THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 54/2015

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN

REVENUE SERVICE **APPELLANT**

and

COLTRADE INTERNATIONAL CC **RESPONDENT**

Neutral Citation: *CSARS v Coltrade International* (54/2015) [2016] ZASCA 53 (1 April 2016)

Coram: Navsa ADP, Leach, Tshiqi and Zondi JJA and Kathree-Setiloane AJA

Heard: 04 March 2016

Delivered: 01 April 2016

Summary: Customs duty levied under Customs and Excise Act 91 of 1964 – principles to be applied in interpreting the Schedule to the Act ─ correct tariff to be applied in respect of coconut milk, coconut cream and coconut powder.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Prinsloo J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Leach JA (Navsa ADP, Tshiqi and Zondi JJA concurring)

[1] Section 47(1) of the Customs and Excise Act 91 of 1964 provides for duties, in accordance with the provisions of Schedule 1 to the Act (the Schedule), to be paid for the benefit of the National Revenue Fund on goods imported into this country. Goods generally dealt with in international trade are systematically grouped into sections, chapters and headings in the Schedule. Different rates of duty are imposed in accordance with tariffs contained therein. The goods in respect of which duties are levied are categorised under different tariff headings or sub-headings (for convenience, when referring to a particular tariff heading or subheading I intend to adopt the abbreviation 'TH' as was used by the parties).

[2] In the appeal the question is under which tariff subheading do the coconut milk, coconut cream and coconut powder (the products) imported by Coltrade International CC, the respondent, properly fall? In an appeal to it under s 47(9)(e) of the Act against a determination made by the appellant, the Commissioner of the South African Revenue Service (SARS), the Gauteng

Division of the High Court, Pretoria upheld the respondent's contention that TH2008.19 was the applicable tariff heading. The appeal to this court against that decision is with the leave of the court a quo.

[3] Historically, SARS has indeed treated the products imported by the respondent as falling within TH2008.19. As far back as March 2005, it issued the respondent with a so-called 'half-slip determination' to the effect that TH2008.19 was applicable to canned coconut milk with a 10-11% fat content. On the strength of this, for some seven years the respondent had its imports of coconut milk (of varying fat contents and not solely that of 10-11%), coconut cream and coconut powder, duly cleared by SARS officials under TH2008.19. Then, in 2012, SARS officials in East London decided that canned coconut milk (with a 10-11% fat content) fell within tariff item TH 2106.90.90 rather than TH2008.19.

[4] Pursuant to this, the respondent made representations to SARS contending that the appropriate subheading had been determined as TH2008.19 by the 2005 half-slip determination. Before us it accepted, however, that a determination may be varied or amended and that the half-slip determination is not binding upon SARS. In any event, on 8 May 2012, the Commissioner accepted that the East London officials were correct and made a tariff determination that canned coconut milk with a fat content of 10-11% fell within TH 2106.90.90. This was followed by a letter of demand from SARS dated 19 October 2012 in which reference was also made to bills of entry relating to canned coconut milk (14-15% fat and 19-20% fat), canned coconut cream and coconut powder. The parties accept that this letter should be construed as a further tariff determination in regard to those products. As mentioned earlier, the respondent proceeded to appeal under s 47(9)(e) of the Act to the court a quo, which held

that TH2008.19 was in fact the correct item of the Schedule to apply. The correctness of this decision is the subject of this appeal.

[5] Two matters should immediately be recorded. First, the parties are agreed that if this court finds that the products do not fall within TH 2008.19, the residual item is TH2106.90.90 and its provisions will then apply. In that event, the appeal must succeed. Second, in SARS's answering affidavit the Commissioner stated that due to the half-slip determination of 2005 and the history thereafter, it had been decided to treat the products as if a determination in respect of all of them under item TH2008.19 had been issued in 2005 and that the tariff determination would be considered to have been correct for the interim period. Consequently, even if this appeal succeeds, SARS will regard the tariff determination that the products fall within TH2106.90.90 as only being effective from 9 February 2012 in respect of canned coconut milk with 10-11% fat content, and from 19 October 2012 (the date of the letter of demand) in respect of the remaining items.

