

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

24 March 2023

DATE

Senani

SIGNATURE

CASE NUMBER: A2/2021

In the matter between:

THE COMMISSIONER FOR THE SOUTH
AFRICA REVENUE SERVICE

APPELLANT

and

PEARLSTOCK (PTY) LTD

RESPONDENT

JUDGMENT

TLHAPI J**INTRODUCTION**

[1] This is an appeal to the full bench of this court against a determination by Collis J, in which she upheld the respondent's tariff appeal in terms of section 47(9)(e) of the Customs and Excise Act 91 of 1964 ("The Act"). The appellant's (Commissioner's) Internal Appeal Committee, had initially classified certain imported polymers of vinyl chloride panels ("PVC Panels") under Tariff Heading ("TH") 3916.20.90 (which attracted an 18% customs duty). The earlier determination by the Commissioner was replaced by the court *a quo* with a classification of the product as contended by the respondent under TH 3921.12 (which attracted a 10% customs duty).

[2] Section 47 (9)(a)(i) of the Act provides that the Commissioner may determine the tariff head (TH) heading and sub-headings under which imported goods are to be classified. Such determination is subject to an appeal to the high court before a single judge and such appeal constitutes a hearing *de novo*, with or without additional evidence¹. The appeal before Collis J was such a hearing *de novo*.

[3] The first issue in this appeal concerns the classification or the interpretation of the TH of the goods, that is, of the PVC panels, which were imported by the respondent and which could be used as ceiling or wall panels. The parties presented competing THs. The question was whether the PVC Panels were "*cellular*" in 'design and structure' as contended by the respondent and as upheld by the court *a quo*, thus falling under TH 3921.12, or, whether the PVC used to produce the panels, although appearing to be externally '*cellular in construction*', were not necessarily "*cellular*" as contended by the Commissioner, thus falling under TH 39.16. A sample of the product was made available to this court for viewing. Also to be determined was the admissibility of the evidence of Professor John which was relied upon by the Commissioner. The appeal is with leave of the court *a quo*.

¹ Tikly and Others v Johannes N.O and Others 1963 (2) SA 588 (T) at 590F to 591A

BACKGROUND

[4] The respondent's clearing agents Worldnet Logistics (Pty) Ltd had on importation of the PVC panels described them on the customs declaration form as "*Other Plates, Sheets, Film, Foil and Strip, of Plastics, Other: of polymer of vinyl chloride Product: PVC WALL PANEL*" under TH 3921.90.47, which attracted customs duty at the rate of 10%. On 5 May 2016 the Commissioner's officials at the port in East London stopped a consignment of the PVC Panels and on inspection determined that the respondent ought to have entered the panels under TH 3925.90 attracting customs duty at the rate of 20%.

[5] The clearing agent submitted a D51 application for determination by the Commissioner at its Head Office and the classification under TH 3925.90 by the officials in East London was confirmed. It turned out later to both the Commissioner and respondent that their description of the goods differed and that the 'TH' utilized was incorrect. Respondent as per photo attached, annexure 'FA2' contended that the PVC panels were of cellular construction or appearance, as seen from the vertical cardboard partitions joining the top and bottom walls of the product. The Commissioner on the other hand disagreed and contended that the description by the respondent ignored the specific technical 'definition of the word cellular when used in relation to PVC products' and that the imported goods did not fall under this definition. It was contended that it was the PVC plastic used to produce those goods which determined whether or not the goods were cellular. A thermal and microscopic analysis had to be conducted. The goods appeared to have been manufactured 'through extrusion and that they had rectangular shapes throughout the panel. In paragraph [72] of the founding affidavit the respondent stated"

"The PVC panels are manufactured by the process of extrusion, i.e. the composite material making up the product (principally PVC resin and calcium carbonate) are

shaped by forcing the mixture through a die at high temperature.....The finishes to both annexure FA16 and FA17 being identified as “white matt” and “grey stripe” respectively, are printed on the panels in a separate process after extrusion.”

[6] Although the Commissioner appeared to have conceded in answer that the product had an external cellular appearance, denied that the product was ‘cellular PVC’ in the technical sense. In the answering affidavit as at paragraph 2.7 the Commissioner places reliance on expert evidence as to the meaning of the term “cellular” as it is contended that “Cellular” ‘had a specific technical meaning in relation to PVC products. The respondent contended in reply that according to the scheme of the Act expert evidence was not admissible to prove the meaning of words used in the Act.

[7] Consequently the clearing agent launched a further internal administrative appeal in terms of section 77A of the Act. It was common course between the appeal committee and the respondent that the TH 39.25 was not applicable to the the goods concerned. The respondent did not abandon its contention that the correct ‘TH’ for the PVC panels were to be classified under 3921.12. The appeal committee disagreed and contended that the correct classification was ‘TH’ 3916.20.90 attracting a customs duty of 18%.

