THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1063/2023

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE **APPELLANT**

and

DIAGEO SA (PTY) LTD **RESPONDENT**

Neutral Citation: *Commissioner for the South African Revenue Service v Diageo SA (Pty) Ltd* (1063/2023) [2024] ZASCA 158 (15 November 2024)

Coram: MOCUMIE, SCHIPPERS and SMITH JJA and COPPIN and MANTAME AJJA

Heard: 04 September 2024

Delivered: 15 November 2024

Summary: Customs and Excise Act 91 of 1964 – Interpretation – classification of beverages under tariff headings – Tariff Heading 2208.470.22 (and corresponding Tariff Item 104.23.21) - liqueur with wine spirit base to which non-alcoholic ingredients are added – meaning of 'non-alcoholic ingredient' in Additional Note 4 to Chapter 2 of Schedule 1 to the Act –

Additional Note 4 (including 4(*b*)) to Chapter 22 of Schedule 1 Part 1 of the Act – whether an alcohol by volume content of less than 0.5% to be construed as 'non-alcoholic' – applicability of other statutes, South African Revenue Service (SARS) Policy and the principle of *de minimis non-curat lex* in giving such meaning.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Van der Schyff, Munzhelele and Millar JJ, sitting as court of appeal):

1 The special appeal is upheld with costs.

2 The order of the full court is set aside and is replaced with the following order:

'The appeal is dismissed with costs.'

JUDGMENT

Coppin AJA (Mocumie, Schippers and Smith JJA and Mantame AJA concurring):

[1] This appeal concerns a dispute about the correct classification of a liqueur product for purposes of excise duty payable under the Customs and Excise Act 91 of 1964 (the Act).

[2] The classification of the product by the appellant, the Commissioner for the South African Revenue Service (the Commissioner), was taken on appeal by the respondent, Diageo SA (Pty) Ltd (Diageo) to the Gauteng Division of the High Court, Pretoria (the high court) in terms of section 47(9)*(e)* of the Act. On 18 March 2021, the high court dismissed Diageo's appeal and upheld the Commissioner's classification of the product. That decision then was taken on appeal by Diageo to the full court of the Gauteng Division of the High Court, Pretoria (the full court). On 5 July 2023, the full court reversed the decision of the high court. It set aside the Commissioner's determination and effectively found in favour of a classification contended for by Diageo. Special leave to appeal to this Court against that order was granted to the Commissioner on petition.

[3] Diageo is a public company incorporated in South Africa. It is a wholly owned subsidiary of a British multinational alcoholic beverage company, Diageo Plc. Diageo manufactures a range of liqueurs which are also marketed as 'Cape Velvet' products. This matter concerns the classification of only one of those liqueurs, namely, Cape Velvet Cream Original.

[4] The Commissioner is tasked with the implementation of the Act and is empowered in terms of s 47(9)*(a)* of the Act to determine the classification of all imported and manufactured products, including alcoholic beverages, such as liqueurs, for the purpose of levying excise duties.

[5] In terms of s 47(1) of the Act, duties are payable in respect of all excisable goods in accordance with the provisions of Schedule 1 to the Act. Part 1 of Schedule 1 to the Act contains the Headings and Subheadings which describe the goods. This part of the Schedule is based on the Harmonized System for the classification of goods. Part 2 of the Schedule to the Act also contains Item Headings, which basically mirrors the Tariff Headings in Part 1, and they serve to identify the excisable goods.

[6] The legal sources for determining an appropriate classification are to be found in the Schedule and in Parts 1 and 2 of the Act. Those sources, insofar as they are relevant for the purposes of this matter, were described by this Court in *Distell Ltd and Another v Commissioner of South African Revenue Service (Distell)* as follows:

'The legal sources applicable to tariff classification are-

(a) Schedule 1 to the Act, Part 1 of which deals with custom duties, and Part 2 with excise duties. Part 1 contains the wording of the tariff headings, section notes and chapter notes. The tariff headings in Part 1 are used in Part 2 for purposes of imposing excise duty. Schedule 1 also contains, in section A of the General Notes, the General Rules for the interpretation of the Harmonized system. . .

