

**REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

**CASE NO: A223/2021**

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

Date:5 July 2023

E van der Schyff

In the matter between:

DIAGEO SA (PTY) LTD

APPELLANT

And

THE COMMISSIONER FOR THE SOUTH  
AFRICAN REVENUE SERVICES

RESPONDENT

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**JUDGMENT**

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Van der Schyff J

**Introduction**

[1] This is an appeal heard by the Full Court against the whole of the judgment and order handed down by the court *a quo* on 17 March 2021.<sup>1</sup> The appeal is with the leave of the court *a quo*.

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<sup>1</sup> Although the judgment was signed by the presiding acting judge on 18 March 2021, the date reflected as the hand-down date is 17 March 2021.

[2] The history of the litigation is as follows:

- i. On 18 April 2016, the respondent ('the Commissioner' or 'SARS') made a tariff determination in terms of s 47(9)(a), read with s 47(11) of the Customs and Excise Act, 91 of 1964 (the Act / Customs and Excise Act). The Commissioner determined 'Cape Velvet Cream Original' ('CVCO'), a liqueur manufactured by Diageo, to be classifiable under Tariff Item 104.23.22 and Tariff Subheading 2208.70.22 of Part 1 of Schedule No.1 to the Act, *viz* 'Other';
- ii. Diageo, however, contended that the CVCO referred should be classified under Tariff Item 104.23.21 and Tariff Subheading 2208.70.21, *viz* 'With an alcoholic strength by volume exceeding 15 percent by vol. but not exceeding 23 percent by vol';
- iii. Diageo appealed the Commissioner's determination in terms of the provisions of s 47(9)(e) of the Act. The court *a quo* determined the CVCO to be classifiable in Tariff Heading 2208.70.22 and dismissed the appeal.

[3] The court *a quo*'s ruling is primarily based on its finding that the vanilla flavouring added to the wine spirits constitutes an alcoholic ingredient. In coming to this finding, the court, *a quo* interpreted the phrase 'non-alcoholic ingredient' as it appears in Note 4(b) published in notice R 387 in Government Gazette No 36515 dated 2013 (Additional Note 4(b)).

### **Grounds of appeal**

[4] Diageo raised several grounds of appeal. Diageo contends that the court *a quo* erred in finding that the proceedings turn on whether the vanilla flavouring used in CVCO constitutes a 'non-alcoholic ingredient' as contemplated in Additional Note 4(b) to Chapter 22 in Part 1 of Schedule No 1 of the Act. The court *a quo*, should, according to Diageo, have found that the proceedings turn on the correct

interpretation of Additional Note 4(b) and whether CVCO falls within its ambit. This, contends Diageo, requires a purposive interpretation.

[5] Other issues to be determined are the applicability of the principles set out in *The Commissioner for the South African Revenue Services v South African Breweries (Pty) Ltd* [2018] ZASCA 101 (27 June 2018) to this application; the impact of Chapter Note 3 on the interpretation of Additional Note 4(b), and, the question as to whether the vanilla as a component to the flavouring as a whole should be regarded as an ingredient in itself. In the final instance, a number of the grounds of appeal concern the applicability of the maxim *de minimis non curat lex* in excise tariff classification appeals since Diageo contends, with reference to foreign case law, that the quantity or percentage of alcohol derived exclusively from the vanilla in the flavouring is so minutely small that the principle *de minimis non curat lex* applies.

### **The court *a quo*'s findings**

[6] For purposes of this appeal, it is sufficient to state that in determining the issue, the court *a quo*'s point of departure was that there is no ambiguity in Additional Note 4(b) and that the interpretation of the Note 'need go no further than its clear and unambiguous wording.' As a result, the court *a quo* held that it could not fault the Commissioner's interpretation of Additional Note 4(b) and its subsequent tariff classification. The court *a quo* found that Diageo accepted the tariff classification of the three other products, to wit, CV Chocolate Cream, CV Strawberry Cream and CV Toffee Cream. The court *a quo* held the view that Diageo's 'acceptance of these determinations demonstrate that the applicant accepts that the presence of alcohol in an ingredient would cause the product to be disqualified from being classifiable in Tariff subheading 2208.70.21.'

[7] Interpreting Additional Note 4(b) without considering the context within which it operates and finding that Diageo 'accepted' the tariff classification of the other three products because it did not challenge the classification is a misdirection by the court *a quo*, in law as far as statutory interpretation is concerned, and in fact as far as Diageo's 'acceptance' of the tariff classification of its other products are concerned. This court is thus entitled to consider the appeal.

## The product

[8] The ingredients used in the manufacturing of CVCO are syrup, flavouring, emulsifiers, preservatives, and dairy products. The vanilla flavouring that is added to the wine spirits contains 0.3% vanilla. Vanilla, in turn, contains 0.6% alcohol. The flavouring, mixed in a separate flavouring tank, that is added to the wine spirits ultimately contains an alcohol content by volume of 0.000252%.<sup>2</sup> The vanilla flavouring contributes 0.00004% alcohol by volume (ABV) of the final product (CVCO), whereas the wine spirit contributes 15.99999964% ABV.

## The sources of law and process of classification

[9] On 30 October 1947, 23 countries signed the General Agreement on Tariffs and Trade (GATT). South Africa is an original signatory to the GATT.<sup>3</sup> In 1958 the 7<sup>th</sup> edition of an information document titled 'The General Agreement on Tariffs and Trade (GATT) - What GATT is and what GATT has done', was published by the Information Office, GATT Secretariat, Geneva, Switzerland.<sup>4</sup> This publication informs that:

'The essential element of the GATT story is that since World War Two, for the first time in history, countries have co-operated in lowering trade barriers between themselves and in accepting a code of practical rules for fair trading in international commerce. This co-operation has been on a world-wide, not a regional basis.'

[10] GATT's objectives included – helping raise living standards; achieving full employment; developing the world's resources; expanding production and exchange of goods; and promoting economic development. The GATT laid down central principles to constrain and guide national trade policies and provided the basis on

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<sup>2</sup> Two hundred and fifty-two Ten Thousandths of One percent.

<sup>3</sup> E.C. Schlemmer 'South Africa and the WTO ten years into democracy' *South African Yearbook of International Law* (2004) Vol. 29, Issue 1, 125-135.