[8] The Commissioner filed a supporting affidavit accompanied by a report by Professor John (Prof John) of the Council for Scientific and Industrial Research (“CSIR”). After conducting tests and analysing the panels “a sample of vinyl chloride” she concluded that the panel does not conform to the common technique used for manufacturing cellular PVC and that the panels were not cellular as contended by the respondent² and therefore could not fall under TH 3921.12. The purpose

² “It has been stated in the founding affidavit that the PVC panels were manufactured by extrusion without the use of any chemical foaming agent/blowing agent. Based on the above tests, the panels cannot be termed as cellular. Thermal analysis did not show the presence of any blowing agent and microscopic analysis revealed the cross-section of the panel to be granular. To claim the panels as cellular, the panels needs to contain cells/cavities dispersed uniformly within the PVC matrix and not in the exterior structure of the panel. The

of the report was to give expert evidence, for establishing the meaning attributed to 'cellular' in the first stage of the interpretation process. The respondent on the other hand introduced evidence that explained the process of manufacture of the panels.³

[9] The competing tariff heads are the following:

Tariff Head	Article Description
39.16 -	Monofilament of which any cross section Dimension exceeds 1mm, Rods, Sticks and Profile Shapes, whether or not surface-worked but not otherwise worked, of Plastics
3916.10	Of polymers of ethylene
3916.20	Of polymers of vinyl chloride
3916.90	Of other plastics

This heading covers monofilament of which any cross-sectional dimension exceeds 1mm, rods, sticks and profile shapes. These are obtained in the length in a single operation (generally extrusion) and they have a constant or repetitive cross section, from one end to the other. Hollow profile shapes have a cross-section different from that of tubes, pipes and hoses of heading 39.17 (see Note 8 to this Chapter),

39.21	Other plates, Sheets, Film, Foil and Strip, of Plastics
	-Cellular
3921.11	Of polymers of styrene
3921.12	Of polymers of vinyl chloride

analysis certificate supplied by the importer should include the processing technique which specifies the foaming/blowing method/agent used

³Paragraph[72] of the founding affidavit "The PVC panels are manufactured by the process of extrusion, i.e the composite materials making up the product (principally PVC resin and calcium carbonate) are shaped into panels by forcing the mixture through a die at high temperature; [74] the PVC panels are thus manufactured under external influences by extruding as provided for in Note 1 to Chapter Note 39,"

3921.13	Of polyurethanes
3921.14	Of regenerated cellulose
3921.19	Of other plastics
3921.90	Other

This heading covers plates, sheets, film, foil and strip, of plastics, **other than** those of heading **39.18, 39.19 or 39.20** or of **Chapter 54**. It therefore covers only cellular products or those which have been reinforced, laminated, supported or similarly combined with other material. (For the classification of plates etc. combined with other materials, see the General Explanatory Note)

THE LAW

[10] Duty is paid to the Commissioner on all goods imported into the Republic of South Africa in terms of Schedule 1 to the Act.⁴ The interpretation of Schedule 1 is to conform to the classification of goods as determined by the International Harmonized Systems as provided in the Act⁵, that is, the General Rules of Interpretation applied to the headings, sub-headings, related codes, chapter and section notes. The section and chapter notes have legal application and the explanatory notes are only used to guide and supplement or compliment the meaning of the headings and sub-headings.

⁴ Section 47(1) and Schedule 1 to the Act provides that the titles of section, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification (as between headings) shall be determined according to the terms of the headings and any relative section or chapter notes and provided such headings and notes do not otherwise indicate according to (2) to(5) below (as mirrored in the General Rules for the Interpretation of the Harmonized Systems)

⁵ Section 47(8)(a) provides guidelines for the interpretation of:

- (i) "Any tariff heading or tariff subheading in Part 1 of Schedule 1;
- (ii)
- (iii)
- (iv) Every section note and chapter note in Part 1 Schedule 1;

Shall be subject to the International Convention on the Harmonized Commodity Description and Coding System done in Brusselsand to the Explanatory Notes to the Harmonized System issued by the Customs Cooperation Council.....: 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."

[11] In disputes the primary role of the court is to establish the meaning of the headings to the imported goods, as stated in *Secretary of Customs and Excise v Thomas Barlow & Sons Ltd*⁶, in a three-staged process according to the principles in *International Business Machines SA (Pty) Ltd v Commissioner of Customs and Excise*⁷ stated below:

- 1) Interpreting the meaning of the words contained in the relevant headings and notes;
- 2) Considering the nature and characteristics of the goods;
- 3) Determining which heading is most appropriate in encapsulating the technical properties and uses of the goods.

As indicated in the Barlow matter the explanatory notes guide, explain and supplement the meaning of the headings, section and chapter notes and do not 'contradict or override them'.

