation;

(b) applied a change in classification policy with retrospective effect on any importer whose rights were adversely affected thereby.

Although the Customs and Excise Act permits retrospective amendments of tariff determination, this had also never been applied where such amendment would adversely affect an importer's rights. In this regard it is worth noting that tariff determinations are legally binding on importers. Therefore, if an importer ignores a determination, he is breaking the law. If SARS changes its classification views by amending or revoking a tariff determination, it would accordingly seem reasonable to apply the amendment from an effective date, with advance notification being provided to any importer whose rights will be adversely affected thereby.

Although the Customs and Excise Act permits retrospective amendments of tariff determinations, there is no provision for:

(a) retrospective amendments of tariff classification policy;

(b) retrospective amendment or withdrawal of any customs substitution authorisation.

Therefore, it would *prima facie* appear that had the notification been implemented and the district office substitution authorisation been revoked, such action would have been *ultra vires*. I did not, however, pursue this avenue further by actually revoking the district office substitution authorisation." (Emphasis added.)

[51] It is perhaps understandable that Pool fell into disfavour with the respondent.

Applying PAJA

[52] Mr Vorster submitted that the source of the respondent's power to make Plasma 2 lies in the provisions of section 47(9)(d)(i)(bb) which provides, *inter alia*, as follows:

> "The Commissioner shall: ... amend any determination ... and make a new determination if it was made in error ..."

[53] The respondent contends that while Plasma 2 may be set aside on appeal, it may not be set aside on review. No authority for this argument is advanced.

[54] Mr Vorster submitted that the effect of the respondent's contention (if correct) would be that the amending of a determination and the making of a new determination in terms of the above subsection is not administrative action as intended by PAJA.

[55] It was submitted that, having regard to the definition of "administrative action" in section 1 of PAJA it is clear that the determination is a decision by an organ of state, exercising a public power or performing a public function in terms of any legislation, which adversely affects the rights of the applicant and has a direct, external legal effect.

[56] It was accordingly submitted on behalf of the applicant, correctly in my view, that the respondent was bound by the provisions of section 3 of PAJA to take administrative action which is procedurally fair. In principle Pool should accordingly have complied with the following requirements of section 3 of PAJA:

(1) Pool should have given the applicant adequate notice of the nature and purpose of the proposed administrative action;

(2) Pool should have given the applicant a reasonable opportunity to make representations;

(3) Pool should have given the applicant adequate notice of any right of review;

(4) Pool should have given the applicant adequate notice of the right to request reasons.

Pool did none of the above. Indeed, in his affidavit which I have dealt with, Pool concedes that the actions of the respondent flew in the face of PAJA.

[57] In view of the aforegoing, it was submitted on behalf of the applicant that Plasma 2 is tainted by such irregularity that it ought to be reviewed and set aside as prayed in prayer 3 of the notice of motion.

[58] The applicant puts it as follows in the founding affidavit:

"41. It should be observed that the applicant had received no advance warning from the respondent that the respondent intended to

internally review and amend the second determination. The effect of the third determination is that, with a proverbial stroke of the pen, the respondent purported to render the previous importations of the imported products unlawful and in the same breath, purported to render the applicant liable for an amount in excess of R15,5 million. Having regard to the fact that the respondent did not give the applicant any opportunity to make representations in this regard prior to arriving at this fundamentally important decision which affected the applicant's rights and interests, it is submitted that the third determination falls to be set aside on the basis of procedural unfairness as intended by section 6(2)(c) of PAJA."

[59] The applicant also lists the following further review grounds to be found in section 6 of PAJA:

"68.2 The respondent failed to take into account facts such as those set out in paragraph 32 of this affidavit which it is submitted were clearly relevant considerations regarding the effective date of the third determination. Accordingly, the respondent did not take into account relevant considerations as intended in section 6(2)(e)(iii) of PAJA. (Paragraph 32 deals with the prejudice suffered by the applicant who proceeded to import the products on the strength of Plasma 1.)

68.3 In the circumstances, the decision regarding the effective date of the third determination was taken arbitrarily and capriciously as intended by section 6(2)(e)(vi) of PAJA.

68.4 The decision in this regard was not rationally connected to the information before the respondent or the reasons given for it by the respondent.

68.5 The decision was so unreasonable that no reasonable person could have exercised the power or performed the function in that manner, as intended by section 6(2)(h) of PAJA."

[60] I add that, in prayer 1 of the notice of motion, the applicant seeks an extension of the period of 180 days referred to in section 7(1) of PAJA. This portion of the application was not opposed.

[61] I also agree with a submission by Mr Vorster that the portions of the answering affidavit dealing with the aforesaid grounds for review do not rebut the case made out by the applicant.

[62] It should also be noted that, although the applicant was afforded the opportunity to make representations in the demand for payment, this demand came well after Plasma 2 which is the administrative action complained about. Moreover, the applicant made lengthy representations in response to the demand for payment, but these representations evoked no reaction from the respondent.

[63] For all these reasons, I have come to the conclusion that the applicant has made out a proper case, in terms of the provisions of PAJA, for Plasma 2 to be reviewed and set aside. Such an order would, in my opinion, be an "order that is just and equitable" as intended by the provisions of section 8(1) of PAJA.