[6] The crisp issue for decision is thus whether all the products fall within item TH2008.19 of the Schedule. In considering this issue it must be remembered, as was set out by Nicholas AJA in *International Business Machines*[1] (a passage since regularly applied by this court in cases such as *The Heritage Collection*[2] and *The Baking Tin*[3]), that:

'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,

[1] *International Business Machines SA (Pty) Ltd v Commissioner for Customs & Excise* [1985] ZASCA 87; 1985 (4) SA 852 (A) at 863G-H.
[2] *The Heritage Collection (Pty) Ltd v Commissioner, South African Revenue Service* 2002 (6) SA 15 (SCA) para 13.
[3] *Commissioner, South African Revenue Service v The Baking Tin (Pty) Ltd* [2007] ZASCA 100; 2007 (6) SA 545 (SCA) para 5.

consideration of the nature and characteristics of those goods; and third, the selection of the heading which is most appropriate to such goods.'

Also to be taken into account are the 'general rules' for the Schedule's interpretation set out in Part A thereof, the first of which provides:

'Classification of goods in this Schedule shall be governed by the following principles:

1. The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes . . . .'

[7] Furthermore, s 47(8)(a) of the Act prescribes that the interpretation of any tariff heading or tariff sub-heading in Part 1 of Schedule 1,[4] the general rules for the interpretation of Schedule 1,[5] and every section note and chapter note in Part 1 of Schedule 1,[6] 'shall be subject to the International Convention on the Harmonised Commodity Description and Coding System done in Brussels on 14 June 1983 and to the Explanatory Notes to the Harmonised System issued by the Customs Co-operation Council, Brussels (now known as the World Customs Organisation) from time to time . . . .'. These explanatory notes do not, however, constitute 'peremptory injunctions'[7] as they 'are not worded with the linguistic precision usually characteristic of statutory precepts; on the contrary they consist mainly of discursive comment and illustrations'.[8] Accordingly, they are designed for guidance to explain or supplement headings 'and not to override or contradict them'.[9]

[8] Finally, it must also be regarded as well-established that the decisive criterion regarding the classification of goods for customs purposes is the objective characteristics and properties of the goods concerned. Bearing that in

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[4] Section 47(8)(a)(i).
[5] Section 47(8)(a)(iii).
[6] Section 47(8)(a)(iv).
[7] Per Lewis JA in *The Baking Tin* para 6.
[8] Per Trollip JA in *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd* 1970 (2) SA 660 (A) at 676B-D; a passage since regularly adopted by this court.
[9] Cf Ibid.

mind, I turn to consider the characteristics and properties of the products at the centre of the debate and their method of production.

[9] The evidence establishes that coconut milk is produced in the following manner. The matured coconut is de-husked, and the coconut juice drained off, leaving the white meat of the coconut. Known as 'endosperm,' this is then comminuted, a process in which the endosperm is shredded into minute particles. A machinated crushing of the comminuted endosperm, with the inedible fibres being separated and strained out, leaves the endosperm in liquid form but retaining all the nutritive and organoleptic characteristics of the original coconut meat. In other words, it retains the essential characteristics of coconut meat; it has the same aroma, flavour and taste.

[10] From that stage a number of different products may be produced by the application of different procedures. First, the water naturally present in the liquid endosperm may be driven off to obtain an edible endosperm solid, known in the trade as 'coconut cream concentrate', which has approximately the same amount of fat, protein, carbohydrates and minerals present in the original endosperm. A second possibility is to add water and minute amounts of emulsifiers and stabilisers, so as to obtain a stable liquid endosperm emulsion known as 'coconut cream' which must contain a minimum of 20% soluble fat solids and at least 4,5% of insoluble non-fat solids. A third possible procedure is to add more than 10% water, and less than 0,5% of emulsifiers and stabilisers, to obtain a somewhat diluted stable liquid endosperm emulsion known as 'coconut milk'. Both the milk and cream are homogenised and canned.

[11] It is clear from this that the nature of the product obtained either by driving off or adding water to the liquid emulsion obtained after the crushing

stage, does not materially affect the nature and characteristics of the original endosperm. As was stated by the quality manager of the Thai Coconut Company Limited, which manufactures the imported products, Ms Lawan Poomphruk, the addition of the stabilisers, emulsifiers and preservatives to the liquid endosperm 'does not serve to alter the character of a product, but rather to enhance it'. This was not disputed.

[12] In the light of this, I turn to the tariff classification of the products. The competing tariff headings that are at the core of the present dispute are both to be found in Part 1, Section IV, of the Schedule. Section IV is headed 'Prepared Foodstuffs; Beverages, Spirits and Vinegar; Tobacco and Manufactured Tobacco Substitutes', a heading so wide ranging as to be of little help in resolving the present dispute.

