THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 715/2021

In the matter between:

PACIFIC SOLAR TECHNOLOGIES (PTY) LTD **APPELLANT**

and

THE COMMISSIONER OF THE SOUTH AFRICAN REVENUE SERVICE **RESPONDENT**

Neutral citation: *Pacific Solar Technologies (Pty) Ltd v The Commissioner of the South African Revenue Service* (Case no 715/2021) [2022] ZASCA 166 (29 November 2022)

Coram: PONNAN, GORVEN and MABINDLA-BOQWANA JJA and BASSON and MASIPA AJJA

Heard: 15 November 2022

Delivered: 29 November 2022

Summary: Customs and Excise Act 91 of 1964 – whether solar home system has the essential character of an energy source and power generation device or that of a lighting kit – product has a utility of its own – it constitutes a fully functioning lamp – classifiable under tariff heading 9405.40.21 of Part 1 of Schedule 1 to the Act.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Baloyi-Mere AJ, sitting as court of first instance):

1 The appeal is dismissed with costs, including those of two counsel.

2 The order of the high court is amended by the addition of the following:

> 'The product is determined to be classifiable under tariff heading 9405.40.21 of Part 1 of Schedule 1 to the Customs and Excise Act 91 of 1964.'

JUDGMENT

Ponnan JA (Gorven and Mabindla-Boqwana JJA and Basson and Masipa AJJA concurring)

[1] This is an appeal against an order made under s 47(9)*(e)* of the Customs and Excise Act 91 of 1964 (the Act) by Baloyi-Mere AJ in the Gauteng Division of the High Court, Pretoria (the high court).

[2] The amount of customs duty payable upon importation depends on the tariff heading (TH) or sub-heading in Part 1 of Schedule 1 to the Act, under which the product is to be classified. The appellant, Pacific Solar Technologies (Pty) Ltd (Pacific Solar), imports five different types of what are described as solar home

systems (the product), which was entered under TH 8501.31. On 29 March 2018, the respondent, the Commissioner of the South African Revenue Service (the Commissioner), made tariff determinations in respect of two of the models imported by Pacific Solar, namely the PVES 20W and PVES 100W models. The Commissioner determined that both (being the only two relevant for the purposes of this appeal) were classifiable under TH 9405.40.90.

[3] Preliminarily, three observations need to be made. First, the Commissioner explained that the initial classification under TH 9405.40.90 was made in error and that the correct classification was rather TH 9405.40.21. Nothing turns on that, as the matter proceeded and was argued on the latter basis before the high court. Second, although Pacific Solar had specifically sought an order that '[t]he determinations made by the Commissioner that [the product] imported by [Pacific Solar] be classified under TH 9405.40 be set aside and be substituted with a determination that the imported goods be classified under TH 8501.31', the high court merely dismissed the application with costs including those of two counsel. In so doing, the court appears to have lost from sight that as the application before it was a hearing *de novo*, it ought in that regard to have made a formal determination and order. Before us, it was accepted that when regard is had to the judgment of the high court as a whole, the absence of a formal determination was clearly due to an oversight on the part of the learned judge; we were accordingly asked to rectify the shortcoming by adding the requisite order. Third, as the only competing headings were respectively '8501' and '9405', the reference by the high court to heading '9404' (instead of '9405') was one clearly in error.

[4] It is unnecessary for the purposes of this judgment to discuss once again the general principles of tariff classification. Those were recently restated in *Samsung Electronics SA (Pty) Ltd v The Commissioner for the South African Revenue Service* [2022] ZASCA 126.

[5] The two competing tariff headings in this case are 8501.31 (as contended by Pacific Solar) and 9405.40.21 (as contended by the Commissioner). They respectively provide:

'8501 – electric motors and generators (excluding generating sets)
8501.31 – Of an output not exceeding 750W.'

'9405 – Lamps and lighting fittings including searchlights and spotlights and part thereof, not elsewhere specified or included; illuminated signs, illuminated name-plates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included.
9405.40 – Other electric lamps and lighting fittings.
9405.40.21 – Other light fittings, containing light emitting diodes (LED) as a source of illumination.'

[6] The Section Notes and Explanatory Notes to Section XVI of the Harmonized Commodity Description and Coding System dated 14 June 1983 provide:

'3. Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.
4. Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the

headings in Chapter 84 or Chapter 85, then the whole falls to be classified in the heading appropriate to that function.'