(b) The Explanatory notes to the Harmonized system (sometimes called 'Brussels Notes') issued from time to time by the World Customs Organization. In terms of s 47(8)*(a)* of the Act, the interpretation of any tariff heading or sub-heading in Part 1 of

Schedule 1, the general rules for the interpretation of Schedule 1, and every section note and chapter note in that Part, is 'subject to' the Explanatory Notes.'[1]
Another source is the case law.[2]

[7] In terms of General Rule 1 of the General Rules for the Interpretation of Schedule 1 to the Act: 'The titles of Section, 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 and, provided such Headings or Notes do not otherwise require according to' the other provisions of the other General Rules. There are five other General Rules. Rule 6 provides as follows:
'For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading Notes and, mutatis mutandis, to the above Rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this Rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.'
Thus, the relevant Headings, Section and Chapter Notes are not only the first but also the paramount consideration in determining which classification should apply in a particular case. The explanatory notes 'merely explain or perhaps supplement the Headings and section and chapter notes and do not override or contradict those Headings.'[3]

[8] It is now well established that the classification of products in terms of the Act, for purposes of the payment of excise duties consists of three stages. In *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise*,[4] they are described as follows:
'…[F]irst, 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

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[1] *Distell Ltd and Another v Commissioner of South African Revenue Service (*416/09) [2010] ZASCA 103; [2011] 1 All SA 225 (SCA) (13 September 2010) (*Distell*) para 22.
[2] *Distell* para 22.
[3] *Secretary for Customs and Excise v Thomas Barlow and Sons Ltd* 1970 (2) SA 660 (A) at 675H-676F and *Distell* (above) para 22.
[4] *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise* 1985 (4) SA 852 (A) at 863 G-H.

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

[9] In *Distell* it was stated that '[t]here is no reason to regard the order of the first two stages as immutable'. The reason given there, with reference to the classification of the goods under consideration there (namely, wine coolers), was that it was convenient '…to consider first, the nature and characteristics of the wine coolers, as without such an understanding the importance of the words used in the Headings may be lost or undervalued'.[5] However, in *Commissioner: SARS v Toneleria Nacional RSA (Pty) Ltd* (*Toneleria*), this Court cautioned against the danger of conflating the first and second stages of the inquiry in the process of classification. In that case, which involved the classification of wooden barrels, it was stated as follows:

'Maintaining a clear distinction between the first and second stages of the determination process was vitally important in this case, because "other coopers" products' constitutes a category of material items of a specific type, in the same way that other items in the tariff heading, such as casks, barrels, vats and tubs, are material items capable of definition and description as a class of objects. . .

A failure to undertake the analysis in the proper stages leads, as it did in this case, to the court analysing the nature, purpose and function of the goods in issue, without having first established what kind of goods were referred to in the tariff heading . . .

Interpreting the tariff heading and understanding to what it refers may require that some facts about the object or goods described in the tariff heading be established by evidence . . .'[6]

[10] On 18 April 2016, the Commissioner determined that four of Diageo's Cape Velvet products, including Cape Velvet Cream Original, had to be classified under Tariff Heading 2208.470.22 (and corresponding Tariff Item 104.23.21), contending essentially, that they were spiritous beverages with a wine spirit base, to which alcoholic ingredients have been added. Regarding Cape Velvet Cream Original – the Commissioner determined that the product

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[5] *Distell* fn 1 above para 24.

[6] *Commissioner for the South African Revenue Service v Toneleria Nacional RSA (Pty) Ltd* [2021] ZASCA 65; [2021] 3 All SA 299 (SCA); 2021 (5) SA 68 (SCA); 83 SATC 42 (*Toneleria*) paras 10-12.

is a spiritous beverage containing wine spirits (ie as a base) to which other 'alcoholic ingredients' have been added as contemplated in Additional Note 4(b) to Chapter 22 of Schedule 1 Part 1 to the Act. The alcoholic ingredient is the vanilla that is added to and mixed separately with other ingredients to create the flavouring, which is then added to the wine spirit base to create Cape Velvet Cream Original. The vanilla on its own has an alcohol content by volume (ABV) of 0.6%. It was not disputed that after all its ingredients, including the vanilla, were mixed, the flavouring itself has a lower ABV of 0.002%.