<sup>4</sup> <https://docs.wto.org/gattdocs/q/GG/MGT/58-44.PDF> accessed on 3 May 2023.

which governments were able to carry forward and extend their multilateral cooperation and trade. Professor Schlemmer explains that the GATT steadily developed into a *de facto* international organisation, and evolved through several rounds of multilateral negotiations. These negotiations ultimately led to the formation of the World Trade Organisation ('WTO').<sup>5</sup> South Africa has been a WTO member since 1 January 1995.

[11] The World Customs Organisation (WCO) evolved from a Study Group formed to examine customs issues identified by the GATT. The WCO's role is to govern various frameworks and conventions that facilitate secure and free-flowing international trade.<sup>6</sup> The WTO and WCO are significant role players in international trade matters. The WTO cooperates regularly with the WCO on a number of subject areas, including market access.<sup>7</sup> For reasons that will become apparent later in this judgment, it is necessary to reflect that South Africa and the United States of America are members of the WCO.

[12] The International Convention on the Harmonised Commodity Description and Coding System (HS) nomenclature (or 'legal text') was developed by the WCO and entered into force on 1 January 1988.<sup>8</sup> The objectives of the HS Convention include facilitating international trade, the collection, comparison, and analysis of statistics by harmonising the description, classification, and coding of goods in international trade and reducing the expenses related to international trade. After its implementation, the use of the HS spread quickly, and there are now more than 200 economies and

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<sup>5</sup> Schlemmer, note 3, *supra*.

<sup>6</sup> WTO and the WCO – What is the Difference?' <https://www.livingstonintl.com/wto-and-the-wco-what-is-the-difference/> accessed on 3 May 2023.

<sup>7</sup> 'The WTO and World Customs Organization'

[https://www.wto.org/english/thewto\\_e/coher\\_e/wto\\_wco\\_e.htm#:~:text=In%20the%20area%20of%20market,concerns%20the%20classification%20of%20goods.](https://www.wto.org/english/thewto_e/coher_e/wto_wco_e.htm#:~:text=In%20the%20area%20of%20market,concerns%20the%20classification%20of%20goods.) Accessed on 3 May 2023.

<sup>8</sup> [https://www.wcoomd.org/en/topics/nomenclature/instrument-and-](https://www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/hs_convention.aspx#:~:text=The%20objectives%20of%20the%20HS,and%20(iii)%20to%20facilitate%20the)

[tools/hs\\_convention.aspx#:~:text=The%20objectives%20of%20the%20HS,and%20\(iii\)%20to%20facilitate%20the](https://www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/hs_convention.aspx#:~:text=The%20objectives%20of%20the%20HS,and%20(iii)%20to%20facilitate%20the) accessed on 3 May 2023.

Customs or Economic Unions currently using the system as a basis for their national Customs tariffs.<sup>9</sup>

[13] The HS can be described as a complete product classification system. It was designed as a 'core' system' to which countries adopting it could make further subdivisions according to their particular tariff and statistical needs. From an informational work titled 'What Every Member of the Trade Community Should Know About: Tariff Classification',<sup>10</sup> it may be gleaned that at the international level, the HS consists of approximately 5000 article descriptions. These descriptions are arranged into 97 chapters and grouped into 21 sections. The HS contains interpretative rules and section, chapter, and subheading notes for use in the classification of merchandise:

'Goods in trade generally appear in the Harmonized System in categories or product headings beginning with crude and natural products and continuing in further degrees of complexity through advanced manufactured goods. This progression is found within chapters and among chapters (e.g., live animals are classified in chapter 1, animals hides and skins in chapter 41 and leather footwear in chapter 64). These product headings are designed at the broadest coverage levels with 4-digit numerical codes (or headings) and, where deemed appropriate, are further subdivided into narrower categories assigned two additional digits (which comprise 6-digit numerical codes or subheadings). The first two digits of a 4-digit heading indicate the chapter in which the heading is found (e.g., heading 2106 is in chapter 21).'<sup>11</sup> (*sic.*)

[14] The General Rules for the Interpretation of the Harmonized System ('GRI') are the rules that govern the classification of goods under the HS. Parties are required to apply the General Rules of Interpretation and all section, chapter, and subheading notes without modification to the scope of the sections, chapters, headings, or subheadings of the HS. Each contracting party is permitted to adopt in

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<sup>9</sup> *Ibid.*

<sup>10</sup> An informed compliance publication, May 2004 – U.S. Customs and Border protection. [https://www.cbp.gov/sites/default/files/documents/icp017r2\\_3.pdf](https://www.cbp.gov/sites/default/files/documents/icp017r2_3.pdf), accessed on 3 May 2023.

<sup>11</sup> *Supra*, 10.

its national tariff system further detailed subdivisions for classifying goods so long as any such subdivision is added and coded at a level beyond the 6-digit numerical code provided in the HS. Coding beyond the 6-digit level is usually at the 8-digit level and is generally referred to as the “national level.”<sup>12</sup>

[15] Explanatory Notes are the official interpretation of the HS approved by the WCO Council and are an indispensable complement to the HS.<sup>13</sup> They provide guidance on the scope of each heading, a list of the main products that each position includes and excludes, and their technical description.<sup>14</sup>

[16] Section 47(8)(a) of the Customs and Excise Act provides:

‘8 (a) The interpretation of –

(i) Any tariff heading or tariff subheading in Part 1 of Schedule No. 1;

(ii) (aa) any tariff item or fuel levy item or item specified in Part 2, 3, 5, 6 or 7 of the said Schedule, and

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

(iii) the general rules for the interpretation of Schedule No. 1; and

i.(iv) every section note and chapter note in Part 1 of Schedule No.1,

ii.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 Harmonized System issued by the Customs Co-Operation Council, Brussels (now known

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<sup>12</sup> *Supra*, 11.

<sup>13</sup> <https://www.wcoomd.org/en/media/newsroom/2021/december/7th-edition-of-the-harmonized-system.aspx> accessed on 3 May 2023.

<sup>14</sup> *Ibid*.

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.’

[17] The HS does not impose any obligation on contracting parties regarding rates of duty.<sup>15</sup> Rates of duty are left to each contracting party to apply based on national legislation. Section 47(1) of the Act provides that excise duty shall be paid on locally manufactured goods in accordance with Part 1 and Part 2A of Schedule No. 1 of the Act, which Schedule simultaneously provides for the classification of goods.