[13] Chapter 20 of Section IV, which is headed 'Preparations of Vegetables, Fruit, Nuts or Other Parts of Plants', is more useful. Having regard thereto, it should be recorded that the Harmonized System regards a coconut as being a nut although, botanically, it is a fruit. But be that as it may, the method by which coconut cream and coconut milk are produced, as already described, is clearly a 'preparation' of nuts which would fall within the ordinary meaning of the words used in the chapter heading.

[14] Importantly, TH20.08, which falls within Chapter 20, reads as follows:

'Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included:

A variety of fruits and nuts are then specified in various subheadings under TH20.08. These include 'Nuts, groundnuts and other seeds, whether or not mixed together' (TH 2008.1), 'Ground nuts' (TH2008.11) in which there are

three further subheadings relating to 'peanut butter', 'ground-nuts roasted' and 'other'. The following item is TH2008.19 (which the respondent alleges applies to its products). It refers to 'Other including mixtures', while pineapples, citrus fruit, pears, apricots, cherries, peaches (including nectarines) and strawberries are thereafter categorised under various other subheadings of TH20.08.

[15] The explanatory note to TH20.08 is of considerable importance. First, it provides:

'This heading covers fruit, nuts and other edible parts of plants, whether whole, in pieces or crushed, including mixtures thereof, prepared or preserved otherwise and by any of the processes specified in other Chapters or in the preceding headings of this Chapter.'

Second, it goes on to state that other substances 'may be added to the products of this heading *provided that they do not alter the essential character of fruit, nuts or other edible parts of plants*'. (My emphasis.)

[16] The contention of SARS is that, in order for the products to fall within TH20.08 the fruit or nuts used have, first to be 'whole, in pieces or crushed' (as set out in both the general explanatory note to Chapter 20 and the explanatory note to item 20.08) and, second, to have the organoleptic characteristics of the base product ie in this case, coconut. In its answering affidavit, SARS stated that the 'Commissioner is satisfied that the products in issue comply with the second requirement' but that the coconuts used had been 'processed to the extent that they are (stabilised and preserved) emulsions' and could no longer be regarded as being coconuts 'whole, in pieces or crushed' as specified in the explanatory notes.

[17] Of course, by reason of the processes that I have described, by the time coconuts are reduced to coconut milk or coconut cream they cannot be regarded as still being whole. The issue then becomes whether it can be said that they are

'in pieces' or 'crushed'. As Lord Wright pointed out in *Forster v Llanelly Steel,*[10] there is a distinction to be drawn between 'breaking' (into pieces) and 'crushing' and that:

'Both words describe the disintegration of the particular object. The difference is in the degree to which the disintegration is carried. Wherever there are differences of degree, there must be cases where the one word becomes more applicable than the other, just as in the old problem of how many things constitute a heap.'

[18] I am prepared to accept for purposes of this judgment that, after being processed into liquid endosperm, it can no longer be said that the coconuts are still 'in pieces.' The issue then becomes whether it can be said that they have been processed beyond having been 'crushed'. In considering this question, it must be remembered that the Act is of general application, and it and the explanatory rules are accordingly to be interpreted by applying the grammatical and ordinary sense of the words used unless the context or the subject clearly shows otherwise. In applying itself to this task, a court is entitled to have recourse to dictionaries in order to take judicial notice of the meaning of a word.[11]

[19] As set out above, the liquid endosperm is prepared largely by crushing the coconut meat or endosperm. Counsel for the appellant, however, fell back on arguing that as it was obtained not only by crushing the coconut endosperm but by then straining out the non-edible the fibres, the liquid endosperm could not be regarded as being a 'crushed' form of coconut as it was in the form of an emulsion.

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[10] *Forster v Llanelly Steel Co (1907) Ltd* [1941] 1 All ER 1 (HL) at 6-7.
[11] *National Screenprint (Pty) Ltd v Minister of Finance* 1978 (3) SA 501 (C) at 507A-H and the cases there cited.

[20] I disagree. *The Shorter Oxford English Dictionary* (6 ed) (2007) gives various meanings of the verb 'crush' including: to 'break down into small pieces; reduce to powder, pulp, etc, by pressure' and to 'press or squeeze forcibly (*against, into, out of, through,* etc); force out or by pressing or squeezing'. As a graphic illustration it gives the following quotation from R Bradbury: 'Wine was being crushed from under the grape-blooded feet of dancing vintners' daughters.'

