IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG NORTH DIVISION)

REPORTABLE

Case number A.1274/06
TPD Case number 11883/04

In the matter between:

DATE: 3/4/2009

DISTELL LIMITED **First Appellant**

STELLENBOSCH FARMERS' WINERY LTD **Second Appellant**

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES **First Respondent**

THE MINISTER OF FINANCE **Second Respondent**

CORAM: WEBSTER et MOLOPA JJ et EBERSOHN AJ.

DATE HEARD: 13TH AUGUST 2008

DATE JUDGMENT HANDED DOWN: 3 APRIL 2009

JUDGMENT.

EBERSOHN AJ.

[1] In this matter the appellants appeal with leave of the court a quo against the whole of the judgment in terms whereof the appellants' application in the court a quo was dismissed with costs. In this judgment the first appellant will be referred to as "Distell",

the second appellant as "SFW" and the first respondent as the "Commissioner".

[2] The court a quo made the following order:

> **"1. The application is dismissed.**
> **2. Applicants are ordered to pay jointly and severally the costs of both first and second respondents on a party and party scale which costs are to include costs occasioned by the employment of two counsel."**

[3] The appellants rely on various grounds in their notice of appeal and these grounds, summarised, read as follows:

a) The court a quo erred in finding that the first appellant does not have locus standi in respect of Crown Premium ("Crown").

b) The court a quo erred in finding that there was no justification for the joinder of the second applicant in order to obtain relief in the alternative in respect of Crown, because any such relief has become time barred.

c) The court a quo erred in finding that the relief claimed in respect of Bernini Sparkling Grape, relating to a determination which was made in 1996, was time barred.

d) The court a quo erred in finding that the 1996 determination relating to Bernini Sparkling Grape was not made in respect of the first applicant.

e) The court a quo erred in holding that the wine coolers were classifiable under tariff item 104.15.50 prior to 18 February 2004.

f) The court a quo erred in finding the applicable tariff heading to be TH22.06 "**other fermented beverages**" for the product could not fall under "**other**"; the reason being that the "**fermented beverage**" of the product is "**wine of fresh grapes**", which is covered by TH22.04.

g) The court a quo erred in holding, on the authority of **AM Moosa Group Ltd. v Commissioner SA Revenue Service** 2003 (6) SA 244 (SCA), that the estoppel

raised by Distell could not succeed.

h) The court a quo erred in holding that the constitutional issue raised was premature, because, as the claim of Distell and SFW for refunds will only arise on the setting aside of the determinations of 13 October 2004, the unconstitutional deprivation by section 76B of the Act of such refunds could only arise in such event.

i) Due to the findings of the court a quo the court a quo did not consider certain aspects which should have been considered and decided in the favour of Distell and SFW.

[4] The court a quo dealt with the facts in its judgment obviating the necessity of repeating everything again in this judgment and only the facts relating to the appeal will be dealt with.

[5] The only issue which falls to be decided in this appeal is the merits of the classification issue and if the appellants succeed on the merits, the orders which should be made to amend the Commissioner's (allegedly) incorrect determination. The following issues will therefore have to be considered by this Court:

a) Distell's locus standi to challenge the 1995 determination given to SFW in respect of Crown.

b) Whether, having regard to:

   i) Section 47(9) of the Act, as it read during 1995/1996, alternatively as it reads presently;

   ii) the common law, alternatively section 7(1) read with section 9 of the **Promotion of Administrative Justice Act**, 3 of 2000 ("PAJA");

   the tariff determinations made by the Commissioner in 1995 and 1996 in respect of Crown and Bernini may now be impugned.

c) Whether the wine coolers, prior to the amendment of Schedule 1 Part 2A on 18

February 2004, attracted payment of specific excise duty in terms of Tariff Item 104.17.15.

[6] In order to determine the aforesaid, a finding on the true nature and characteristics of the wine coolers and, in particular, a finding on whether water is, for classification purposes, to be regarded as a "**non-alcoholic beverage**", is to be made. With regard to the belated attack on the constitutionality of section 76B of the Act, resulting in the second respondent being joined, the appellants conceded that the constitutionality questions should not be adjudicated in this application and if the appellants succeed on the classification issue, they will raise these matters (to the extent necessary) in any subsequent proceedings that may be instituted. (Appellants' heads of argument paras. 94-99).