[12] Mr Meyer for the Commissioner conceded in argument that the principles of legal interpretation as expounded in *National Joint Municipal Pension Fund v Endumeni Municipality*⁸ had to be applied, even though he had not specifically

⁶Secretary for Customs and Excise v Thomas Barlow & Sons Ltd 1970 (2) 660 (A)676B-676F "the primary task in classifying particular goods is to ascertain the meaning of the relevant headings and section and chapter notes but in performing that task one should also use the Brussels Notes for guidance especially in difficult cases....they are merely intended to explain or perhaps supplement those headings and not to override or contradict them.....if an irreconcilable conflict between the two should arise...then possibly the meaning of the heading or notes should prevail" ;

⁷ International Business Machines SA (Pty) Ltd v Commissioner of Customs and Excise 1985(4)SA 852 (A) at 863G-H

⁸2012(4) SA 593(SCA) at [18] "Interpretation is the process of attributing meaning to the words used in a document,.....having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existences. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible.....results or undermines the

addressed these principles in both the main and supplementary heads of argument or explained how the principles had to be applied in interpreting the tariff heads. He contended that in interpreting the classification of the goods, the principles in Endumeni, together with those provided for in the nomenclature to the Harmonized Systems, as incorporated in legislation provided in Section 47(8)(a) had to be applied. Particularly relevant to this matter were 47(8)(a)(i) and 47(8) (a)(vi) and the general rules in the first Schedule to the Act. He emphasized the importance of first stage in the process of interpretation⁹ before progressing to the second and third stages.

[13] Mr Vorster for the respondent wished to emphasize that under the General Rules of Interpretation, the explanatory notes in Rule 1 provided that the titles were for ease of reference only and had no legal bearing and, that classification shall be determined according to the terms of ‘the heading, section or chapter notes, subject to the explanatory note. With regard to the principles in Endumeni, it was the interpretation of the ordinary language and syntax in the tariff heads together with the context which were of importance, without ignoring the relevance of the role played by the rules of the harmonized systems in our law. In the alternative the respondents relied on Rule 3(a) and 3(c)¹⁰, in particular the latter rule because as prescribed, the tariff heading 39.21 was the last in contention.

[14] Supplementary heads of argument were filed on behalf of the Commissioner in order to address the deficiency in discussions pertaining to the classification process of the TH 3921 in the main heads of argument, in that the main heads failed to deal with the context within which the word “cellular” had to be interpreted,

apparent purpose of the document.....Be alert to, and guard against, the temptation to substitute what you regard as reasonable or sensible or the words actually used for to do so is to cross the divide between interpretation and divination.....The inevitable point of departure is the language....itself, read in context and having regard to its purpose....and the background to the preparation and production of this document.”

⁹International Business Machines *supra* (first stage)

¹⁰ Rule 3 (a) the heading which provides the most specific description shall be referred to heading providing a more general description; 3(c) when goods cannot be classified by reference to 3(a) or 3 (b) they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

(paragraphs 3.4;3.5, and 5). The purpose was to address the recent judgment regarding interpretation in the first two stages of the classification process, especially the context within which the word 'cellular' was to be interpreted in TH 3921.1. He contended that it was imperative that firstly the meaning in the tariff headings be interpreted, followed by a determination as to the nature and characteristics of the product as dealt with in *Commissioner SARS v Toneleria Nacional RSA (Pty) Ltd*¹¹. Mr Meyer argued that the court *a quo* had misdirected itself as at paragraphs [44] to [47] of the judgment by commencing with the second stage of interpretation which concerned the nature and characteristics of the product and by neglecting to maintain a clear distinction between the first and the second stages of the classification.

[15] Mr Vorster on the other hand presented a *Distell* SCA judgment¹² which he said was in conflict with *Toneleria supra*, and which dealt with similar issues. He contended that the *Distell* judgment was not referred to in *Toneleria*, regarding the sequential order of interpretation process as formulated in *International Business Machines supra*. Furthermore, that the court *a quo*'s judgement preceded *Toneleria* and that it served no purpose to be critical of the manner in which the court *a quo* dealt with the classification process, by first considering the second stage, the nature and characteristics of the product. In *Distell* Heher J stated that 'there is no reason to regard the two stages as immutable'¹³ and he commenced the process by considering the second stage first. In my view the two matters are distinguishable. *Distell* dealt with the classification of "coolers" (whether coolers were fermented beverages or not /

¹¹ *Commissioner, South African Revenue Services v Toneleria Nacional RSA (Pty) Ltd* 2021(5)SA 68 (SCA) "[8] In accordance with the established taxonomy of classification the first step was to ascertain the meaning of tariff heading.....in this regard the judge said that it was 'the typical use of the goods in question that fell to be established by evidence of fact for the range of products that cooperers currently make.' Accordingly, so he held, whether or not a particular product is characteristically made by cooperers is a question of fact that is amenable to proof by evidence. [9] In adopting this approach the judge fell into the error of conflating the first and second enquiries in the process of classification.....In the process of classification determining the meaning of the tariff is the essential first stage. Only thereafter does one proceed to the second sate of considering the nature of the product in issue to determine in the third stage whether they fall within the class of product identified in the tariff heading."