[18] Since there is consensus between the parties up to the 7-digit tariff subheading level, 2208.70.2, it is not necessary to deal in detail with the classification system, save to state that the court is alive to the fact that the –

‘Classification as between headings is a three-stage process: first, interpretation - the ascertainment of the meaning of the words used in the headings (and relative section and chapter notes) which may be relevant to the classification of the goods concerned; second, consideration of the nature and characteristics of those goods; and third, the selection of the heading which is most appropriate to such goods.’<sup>16</sup>

[19] The Supreme Court of Appeal held in *Distell Ltd and Another v Commissioner of South African Revenue Service*,<sup>17</sup> that there is no reason to regard the order of the first two stages of the classification process as immutable. The same court, however, held in *Commissioner, South African Revenue Service v Toneleria Nacional RSA (Pty) Ltd*,<sup>18</sup> that the first and second stages in the classification process should not be conflated. In *Toneleria*, the court explained that the first stage

<sup>15</sup> See Article 9 to the HS Convention.

<sup>16</sup> *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise* 1985 (4) SA 852 (A) 863F-G.

<sup>17</sup> [2011] 1 All SA 225 (SCA) (13 September 2010) at par [22].

<sup>18</sup> 2021 (5) SA 68 (SCA) at par [9].

requires a determination of the meaning of ‘other coopers’ products’, without regard to whether the disputed items constitute ‘other cooper’s products’ -

‘In the process of classification determining the meaning of the tariff heading is the essential first stage. Only thereafter does one proceed to the second stage of considering the nature of the products in issue to determine in the third stage whether they fall within the class of products identified in the tariff heading. Failing to observe that vital distinction has the result that the nature of the products is used to colour the meaning of the tariff heading.’<sup>19</sup>

[20] In this matter, Additional Note 4(b) requires interpretation. Through Additional Note 4(b), products that otherwise meet the description of tariff subheading 2208.70.21, are excluded from its ambit.

[21] For clarity, it is necessary to have regard to the appropriate classification structure:

Tariff Item	Tariff Subheading	Article
104.23	22.08	Undenatured ethyl alcohol of an alcoholic strength by volume (“vol”) less than 80% vol; spirits, liqueur, and other spirituous beverages,
104.23	2208.70	Liqueurs and cordials,
104.23	2208.70.2	In containers holding 2l or less;
104.23.21	2208.70.21	With an alcoholic strength by volume exceeding 15 per cent by vol. but not exceeding 23 per cent by vol.
104.23.22	2208.70.22	Other

[22] Additional Note 4(b) to Chapter 22 of Schedule No. 1 provides as follows:

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<sup>19</sup> *Ibid*, at par [9].

'Tariff subheading 2208.70.21 ... shall only apply to liqueurs ... 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.'

#### **Contextualising Additional Note 4(b)**

[23] It is common cause that National Treasury proposed lower excise duty rates for wine spirits during the budget review dated 23 February 2011.<sup>20</sup> A reduced excise duty rate was introduced so that wine spirits could be competitively used as a substitute for C-spirits in the manufacture of spirituous beverages.<sup>21</sup> Without the lower tariff, it is not economical to use wine spirits in the manufacturing of, amongst others, liqueur.

[24] The parties agree on the purpose of introducing Additional Note 4(b), and the Commissioner stated in its heads of argument:

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<sup>20</sup> The special provision for spirituous beverages derived from a fermented alcoholic base or wine spirits (to be taxed at an excise rate lower than the rate applicable to other distilled spirits) was introduced with effect from 23 February 2011. Tariff subheadings 2208.70.21 and 2208.70.22 and tariff items 104.23.21 and 104.23.22 were introduced in the 2011 Budget Review, and the Schedule to the Act was amended with effect from 1 March 2011. Additional Note 4 was inserted in the Chapter Notes. Additional Note 4(b) underwent several amendments before it reached its current form.

<sup>21</sup> 'Wine spirits' also referred to as 'A-spirits', is derived from the distillation of wine. It is more expensive than 'C-spirits', that is derived from other sources such as sugar cane.

‘The reason for the introduction of Additional Note 4 was to support the labour-intensive wine and soft fruit industries by incentivising the local manufacturers of alcoholic beverages to use wine spirits (as opposed to cane spirits) as the main alcoholic component of their products; ...’

### **Diageo’s submissions**

[25] Diageo submits that when Additional Note 4(b) is interpreted, it must be read in context, of, amongst others, the circumstances attendant upon its coming into existence. Diageo argues for a purposive interpretative approach and contends that the probable intention of the legislature was to prevent a situation where a manufacturer used the more expensive wine spirits, but then added non-expensive C-spirits thereto and, in doing so, increased the alcohol content of the beverage with the cheaper C-spirits, but simultaneously benefitting from the lower rate of excise duty.

[26] Diageo draws attention to the fact that the term ‘non-alcoholic beverage’ is defined in the Chapter Notes to Chapter 22 which state:

‘For the purpose of heading 22.02 the term ‘non-alcoholic beverage’ 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 submits that although the Chapter Note is specifically aimed at tariff heading 22.02, which deals with non-alcoholic beverages, the Explanatory Notes associated with headings 22.03 to 22.06 and 22.08, refer throughout to ‘alcoholic strength by volume of 0.5 percent’ as a threshold between alcoholic and non-alcoholic beverages.<sup>22</sup>

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<sup>22</sup> Consider, e.g., TH 22.03 – Beer made from malt: ‘The heading does not cover ... (b) Beverages called non-alcoholic beer consisting of beer made from malt, the alcoholic strength of which by volume has been reduced to 0.5% or less (heading 22.02).’, TH 22.04 – Wine of fresh grapes, including fortified wines; grape must other than of heading 20.09: ‘It should be noted that this group covers grape must partially fermented, whether or not fermentation has been arrested, as well as unfermented grape must, with alcohol added,

[27] Diageo contends that it is not the alcohol content by volume of the vanilla which is determinant of the question as to whether 'other non-alcoholic ingredients' have been added to the wine spirits to constitute the liqueur, but the alcohol content by volume of the flavouring that is added to the wine spirits. The flavouring is made separately in the flavouring tank. The flavouring contains  $0,48\text{kg}/142.66\text{kg} \times 100 = 0.3\%$  vanilla, and also prune fruit oil, chocolate caramel, caramel, brown food colouring, and yellow food colouring. The flavouring has an alcohol content of alcohol by volume (ABV) of approximately 0.000252%. Diageo contends that by virtue of its manufacturing process, the CVCO falls within the ambit of Additional Note 4(b). The vanilla ultimately adds 0.00004% ABV to the final product, with the wine spirits contributing 15.9999996%. A 750ml bottle of the CVCO, with an ABV of 16%, thus contains 0.0003ml of alcohol from the vanilla.

