IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Reportable

Case No: 8540/2017

In the matter between:

ACTI-CHEM SA (PTY) LTD **Applicant**

and

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

JUDGMENT

GORVEN J

[1] The applicant contends that it is entitled to a rebate on goods imported by it. The position is governed by the Customs and Excise Act (the Act).[1] The rebate item in question is item 306.07 of Schedule 3 to the Act. This concerns '[p]repared waxes, not emulsified or containing solvents.' The industry under which it is listed is 'Polishes and Creams'

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[1] Customs and Excise Act 91 of 1964.

(the industry). A full rebate is allowed for such goods. The applicant is a rebate registrant in respect of this item. Claims by the applicant for rebates have been allowed over the past 30 years. Following an inspection of the applicant's books and documents in September 2013, the respondent (the Commissioner) issued a determination letter dated 25 February 2014. This asserted that the imported goods had been used 'otherwise than in accordance with the item under which entry was intended for.' Demand was made of the applicant to pay duty on the goods together with VAT, penalties and interest.

[2] That determination prompted the present application. It is brought in terms of s 47(9)*(e)* of the Act. In the Act, this is framed as a wide appeal which allows for a retrying of the issues.[2] On this basis the applicant asks for orders:

'1. Declaring that the respondent's determination dated 25 February 2014 . . . is set aside.

2. Declaring that rebate item 306.07 is applicable to the importation of the products in question, namely AC 540 and AC 673P.

3. The respondent is liable to pay the costs of the application on an attorney and client scale, including the costs occasioned by the employment of two counsel.'

In argument, the applicant did not persist in the punitive costs order or that for two counsel.

[3] Section 75(1)*(a)* provides that specified goods:

'…shall be admitted under rebate of any customs duties or excise duty applicable in respect of such goods at the time of entry for home consumption thereof, to the extent and for the purpose or use stated in the item of Schedule No. 3 in which they are specified .'

And s 75(2)*(a)* provides:

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[2] *Pahad Shipping CC v Commissioner, SARS* [2010] 2 All SA 246 (SCA) para 14.

‘A rebate of duty in respect of any goods described in Schedule No. 3 shall be allowed –

a) only in respect of goods entered for use in the production or manufacture of goods in the industry and for the purpose specified in the item of the said Schedule in which those goods are specified.’

This requires an interpretation of the relevant provisions. Section 47(8)*(a)* of the Act governs the approach to interpretation of provisions in the Act:

‘(*a*) The interpretation of—

. . .

(ii) (*bb*) any item specified in Schedule No. 2, 3, 4, 5 or 6;

. . .

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

[4] The relevant note[3] to Schedule 3 reads:

‘The imported goods . . . shall . . . be admitted for use in connection with the production or manufacture of goods in the industries specified . . .’.

The imported goods must accordingly be used ‘in connection with the production or manufacture of goods’ in the industry.

[5] The approach to interpretation of documents was summarised in *Natal Joint Municipal Pension Fund v Endumeni Municipality*:[4]

[3] Note 1.

[4] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18. Approved by the Constitutional Court in *Democratic Alliance v African National Congress & another* 2015 (2) SA 232 (CC) para 136.

'The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.' (Reference omitted)

To this must be added:

'There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in *(a)*.'[5] (References omitted)

So, the approach is to consider the meaning of the words used, in the context in which they appear, the purpose of the provision and the circumstances in which it came into being, the result of all of which must be consistent with the Constitution. These factors are all material and interlinking, and result in the interpretation to be given. Inevitably, the approach goes beyond a purely grammatical construction of words conducted, as it were, in a vacuum and without reference to the other factors.

[6] The following facts form common ground between the parties. The imported goods are AC 540, an Ethylene-Acrylic Acid Copolymer and AC 673P, an Oxidised Polyethylene Homopolymer (the imported goods). The products manufactured by the applicant using the imported goods are Quecolin ESP and Quecolin HW1 (Quecolin). Neither of these is a polish or cream. They can be used in the manufacture of polishes or creams. The applicant does itself not use them to do so. They can also be used to manufacture goods other than polishes or creams. Most, but not all, of the customers of the applicant to whom they are sold (the customers)

[5] *Cool Ideas 1186 CC v Hubbard & another* 2014 (4) SA 474 (CC); 2014 (8) BCLR 869; [2014] ZACC 16 para 28, after referring to *Endumeni*.

manufacture polishes or creams from the Quecolin. None of these customers is a rebate registrant for rebate item 306.07.