[7] Based on averments made by the deponent (Vermaak AA (Vol. 2, para. 7.1, record p. 149) it appears that Distell and SFW launched the application in an attempt to reclaim at least R150 million from the fiscus.

[8] During 1995 SFW manufactured, among others, a drink known as a "**wine cooler**" under the mark "**Crown Premium**" ("Crown").

[9] On 17 July 1995 a written tariff determination was given to SFW by the Commissioner in terms whereof Crown was determined to be:

a) classifiable under Tariff Heading 2206.00.90 of Part 1 of Schedule 1 of the **Customs and Excise Act**, 91 of 1964 ("the Act"); and hence

b) liable to excise duty in terms of Tariff Item 104.15.80 of Part 2A of Schedule 1 of the Act. (All references hereafter to Tariff Headings and Tariff Items will be references to the relevant headings and items in Part 1 and Part 2A of Schedule 1 to the Act). Part 1 deals with what might be termed "**ordinary**" customs duty on imported goods, whilst Part 2A deals with excise duty payable (for present purposes) on goods manufactured in South Africa. The items mentioned in Part 2A invariably mirror Tariff Headings in Part 1 with or without minor amendments.

[10] On 1 December 1995 the Part 2A determination given to SFW was amended by

the Commissioner from Tariff Item 104.15.80 to Tariff Item 104.15.50.

[11]During 1996 a company known as Distillers Corporation Limited ("Distillers") manufactured, among others, a wine cooler known as Bernini Sparkling Grape Beverage ("Bernini").

[12] On 21 June 1996 a written tariff determination was given to Distillers in terms whereof Bernini was determined to be:

a) classifiable under Tariff Heading 2206.00.90; and hence

b) liable to excise duty in terms of Tariff Item 104.15.80;

[13] On 10 September 1996 the Part 2A determination given to Distillers was amended by the Commissioner from Tariff Item 104.15.80 to Tariff Item 104.15.50.

[14] Neither SFW nor Distillers NO appealed against the Commissioner's determinations.

[15] During January 2001 Distillers bought the business of SFW and eventually became Distell.

[16] In early 2002 the Commissioner apparently realized that there could be a problem with the classification of the wine coolers, in particular the excise duties paid thereon, as and as a result thereof an in-depth investigation was undertaken.

[17] In terms of a (new) written tariff determination made by the Commissioner on 14 August 2002, eight other wine coolers ("the eight wine coolers") manufactured by the newly formed Distell were determined to be:

a) classifiable under Tariff Heading 2206.00.90; and

b) liable to the levy of excise duty in terms of Tariff Item 104.15.50.

[18] A firm known as KPMG (acting on behalf of Distell) made certain submissions to the Commissioner, and the Commissioner in reaction thereto, in terms of a written

determination dated 12 March 2003:

a) withdrew the determinations of 14 August 2002 (in respect of the eight wine coolers) insofar as they pertained to the Part 2A classification; and

b) determined the eight wine coolers to be classifiable under Tariff Item 104.15.10, with effect from 14 August 2002.

[19] As regards Crown and Bernini the Commissioner, in a further evenly dated letter, advised Distell that, as the classifications in respect thereof had been made as long ago as 1995 and 1996 respectively, the right to appeal the same had lapsed by virtue of the provisions of section 47(9) read with section 96 of the Act.

[20] In terms of a letter dated 15 December 2003 Distell gave notice in terms of Section 96 of the Act of its intention to institute legal proceedings against the Commissioner.

[21] On 18 February 2004 (as part of the budget speech of the Minister of Finance), and with effect from that date, Part 2A of Schedule 1 was amended. The effect of the amendment was to make it clear that from that date all the beverages classifiable under Tariff Heading 22.06 would be liable to the same excise duty.

[22] The proceedings before the court a quo were instituted on 6 May 2004.

[23] In terms of a written determination dated 13 October 2004 the Commissioner issued the following new determinations to Distell in respect of Crown:

a) It was determined to be classifiable under Tariff Heading 2206.00.80 with effect from the date of the determination, i.e. 13 October 2004;

b) it was determined to be subject to specific excise duty in terms of Tariff Item 104.17.15.