[11] Additional Note 4 (including 4(*b*)) to Chapter 22 of Schedule 1 Part 1 of the Act provides as follows:

'4. Tariff subheadings 2208.70.21, 2208.70.91, 2208.90.21 and 2208.90.91, shall only apply to liqueurs, cordials and other spirituous beverages containing the following:

(a) (i) distilled spirits;

(ii) the final product of fermentation of fruit stripped of its character to the extent that it is not classifiable within tariff headings 22.04, 22.05 or 22.06 and of which the volume exceeds the volume of the distilled spirits; and

(iii) other non-alcoholic ingredients; or

(b) wine spirits to which other non-alcoholic ingredients have been added.'

[12] Diageo took issue with the Commissioner's classification of its Cape Velvet Cream Original liqueur, although it seemingly accepted the classifications of its other Cape Velvet Cream liqueurs. It contended essentially that the Commissioner incorrectly classified the Cape Velvet Cream Original product. It should have been classified under Tariff Heading 2208.70.21, and Tariff Item Heading 104.23.21, because, so it contended, the product has a wine spirit base with 'non-alcoholic ingredients added', as contemplated in Additional Note 4(*b*).

[13] While Diageo acknowledged that the vanilla used in the liqueur has an ABV of 0.6%, it argued that the actual flavouring, which includes the vanilla, and has a significantly lower ABV of 0.002%, is the ingredient added to the wine spirit base. Diageo relied on Note 3 to Chapter 22 of Schedule 1 to the Act which reads as follows: 'For the purposes of heading 22.02, the term 'non-

alcoholic beverages' means beverages of an alcoholic strength by volume not exceeding 0.5 per cent vol. Alcoholic beverages are classified in headings 22.03 to 22.06 or heading 22.08 as appropriate'. Diageo thus argued that any ABV not exceeding 0.5% was therefore 'non-alcoholic' and that the flavouring of its Cape Velvet Cream Original product, which has an ABV of 0.002%, was to be construed as 'non- alcoholic'. Diageo argued further that an ABV of 0.002% (or even of a 0.6%) was so minuscule that it could be ignored, inter alia, on the basis of the *de minimis non curat lex* principle (*de minimis* principle) and that the flavouring could thus be treated as a 'non-alcoholic' ingredient by virtue of its very low alcohol content.

[14] It is common cause that the Commissioner and Diageo are in agreement with the classification of the Cape Velvet Cream Original product only up to the 7th digit of the Tariff Subheading, ie up to 2208.70.2, but they do not agree on the 8th or last digit, and in particular whether the appropriate classification should be under Tariff Subheading 2208.70.22, or 2208.70.21.

[15] The detail of the relevant Headings and Subheadings in the Act is as follows. Tariff Item 104.23 with Sub-heading 22.08 applies to the following products: undenatured ethyl alcohol of an alcoholic strength by volume of less than 80% volume, spirits, liqueurs and other spirituous beverages. Tariff Item 104.23, with Tariff Subheading 2208.70. applies to liqueurs and cordials. And Tariff Item 104.23 with Tariff Subheading 2208.70.2 applies to all the products listed in this paragraph but which are in containers holding 2 litres or less. Tariff Item 104.23.21, with Tariff Subheading 2208.70.21, applies to all the products identified in this paragraph, but which have 'an alcoholic strength by volume exceeding 15% volume but not exceeding 23% volume. And, Tariff Item 104.23.22, with Subheading 2208.70.22, is stated to apply to 'other' products. The latter category is obviously broad.

[16] As pointed out above, Additional Note 4 to Chapter 22, Schedule 1, Part 1 makes it clear to which products the Subheadings, stated in that note, shall apply. The Subheading of relevance in this matter, is referred to in Additional Note 4 as '2208.70.21'. Diageo contends that this is the correct classification in

terms of the Act for Cape Velvet Cream Original. It specifically relies on Additional Note 4(b) and essentially contends that its product contains a wine spirit base to which other non-alcoholic ingredients have been added.

Litigation history

[17] In the appeal before this Court, the Commissioner's argument, essentially, is that the high court was correct and that the full court erred in its classification of the product. On the other hand, the argument for Diageo was the complete opposite. The parties' arguments before all the courts were basically consistent. A brief traversal of the findings of the respective courts is therefore necessary.

The high court

[18] Diageo's application to the high court which ultimately, was to set aside the Commissioner's classification of its Cape Velvet Cream Original product, and to replace it with the classification it contended for, was opposed by the Commissioner. The high court dismissed Diageo's application and upheld the Commissioner's classification.