[7] As I understand it, the applicant relies on two submissions. First, it says that the manufacture of Quecolin, without regard to the use to which it is put, is sufficient to justify the rebate. Secondly, and in the event that this is not sufficient, because the predominant use of Quecolin is for the manufacture of polish or cream, the rebate is warranted. I shall deal with each in turn.

[8] The first argument of the applicant is that it satisfies the test by using the imported goods to manufacture Quecolin. For this proposition, the applicant relies on the definitions section of Schedule 1 to the Act which is made applicable by note 2 to Schedule 3. The relevant definitions are:

'"goods" means both materials and products'.

'"material" means any ingredient, raw material, component or part used in the manufacture of the product'.

'"product" means the product being manufactured, even if it is intended for later use in another manufacturing operation'.

As I understand it, the argument proceeds as follows. The imported goods are materials. They are used by the applicant as ingredients to manufacture Quecolin. Quecolin is thus a product as defined. It is one intended for later use in another manufacturing operation. Because 'goods' includes products, Quecolin falls within the definition of goods. It is a good manufactured from the imported goods. Because it is capable of being used to manufacture polishes and creams, the criterion is satisfied. Actual use for that purpose is not required.

[9] The Commissioner says that the use requirement is crucial. The note says that '[t]he imported goods . . . shall . . . be admitted for use in connection with the production or manufacture of goods in the [industry]'. It therefore cannot be said that the mere manufacture of Quecolin means that the imported goods have been used 'in connection with the production or manufacture of goods in the [industry]' solely because they are capable of such use. It is the final product which determines whether the imported goods have been so used. That final product must be a polish or a cream. Quecolin is neither.

[10] The applicant, in response to this submission, says that the requirement is that the imported goods are used 'for use in connection with' the manufacture of goods in the polishes and creams industry. The words 'in connection with' imply something other than actual use. In support of this submission, the applicant points to an extract from Part 1 of Schedule 3.

[11] The extract contains three industry headings. The first is the one in this matter, 'Polishes and Creams'. The second is 'Disinfectants, Insecticides, Fungicides, Rat Poisons, Herbicides, Anti-Sprouting Products, Plant-Growth Regulators and Similar Products, put up in Forms or Packings for Sale by Retail or as Preparations or Articles'. The third is 'Chemical Preparations'. The applicant points to items under the first heading which specify that the items listed are either 'for use as active ingredients in . . .' or 'for the manufacture of . . .'. It continues to say for which product they must be used as active ingredients or what must be manufactured from them. Similarly, under heading three, items are said to be 'for the manufacture of . . .'. The kind of product is then specified for each item. In contrast, the applicant says, the present item is simply listed

as 'Prepared waxes, not emulsified or containing solvents'. No specific use is mentioned. As a result, says the applicant, the imported goods need not be used to manufacture polishes or creams.

[12] The fallacy of this submission becomes clear on a perusal of the items listed under the other two headings. The headings are general while the specified uses are particular to a range of products falling under the heading. Thus, each of the imported goods listed under the first heading is required to be used variously as active ingredients in the manufacture of pesticides or for the manufacture of disinfectants or of fungicides. Examples under the third heading are that starch must be used to manufacture adhesives and rape seed oil to manufacture emulsifiers. The failure to specify under the heading 'Polishes and Creams' that the imported goods under discussion must be used for a particular product within that industry does not mean that they need not be used in the industry, only that any product which is a product or cream is acceptable.

[13] That there is such a general use requirement is made clear in s 75(2)*(a)* of the Act and in the explanatory note. As mentioned, the section requires them to be used:

'. . . in the production or manufacture of goods in the industry and for the purpose specified in the item of the said Schedule in which those goods are specified . . .'

while the note requires that they be used:

'. . . in connection with the production or manufacture of goods in the industries specified . . .'.

The industry is polishes and creams. This does not contain numerous categories such as the list in the second heading, nor is it necessary to specify which detailed product must be manufactured as is necessary under the extremely broad heading of chemical preparations.