¹² *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)

¹³ Paragraph [22]

whether water is a non-alcoholic beverage) and, *Toneleria* dealt with the classification of oak barrels used for storage in wine making.

[16] As I see it, there is no explanation in *Distell* on a reading of the preceding paragraphs, while relying on the principles in *International Business Machines*, why Heher J made the comment, except for the fact that in the *Distell* matter he found it convenient to deal with the second stage first.¹⁴ In my view this preference does not mean that he disavowed the importance of the well-established manner of dealing with the three staged process sequentially or that there were conflicting judgments. In a plethora of cases the three-stage process has been applied even in the most recent *Toneleria* at paragraph [4].

[17] In the judgement of the court *a quo*, when dealing with the interpretation of the meaning of the words, it is stated that the wording of chapter headings 39.16 and 39.21, paragraphs [42] and [43] 'do not provide guidance as to the meaning of the word 'cellular', or how 'cellular' is to be interpreted within the context of the sub-headings in TH 39.21. Furthermore, it is suggested that even the explanatory notes did not give guidance. Having regard to this statement, it does not seem to me that there was an interpretation by the court *a quo* of what 'cellular' meant within the process of the first stage, which in my view should have been dedicated to interpreting the tariff head and subheadings that go with it. Without giving an interpretation as required in the first stage on the meaning of "Cellular" by applying the principles of *Endumeni* together with the chapter notes and explanatory notes, the court, by observing the product made a definite finding on the nature and characteristics of the goods, which was a process to be embarked upon in the second stage of interpretation, which required that objective facts be placed before the court when classifying the product. The following was stated.

¹⁴ Paragraph [24] "In applying the three stages of tariff classification in this case it is convenient to consider first the nature and characteristics of the wine coolers, as without such an understanding the importance of the words in the headings may be lost or undervalued"

“[47] ...this court has had the benefit of observing an example of the ‘goods’ under discussion. Having regard to the objective characteristics of the example given to the court, it is a far stretch to contend that the example of the panel handed to the court is neither a sheet or plate of plastic. This is the point of departure for the court and it ought to have been the point of departure for the respondent’s officials on the date of importation when such tariff classification was made.”

[18] In my view this approach is similar to the one commented upon by Wallis J in *Tonelaria*, where he discouraged the conflation of the first and second stages in the process of interpretation.¹⁵ As correctly conceded by Mr Voster, this court was not prevented from applying the three-stage process sequentially as found in *International Business Machines supra*, as all the necessary information which was before the court *a quo* is in the record of appeal.

AN INTERPRETATION AND MEANING OF ‘CELLULAR’

[19] Before dealing with the interpretation of the tariff heads in annexure ‘A’, annexed to the respondent’s heads of argument, Mr Meyer’s exposition of the chapter notes in section V11, Chapter 39 of the Harmonized Systems (as adopted in section 48 (8) of the Act), with the explanatory notes under heading ‘General’ drew attention to the Chapter Notes 1, 6, 8, 9 and 10 which sought to find the meaning of the expressions ‘plates sheets, film and strip applicable in TH 39.20 and 39.21. As I see it, this was to establish whether the expression ‘plate’ could also be referred to as a ‘panel’, which was an expression used by the respondent to describe the manufactured product as PVC panels in the Declaration Form and founding affidavit, as shall be dealt with later.

[20] Mr Vorster emphasized the importance of distinguishing between the raw

¹⁵ Paragraphs [8] and [9] of *Tonelaria supra*

material or substances on the one hand from other articles or products manufactured from the raw material¹⁶. He contended that in this instance manufactured products included panels and that it was the classification of the finished product made of such raw material which had to be determined and to which 'cellular' was applicable.

[21] The pre-amble to the General Explanatory Note to chapter 39 provided that the chapter covers 'substances called polymers and semi-manufactures and articles thereof provided they are not excluded by Note 2 to the chapter.'

[22] It was common cause between the parties that:

- (i) Chapter 39 Note 1 refers to 'plastics' being the raw material in tariff heads 39.01 to 39.14 'which are capable of being formed under external influence... by moulding, casting, extruding, rolling or other process into shapes which are retained on the removal of the external influence. The Chapter was divided into two sub-chapters, sub-chapter 1 dealt with Plastics in their 'Primary Form' (raw material) and sub-chapter 11 related to 'Articles Thereof' (products manufactured from the different types of plastics). The tariff heads under contention, 39.16 and 39.21 fall under sub-chapter 11.
- (ii) that the material in tariff heads 39.01 to 39.14 represented 'Plastics in its raw form (Liquids and Pastes) as explained in the chapter notes and that nowhere in those tariff headings does the word 'cellular' in particular appear.
- (iii) the tariff headings 39.16 to 39.25 cover semi-manufactured or specified articles of plastics, as explained in the explanatory notes. Tariff head 39.16

¹⁶ *Sava Di Bella Bathroom Accessories and the Commissioner for the South Africa Revenue Services* (66155/2011) [2021]ZAGPPHC 5640 (29 September 2021)

referred to 'Monofilament of which any cross-sectional dimension exceeds 1mm rods, sticks and profile shapes, whether or not surface-worked but not otherwise worked of plastics'