The full court

[19] The full court held that the high court erred in the meaning it assigned to the terms 'non-alcoholic' and 'ingredient'. According to the full court, Diageo had correctly identified the issue not as one where meaning is to be attributed to two loose-standing words or phrases, but as one in which Additional Note 4(*b*) must be 'holistically interpreted taking into account its purpose within the broader Customs and Excise regulatory regime'. It is also in that context, according to the full court, that the application of the *de minimis* principle had to be considered.

[20] The full court held that although Additional Note 4(*b*) and the SARS policy are separate documents, the SARS policy indicates that SARS disregards negligible percentages of alcohol in determining the excise duty payable in respect of spirits and spiritous products, and that SARS 'intuitively applies the *de minimis* principle'. The full court stated that the *de minimis*

principle was applied in customs and excise duty matters in the United States of America (USA);[7] it held further that, locally, the principle was applied in s 65 of the Road Traffic Act.[8]

[21] The full court concluded finally that 'the law does not take account of an ABV which is so minute as not to be appreciable to exclude an ingredient from the ambit of 'non-alcoholic ingredient'. The full court then proceeded to uphold Diageo's appeal and set aside the Commissioner's determination.

Discussion

[22] Even though the full court accepted that the issue of the correct classification of the Cape Velvet Cream Original product of Diageo, ultimately turned on the interpretation of Additional Note 4(*b*) (in its context), it appears that in its exercise of giving meaning to that note, the full court did not give adequate attention to its actual wording. Having conflated the first and second stages of classification, the full court decided what outcome (in its view) was reasonable, sensible and businesslike, and in that process, which was described as purposive, employed as aides, not only the annotation in Note 3 of Chapter 22, the provisions in other statutes, such as the Road Traffic Act, but also the *de minimis* principle as has been applied in the US courts and in our courts in other contexts.

[23] It bears mentioning that the wording of a provision is vital in the process of its interpretation, because 'interpretation is a process of attributing meaning to the words used', in their proper context. The words of a provision are the starting point of any interpretation, be it purposive or otherwise.[9] Therefore, the interpretation of a provision must illustrate an engagement, inter alia, with its actual wording.

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[7] With reference to *Westergaard v United States* 19 C.C.P.A. 299 (1932), *Alcan Aluminium Corporation v United States* 165 F 3D 898 (Fed. CIR. 1999) and *Vanity Watch Co. v United States* 34 C.C.P.A. 155 (1947).
[8] National Road Traffic Act 93 of 1996.
[9] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) *(Endumeni)* para 34.

[24] The position concerning the importance of words in an interpretation, that is consistent with the Constitution, was put aptly by the Constitutional Court in *SA Transport and Allied Workers' Union (SATAWU) and others v Moloto N O and Another*, as follows:

'. . . the provisions of the Act must be interpreted purposively so as to give effect to the Constitution, the objects of the Act itself and the purpose of the provisions in issue. But, this approach does not necessarily equate to an expansive construction of the provisions of the Act. This is so because the purpose of the Act may well require a restrictive interpretation of the particular provisions so that the exercise of a protected right is not unduly limited. Therefore, due regard must be had to the express language used in the provisions under consideration. . .'[10]

[25] In *Minister of Police and Another v Fidelity Security Services (Pty) Limited*,[11] the Constitutional Court confirmed and restated the approach to interpretation explained in, inter alia, *Endumeni* as follows:

'The interpretation of the Act must be guided by the following principles:

(a) Words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity.

(b) This general principle is subject to three interrelated riders: a statute must be interpreted purposively; the relevant provision must be properly contextualised; and the statute must be construed consistently with the Constitution, meaning in such a way as to preserve its constitutional validity.

(c) Various propositions flow from this general principle and its riders. Among others, in the case of ambiguity, a meaning that frustrates the apparent purpose of the statute or leads to results which are not businesslike or sensible results should not be preferred where an interpretation which avoids these unfortunate consequences is reasonably possible. The qualification "reasonably possible" is a reminder that judges must guard against the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.

(d) If reasonably possible, a statute should be interpreted so as to avoid a lacuna (gap) in the legislative scheme.'