[24] In terms of a written determination dated 13 October 2004 the Commissioner issued the following determinations in respect of Crown:

a) The Part 1 classification was amended from Tariff Heading 2206.00.90 to

Tariff Heading 2206.00.80 with effect from 13 October 2004; and

b) the Part 2A classification, as it was prior to the amendment of the Act on 18 February 2004, was confirmed.

[25] In terms of a written determination dated 13 October 2004 the Commissioner issued the following new determinations to Distell in respect of Bernini:

a) it was determined to be classifiable under Tariff Heading 2206.00.80; and

b) it was determined to be subject to specific excise duty in terms of Tariff Item 104.17.15.

[26] In terms of a written determination dated 13 October 2004 the Commissioner issued the following determination to Distell in respect of the eight wine coolers:

a) the determination of 12 March 2003 (**annexure "JWW7"**) was withdrawn; and

b) the coolers were determined to be classifiable under Tariff Heading 2206.00.80 and thus liable to specific excise duty under Tariff Item 104.15.50, before, and under Tariff Item 104.17.15, after the amendment of Schedule 1 Part 2A on 18 February 2004.

[27] On or about 12 October 2005 Distell, belatedly, filed an application for the joinder of SFW as a second applicant.

[28] Distell's locus standi to assail the determinations given to SFW relating to Crown, must now be considered:

a) It was submitted by Mr. Puckrin, who appeared with Mr. Meyer, for the Commissioner and the Minister that the Commissioner's arguments on the classification issue were trenchant and, if upheld, would be determinative of the entire appeal, as a matter of logic issues of locus standi and time-barring must perforce be dealt with first. He emphasized that these arguments were not mere technical makeweights, but were substantial and indeed unanswerable, hence the appellants' attempts to involve the **Promotion of Administrative Justice Act**,

No. 3 of 2000, ("PAJA") to extricate themselves from the clear provisions of the Act in relation to appeals and their abortive attack on the constitutionality of section 76B of the Act.

b) Section 47(9)(a)(iii)(aa) of the Act provides that any tariff determination made by the Commissioner shall operate "**only in respect of the goods mentioned therein and the person in whose name it is issued**" as was correctly held, with respect , by the court a quo**.**

c) Mr. Puckrin submitted that the legal and practical effect of the aforesaid must be that:

i) the rights derived by the person or entity to whom a determination was given attach to such person or entity and are not capable of being transferred, either by way of cession or otherwise; and hence

ii) as the determination was given to SFW, only SFW has the necessary locus standi to impugn the determination.

[29] Distell's locus standi is founded solely on the rights derived from the agreement entered into with SFW on 1 January 2001. The evidence in the aforesaid regard is the following:

a) In its replying affidavit (record par. 30.1 on p.21) Distell explained that on or about 1 January 2001 it had entered into a written agreement with SFW in terms of which Distell obtained cession of all SFW's rights pertaining to Crown;

b) as the agreement was not annexed to the affidavit of De Wet, the Commissioner called for a copy thereof and it was furnished;

c) a perusal of the agreement, however, made it clear that Distell's explanation that SFW's rights had been ceded to it, was not true.

[30] The reality is thus that even if it were possible to cede the right to appeal a tariff determination (which Mr. Puckrin did not concede), SFW's right to do so was never ceded to Distillers and, consequently, to Distell. I find that Distell did not, and could

not, have locus standi to impugn the determination given to SFW in 1995 in respect of Crown.

[31] At the time when the original determinations in respect of Crown and Bernini were made (i.e. in 1995 and 1996) sections 47(9)(b) and (f) of the Act read as follows:

> **"47(9)**
> **(b) Any determination so made shall, subject to appeal to the court, be deemed to be correct for the purposes of this Act, and any amount due in terms of any such determination shall remain payable as long as such determination remains in force.**
>
> **...**
>
> **(f) Such appeal shall be prosecuted within a period of 90 days from the date of the determination."** (My emphasis)

[32] It seems that as the erstwhile section 47(f) was peremptory, in that an appeal had to be prosecuted within 90 days from the date of the determination, the determination by the Commissioner is to be regarded as correct. The section did not allow for the granting by the Court of condonation for the failure by an importer to timeously note and prosecute an appeal. The appellants' failure timeously to prosecute their appeals is irremediable and has time-barred their right to assail the determinations.