[28] Diageo submits that the alcohol content of the flavouring that is added to the wine spirits is nugatory and insignificant and should be disregarded. This approach is justified if the principle *de minimis non curat lex* is considered, and corresponds with the approach followed in *Westgaard v United States*, 19 C.C.P.A. 299 (1932), and *Alcan Aluminium Corporation v United States*, 165 F.3D 898 (*FED. CIR. 1999*).

[29] Diageo contends that the South African Revenue Service's own Excise External Policy on Spirits (SARS' policy) provides that the ABV of a product should only be measured up to the second decimal place, and the rest is irrelevant. Diageo submits that the court can take judicial notice of SARS' policy as it is a document that is available in the public domain. In paragraph 2.11.1 (a), SARS' policy deals with the assessment of excise duty and how the dutiable excise is measured:

'(a)The dutiable quantity of and Excise duty on spirits / spirituous products is assessed on the total alcohol contained in the product, expressed in litres of

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both having an alcohol strength by volume exceeding 0.5% vol. The heading excludes grape juice and grape must, whether or not concentrated, unfermented or having an alcoholic strength by volume not exceeding 0.5% vol (heading 20.09).', and TH 22.08 (the relevant tariff heading in the current matter), which provides in relation to fruit juices that '... the heading includes, inter alia: (15) Fruit or vegetable juices containing added alcohol and of an alcoholic strength by volume exceeding 0.5% vol, other than products of heading 22.04.'

absolute alcohol 9LAA) 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.

(ai) 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, and ...'

The alcohol by volume added by the vanilla to the final product is not a dutiable quantity.

### **The Commissioner's submissions**

[30] The Commissioner contends that the issue in the appeal turns on whether the vanilla used in the manufacturing of CVCO constitutes a 'non-alcoholic' ingredient. The Commissioner's approach is that 'non-alcoholic' means 0% alcohol. Since the vanilla extract contains 0.6% alcohol, that is the end of the matter.

[31] The Commissioner, relying on *Toneleeria*,<sup>23</sup> contends that the classification process requires that the meaning of the words used in the headings and sub-headings and relevant section and chapter notes which may be relevant to the classification of the goods concerned, must be ascertained without having regard to the nature of the product. The nature of the product should not colour the meaning of the tariff heading.

[32] The Commissioner proceeds to interpret the phrase 'non-alcoholic ingredients' by first defining the word 'ingredient'. Having regard to the dictionary meaning of the word, the Commissioner states that the term includes 'something that enters into a compound or is a component part or any combination or mixture; one of the parts in a mixture; and a component part or element of something'. The term 'alcoholic' is then defined as 'containing alcohol and containing or relating to alcohol' while the definition of 'non-alcoholic' includes 'not containing alcohol'.

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<sup>23</sup> Note [18], *supra*.

[33] Relying on Wallis JA, who explained in *Commissioner, South African Revenue Service v Bosch and Another*,<sup>24</sup> that '[t]here may be rare cases where words used in a statute or contract are only capable of bearing a single meaning...', the Commissioner contends that the term 'non-alcoholic' means no-alcohol. 'As such,' counsel submitted, 'there is no real need to have regard to any of the factors identified in the Endumeni judgment.' The Commissioner argues that in interpreting a statutory provision, the purpose of an Act, as opposed to the purpose of a provision is of paramount importance and that a 'more accommodating approach' towards the 'user/importer/manufacturer/ is not legally warranted.'

[34] Counsel submits that Chapter Note 3 altered the meaning of 'non-alcoholic' as 0% vol., to 0.5% vol. but only as far as tariff heading 22.02 is concerned. The need for this specification was rooted in the ordinary meaning of the term 'non-alcoholic.' The legislature, however, did not apply Chapter Note 3 to Additional Note 4(b), and, states the Commissioner, if read with Chapter Note 3, the term 'non-alcoholic' in tariff heading 22.02 is open only to one interpretation – 'it means 0% vol alcohol. By means of Chapter Note 3 the definition of 'non-alcoholic' is then, for purposes of tariff heading 22.02, altered from 0% vol to 0.5% vol'.

[35] The Commissioner holds that the reference to this 0.5% vol threshold in the explanatory notes to tariff headings 22.03, 22.04, 22.06 and 22.08 is merely explaining that if the alcoholic strength of the product does not exceed 0.5% vol it is classifiable in tariff heading 22.02.

[36] The Commissioner further contends that a loss of revenue to the fiscus is inherent to the introduction of an incentive such as the one introduced by Additional Note 4(b). This, counsel argues with reference to the Cape Provincial Division decision in *BP Southern Africa (Pty) Ltd v Secretary for Customs and Excise*,<sup>25</sup>

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<sup>24</sup> 2015 (2) SA 174 (SCA) at par [9].

<sup>25</sup> *BP Southern Africa (Pty) Ltd and Others v Secretary for Customs and Excise and Another* 1984 (3) SA 367 (C) at 375H-376B. Tebutt J held at 376A: 'It has been stated that it is neither unjust nor inconvenient to exact a rigorous observance of the conditions as essential to the acquisition of the privileged conferred and that it is probable that this was the intention of the Legislature.'

places a concomitant obligation on the Commissioner to ensure that the requirements of the incentive are strictly adhered to. In drawing a parallel between the incentive provided for by Additional Note 4(b) and diesel rebates, counsel submitted that an ingredient is either alcoholic or not. It is apposite to pause at this juncture to indicate that the decision of the Cape Provincial Division was overturned on appeal by the, then, Appellate Division.<sup>26</sup> Although van Heerden JA, writing for the court, did not deem it necessary to deal with the bases on which the court *a quo* dismissed the application,<sup>27</sup> the court held that a mere non-compliance with the provisions of regulation 410.04.04 (a) promulgated under the Customs and Excise Act did not deprive the appellants of their entitlement to rebates.