- (iv) tariff heads 39.20 and 39.21 referred to 'Other Plates, Sheets, Film, Foil and Strip (other than those of Chapter 54)' as explained in the chapter notes, the tariff head 39.20 related to manufactured products of plastic non-cellular and not reinforced, laminated supported or similarly combined with other materials and,
- (v) tariff head 39.21 related to manufactured products without mention of 'cellular'. 'Cellular is provided for in a sub-heading titled '-Cellular' and under which appear further sub-headings and also another sub-heading 3921.90 titled as 'Other' and that 'Other' referred to non-cellular products.
- (vi) That the product in contention was manufactured from the raw material PVC (polymers of vinyl chloride)

[23] Mr Meyer contended that it was not clear, when dealing with the explanatory note referring to 'Cellular Plastics' under heading General¹⁷ where the note fitted in, unless it denoted that the expression needed to be used somewhere, that it was there for a purpose. He alluded to the note that dealt with 'Plastics and Textile Combinations' from the explanatory notes under (d) described as 'Plates, Sheets and Strip of Cellular Plastic combined with textile fabrics as defined in Note 1 to Chapter

¹⁷ Cellular plastics are plastics having many cells (either open, closed or both), dispersed throughout their mass, they include foam plastics, expanded plastics and microporous or microcellular plastics. They be either flexible or rigid.

Cellular plastics are produced by a variety of methods. These include incorporating a gas into plastics (e.g. by mechanical mixing, evaporation of a low boiling point solvent, degradation of a gas producing material), mixing plastics with a hollow micro-sphere (e.g. of glass or phenolic resin) sintering granules of plastic and mixing plastics with water or solvent-soluble material which are leached out of plastics leaving voids.

59), felt or nonwovens, where the textile is present merely for reinforcing purposes.’ He contended that between TH39.16 to TH39.25 the only place where ‘Cellular’ was mentioned was in the sub-heading to TH39.21. It made no sense therefore for the respondent to maintain that the explanation was not applicable to it because meaning had to be given to the nature of the finished product. On the contrary the Commissioner maintained that it was the nature of the plastic used to manufacture the finished product that had to be looked at. He contended that if that was not the case, that is, not applicable to the respondent then the explanatory note was nonsensical.

[24] Mr Vorster contended that reference to (d) in Chapter Note 1 under heading ‘Plastics and textile combinations’ only identified where ‘cellular plastics’ in their primary form could be found. ‘Plastics’ could be “Cellular” as appears in the explanatory note to tariff heading 39.03 where it pertained to plastics in their primary form. Although sub-heading 3903.11 referred to ‘expandable’, in the explanatory notes to tariff heading 39.03 the expression ‘expanded’ meant cellular with a low bulk-density meaning that it had gaps or cells dispersed throughout. Expanded appears as a synonym to ‘cellular’ and ‘unexpanded’ as a synonym to ‘non-cellular’. Therefore, the chapter note describing ‘cellular plastics’ was applicable also to both the raw material and the product. This in my view should give the clarity to what Mr Meyer was seeking when dealing with the heading “Cellular Plastics”.

[25] Sight should not be lost to the fact that in a preceding heading under ‘General Arrangement of the Chapter’ it is explained that Headings 39.16 to 39.25 cover semi-manufactures or specified articles of plastics and included in this group are the tariff headings contended for by the parties as they fall under sub-chapter 11 . The language and syntax of the tariff headings and subheadings read contextually with the section and explanatory notes can only mean that cellular plastics in this context refers to the product already manufactured, the finished product. (my underlining).

[26] The dictionary meaning of the word ‘cellular’ was referred to in the founding

affidavit, and in the judgment of the court *a quo*. The Commissioner did not place reliance on the dictionary meanings. However, Mr Meyer now contended that the Toneleria route was applicable¹⁸ where the dictionary meaning of the words in the tariff heads was considered and he chose to deal first with the tariff head 39.21 contended by the respondent followed by 39.16 as contended by the Commissioner.

TH 39.21 and sub-heading 3921.1 and TH 3916

[27] I now deal with the interpretation given by both Counsel to the above tariff heads and sub-heading. According to Mr Meyer the tariff head and the sub-heading had to be interpreted first, by having regard to the meaning of the words attributed in the TH39.21 as 'Other plates, Sheets, Film, Foil and strip, of plastic', which were words that did not require a special explanation and that dictionary meanings applied. The sub-heading 3921.1 had to have regard to the components in the tariff heading.