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[10] *South African Transport and Allied Workers Union (SATAWU) and Others v Moloto NO and Another* [2012] ZACC 19; 2012 (6) SA 249 (CC); 2012 (11) BCLR 1177 (CC); [2012] 12 BLLR 1193 (CC); (2012) 33 ILJ 2549 (CC) para 20.

[11] *Minister of Police and Others v Fidelity Security Services (Pty) Limited* [2022] ZACC 16; 2022 (2) SACR 519 (CC); 2023 (3) BCLR 270 (CC) (*Minister of* Police) para 34.

[26] To this should of course be added the further observation by this Court in *Capitec Bank*,[12] that even though a consideration of the text, context and purpose of a provision constitutes the unitary exercise of interpretation, the exercise should not be mechanical and that 'the relationship between the words used, the concepts expressed by the words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole constitutes the enterprise by recourse to which a coherent and salient interpretation is determined.'

[27] The approach of the high court, in giving the words in Additional Note 4, namely, 'ingredient', 'non-alcoholic' and 'alcoholic' their ordinary grammatical meaning, was proper, unless that would have resulted in an absurdity. The mere fact that in certain instances (such as in the case of those beverages contemplated in Note 3) where in ABV of less than 0.5% may be considered 'non- alcoholic', while in other instances an ABV of anything more than 0% will be considered 'alcoholic', under the same Act, is not an absurdity if one considers the text, the context and purpose of Additional Note 4.

[28] As correctly argued by the Commissioner, while the full court mentioned the applicable legal principles, it (unfortunately) did not apply them. It seemingly set out to purposively interpret Additional Note 4(*b*). But it concentrated solely on its conception of the note's secondary purpose, and background, instead of considering its text, the context and the primary purpose (which was to explain and clarify to which liqueurs certain Subheadings, specifically mentioned in that note, would be applicable) together.

[29] The two main categories of such liqueurs are those with a distilled spirit base and those with a wine spirit base. It was not disputed that Cape Velvet Cream Original, has a wine spirit base, and that the issue between the parties was narrow and limited to determining whether it was a liqueur with a wine spirit base to which 'other non-alcoholic ingredients have been added'. In seeking to

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[12] *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) para 25.

resolve that issue, one would necessarily first want to establish the meaning of the phrase ‘non-alcoholic ingredients’ both conjunctively and disjunctively, to conclude the first stage of the classification process.

[30] Since the terms, ‘alcoholic’, ‘non-alcoholic’ and ‘ingredient’ are not defined in the Act, or with reference to the Headings, Subheadings and Item Headings under consideration in this matter, it is necessary to determine their ordinary meaning in their immediate and wider context. Even though it was held in *Distell* that the first and second stages of the process were not immutable, this Court in that matter embarked on the second stage first because it was convenient to obtain an understanding of the product to appreciate the importance of the words used in the Headings applicable in that case. In *Toneleria* this Court warned against the failure to maintain a clear distinction between the first and second stages.

[31] The full court unfortunately conflated the stages. It expressly confirmed, for example, that because of its application of the *de minimis* principle, ie in the process of interpretation, ‘it is not necessary to consider the question of whether the vanilla extract. . . constitutes the ingredient that is added to the wine spirits’. That question was, in any event, not part of the first stage of the classification process, ie the interpretation of the Headings, Notes, etc, but was quintessentially an issue for the second or third stage.

[32] It is further apparent that the full court considered the nature and characteristics of Cape Velvet Cream Original, either before its interpretation, or as part of its interpretation process, and conflated the stages because it interpreted Additional Note 4(*b*) with reference to the contribution of the vanilla or the flavouring, to the total alcohol content of the final product. It found effectively because that contribution to the alcohol content of the final product was little or small, that the vanilla or flavouring as an ingredient added to the wine base, was ‘non-alcoholic’.

[33] The full court’s approach was also incorrect in that it relied on the annotation in Note 3, the provisions of s 65 of the Road Traffic Act and the *de*

minimis principle to give meaning to the word or phrase ‘non-alcoholic’ in Additional Note 4(*b*). There is no support in the Act or our law for such an approach.