[64] There was an argument advanced on behalf of the respondent to the effect, if I understood it correctly, that Plasma 2 was not "a determination" in the true sense of the word but that the "determination" is embodied in the notice of intention to demand. Consequently, a review application aimed at Plasma 2 was misplaced. I see no merit in this argument. The respondent, throughout, referred to the three determinations, namely the LCD determination, Plasma 1 and Plasma 2, as "determinations".

Plasma 2 is headed "tariff determination" and at the end of Plasma 1 the words "tariff determination" are found. It was never argued that the LCD determination is not a "determination". Pool, as appears from the extracts of his affidavit, refers to Plasma 1 and Plasma 2 as "determinations" without any hesitation. He should know.

[65] In any event, Mr Vorster argued, if I understood him correctly, that even if Plasma 2 is not a "determination" in the true sense of the word it still amounts to

"administrative action" as intended by PAJA as it would fall within the ambit of the provisions of section 3(2)(a) of the Act which reads as follows:

> "Any decision made and any notice or communication signed or issued by any such officer or person may be withdrawn or amended by the Commissioner or by the officer or person concerned (with effect from the date of making such decision or signing or issuing such notice or communication or the date of withdrawal or amendment thereof) and shall, until it has been so withdrawn, be deemed, except for the purposes of this subsection, to have been made, signed or issued by the Commissioner."

[66] Nevertheless, as a precautionary measure, Mr Vorster applied for a provisional amendment (which was granted without opposition) of prayer 5 of the notice of motion to accommodate the review and setting aside of the demand notices "FA17" and "FA18". In view of the findings I have made and the conclusions I have arrived at, I see no need for prayer 5 to be granted in its provisionally amended form. Prayer 5 (which will assume another number in the order which I intend to make) is a declarator to the effect that the amounts demanded are not owing by the applicant to the respondent.

[67] It remains for me to deal with a rather complicated argument, involving the multi-digit tariff subheadings, presented by Mr Puckrin. If I understood the argument correctly, it amounts to a submission that a video monitor cannot be a

reception apparatus for television. Where both these categories are accommodated in separate five-digit subheadings, the one cannot be the same as the other. Rebate item 460.16 only refers to video monitors and, therefore, cannot accommodate television sets.

[68] In the context of this particular case, I have difficulty with this argument. In Plasma 1, Pool emphatically states that "included under television receivers are video monitors and video projectors". At the end of Plasma 1 Pool holds that "TH 8528.21.20 applies to the goods at issue. They are admissible under rebate item 460.16 in so far as they comply with all the other requirements of this rebate item." I have mentioned that the other requirements were met. It is common cause that TH 8528.21.20 relates to video monitors. It is common cause that the "goods at issue" are the imported goods. What Pool determined, was done in his capacity as a duly authorised officer of the respondent. According to Pool, it became the official "SARS tariff policy". Even if this was wrong, given Mr Puckrin's clinical argument, the determination still stands until corrected. It was "corrected" in a manner which flew in the face of PAJA. The "correction" falls to be set aside for that reason. This means that Plasma 1, flawed or not, will be revived. If it is to be "corrected" again, such "correction" should take place in terms of the requirements of PAJA.

[69] A final submission by Mr Puckrin, if I understood it correctly, was to the effect that if Plasma 1 were to be endorsed, it would mean that all television sets could

now be imported with impunity as admissible under rebate item 460.16. Mr Vorster, correctly in my view, countered this argument by referring me to the provisions of section 47(9)(a)(iii) of the Act which reads as follows:

> "(iii) Any determination made under this subsection shall operate-
>
> (aa) only in respect of the goods mentioned therein and the person in whose name it is issued; and ..."

From this it appears that Plasma 1 is concerned only with the applicant and its imported goods as clearly described in the determination.

[70] For all these reasons I have come to the conclusion that the application must succeed.

The order

[71] I make the following order:

1. The period of 180 days referred to in section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 is extended until 21 September 2007 for purposes of the relief set out in paragraph 2 below.
2. The tariff determination/decision captured on the respondent's system on 27 July 2006 and conveyed to the applicant on 4 0ctober 2006, and contained in annexure "FA1" to the founding affidavit, is hereby reviewed and set aside.

3. It is declared that the amounts demanded by the respondent from the applicant in annexures "FA17" and "FA18" to the founding affidavit, being respectively R8 924 191,69 (together with interest thereon) and R6 591 987,90 (together with interest thereon), are not owing by the applicant to the respondent.

4. The respondent is ordered to pay the costs of this application which will include the costs of senior counsel.

W R C PRINSLOO
JUDGE OF THE HIGH COURT

44029-2007

HEARD ON: 5 SEPTEMBER 2008
FOR THE APPLICANT: ADV J P VORSTER SC
INSTRUCTED BY: BUITENDAG'S INCORPORATED
FOR THE RESPONDENT: ADV C E PUCKRIN SC ASSISTED BY ADV T KHATRI
INSTRUCTED BY: STATE ATTORNEY