[33] In terms of section 47(9)(f) of the Act, as it presently reads, any proceedings against the Commissioner are to be instituted within one year from the date on which an aggrieved party's cause of action first arose, although in terms of section 96(1)(c)(ii) of the Act the Court may "upon application" extend the one year period "**where the interest of justice so requires**".

[34] Even if this issue were to be adjudged by this Court, in terms of section 47(9)(f) of the Act as it presently reads, the appellants have failed to make out a case for condonation, regard being had to the following:

a) the relevant determinations were made in 1995 and 1996 i.e. more than 10 years ago;

b) but for the statement that "**(F)urther and in any event, the interests of justice require, for all the reasons set out in these papers, that the period within which the Applicant should, in law, be entitled to seek the relief contemplated herein be extended to 12 May 2004**" no evidence is given in Distell's papers as to why the limitation period provided for in section 47(9)(f) of the Act should be extended by (at the time) to 10 years. The Commissioner on the other hand has introduced evidence, by way of the affidavits of De Wet, FA (Vol 1, p10 to p.25 and par 30, p.21) in particular and of Walters, RA, (Vol 4, para 2, p.360) as to the prejudice which the Commissioner will suffer because of the belated proceedings;

c) SFW also did not make any allegations relating to either the delay of more than 10 years or why the interests of justice call for the adjudication of the appeal after the lapse of a decade.

[35] With regard to the applicability, or not, of PAJA:

a) The wording of the Act is trenchant and that the prescribed remedy of an aggrieved party against a tariff determination, irrespective of whether it is founded on the Commissioner's alleged wrong interpretation of the relevant statutory provisions (i.e. the first step in the classification process), or his incorrect application of the said provisions to the facts (i.e. the second and third steps of the classification process)), is an appeal in terms of section 47(9)(e) of the Act.

b) Because the Act governs both the procedural and substantive prescripts and requirements of an aggrieved party's rights and remedies and because an appeal in terms of section 47(9)(e) is an appeal "**in the wide sense"** i.e. a complete rehearing of the whole issue, there is simply no need to resort to the corresponding provisions of PAJA.

[36] Furthermore, in this regard, Mr. Puckrin also submitted that even if the administrative justice principles relating to the (timeous) institution of the relevant legal proceedings were to find application, the appellants have failed to make out a case for condonation. In this regard he pointed out:

a) in terms of section 7(1) of PAJA judicial review proceedings are to be instituted not later than 180 days after the date on which the entity concerned was informed of the administrative action;

b) in terms of section 9 of PAJA the 180 days may be extended by the Court "**on application by the person … concerned**" under circumstances "**where the interests of justice so require**";

c) before the advent of PAJA review proceedings had to be instituted within a reasonable time after the challenged decision or action became known;

d) it is trite law that it is incumbent on a party seeking an indulgence to advise the Court of all the relevant facts, **firstly**, to explain the delay and the reason for the non-compliance with the prescribed time periods and, **secondly**, substantiating and justifying a legal conclusion that the interests of justice call for an extension of the relevant period (**Associated Institutions Pension Fund and Others v Van Zyl and Others** 2005(2) SA 302 (SCA) at 322 C - J ; **Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad** 1978(1) SA 13(A) at 39 C - D; **Minister of Safety and Security v Standard Bank of SA Limited** 1999(3) SA 471 WLD at 476 I/S - 479 A-B; **Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie en 'n ander** 1986(2) SA 57(A) at 86 G - 87 H/I; **Lion Match Co Ltd v Paper Printing Wood and Allied Workers Union & Others** 2001(4) SA 149 SCA at 156 G - 157 J; **Sasol Oil (Pty) Ltd & Another v Metcalf N.O** 2004(5) SA 161(W) at 164 I - 166 G);

e) on behalf of Distell it was stated in its papers: "**(F)urther and in any event, the interests of justice require, for all the reasons set out in these papers, that the period within which the Applicant should, in law, be entitled to seek the relief contemplated herein be extended to 12 May 2004"**. Not a single fact was stated, or submission made, in its founding affidavit as to why the "**reasonable time**" and/or the limitation period provided for by section 7 of PAJA should be extended by an order of Court beyond 180 days after the lapse thereof, for about a decade;

f) SFW made not a single allegation relating to either the delay or why the interests

of justice call for the adjudication of the appeal after 10 years.