[14] This then returns us to the issue as to whether the words 'in connection with' mean that the imported goods need not ultimately be used to manufacture polishes or creams. If this were so, no 'connection' would be established. The connection requires polishes or creams to ultimately be manufactured from the imported goods. In my view, the phrase 'in connection with' simply means that the initial importer need not itself manufacture polishes or creams from the imported goods. This can be done by a subsequent entity. However, the manufacture of polishes or creams from the imported goods is necessary before it can be said that they have been used 'in connection with the production or manufacture of goods in the [industry]'. Thus, unless Quecolin is used for that purpose, it cannot be said that there has been use of the imported goods 'in connection with . . . the [industry]'. The connection is not established if this does not take place.

[15] It should be mentioned that it is not the contention of the Commissioner that the applicant must itself manufacture polishes or creams. It may manufacture a product from the imported goods which is then used to do so. If Quecolin is used by others to do so, the applicant's use is one 'in connection with' the manufacture of polishes or creams. I accordingly find that the manufacture of Quecolin without more does not qualify the applicant for the relevant rebate. It must ultimately be used to manufacture polishes or creams in order to do so.

[16] This brings into focus the second argument of the applicant. It concedes that Quecolin is in fact used for other purposes. It says, however, that it is sufficient if the 'predominant use' of Quecolin is to manufacture polishes or creams. This argument hinges on whether predominant use or exclusive use for the prescribed purpose is required. On the other hand, the

Commissioner says that the Quecolin must exclusively be used for that purpose. In addition, this must be done by an entity which is itself a rebate registrant. In other words, there must be use of the imported goods to manufacture polishes or creams by a rebate registrant, whether or not this is the applicant. If Quecolin is not used for the manufacture of polishes or creams, the rebate does not apply to the applicant. Nor does it apply if the polishes or creams are manufactured from Quecolin by an entity which is not a rebate registrant.

[17] In support of its contention that predominant use is sufficient, the applicant calls in aid the matter of *Warren Marine (Pty) Ltd v Secretary for Customs and Excise*.[6] In that matter, a 100% rebate was given to engine fuel used in 'coasting ships'. The appellant claimed the rebate. Vessels used for pleasure were excluded. The Commissioner denied that the vessel of the applicant was a 'coasting ship' within the meaning of those words. In the court *a quo* and on appeal it was found as a fact that it was not. The test was whether the vessel was used as a 'ship which plies between the ports or along the coast of the same country'. The vessel was used on three kinds of trips, all from its base in Hout Bay. Of these, one was a return trip to Seal Island, one a Sunset Cruise to Cape Town Harbour and back and the third a Night Trip where no detail was given. Rabie ACJ assumed in favour of the appellant that the second of these gave rise to a use as a 'coasting ship' although expressing some doubt. He held, however, that the other two trips predominated. The vessel was thus used for pleasure and it could not be said that the 'predominant use to which it was put' was as a 'coasting ship'.[7] The rebate was disallowed.

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[6] *Warren Marine (Pty) Ltd v Secretary for Customs and Excise* 1982 (3) SA 828 (A).
[7] *Warren Marine* at 839D-G.

[18] In *Warren Marine*, the court based its approach on that taken in *Kommissaris van Doeane en Aksyns v Mincer Motors Bpk*.[8] Here the issue was the classification of the imported goods. Vehicles designed to convey goods were all manufactured and delivered with two front seats only. They were then fitted with a further seat in the goods area which, when folded flat, restored all available storage space in that area. A window was also installed in the rear. The Commissioner contended that this meant that the vehicles should be classified as passenger vehicles. The duty was claimed because a rebate had been allowed on the basis that the vehicles were goods vehicles. The court held that, although the vehicles could convey passengers, the purpose for which they were primarily built was to convey goods. The rebate was thus allowed. The present matter is distinguishable. It concerns the use to which the goods must be put rather than the classification of the imported goods themselves.

[19] The question, then, is whether the 'predominant use' of Quecolin in the polishes and creams industry is sufficient. In this regard, it would be interesting to know what the outcome of *Warren Marine* would have been if the vessel's predominant use had been as a 'coasting ship'. In other words, if the court had adopted that approach to qualify the ship for the rebate rather than to disqualify it. I have considerable difficulty with this notion applying to the present matter. In the first place, the wording of the present provision does not support this interpretation. If that were intended, the note would presumably read 'for predominant use' and not simply 'for use'. Secondly, the clear purpose of the rebate is to promote the polishes and creams industry. This seems to me to require that the imported goods are ultimately used to manufacture polishes or creams. If this were not so, the rebate would not serve its purpose.