[28] In the declaration form, respondent while using the same description as the tariff heading after the colon, described the product as a PVC Wall Panel. It was contended by Mr Meyer that the court *a quo* had as at paragraphs [45] and [46] not mirrored the description of the product as appeared in the declaration 'FA1'. Furthermore, that there was no reference to the word 'panel' in the nomenclature of the harmonised system as at Chapter 39. Although the Commissioner did not initially rely on dictionary meanings, counsel has now conceded that they were applicable and based, on Toneleria he considered the following dictionary meanings to the description of the products in the tariff head:

1)The dictionary meaning of

-plate – was "*a sheet of metal or wood, glass or plastic,*" and that the word 'plate' did not relate to products which were not flat.¹⁹

¹⁸ Toneleria [12] by establishing first the meaning by use of dictionaries, encyclopaedia, reference books

¹⁹ www.vocabulary.com ; Kemtek Imaging Systems Ltd v Commissioner for Customs and Excise 13255/96 at 6, line 30-p7 line 11 'The dictionary meaning of the word plates is not a concept relating to material objects

-‘film’ was “ a thin sheet of (usually plastic and usually transparent) material used to

wrap of cover things”,²⁰

-‘ foil “ a very thin sheet of metal, used esp. for wrapping food,²¹ and “a very which sheet of metal”²²

In the main heads of argument a definition of ‘Cellular’ and another ‘Extrude’ is provided:

-Extrude –“ to force, press, or push out and “to shape a substance, such as metal or plastic) by forcing through a die”²³ , and

-Cellular, 2 Of pertaining to, characterised by, or consisting of biological cells; of a plant) lacking the distinct stem, leave, etc....2. of or pertaining to cell of a monastery, prison, etc... 3 of or having small compartments, cavities or division of areas; porous: (of fabric or garment) having an open texture..... Designating or pertaining to a mobile telephone system that uses a number of shorrange radio stations to cover the area it serves, the signal being automatically switched from one station to another as the user travels about”(my underlining)

[29] The crux of his argument in dealing with the first leg of interpretation was that that there was a difference between ‘plate’ and ‘panel’ and the fact that the product was referred to as a panel did not translate into a plate. The dictionary defined plate as a solid piece of plastic which was not a designed 3 dimensional configured product. In dealing with the second leg of interpretation, that is on the nature and characteristics

which are not flat” (my view is that here plate was being discussed in the context of photography that tariff heading 37.01 was being discussed and there is no explanation here that it also related to plates as discussed in chapter 39 TH39.20/39.21)

²⁰ www.vocabulary.com

²¹ www.cambridge.org

²² www.britannica.com

²³ Online Merriam -Webster dictionary at www.merriam-webster.com;
‘Cellular: The New Shorter Oxford English Dictionary

of the product he contended that the product (panel) was not flat, but was a 3 dimensional product consisting of two panels connected by ribs. No dictionary meaning of panel was considered by him, I suppose because it is not mentioned in Chapter 39.

[30] Mr Meyer developed his motivation for the admission of Prof Johns expert evidence from her analysis of tariff head 39.21 and the explanatory note. She maintained that plastic had microscopic internal bubbles not visible externally. Since the note covered only “cellular products or those which have been reinforced laminated, supported or similarly combined with other material, see General Explanatory Note”, the ordinary dictionary, encyclopaedia meaning of the word cellular was of general application and not helpful in determining where cellular plastics found relevance according to the version of the respondent. Under the general notes under the heading Plastics and ‘textile combinations’ products covered by the chapter included:

- (a) felt impregnated, coated with plastics;
- (b) textiles fabrics and non-wovens...embedded in plastics;
- (c) textile fabrics impregnated.....with plastics;
- (d) plates sheets and strip of cellular plastics combined with textile fabrics (as defined in Note 1 to Chapter 59.(my underlining)

[40] He contended that (a) –(c) above were not relevant, that ‘cellular plastics’ under these notes acquired a technical meaning and that ‘cellular’²⁴ had to be interpreted by Prof John’s explanation of its composition, if it had to find relevance within ‘plastics’ of a cellular nature. He contended that tariff head 39.16 was the only tariff head contended for by the Commissioner as the one referred to under (d); that cellular can only refer to the plastics and not the final product. Furthermore, the founding affidavit as at paragraphs [71] and [72] explains the method of manufacture by extrusion as complying with the Chapter Note 1 where the product was manufactured by forcing

²⁴ Founding Affidavit para 6.8

out the two plates with the ribs under once process.

[41] Mr Vorster contended that the principles in *Endumeni* required the meaning of the tariff heads to be established by first applying the ordinary rules of grammar and syntax and interpreting them in context. I understand him to mean a single process. In this instance he said, it was how the words were used or put together in the tariff heading that was important. He contended that it was how the words first 'of plastic' interpreted contextually having regard to the manufactured product, chapter and explanatory notes were interpreted, then followed by an interpretation of the significance of 'Cellular' in the subheading' and 'Other' in as far as it related to 'non-cellular' product, how these were used in relation to the manufactured product. He contended that all the tariff headings from tariff head 39.15 onwards related to articles which have been manufactured 'of plastics'. (my underling)