[37] The Commissioner submits that the non-alcoholic prescript in Additional Note 4(b) should be interpreted as an absolute, 'that is if any ingredient (bar the wine spirits) contains any alcohol, the end product is excluded from classification under tariff heading 2208.70.21.' The vanilla flavouring [extract] as an individual detached ingredient contains at least 0.6% alcohol, counsel submits, the CVCO cannot be classified under tariff heading 2208.70.21.

[38] The Commissioner, in addition, points out that Diageo did not contest the tariff determination in relation to three of its other products. In CV Chocolate Cream, the vanilla flavouring contains 27.12% ABV, in CV Strawberry Cream, the strawberry flavouring contains 28.6% ABV and in CV Toffee Cream, the flavouring contains 14.70% ABV. These three products were classified in tariff subheading 2208.70.22 and tariff item 104.23.22, because one of their ingredients contained alcohol. Diageo did not appeal the tariff determination of these products, and the Commissioner contends that Diageo's acceptance of these determinations indicate that Diageo accepts that the presence of alcohol in an ingredient would cause the product to be disqualified from being classifiable under tariff subheading 2208.70.21. There is, however, in my view, no factual basis for this inference to be drawn from Diageo's

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<sup>26</sup> *BP Southern Africa (Pty) Ltd and Others v Secretary for Customs and Excise and Another* 1985 (1) SA 725 (A).

<sup>27</sup> *Supra*, 737A.

decision not to appeal those tariff determinations. As a result, I do not deal with this submission below.

[39] The Commissioner asserts that unless the 'non-alcoholic' prescript in Additional Note 4(b) is interpreted to be absolute, it would lead to results that are 'inconsistent, insensible and in direct conflict with one of the purposes of tariff classification – that is to ensure that the same products are classified in the same heading or sub-heading.' It would also make it practically impossible for the Commissioner to administer and enforce the Act. This is also the reason, then, that the Commissioner contends that Additional Note 4(b) is analogous to s 65 of the Road Traffic Act 93 of 1996. Section 65 of the Road Traffic Act provides that no person may drive a vehicle while the concentration of alcohol in any specimen of blood taken from him or her is 0.05 gram per hundred milliliters. When the question arises whether section 65 has been breached, the test is simple. If the test result is 0.049 g/100 ml, it has not been breached. If it is 0.05 g/100 ml, it has been breached. In practical terms, this means that less than 1/100 of a gram of alcohol is determinative of whether a driver is innocent or guilty of a criminal offence. There is no room for debate.

[40] The reason why the wording of certain texts, such as Additional Note 4(b), and s 65 of the Road Traffic Act are exact, submits the Commissioner, is to eliminate any uncertainty and to create a fixed platform to ensure the easy and effective administration and enforcement of the said provisions. It also benefits the local manufacturer, or driver in that it is informed in absolute terms of 'the rules of the game'.

[41] The Commissioner contends that Diageo's reliance on the *de minimis non curat lex* principle is misplaced. Reliance on this principle ignores the wording of Additional Note 4(b) and the process to be followed in tariff determination, as stated in *Toneleeria*, completely.

[42] The Commissioner holds that the determination as to whether a product complies with the requirements of Additional Note 4(b), requires a simple two-stage process. The first is to determine and identify the ingredients that make up the

product. The second is to determine whether any one of those ingredients contains alcohol. The loss that will be suffered by SARS, if Diageo's reliance on the *de minimis* principle is accepted, is no trivial loss and not *de minimis*. Due to the large quantity of CVCO exported, the duty payable on the final product, if the Commissioner's approach is followed, amounts to millions of Rands annually.

## Discussion

### *Statutory Interpretation*

[43] Having considered, amongst others, *KPMG Chartered Accountants (SA) v Securefin Ltd and Another*,<sup>28</sup> and *Natal Joint Municipal Pension Fund v Endumeni Municipality*,<sup>29</sup> Lewis JA held in *Novartis v Maphil*:<sup>30</sup>

'I do not understand these judgments to mean that interpretation is a process that takes into account only the objective meaning of the words (if that is ascertainable), and does not have regard to the contract as a whole or the circumstances in which it was entered into. This court has consistently held, for many decades, that the interpretation process is one of ascertaining the intention of the parties - what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it.'

[44] The relevance of Lewis JA's reasoning in *Novartis*, for this matter, is that it evinces that the interpretative process requires more of a court than to consider only the objective meaning of words. This view was recently again endorsed by the Supreme Court of Appeal in *South African Nursing Council v Khanyisa Nursing School (Pty) Ltd and Another*.<sup>31</sup> In this case, the court reiterated that interpretation is a unitary exercise that takes account of text, context, and purpose. The court held

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<sup>28</sup> 2009 (4) SA 399 (SCA) at par [39].

<sup>29</sup> 2012 (4) SA 593 (SCA) at par [18].

<sup>30</sup> 2016 (1) SA 518 (SCA) par [27].

<sup>31</sup> [835/2022] [2023] ZASCA 86 (2 June 2023).

that there is no straightforward attribution of a dictionary meaning of a word as the word's ordinary meaning to construe a statute.<sup>32</sup> The court observed that to stare blindly at the words used in a statutory provision seldom suffices to yield their meaning.

[45] It goes without saying that the inevitable point of departure when a statutory provision stands to be interpreted, is the language of the provision itself.<sup>33</sup> The meaning of the written words that fuse into a statutory text can, however, only be understood considering the background, surrounding circumstances, purposes, and object of that statute. Context and language should therefore be considered together; neither is predominant, but both are elements of a unitary interpretative process.<sup>34</sup> In the process of interpretation, the interpreter of any provision of an Act must strive to answer the question, 'In this statute, in this context, relating to the subject matter, what is the meaning of that word (or provision or phrase)?'<sup>35</sup> This approach should be followed even where the words to be construed are clear and unambiguous.<sup>36</sup>

[46] The interpretative approach, as articulated by the apex courts of our country, put the Commissioner's contention that the words in issue in this appeal, identified by the Commissioner to be 'non-alcoholic' and 'ingredient', form part of those 'rare cases where words used in a statute or contract are only capable of bearing a single meaning', and 'as such there is no real need to have regard to any of the factors identified in the *Endumeni* judgment', to rest.

[47] In my view, the Commissioner erred in holding the view that meaning had to be attributed to the phrase 'non-alcoholic' and the word 'ingredient'. Diageo correctly

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<sup>32</sup> *Supra*, at par [15].

<sup>33</sup> *Endumeni, supra*, at par [18].