[21] Furthermore, the *Collins Dictionary of the English Language* (2010) gives one of the meanings of the verb 'crush' to be 'to extract (liquid) by pressing' and the meaning of the noun to be 'a drink made by crushed fruit.'[12] Just as wine is crushed out of grapes, it seems to me that to press liquid out of the meat of a coconut is consistent with the commonly understood concept of crushing.

[22] Consequently, the process by which the liquid endosperm is produced clearly falls within the generally accepted meaning of the white coconut meat being crushed. This is so even if the inedible fibres are removed in the process ─ just as grape skins are removed after grapes are crushed in the process of the manufacture of wine. However, as already pointed out, their removal does not alter the essential character 'of fruit, nuts or other edible plants' as specified in the explanatory note to TH20.08. Nor does the addition of water and minute amounts of emulsifiers and stabiliser to the liquid endosperm so as to obtain either coconut cream or coconut milk, depending upon how much water is added (which is also permissible under the explanatory note to TH20.08[13]), alter the essential characteristics of the coconut.

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[12] Essentially the same definition is to be found in the *Shorter Oxford English Dictionary*.
[13] As already mentioned in para 15.

[23] To summarise then: a coconut is regarded as a nut under the Harmonised System; coconut milk and coconut cream are preparations of a nut consistent with the heading of Chapter 20; equally they have a meaning consistent with 'nuts . . . prepared or preserved' as required by TH20.08 itself and by what is envisaged in the explanatory note to that tariff item; they have also not lost their essential character of coconut as further specified in that explanatory note; coconuts – or more correctly coconut preparations of coconut milk and coconut cream – do not fall within any of the specific products particularised under the various sub-headings of TH20.08 and, therefore, conveniently fall under TH2008.19 ie 'Other, including mixtures'.

[24] Faced with this, it was suggested on behalf of SARS in argument, albeit somewhat tentatively, that TH20.08 does not cover liquid preparations or emulsions ─ and as coconut milk and cream are correctly described as being emulsions, they are excluded from its ambit. Such reticence is understandable. The original meaning of the word 'emulsion' was 'a milky liquid obtained by crushing almonds in water', albeit that definition has now been widened.[14] A milky liquid obtained by crushing another type of nut is therefore consistent with the ordinary grammatical meaning of a product envisaged by TH20.08. Furthermore, not only are emulsions not specifically excluded but the explanatory notes to TH20.08 contain examples of what may be typified as liquid preparations: they include fruits which have been crushed containing added water, fruit, including fruit-peel and seeds, preserved in water, syrup or alcohol; and fruit peel put up in syrup. As emulsions are not specifically excluded, and are indeed consistent with TH20.08, SARS's argument in this regard has no merit.

[14] *Shorter Oxford English Dictionary*.

[25] In my view, then, the respondent's products fall squarely within the compass of TH20.08 and the court a quo was correct in concluding that to be the case. Counsel for the appellant, however, argued that even if coconut milk and coconut cream are items envisaged by TH20.08, the same could not be said for coconut powder, the third of the products which form part of the dispute.

[26] Coconut powder consists of the solids which remain after water is removed from liquid coconut endosperm. It, too, retains the essential character of the coconut and there is no reason to distinguish between it, on one hand, and coconut milk and coconut cream, on the other. But of equal importance is the fact that SARS, in its answering affidavit, placed on record that the Commissioner 'accepts that for classification purposes the milk, cream and powder are essentially the same and can therefore be treated the same'. That being so, the issue was common cause and it does not redound to SARS's credit to now attempt to allege that coconut powder should not be treated the same as coconut milk and coconut cream for purposes of these proceedings.

[27] For these reasons there is no merit in the appeal, which must be dismissed. There is no reason for costs not to follow the event.

[28] The appeal is dismissed, with costs.

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L E Leach
Judge of Appeal

Appearances:

For the Appellant	J A Meyer SC (with him MPD Chabedi) Instructed by: The State Attorney, Pretoria The State Attorney, Bloemfontein
For the Respondent:	J P Vorster SC Instructed by: Shepstone & Wylie c/o Clarinda Kügel Attorneys, Pretoria Webbers Attorneys, Bloemfontein