[42] An example was given of tariff head 39.20 which precedes 39.21 which is contended by the respondent. TH 39.20, referred first, to the articles manufactured of 'plastics' followed by the word 'non-cellular,' (Other plates, sheets, film, foil and strip, 'of plastics', non-cellular'). It was contended that in using the ordinary language and syntax, if the author wished to refer to non-cellular plastics the word non-cellular would have preceded the word plastics. The same would have applied with TH 39.21, if the author wished to refer to cellular plastics in the tariff head, the word cellular would have preceded plastics in the tariff heading (my underlining)

[43] In TH 39.21 the word 'cellular' is not mentioned but what is described are the products manufactured of plastics. The word 'cellular' appears in the sub-heading 3921.1 under which appears sub-headings 3921.11 -3921.19. Both counsel were in agreement that the word 'Other' below at 3921.90 after the sub-heading '-Cellular' referred to 'non-cellular'. (my underlining)

[44] Furthermore, Mr Vorster contended that if 'cellular' was used in the context of

the raw material then it referred to the raw material in its primary form (TH39.04 'polymers of vinyl chloride ...in primary form) which could be contrasted with products manufactured from PVC as appears in 39.20 and 39.21. Therefore, if 'cellular' was used in the context of the article, that is the product manufactured from the raw material then it referred to the nature and characteristics of the product. He further contended that the significance in the last sentence in the preamble to the explanatory note under heading Plastics and textile combinations, 'The following products are also covered by this Chapter' only identified that the products in (a) to (d) which were covered by Chapter 39 and in (d) that the words relating to plates, sheets and strip of 'cellular plastics' meant those raw materials 39.01-39.14 in Chapter Note 1. I agree with this submission.

Analysis

[45] I am of the view that of significance is the ordinary language and syntax interpreted contextually as used in the tariff heading, however, this should not disregard the meaning attributed to the individual products in the tariff heading. Having regard to the requirement that the goods must be described according to the relevant tariff head, as I see it, the real contention as argued by Mr Meyer is that words "PVC Wall Panel" (panel) used in the description in the declaration form, was not referred to or explained anywhere in the nomenclature in particular where 'cellular' products were referred to and that panel was not a plate. Mr Vorster objected to argument that the panels were not plates as this was not clearly raised in the answering papers. I deal with this later. (my underlining)

[46] True as contended by the Commissioner the fact that the product is described as a panel does not translate it into a plate, however, my view is that the words should not be isolated from the entire description of the product on the declaration form and in the founding papers, which allude to the product as falling under the tariff head contended for by the respondent (39.21- Other plates, sheets, film, foil of plastics of

polymer of vinyl chloride). If there was a difficulty in understanding the meaning of the tariff heads and cellular by resorting to the ordinary language and syntax contextually within the chapter and explanatory notes, then resort should be had to the dictionary and encyclopaedia and, where the words used are technical so as to obscure the ordinary language and syntax, then resort should be had to other sources and, expert evidence could be relied upon to explain the nature and characteristic of the product. In the founding papers and the judgment of the court *a quo* the dictionary meaning of 'cellular' was referred to²⁵.

[47] Mr Vorster contended that the tariff heads had to be interpreted first so as to establish the meaning of the words used and, that Mr Meyer had failed in his heads of argument and in his submissions to deal with the application of the *Endumeni* principles to the interpretation of the tariff headings. I am in agreement with this proposition, in that, although there was a concession that the principles in *Endumeni* were applicable, Mr Meyer in dealing with the tariff heads in contention preferred to go the *Toneleria* route by first establishing the meaning of the words from dictionaries and encyclopaedia and other sources without emphasising the application of the principles of interpretation.

[48] Mr Vorster contended that the word 'Cellular' did not have a specialized technical meaning as contended by the Commissioner, which justified reliance on the expert evidence of Prof John, and which contention was at variance with established and recognized authority as seen in *Crown Chickens (Pty) Ltd v Minister of Finance*²⁶ where it was held that the Customs and Excise Act was an "act of general application across an extremely wide spectrum of commodities, it is not the sort of legislation which has limited technical application which requires a special understanding of technical language usage." Mr Vorster contended that expert

²⁵ Paragraph 57 of the founding affidavit: The New Shorter Oxford Dictionary defines cellular (of the variety of possible meanings the respondents contended for as" ...E19 3 Of or having small compartment, cavities or divisions of area: porous (of a fabric or garment) having an open texture

²⁶ 1996 (4) SA 389(E) at 394F-375F ; *National Screen Print (Pty) Ltd v Minister of Finance* 1978 (3) SA 501 (C) at 506 D-H

evidence was allowed where its purpose was to give an interpretation to the nature and characteristics of the product and where the court had pronounced that the word to be interpreted was technical.