[37] The appellants' reliance on PAJA must therefor fail for both reasons namely, firstly, because it could not be invoked and secondly, because of the time bar.

[38] This Court now has to deal with the principles relating to tariff classifications.

a) The Commissioner is charged, in terms of the provisions of section 2(1) of the Act, with the administration of the Act, including the interpretation of the Schedules thereto;

b) In terms of section 47(9)(a)(i) of the Act the Commissioner may, in writing, determine the Tariff Heading, Tariff Sub-headings or items of any Schedule under which any imported goods or goods manufactured in the Republic are to be classified. The Commissioner's determination is, however, subject to an appeal to the High Court in terms of sections 47(9)(b), (e) and (f) of the Act.

c) Such an appeal is brought as an application before a single judge and all the evidence is considered afresh in a hearing de novo (**Metmak (Pty) Ltd v Commissioner of Customs and Excise** 1984(3) SA 892 (T); **Autoware (Pty) Ltd v Secretary for Customs and Excise** 1975(4) SA 318 (W) at 320 D - 321 C).

d) The original legal sources applicable to Tariff classification are, **firstly**, Part 1 of Schedule No 1 to the Act and, **secondly**, the Explanatory Notes to the Harmonized System issued by the Customs Co-operation Council, Brussels.

e) Part 1 of Schedule No 1 to the Act comprises:

   i) The General Rules for the Interpretation of the Harmonized System;

   ii) Section Notes;

   iii) Chapter Notes;

   iv) Tariff Headings and Subheadings;

v) The rate of duty payable in terms of the various tariff headings and subheadings.

[39] Section 47(18)(a) of the Act provides that the:

> **"..interpretation of Part 1 of Schedule No 1 shall be subject to the Explanatory Notes to the Harmonized System and the Customs Cooperation Council Nomenclature issued by the Customs Co-operation Council, Brussels, from time to time …"**

[40] Often cited legal authorities on the status of the Explanatory Notes and their relationship to Tariff Headings, Sections Notes and Chapter Notes in matters of Tariff classification, as well as the process of classification are the cases of **Secretary for Customs and Excise v Thomas Barlow & Sons Ltd**. 1970(2) SA 660 (A) at 675 D - 676 F and 679 C - 680 C and **International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise** 1985(4) SA 852 (A). In the latter case, at 863 G - H, the classification process is summarized as follows:

> "**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 the goods.".**

[41]The rule of interpretation pertaining to fiscal statutes, i.e. that such legislation should be strictly interpreted, finds no application in classification matters since –

> "**…the case concerns the classification of goods under the correct tariff head and there is no basis for regarding one interpretation as stricter than another.**"(**Commissioner for Customs and Excise v C I Caravans (Pty) Ltd**. 1993(1) SA 138 (N) at 153 I - J).

[42] What are relevant in the classification process are the nature, form, characteristics and functions of the imported or manufactured goods, objectively determined. (**Autoware (Pty) Ltd v Secretary for Customs and Excise** supra at 321 G - 322 A), Expert evidence is not admissible to prove the meaning of words save where the words

are technical or specialized words in a technical or specialized setting. Questions of interpretation are matters of law which exclusively fall within the domain of the court. (**Crown Chickens (Pty) Ltd. v Minister of Finance and Others** 1996(4) SA 389 (E) at 394 I - 395 H; **National Screen Print (Pty) Ltd v Minister of Finance** 1978(3) SA 501 (C) at 506 A - 507 B; **International Business Machines case** supra at 874 A; **Kommissaris van Doeane en Aksyns v Mincer Motors Beperk** 1959(1) SA 114 (A) at 121 C – D).

[43] The parties were ad idem that all the wine coolers are to be classified under Tariff Heading 2206.90 and the disagreement turns on the reason for their classification under that heading.