[34] Chapter 22 Note 3 only applies to Tariff Heading 22.02., namely the category of non-alcoholic products that are beverages, not liqueurs. The note specifically provides: ‘For the purposes of heading 22.02, the term ‘non-alcoholic beverages’ means beverages of an alcoholic strength by volume not exceeding 0.5 per cent vol’. Cape Velvet Cream Original has an alcoholic strength way above that, and neither the vanilla, nor the flavouring of which it is a part, is a ‘beverage’ as contemplated there. Diageo does not market either the vanilla, on its own, or the flavouring as a beverage. The annotation in Note 3 was clearly deliberately added to extend the range of beverages to be classified under Tariff Heading 22.02, so as to include beverages with an alcohol strength not exceeding 0.5% by volume.

[35] If the legislature intended to extend the range of liqueurs classifiable under the Tariff Headings specified in Additional Note 4, so as to include, in particular, those liqueurs with a wine spirit base to which ingredients are added which have an alcoholic strength by volume not exceeding 0.5%, it would have added such an annotation to Additional Note 4, or expressly made the annotation in Note 3 also applicable to Additional Note 4. That is clearly not the case here.

[36] Diageo persisted to rely on section 65 of the Road Traffic Act for the interpretation of Additional Note 4(*b*). In brief, section 65 provides that no person may drive a vehicle while the concentration of alcohol in any specimen of blood taken from him or her exceeds 0.05 gram per 100 millilitres.

[37] Diageo submitted in the other courts and in this Court that if the word ‘non-alcoholic’ in Additional Note 4(*b*) is interpreted to mean ‘absolutely no alcohol’, or to that effect, it would lead to results that are inconsistent, insensible and in direct conflict with one of the purposes of tariff classification, namely, to ensure that the same kind of products are classified under the same Heading,

or Subheading; and that it would make it 'practically impossible' for the Commissioner to administer the Act in that instance. According to Diageo, all of that could be avoided if Additional Note 4(*b*) is treated as 'analogous' to section 65 of the Road Traffic Act.

[38] On the face of it, the analogy is inappropriate. The Act (including Additional Note 4(*b*)) and section 65 of the Road Traffic Act, deal with diverse topics and have totally different purposes. In any event, the fact that the person does not commit the offence contemplated in section 65 if the alcohol concentration in a specimen of blood taken from him or her is less than 0.05 gram per 100 millilitres, does not mean that there is absolutely no alcohol in his or her blood. It simply means that the legislature determined that having such a lower concentration would not constitute an offence. But crucially, that does not justify the interpretation of the word or phrase 'non-alcoholic' in any other statute, including the Act, as an alcohol concentration of less than 0.05% ABV, or anything to that effect.

[39] The interpretation of Additional Note 4(*b*) 'through the prism' of s 65 of the Road Traffic Act, or any other statute in this matter, is impermissible. Such an approach could lead to anomalous results and produce the exact opposite of what Diageo contends. In *Independent Institute of Education (Pty) Limited v Kwa-Zulu Natal Law Society and Others* (*Independent Institute*),[13] the Law Society sought to interpret a term in one legislative document 'through the prism' of a specific meaning from another legislative context. The Constitutional Court denounced the approach. It held:

'. . .This is impermissible in law, barring, for example, instances where the need to do so flows effortlessly from context or from the provisions of the statutes being used as guideline, or where, for example, the impugned provision cross-references a meaning of the same word or expression in another legislation. . .'

[40] Turning to this matter, there is nothing that flows from the text or context of either Additional Note 4 (including 4(*b*)), or s 65 of the Road Traffic Act which

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[13] *Independent Institute of Education (Pty) Limited v Kwazulu-Natal Law Society and Others* [2019] ZACC 47; 2020 (2) SA 325 (CC); (2020 (4) BCLR 495 (CC) para 26.

permits the exercise proposed by Diageo and which was apparently approved by the full court. Diageo also sought to rely, as a guideline for interpreting Additional Note 4(*b*), on the SARS policy which provides (insofar as is relevant for present purposes) as follows:

'2.11 Assessment of Excise Duty
2.11.1 Measure of dutiable quantity
(a) The dutiable quantity of an Excise duty on spirits/spirituous products is assessed on the total alcohol contained in the product, expressed in litres of absolute alcohol (LAA) rounded off to the second decimal point, contained in the total bulk volume of the product removed to the local SACU market for accounting purposes.
(b) For duty purposes:
(i) the bulk volume of spirits is rounded to the second decimal point; i.e. where the third decimal point is less than .005, it is rounded down to 0.00 and where the third decimal point is 0.005 or more it is rounded up to .01. . .'