[49] It was therefore the court that had a duty to determine the meaning of cellular and not the expert.²⁷ In this instance the expert evidence should be disallowed because the conclusion Prof John arrived at was actually her own interpretation or understanding of the word 'Cellular'. Having regard to the well-established principles of interpretation the responsibility of interpreting and giving meaning to words in the tariff head, and the process of interpreting was an objective one.²⁸

[50] It is trite that matters of interpretation with regard to the first stage as stated in *International Business Machines supra* fall within the competence of the court having regard to the rules of interpretation already referred to in *Endumeni*, the chapter and explanatory notes. It was trite that classification of goods was the objective characteristics determined at importation or presentation for customs clearance. Mr Meyer conceded that the rules in *Endumeni* were relevant although not referred to or dealt with by the Commissioner or in his heads of argument. My view is that these rules were casually referred to without dwelling on the relevance of the ordinary language, syntax and context.

[51] The Commissioner stated in the answering affidavit that resort was had to expert evidence to explain the 'technical' meaning of 'cellular' in relation to PVC products.²⁹ This as the authorities now show does not require an analysis into the composition of the product to establish or understand the meaning of 'cellular'. The dictionary, chapter and explanatory notes using the principles of interpretation sufficed. In the main heads of argument Mr Meyer concedes at paragraph 5.8 that 'the explanation/ definition provided by the explanatory note to Chapter 39...accords with

²⁷ *Selero (Pty) Ltd and Another v Chauvier and Another* 1984(1)SA 128 (A) Corbett JA at page 139

²⁸ *Endumeni supra* para[18]

²⁹ Para 2.7 and 6.9

the definition thereof in the New Shorter Oxford English Dictionary³⁰ - 'having small compartments, cavities or division of areas'. As I see it the expert evidence of Prof John in giving interpretation into the meaning of the word cellular was unnecessary and is inadmissible

[52] In responding to the Mr Meyer's supplementary heads of argument, Mr Vorster objected to the introduction of fresh argument, that the products in contention 'PVC panels were not plates. It was contended that these issues were not properly addressed in answer and that the respondent did not have the opportunity to reply. Furthermore, that the notice of appeal did not address the definite finding as at paragraph [47] of the judgment of the court *a quo*, that this being an appeal in the narrow sense the Commissioner was confined to the record and the judgment. It was contended that should the court allow the submissions, he proffered another definition of plate³¹.

-plate – flat, comparatively thin, usually rigid sheet, slice, leaf, or a lamina of metal or other substance, of more or less uniform thickness and even surface.....”

[53] In classifying the product the difficulty is that the word 'panel' is not mentioned in the Harmonized Systems nomenclature. The answering affidavit mentions that the 'panel' is not a plate and that it was not flat. Therefore, it is important for this court to determine whether a panel is also a plate and whether it was cellular or non-cellular.

[54] Having established the meaning of cellular plastics the next stage is to examine the product, the panel, which was the sample availed to the court. It is my view that the New Shorter Oxford Dictionary offers a better definition of 'plate and cellular' and that I would describe the sample (PVC panel) provided as a flat rigid plate of uniform thickness made of plastics with compartments dispersed throughout.

³⁰ Definition of Cellular see foot note 23 has several meanings only one is compatible

³¹ New Shorter Oxford Dictionary (contrast this with the definition in footnote 19 www.vocabulary.com -plate was a sheet of metal, or wood, glass or plastic” and the word did not relate to products which were not flat,”

[55] Reliance on classification under 39.16 by the Commissioner is based mainly on the view that according to the respondent the product was manufactured by extrusion which according to Mr Meyer meant that the plastics used to create the product were not cellular. Mr Meyer in the supplementary heads contended that the products have a profile shape. Mr Vorster objected to the introduction of the profile shape because this had not been dealt with in the answering affidavit. My view is that referring to the profile shapes loses sight of the fact that it is the tariff head contended by the respondent in 39.21 which has to be interpreted first and that in that head no mention is made of the word cellular but that it is only mentioned in the sub-heading.

[56] When referring to the manufacture of the product it became necessary to establish whether a plate could also be referred to as a panel. Since the word panel is not provided for in the nomenclature of the harmonized systems, it is still important to find a place where this imported product could be classified. Ordinarily the product should be classified in terms of GIR1, however provision is made for an exception which is contended for by the respondent under GIR 3 (C). This rule provided that goods should be classified in the heading which occurs 'last in numerical order among those which equally merit consideration'. I therefore for the above reasons recommend that the appeal be dismissed.

[57] In the result the following order is granted

1. The appeal is dismissed with costs to include costs of two counsel.



TLHAPI J
JUDGE OF THE HIGH COURT

I agree,



KHUMALO J
JUDGE OF THE HIGH COURT

I agree and It is so ordered.



MBONGWE J
JUDGE OF THE HIGH COURT

APPEARANCES

FOR THE APPELLANTS

: ADV. J A Meyer SC and L G
Kilmartin

INSTRUCTED BY

: STATE ATTORNEY PRETORIA

FOR THE RESPONDENTS

: ADV J P Voster SC

INSTRUCTED BY

: SHEPSTONE & WYLIE

HEARD ON

: 10 AUGUST 2022

DATE OF JUDGMENT

: 24 MARCH 2023