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[8] *Kommissaris van Doeane en Aksyns v Mincer Motors Bpk* 1959 (1) SA 114 (A).

[20] In addition, the regulatory framework set up under the Act for this rebate item supports an exclusive use interpretation. The Rules promulgated under the Act seem to me to provide important contextual and purposive clues in this regard. Some material provisions are:

(a) Rule 75.01 requires registration of the premises where the goods imported under Schedule 3 will be used or stored by the rebate registrant, with a plan of the premises showing the exact location of the store.

(b) Rule 75.03 requires the books, documents, stocks and premises of every registrant under any item to be available for inspection.

(c) Rule 75.04 requires a registrant to 'carry out under the supervision of an officer . . . any manufacturing operation in which materials specified in and entered under any item referred to in rule 75.01 are being used.'

(d) Rule 75.06 does not allow a registrant to 'perform or permit or arrange to be performed any process or operation or any portion of the manufacture of any goods on any premises other than his registered premises.'

(e) Rule 75.11 provides that a 'registrant may transfer any goods entered under any item referred to in rule 75.01 to any other registrant who is registered under the same item or to the same or any other registrant who is registered under any other item in which the same goods are specified if the extent of the rebate under such items at the time of such transfer is the same, provided such goods were acquired as a result of an unconditional sale and are owned by the first-mentioned registrant at the time of such transfer and an application on form DA 62 for such transfer is submitted to and approved by the Controller prior to such transfer. If the extent of the rebate under such items is not the same the Controller may require

the application on form DA 62 to be accompanied by a statement of the circumstances in which the transferor desires to transfer the goods in question. If such application is granted any difference in duty payable as a result of such transfer shall be paid to the Controller by the transferor before such transfer.'

(f) Rule 75.13 provides that the transferor of goods referred to in rule 75.11 remains liable for the duty on such goods until they have been delivered to the transferee.

(g) Rule 75.14 requires every registrant to keep a stock record to show full particulars of all goods obtained under rebate as well as the use or disposal of such goods.

(h) Rule 75.15 permits the Commissioner to impose an obligation on rebate registrants to keep a production record containing all receipts at the factory ex rebate store with details of the nature and quantities of the materials used and of the finished articles manufactured therein.

[21] These Rules form a raft of regulatory measures designed to empower the Commissioner to establish whether the rebate has been correctly claimed. Since the applicant does not manufacture polishes and creams from Quecolin, this must ultimately be done by a subsequent entity for the rebate to apply. Without these powers, the Commissioner must perforce rely on the say so of the applicant or entities to which Quecolin is sold that this is the case. The Commissioner would not be able to verify this unless the entities which claim to do the manufacturing choose to co-operate. The Rules allow the Commissioner to use these provisions without having to rely on the co-operation of that entity. The Rules relating to the inspection of premises and processes enable the Commissioner to establish whether the entity is capable of using the products to manufacture polishes

or creams. Those concerning inspection of the stock records and books empower the Commissioner to ascertain whether the products manufactured from Quecolin are in fact polishes or creams. It may also well be that any transfer of Quecolin by the applicant is hit by rules 75.11 and 75.13. This last point was not specifically argued before me and I therefore do not make a finding to that effect.

[22] The language of the provisions, the context of granting the Commissioner the powers in question and the purpose of rebates being to promote the industry all coalesce to show that the ultimate, exclusive use of the imported goods must be for the manufacture of polishes or creams. Also that the polishes and creams must be manufactured by a rebate registrant. This interpretation is consistent with the Constitution. No argument to the contrary has been raised by the applicant. Since the applicant does not manufacture polishes and creams and the entities to which the applicant sells Quecolin are not rebate registrants, the rebate claimed by the applicant does not apply.

[23] In the result, the application is dismissed with costs, such costs shall include those consequent upon the employment of two counsel wherever this was done.

GORVEN J

DATE OF HEARING:	21 June 2019
DATE OF JUDGMENT:	15 August 2019
FOR THE APPLICANT:	JPV McNally SC instructed by Prinsloo Incorporated, locally represented by Colin Msizi Mnguni Attorneys.
FOR THE RESPONDENT:	J Peter SC (with him S Kazee) instructed by The State Attorney, locally represented by Cajee Setsubi Chetty Incorporated.