<sup>34</sup> This approach was also identified by the Constitutional Court to be the preferred approach. See *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) at par [53].

<sup>35</sup> *Jaga v Dönges and Another, Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) 663H-664A.

<sup>36</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at par [90], *Goedgelegen, supra*, at par [53].

identified the issue at hand, not as the attribution of meaning to two loose-standing words or phrases, but as holistically interpreting Additional Note 4(b) having regard to its purpose within the broader customs and excise regulatory regime. It is also in this context, that Diageo's reliance on the *de minimis* doctrine must be considered.

*Purpose of the Customs and Excise Act 91 of 1964*

[48] The Customs and Excise Act was promulgated, amongst others, 'to provide for the levying of customs and excise duties and a surcharge.' The Commissioner is charged with the administration of the Act. The primary function of excise tax is to ensure a constant stream of revenue for the State.

[49] Liqueur is a distilled spirit that is sweetened with sugar or syrup, and often also contains flavouring agents. The parties agree that National Treasury proposed, during the budget review of 23 February 2011, to impose lower excise duty rates for wine spirits so that it can competitively be used as a substitute for C- spirits in the manufacture of spirituous beverages. To provide for this, a special provision for spirituous beverages derived from a fermented alcoholic base or wine spirits, to be taxed at an excise rate lower than the rate applicable to other distilled spirits, was introduced. Tariff sub-headings 2208. 70. 21 and 2208. 70. 22 were introduced. The Schedules to the Act were amended with effect from 1 March 2011 by Notices 172 and 173 in Government Gazette 34059. Additional Note 4(b) was subsequently implemented.

[50] It is against this background that Additional Note 4(b) needs to be interpreted. Considering the purpose for which tariff subheading 2208.70.21 was introduced, I agree with Diageo's contention that Additional Note 4(b) was introduced to prevent a situation where a manufacturer uses the more expensive wine spirits but then adds non-expensive C-spirits thereto and, in doing so, increases the alcohol content of the beverage with the cheaper C- spirits, but simultaneously benefit from the lower rate of excise duty.

[51] The purpose for which tariff subheading 2208.70.21 was promulgated guides the interpretation of Additional Note 4(b) and in particular, the interpretation of the

phrase ‘to which other non-alcoholic ingredients’ were added. In the context of not only the said tariff subheading, but also the manufacturing process and inherent characteristics of liqueur, an ingredient can only be regarded as an alcoholic ingredient if it significantly contributes to the ABV of the final product.

[52] The ingredient may be held to significantly contribute to the ABV of the final product if, for example, it brings the ABV of the product within the required 15% ABV for the product to be classified under tariff subheading 2208.70.21. A specific ingredient can theoretically have an ABV of 15%, but the quantity that is added to the wine spirit base is so small that it does not affect the ABV of the final product. In these circumstances, the ingredient is a ‘non-alcoholic ingredient’ despite the ABV of the ingredient. The contrary is also theoretically possible, an ingredient with an ABV of 0.5% can be added to the wine spirit base in such quantities that it significantly impacts the ABV of the final product, in which event it may not fall in the ambit of ‘non-alcoholic ingredients.’

[53] In light of this practical reality, and because of the finding I come to below regarding the application of the maxim *de minimis non curat lex*, I am of the view that it is not necessary to consider the question of whether the vanilla extract or the content of the flavouring mixture in the flavouring tank, constitute the ingredient that is added to the wine spirit. Neither is it, *in casu*, necessary to definitively determine the applicability of the principles set out in *The Commissioner for the South African Revenue Services v South African Breweries (Pty) Ltd* [2018] ZASCA 101 (27 June 2018). In the appropriate factual context these might be highly relevant questions in a case where its determination will impact on the outcome of the matter. This matter is not such a case.

[54] It suffices to state that, in my view, the phrase ‘non-alcoholic’ could not have been intended to mean 0% alcoholic as advanced by the Commissioner. If the legislator intended to deviate from the 0.5% threshold referred to throughout Chapter 22, and defined in Chapter Note 3 of Chapter 22, it would have stated the same unequivocally.

[55] *In casu*, it is not disputed that the ABV of the flavouring which is added to the wine spirits is 0.000252%. The ABV of the wine spirit base is 15.99999964%. If it is accepted that the lower tariff was introduced to encourage and promote the use of the more expensive wine spirits in the manufacturing process of liqueur, it would be inherently contradictory to find that a product of which the ABV is only increased by 0.00004% through the alcohol component that is added to the wine spirit base, is excluded from reaping the benefit associated by the introduction of the lower tariff. To find otherwise would be to apply a meaning that will lead to insensible and unbusinesslike results and undermine the purpose of the tariff subheading.

*De minimis non curat lex*

[56] The maxim *de minimis non curat lex* encapsulates that the law does not concern itself with a fact or thing that is so insignificant that a court may overlook it in deciding an issue or case. The maxim signifies that ‘mere trifles and technicalities must yield to practical common sense and substantial justice’.<sup>37</sup> The maxim has been applied, in South Africa in a variety of cases, but predominantly in criminal matters.<sup>38</sup> The policy reasons behind invoking the maxim are, however, similar, and the principles flowing from the case law provide guidance in this matter.

[57] The main principle that is evident when the case law wherein reference is made to the *de minimis* principle is considered, is that the question as to whether the principle applies depends solely on the factual matrix of each case.<sup>39</sup> The applicability of the rule in a particular case depends on all the circumstances thereof. It requires a value judgment, and in determining the application of the *de minimis* principle, the judicial officer is charged with a policy decision to be exercised according to all the relevant circumstances of the case.<sup>40</sup>

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<sup>37</sup> A phrase borrowed from *Goulding v Ferrell*, 117 N.W. 1046 (Minn 1908) as cited by Nemerofsky, J ‘What is a “Trifle” Anyway?’ (2001/02) *Gonzaga Law Review* 37:2 315-341 at 323.

<sup>38</sup> For the application of the maxim in cases concerning *locatio operis*, see, *inter alia*, *Hitchins v Breslin* 1913 TPD 677 at 682-683 and *Florencio v Kreuter* 1969 (2) SA 673 (R).

<sup>39</sup> See also *AA Mutual Insurance Association Ltd v Sibothobotho* 1981 (4) SA 593 (A) 603F-G where the court considered ‘the whole incident in perspective’.