[44] The reason why the rationale underpinning the classification under Tariff Heading 2206.90 is of pivotal importance, is the following:

a) Goods can be classified under the Tariff Heading on the basis that they are one of the following products:

   i) "**Other fermented beverages (for example cider, perry and mead)**";

   ii) "**mixtures of fermented beverages**";

   iii) "**mixtures of fermented beverages and non-alcoholic beverages**".

b) In terms of Tariff Item 104.15 (before its amendment in 2004), only "**Other fermented beverages**" (falling within Tariff Heading 2206.90) were liable to specific excise duty in terms of Part 2A of Schedule 1.

c) Item 104.15.80 as it read prior to amendment is cited in full:

Tariff Item	**Tariff Heading**	**Description**
104.15		WINE OF FRESH GRAPES, INCLUDING FORTIFIED WINES, GRAPE MUST, OTHER THAN THAT OF HEADING 20.09

	VERMOUTHS AND OTHER WINE OF FRESH GRAPES FLAVOURED WITH PLANTS OR AROMATIC SUBSTANCES
	OTHER FERMENTED BEVERAGES (FOR EXAMPLE CIDER, PERRY AND MEAD):
.05	Sorghum beer (excluding beer made from preparations based on sorghum flour)
.10	Unfortified still wine
.40	Fortified still wine
.50	Other still fermented beverages, unfortified
.60	Other still fermented beverages, fortified
.70	Sparking wine
.80	Other fermented beverages (excluding sorghum beer)

d) Distell contends that the products are classifiable on the basis that they are "**mixtures of fermented beverages and non-alcoholic beverages**" (water, allegedly being a "**non-alcoholic beverage**").

e) The Commissioner, on the other hand, contends that the products are "**(O)ther fermented beverages (for example, cider, perry, mead)**".

f) Other relevant Tariff Headings must now also be considered.

G)Tariff Headings 22.01, 22.02 and 22.06 are concerned with the following goods:

Heading	**Sub-Heading**		**Article Description**
22.01			**Waters, Including Natural or Artificial Waters and Aerated Waters, Not Containing Added Sugar or Other Sweetening Matter Nor Flavoured; Ice and Snow.**
	2201.10		-Mineral Water and earated waters
	2201.90		-Other
22.02			**Waters, Including Mineral Waters and Aerated Waters, Containing Added Sugar or Other Sweetening Matter or Flavoured, and Other Non-alcoholic Beverages (Excluding Fruit or Vegetable Juices of Heading No. 20.09):**
	2202.10		Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured:
		.10...	in sealed containers holding 2.5l or less(excluding those in collapsible plastic tubes)
		.90	... Other

	2202.90	- Other
	.20	...in sealed containers holding 2.5l or less (excluding those in collapsible plastic tubes and those with basis of milk)
	.90	...Other
22.06		**Other Fermented Beverages (for example, Cider, Perry, Mead), Mixtures of Fermented Beverages and Non-alcoholic Beverages not elsewhere Specified or included:**
	.05	**...Sparkling Beverages**
	.15	**...Sorghum Beer**
	.80	**...Other unfortified beverages**
	.90	**...Other**

h) **Tariff Heading 21.06 is concerned with the following goods:**

Heading	**Sub-Heading**	**Article Description**
21.06		Food Preparations Not Elsewhere Specified or Included:
	2106.90	-Other

.17	-Disaccharide free infant's food, in powder form...
.25	- Syrups (including syrups with a basis of fruit juice)
.35	- Sweetene substances (excluding sweetening substances with a basis of accharine.....
.50	- Mixtures of chemicals and foodstuffs of a kind used in the preparation of human foodstuffs
.67	- Compound alcoholic preparations of a kind used for the manufacture of beverages (excluding those based on odoriferous substances
.90	- Other

[45] The classification of the products in issue, is done in three stages.

[46] The first stage is the ascertainment of the meaning of the words. There is a dispute between the parties as to the interpretation of the word "**beverage**" used in the relevant Tariff Headings and Tariff Items.