[7] Pacific Solar contends that 'Other electric lamps and lighting fittings' in the tariff sub-heading 9405.40, refers to the source of illumination, for example, the globe or LED. In order to address this argument, it is necessary that regard also be had to the relevant explanatory note to tariff heading 94.05 and subheading 9405.40. It provides:

'Lamps and light fittings of this group can be constituted of any material (excluding those materials described in Note 1 to Chapter 71) and use any source of light (candles, oil, petrol, paraffin (or kerosene), gas, acetylene, electricity, etc.). Electrical lamps and lighting fittings of this heading may be equipped with lamp-holders, switches, flex and plugs, transformers, etc., or, as in the case of fluorescent strip fixtures, a starter or a ballast.'

[8] The explanation that 'lamps and lighting fittings . . . can . . . use any source of light' and 'may be equipped' with any type of components alluded to, are destructive of Pacific Solar's contention. TH 9405.40.21 gives further effect to the provisions in the heading, as explained and supported by the explanatory note. It describes the lamps classifiable therein with reference to both the lamp/light fitting and the light source. The words 'containing light emitting diodes (LED) as a source of illumination' make it clear that the product to be classified is the 'light fittings'.

[9] As presented on importation, the product, which bears the description 'Solar Lighting Kit', comprised the following three main components: (a) a solar panel; (b) a power bank (battery and controller); and (c) LEDs (including the cabling). Although there are some issues on which the experts do not agree, which relate in the main to finer technical aspects and not the fundamental features of the product,

it is not in dispute between them that, as presented upon importation, the kits are fully functional lamps. It is also not in dispute that the product is similar to that which formed the subject of the dispute in *Ellies Electronics (Pty) Ltd v The South African Revenue Service*.[1]

[10] In that regard, Pacific Solar's expert, Professor Fourie, stated:

'[54] I have compared the Ellies Product with the Solar Home System. The Solar Home System has been discussed in detail above.

[55] The Ellies Products are very similar to the Solar Home System. The only clear difference is the power ratings or output. The Solar Home System has a much higher power rating, allowing a wider range of electronics to be powered either alone or simultaneously than the Ellies Products.

[56] I have physically verified that the Solar Home System can power electronics in parallel with the LED lamps, or even when no LED lamps are present. From what I can gather from documentation, the Ellies products can do the same.

[57] Apart from the difference in power rating or output, the Solar Home System and Ellies Product are very similar. I cannot verify the exact DC connectors on the Ellies Products, but it looks probable that the Ellies lamp connectors use the very same DC connectors as the Solar Home System. In that case, lamps are completely interchangeable between the Ellies and Solar Home System, which would nullify any claim that the lamps are dependent on their specific solar power units. Even if the DC connector sizes differ, these are all industry standard.

[58] As for the lamps: the Ellies Products and the Solar Home System products all use the same standard E27 screw connector, so that the lamps can be directly interchanged between the Ellies Products and the Solar Home System and they would work with any of the devices. The lamps were thus clearly not designed to be used specifically with the products with which they are sold, but are added as <u>standard accessories</u> to the solar power generators for both the Ellies Product and the Solar Home System.'

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[1] *Ellies Electronics (Pty) Ltd v The South African Revenue Service* [2019] ZAGPPHC 61.

[11] In the *Ellies Electronics* matter, Van der Westhuizen J observed:

'The point of dispute is a narrow one. The issue is whether the product is merely a generator, or, a source of illumination as described in Tariff Heading 9405.40.21, as contended for by the respondent.

In considering this dispute, what has to be determined is whether the product can be described having an essential part, or whether the product has no essential part but is made up of different components, all having no essential characteristics.'[2]

[12] The learned judge held:

'The product as presented, and as described in the product manual or data sheet supplied therewith, is in my view clearly aimed at supplying an alternative light source. It is irrelevant for what the end user may use the product.

Further in my view, had the product as presented not contained the lights, the approach adopted by the applicant and as contended for on its behalf, may have been persuasive. However, the inclusion of the lights, as part of the product, cannot be ignored . . . The inclusion of the lights have a purpose. That purpose is clearly defined by the combination of the three main components in the package and as defined in the product manual or data sheet. The primary design and use of the product is a solar panel light kit.

The primary design and use of the product being a solar power panel light kit, the product as presented cannot fall under Tariff Heading 85.01 "– *Electric motors and generators (excluding generating sets*)" of Part 1 of Schedule No 1 to the Customs and Excise Act.