<sup>40</sup> *S v Visagie* 2009 (2) SACR 70 (W) at par [15].

[58] This was aptly explained by Beadle CJ in *R v Maguire*,<sup>41</sup> albeit in a criminal law context. The learned judge said:

‘It seems to me that, wherever the defence of *de minimis non curat lex* is raised, the court has to consider all the circumstances under which the blow which is said to be trivial was delivered. In some circumstances a blow may be considered so trivial as to justify the court ignoring it altogether; in different circumstances, a similar blow might be a relatively serious assault; for example, slaps delivered by fishwives to each other during a drunken brawl might well be ignored on the principle of *de minimis non curat lex* whereas an unprovoked slap delivered to the face of a lady, say at a garden party, could not be similarly ignored.’

[59] The principle was echoed in a civil context when Janse J stated in *Benoni Town Council v Meyer & Others*:<sup>42</sup>

‘It would be difficult to formulate a definition of minimum that would be valid for all circumstances; ...’

[60] For purposes of the current appeal, it can be stated that the question as to whether a particular activity is a *de minimis* deviation from a prescribed standard must be determined with reference to the purpose of the standard. The purpose for which tariff subheading 2208.70.21 was enacted, has been set out above. Having regard to this purpose, the quantity of alcohol added to the wine spirit base is, in my view, negligible, and insufficient to invoke the application of Additional Note 4(b). To hold that Additional Note 4(b) excludes CVCO from the ambit of tariff subheading 2208.70.21 because the vanilla, as a result of the process through which vanilla extract is produced from vanilla beans, contains 0,6%<sup>43</sup> alcohol which renders the

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<sup>41</sup> 1969 (4) SA 191 (RA) 193A.

<sup>42</sup> 1961 (3) SA 316 (W) 325D.

<sup>43</sup> For purposes of this argument, it is irrelevant whether the vanilla extract consists of 0.6% ABV or 1% ABV. The issue is whether the minuscule impact it has on the CVCO’s total ABV renders the fact that it contains alcohol to be of no moment.

ABV of the flavouring which is added to the wine spirits 0.000252% and in turn, contributes 0.00004% to the ABV of the final product, will bring about a result contrary to the underlying purpose for which the tariff classification under tariff subheading 2208.70.21 provides.

[61] The purpose of the Customs and Excise Act and the undisputed purpose of tariff subheading 2208.70.21, should not be regarded to be in conflict. Neither is applying the *de minimis* principle in conflict with the purpose of the Customs and Excise Act. By promulgating tariff subheading 2208.70.21, National Treasury weighed up the benefit of promoting the local wine and soft fruit industries by incentivising the local manufacturers of alcoholic beverages to use wine spirits (as opposed to cane spirits) as the main alcoholic component of their products, against the loss of excise duty that would be brought about by providing for classification under tariff subheading 2208.70.21 and concluded that the benefit outweighs the loss. To hold that the addition of an ingredient that contributes 0.00004% ABV to the final product excludes that product from the ambit of tariff subheading 2208.70.21, would be counterintuitive. The benefit associated with tariff subheading 2208.70.21 would not materialize, and producers may again revert to using cane spirits instead of the more expensive wine spirits in the manufacturing process of liqueur.

[62] The insignificance of the added 0.000252% of alcohol in the vanilla flavouring is underscored by SARS' Excise External Policy on Spirits (the policy), a document this court can take judicial notice of.<sup>44</sup> In dealing with the assessment of excise duty and the measurement of dutiable quantities, the policy provides as follows:

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<sup>44</sup> *Grootkraal Community and Others v Botha NO and Others* 2019 (2) SA 128 (CC) at par [21] – 'Much of what follows is drawn from these sources and has been used to complete and correct the picture drawn by the parties in their affidavits. The court may take judicial notice of such material when it is readily available and reliable, however it may come to the court's attention. The emphasis must be on the material's availability and reliability, recognising that in our technological era information that could in the past have been unearthed only after lengthy investigation, may now be readily available from reliable sources in digitised form. Where necessary, in the interests of procedural fairness, the parties must be apprised of the existence of such material and its relevance to the case in hand to enable them to deal with it either at a factual level, if it is disputed, or in their submissions.'

‘(a) the dutiable quantity of and Excise duty on spirits / spirituous products is assessed on the total alcohol contained in the product, expressed in litres of absolute alcohol (LA) 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.’

[63] Although the policy and Additional Note 4(b) are separate documents and regulate different aspects relating to the determination of excise duty, the policy indicates that SARS disregards negligible percentages of alcohol in determining the dutiable quantity of excise duty on spirits and spirituous products. The policy reflects that SARS intuitively applies the *de minimis* principle. In addition, it is common cause that a beverage is only classifiable as an alcoholic beverage if it has an ABV of 0.5% or higher. I pause to state that the mere fact that a beverage can be coined ‘non-alcoholic’ or ‘alcohol-free’ while containing a negligible percentage ABV, is a further indication that the dictionary meaning of the term ‘non-alcoholic’ cannot be determinative in this inquiry.<sup>45</sup>

[64] I could not find any South African case law on the applicability of the *de minimis* maxim in the context of customs and excise duty. However, the court was referred to two decisions emanating from the United States to wit *Westergaard v United States*, 19 C.C.P.A 299 (1932) and *Alcan Aluminium Corporation v United States*, 165 F.3D 898 (FED. CIR. 1999). In both these cases, the courts applied the *de minimis* principle.

[65] In *Westergaard* the plaintiff imported canned fish balls, fish cakes, meatballs and meat cakes into the United States.<sup>46</sup> These products contained a small amount of potato flour to hold the ingredients together during the preliminary cooking process. The government contended that since potato flour is a vegetable under the Tariff Act of 1922, the merchandise should be taxed at a higher duty rate. On appeal, the court ruled that the amount of potato flour involved was insufficient (*de minimis*) to give the cakes and balls the character of a vegetable.

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<sup>45</sup> See par [32] above.

<sup>46</sup> The summary is taken over from Nemerofsky, *supra*, 325 – 326.

[66] In *Alcan* the Federal Circuit court applied the *de minimis* maxim to reverse a U.S. Customs Service decision imposing an unfavourable import duty on an ingot shipped by the plaintiff from Canada.<sup>47</sup> The court noted that the purpose of the relevant statute was to prevent non-Canadian goods from being shipped to the US through Canada, and held that the application of the higher duty was improper where less than 1% of the content of the ingot originated outside Canada. The court held that the:

‘[a]pplication of *de minimis* is particularly important in cases such as the one at hand, where stark, all-or-nothing operation of the statutory language would have results contrary to its underlying purpose.’