[41] Diageo particularly relied on the 'rounding-off' of decimal figures and ultimately argued that it was common cause that excise duty is payable on the litres of absolute alcohol (LAA) in the bulk product rounded to the second decimal point; that the bulk product contains 0.48 kg vanilla; that the vanilla itself has an ABV content of 0.6% and therefore constitutes 0.00288 litres (or 2.88 ml) of absolute alcohol to the bulk product (ie 0.48 kg x 0.6% = 0.00288 litres); that this translates to about half of a teaspoon of alcohol being contributed to the alcohol found in every batch of Cream Velvet liqueur (ie just short of 1000 litres or '10 JoJo tanks'); and that ultimately, the amount of alcohol introduced by the vanilla into the liqueur, applying rounding-off, is 0.00%.

[42] As pointed out earlier, the full court merely found that the SARS policy shows that SARS 'intuitively applies the *de minimus* principle'. Diageo's argument is a perpetuation of the full court's erroneous interpretational approach, but even more so. The Commissioner and the high court were not called upon to interpret what an ABV of '0.05 %', or anything more, less or equating to that, means, but what the word 'non-alcoholic' means within the proper context of Note 4(*b*). To merely assign it a meaning of, say, 'anything less than 0.05%', because of the SARS policy, to which SARS is bound, is not

permissible. It is not SARS's intention but that of the legislature that is relevant. The fact that (a) the terms 'alcoholic' and 'non-alcoholic' are not defined in Chapter 22, or even in the Act; (b) that Note 3, which is not applicable to Additional Note 4, explicitly defines what the words 'non-alcoholic beverage', in respect of a different product means; and (c) the fact that Note 4 does not define the phrase 'non-alcoholic ingredients', or give any special meaning to it - leaves one with no doubt that the legislature intended the words 'non-alcoholic' to have its ordinary, grammatical meaning, namely, 'no alcohol'. Meanings such as 'anything less than 0.05%' are not ordinary meanings of the word 'non-alcoholic'.

[43] Notwithstanding the fact that courts in the United States of America, in rather dated cases this Court was referred to, have applied the *de minimis* principle to customs and excise cases, it does not mean that it should be applied in this country in the present context. It is common cause that there is no case in this country where the principle has been applied by the court in customs and excise tariff classifications, or as an aid or guide in the interpretation of statutes. This Court was not referred to such cases. As far as could be ascertained, the principle has never been used as an interpretational aid in this country even though it might have been used elsewhere in the world for that purpose. In this country, we have mainly encountered and applied it as an excusatory defence in criminal cases.[14]

[44] Even if it was or is a legitimate interpretational tool in other jurisdictions, in this country it may give rise to concerns and reservations about its unrestricted application, considering our constitutional principles, including the principle of separation of powers. The application of the principle is arguably a form of judicial law-making. In this country, the law-making function is pre-eminently that of the legislature. The principle of separation of powers requires all arms of government (including the judiciary, which includes the courts) to respect the domain of the other arms of government. The implications of applying the d*e minimis* principle as an interpretation tool in the way proposed

[14] *R v Dane* 1957 (2) SA 472 (N) and *S v Kgogong* 1980 (3) SA 600 (A).

by Diageo, considering our constitutional principles, has not been addressed in argument before us and this is most certainly not the appropriate case for making a decision in that regard.

[45] Besides the fact that it would be difficult to formulate a definition of a minimum that would be valid in all circumstances in this kind of matter, ie it would be difficult to determine when something becomes trifling. Because arguably the amount of alcohol is not the only factor that ought to be considered in that regard, because, while the amount of alcohol may seem trifling, the revenue emanating from the classification may not be. In any event, the application of the principle for the purpose sought by Diageo is not of any help and is irrelevant in this matter.