The more appropriate Tariff Heading, in my view, is that of "9405.40.21" of Schedule 1, "*Lamps and lighting fittings, including searchlights and spotlights and parts thereof not elsewhere specified or included: Other electric lamps and lighting fittings: Other [light fittings], containing light emitting diodes (LED) as source of illumination*.".'[3]

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[2] Ibid paras 17 &18.
[3] Ibid paras 21-24.

[13] This accords with what was said by this Court (per Heher JA) in *Commissioner for the South African Revenue Services v LG Electronics SA (Pty) Ltd*.[4] In that matter, the respondent, LG Electronics, imported plasma display screens from Korea. It also imported tuners (also described as interface boards) from the same source. When the two were appropriately combined, they constituted a television set. A tuner is the means by which television signals are received and converted to an optical image on the screen. Absent a tuner, the screen lacked the essential character of a complete television set. The screens, which were per se functional video monitors, were sold and used as such. Although the overwhelming use by retailers and the public of the two items was in combination as a television set, the respondent did not itself assemble the screens and tuners into television sets, but sold them separately. This Court accepted that the modus operandi of the respondent was what it purports to be, namely the importation of two separate items, each having its own commercial utility.

[14] On that score, Heher JA reasoned:

'While it is clear that each determination must be made according to the salient facts attaching to the goods in question (and, in particular, its objective characteristics), and while in one case an engine may properly be regarded as the essence of the goods, in another a frame or chassis may be sufficient to satisfy that test. In *Autoware (Pty) Ltd v Secretary for Customs and Excise*, Colman J was required to consider whether a vehicle was a panel van or an incomplete station wagon on importation. The learned judge found that the relative simplicity and low cost of modification was not a decisive criterion, because the enquiry does not turn on what the product was going to be or

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[4] *Commissioner for the South African Revenue Services v LG Electronics SA (Pty) Ltd* [2010] ZASCA 79; 2012 (5) SA 439 (SCA).

what it will be adapted to be. Rather, the court must consider what the product was at the time of importation. Colman J held that that issue –

"must be decided on the basis of the presence or absence, in the unmodified vehicles, of the essential features or components of a station wagon . . . What I mean by an essential feature of a station wagon is not a feature which is important, for one reason or another, or even one which is essential for the proper functioning of a station wagon. I mean a feature which is essential in that it embodies the essence of a station wagon, and differentiates such a vehicle from others which are not station wagons."

I respectfully endorse that approach.

At the time of entry the screens were, as the appellant concedes, functional video monitors. They possessed an existence and utility of their own which did not include or require the incorporation of a device capable of receiving high frequency radio waves and converting the signal into optical images. But without such a device the use of the screens as 'reception apparatus for television' was totally excluded. That the screen was designed to accept such a device or could be easily modified to accept it, is, as, Colman J pointed out, of no consequence if the essential nature does not exist at the time of importation. Nor does the 'unnecessary' addition of the 'sophisticated' features which are embodied in the respondent's screens, make up for the absence of the means of receiving and converting signals albeit that it strongly indicates an intention on the part of the importer that the product is to offer an alternative use to the ultimate purchaser. It is the *primary* design and use which carries most persuasion.'[5]

[15] The corollary, so it seems to me, must be that if the screen and tuner had been packaged and presented, as here, in combination as a composite machine, the product, upon importation, would have been classifiable as a television set. The product in this matter, as presented at the time of entry, constituted a fully functioning lamp. That is common cause. Accordingly, by application of the

[5] Ibid paras 15 and 16.

principle in the *LG Electronics* matter, the product falls to be classifiable under TH 9405.40.21. Pacific Solar attempts to elide the fact that, as presented, the kits were fully functional lamps and, as such, 'possessed an existence and utility of their own'. And, seeks to wish away the presence of one of the main components of the product, namely the LEDs and cabling connecting them to the power bank. It, of course, has to do so to establish a proper factual foundation, upon which to rest its case.

[16] In the result:

1 The appeal is dismissed with costs, including those of two counsel.

2 The order of the high court is amended by the addition of the following:

'The product is determined to be classifiable under tariff heading 9405.40.21 of Part 1 of Schedule 1 to the Customs and Excise Act 91 of 1964.'

V M PONNAN

JUDGE OF APPEAL

APPEARANCES

For appellant:	A P Joubert SC and D Gintner
Instructed by:	Harris Billings Attorneys, Johannesburg Webbers, Bloemfontein
For respondent:	J A Meyer SC and W N Mothibe
Instructed by:	Klagsbrun Edelstein Bosman & Du Plessis Attorneys, Pretoria Symington De Kok Attorneys, Bloemfontein.