[67] It would, however, be remiss not to also take cognizance of *Varsity Watch Co. v United States*.<sup>48</sup> Counsel did not refer us to this case, but it is relevant to the issue at hand. Section 367(f) of the Tariff Act of 1930 put a higher rate of duty on items that are plated with gold. The merchandise, in this case, consisted of wrist-watch cases made of a very cheap metal. A slight quantity of gold, amounting to less than one- and one-half thousandths of one inch in thickness was added to the watch bezel by a process of electrolytic deposition for the purpose of imparting a gold appearance. The plaintiff invoked the *de minimis* maxim, contending that considering the insignificant quantity of gold involved, the importation should be treated for classification purposes as if it contained no gold at all. The court held otherwise. It stated that the *de minimis* principle was not applicable because ‘Congress intended ... to put the higher rate of duty upon those cases which were in part of gold, no matter how small.’ This precedent illustrates that the purpose for which the legislature enacted the provision, guided the court in not applying the *de minimis* maxim.

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<sup>47</sup> The summary is taken over from Inesi, A, ‘A Theory of de Minimis and a Proposal for its Application in Copyright’ (2006) *Berkeley Technology Law Journal* 945 – 995 at 954.

<sup>48</sup> 34 C.C.P.A. 155 (1947) as discussed by Nemerofsky, *supra*, 337 – 338.

[68] It is appropriate to seek guidance from other legal systems,<sup>49</sup> even more so if regard is had to the fact that both South Africa and the United States are members of the WCO,<sup>50</sup> and the fact that the *de minimis* principle is not foreign to the sphere of international trade.<sup>51</sup> These decisions are on point and support the view that it is justified to have regard to the *de minimis* principle in the current factual context, particularly if the purpose for which tariff subheading 2208.70.21 was created is considered.

[69] The Commissioner submits that the *de minimis* principle does not find application in this matter as the ultimate practical effect, the extent of excise duty lost by SARS, is not trivial. I disagree. It cannot be that the volume and quantity of the product that is manufactured and ultimately exported have a bearing on whether a product is classified under tariff subheading 2208.70.21.

[70] The Commissioner's analogy between s 65 of the Road Traffic Act and Additional Note 4(b), submitted not only for substantiating the view that the *de minimis* principle cannot apply but also for justifying the Commissioner's submission that 'non-alcoholic ingredient' means an ingredient with a 0% ABV, is misplaced. Insofar as s 65 of the Road Traffic Act is concerned, the legislature determined a fixed blood-alcohol level that may not be exceeded, otherwise, a crime is committed. In Additional Note 4(b), the term 'non-alcoholic ingredient' is not defined. Meaning must be attributed to the term 'non-alcoholic ingredient' through the process of interpretation in circumstances where it is evident that the term 'non-alcoholic' can be used in relation to beverages with an ABV of less than 0.5%, and having regard to the purpose for which, amongst others, tariff subheading 2208.70.21 was

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<sup>49</sup> See e.g., *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) at par [35], *President of the Republic of South Africa and Others v M & G Media Ltd* 2012 (2) SA 50 (CC) at par [16], *Distell Ltd v Commissioner, South African Revenue Services* 2012 (5) SA 450 (SCA) at paras [57] – [58], and *Commissioner, South African Revenue Service v De Beers Consolidated Mines Ltd* 2012 (5) SA 344 (SCA) at par [39].

<sup>50</sup> See par [10], *supra*.

<sup>51</sup> Porter, D. 'What is de minimis value?' <https://www.curtis.com/glossary/international-trade/de-minimis#:~:text=De%20minimis%20non%20curat%20lex,imposition%20of%20duty%20or%20tax> accessed on 15 June 2023.

introduced. Contrary to the position in s 65 of the Road Traffic Act,<sup>52</sup> no verifiable basis is provided for determining the meaning of ‘non-alcoholic ingredient’.

[71] Davis J stated in *Levin v Number Plates and Signs (Pty) Ltd*<sup>53</sup> in relation to a patent:

‘The law does not take account of amounts which are so small as not to be appreciable. And the law does not bestow the great benefit of a monopoly for a mere peppercorn consideration.’

[72] *In casu*, 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’.

## ORDER

**In the result, the following order is granted:**

- 1. The appeal is upheld.**
- 2. The order granted by the court *a quo* on 17 March 2021 is set aside and replaced by the following order:**

**2.1. ‘The Commissioner’s tariff determination of 18 April 2016 that the Cape Velvet Cream Liqueur falls under Tariff Item 104.23.22 and TH 2208.70.22 *viz* “Other” is set side. In substitution thereof, the Cape Velvet Liqueur referred to in the Commissioner’s determination is determined to fall under Tariff Item 104.23.21 and TH 2208.70.21, *viz* “With an alcoholic strength**

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<sup>52</sup> It was held in *Director of Public Prosecutions, Eastern Cape v Klue* 2003 (1) SACR 389 (E) that there is no room for the application of the *de minimis* principle where the legislature determined statutory limits. It is noteworthy that in coming to this finding the court considered the aims and objectives of the legislation to be important considerations.

<sup>53</sup> 1942 CPD 412 at 421.

*by volume exceeding 15 percent by vol. but not exceeding 23 percent by vol.”*

**2.2. The Cape Velvet Cream Liqueur, which is the subject matter of this appeal, falls within the meaning of Additional Note 4(b) to Chapter 22 of Schedule 1 of the Customs and Excise Act, 1964.**

**2.3. Respondent is ordered to pay the costs of the application, inclusive of the costs of two counsel, where so employed.**

**3. Respondent is ordered to pay the costs of the appeal which is to include the costs of two counsel.**

**E van der Schyff  
Judge of the High Court**

I agree.

**M Munzhelele  
Judge of the High Court**

I agree.

**A Millar  
Judge of the High Court**

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

For the applicant: Adv. A.P. Joubert SC  
With: Adv. D. Ginter  
Instructed by: Webber Wentzel

For the respondent: Adv. A. Meyer SC

With: Adv. L. Harilal

Instructed by: RW Attorneys

Date of the hearing: 19 April 2023

Date of judgment: 5 July 2023