[46] Ultimately, Diageo is contending that the words 'non-alcoholic', in Additional Note 4(*b*) ought to be given a special meaning, ie other than its ordinary grammatical meaning, in circumstances where there is no legitimate basis for doing so. Since the Act (including the note) does not define 'non-alcoholic', either within its text or with reference to other statutes or policies, the word must be given its ordinary, grammatical meaning.[15] This is the most sensible meaning. As argued by the Commissioner, it not only gives practical effect to the general purpose of the Act and special effect to the harmonised system, but it results in certainty. It is easier for the Commissioner to administer the law in that instance. In determining the classification of a liqueur, the Commissioner merely has to establish what ingredients are being added to a wine spirit base and whether any of the ingredients added to the base contains alcohol. The ordinary meaning of the term also ensures that there would be uniformity in the classification of liqueurs under the appropriate Tariff Subheadings. And finally, it is reasonable in the circumstances, to suppose that if the legislature intended the words 'non-alcoholic' to mean anything other than 'no alcohol', such as, for example, 'an ABV of less than 0.5%', it could easily have stated that in Note 4, as it did in respect of Note 3.

[15] *Minister of Police* fn 13 above para 34.

[47] On the other hand, the interpretation of the full court, which is unduly strained, undermines the purposes of Additional Note 4(*b*) and the Harmonized System, in that it introduces uncertainty and an element of arbitrariness. Besides the erroneousness of the approach of the full court, it does not result in certainty and uniformity, in the determination whether a particular ingredient 'significantly contributes to alcohol content of the final product'.

[48] The wording of Additional Note 4, including 4(*b*) is plain and unambiguous and its purpose is to provide further clarity in respect of the appropriateness of certain Subheadings for certain products. In ordinary language, it means that the Tariff Headings specified in Additional Note 4 shall only be applicable to a liqueur consisting of a wine spirit base to which the other of its parts, components, or elements, have been added, which do not contain any alcohol.

The nature of the product

[49] As pointed out, the second stage of the inquiry concerns the nature of the product. Because of the way in which the matter was dealt with by the full court, aspects of the nature of the product have already been discussed above. The nature of the product is not an issue. Cape Velvet Cream Original is a liqueur. It contains undenatured ethyl alcohol of an alcoholic strength by volume of less than 80% vol. It is marketed in containers holding 2 litres or less; and it has an alcoholic strength of 16%, which falls within the parameters of '. . . an alcoholic strength by volume exceeding 15 percent vol., but not exceeding 23 per cent vol'.

[50] Further, the product has a wine spirit base (also referred to as 'A spirit' base), which is derived from the distillation of wine, ie it is made from grapes. Previously it had a 'C-spirit' base, that is, a base made from eg. cane spirits. To the wine spirit base, a flavouring is added which is made separately before being added to the wine base. The flavouring consists of ingredients such as vanilla, prune fruit oil, chocolate caramel, caramel, brown food colouring and yellow food colouring in specified quantities, and other ingredients. Of significance is the vanilla, which has an ABV of 0.6%. Zero-point-three percent

(0.3%) of vanilla is added to the flavouring. It is not disputed that once the ingredients of the flavouring are mixed, the flavouring has an ABV of approximately 0.002%. The flavouring itself contributes 0.00004% to the ABV of the final product, whereas the wine spirit base contributes 15.99999% to the ABV off the final product.

The appropriate headings

[51] There is a limited difference between the parties concerning the appropriate Tariff Heading (and Item Heading) under which the product must be classified. The final determination also depends on the interpretation of Additional Note 4(b). On a proper construction of that note, both the flavouring and the vanilla are components of the product and, therefore, are ingredients that are added to the wine base of the product. That is so even though the vanilla is technically a secondary component of the product and is a primary component of the flavouring. It is not disputed that the vanilla itself is alcoholic. But, in any event, the flavouring itself is also not free of alcohol and is alcoholic. Therefore, the classification contended for by Diageo is not appropriate, and the correct classification of the product is under Tariff Subheading 2208.70.22 (and Item Heading 104.23.22), as contended for by the Commissioner, and confirmed by the high court.

Conclusion

[52] Consequently, the appeal to this Court must succeed and the full court's order must be set aside and replaced with one dismissing Diageo's appeal to that court. There is no reason why costs should not follow the outcome and why the cost of senior counsel should not be allowed.

[53] In the result, the following order is made:

1 The special appeal is upheld with costs.

2 The order of the full court is set aside and is replaced with the following order:

‘The appeal is dismissed with costs.’

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ACTING JUDGE OF APPEAL

APPEARANCES

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