[47] The second stage is the consideration of the nature and characteristics of the goods:

a) The Commissioner has decided for purposes of the proceedings before the Court, to accept the evidence introduced by Distell relating to the nature and characteristics of
the wine coolers and there is, consequently, no dispute between the parties in this regard.

b) The manufacturing process is set out in the affidavit of Duncan Alan Green ("Green") read with **annexure "JMV6"** to the answering affidavit of Ms Vermaak (**Green, Vol 1, p65 to p85, annexure "JMV6", Vol 3, p189).**

c) The manufacturing process of Crown, Bernini and the Tiffany's products ("the Crown process") entails the following:

i) A concentrate, made up of grape wine, sweetening-, flavouring- and colouring agents is prepared. It is made as a concentrate for ease of transport.

ii) The concentrate is then diluted with water in order to attain the required alcohol level, after having been transported to the bottling facility. Other operations are also conducted (**Green, Record Vol 1, p65 et seq read with "DAG2" p70; "DAG3", p73; "DAG4", p75 and "DAG8, p83).**

d) The manufacturing process of Ginger Fizz and the various River Dew products ("**the Ginger Fizz process**") entails the following:

i) All the ingredients i.e. the water, grape wine, sweetening-, flavouring-, and colouring agents are added simultaneously.

ii) In order to attain the correct alcohol level, two blends with different alcohol levels are then interblended .(**Annexures "DAG5", p77; "DAG6", p79, "DAG7", p81 and "DAG9", Vol2, p85)**

[48] The third stage is the selection of the heading which is most appropriate:

a) **Tariff Headings 21.01 and 22.02**

i) Tariff Heading 22.01 covers "**ordinary natural water of all kinds…. Whether or not clarified or purified**…"; (**Annexure "JWW19": Explanatory Note (A) to Tariff Heading 22.01, Vol 2, p136**).

ii) It follows from the aforesaid that technically speaking dam water, river water, sewage water, drain water etc. would all be classifiable under Tariff Heading 22.01 and not as "**beverages**".

iii) Nowhere in Tariff Heading 22.01, or the Explanatory Notes thereto, is the word "**beverage**" used.

iv) Tariff Heading 22.02, on the other hand:

a) expressly states that it covers (non-alcoholic) "**beverages**";

b) clearly contemplates only water that is suitable for human consumption and that has been further enhanced to that end;

c) clearly provides for at least two main types of beverages namely:

i) "**waters … containing added sugar or other sweetening matter or flavoured**";

ii) "**and other non alcoholic beverages**".

v) Based on the aforesaid:

a) Water is only to be regarded as a beverage if it is suitable for human consumption and only once it has been sweetened and flavoured (and provided, of course, that it is not (still) a preparation in terms of Tariff Heading 21.06);

b) The reference to "**and other**" in Tariff Heading 22.02 is clearly a reference to the first part of the said tariff heading only and not also to the provisions of Tariff Heading 22.01.

b) If the waters contemplated in Tariff Heading 22.01 were intended also to be beverages then their being grouped under a different tariff heading would be totally senseless and have no practical meaning. (**Annexure "JWW19", Explanatory Notes to Tariff Heading 22.02, Vol 2, p137)** and the aforesaid is borne out by the assigning of names to the various products as is set out further in this paragraph:

Hunters Gold:

i) Distell also manufactures a product known as Hunters Gold ("Hunters"). The composition of the said product and the manufacturing process thereof are fully set out in a document obtained from Green and annexed to the answering affidavit of Vermaak as **annexure "JMV9"** and which has apple cider, as opposed to grape wine, as its core ingredient and specific excise duty in terms of Tariff Item 104.15.50, before 18 February 2004, and in terms of Tariff Item 104.17.15 thereafter, has been paid by Distell on Hunters on the basis that it is classifiable under Tariff Heading 22.06 as "**(O)ther fermented beverages**".

ii) The aforesaid classification by Distell is clearly correct as it is expressly mentioned in the examples enumerated in Tariff Heading 22.06 and the mere fact that cider (as well as mead and perry) were grouped separately, notwithstanding the fact that it also comprises a "mixture" of wine (although not grape wine) and water, is indicative of the fact that, for classification purposes, the legislator did not intend the waters of Tariff Heading 22.01 to be a "**non-alcoholic beverage**" as contemplated in Tariff Heading 22.06; and it would be totally wrong to classify the wine coolers differently merely because wine, instead of cider, is used as the alcohol component of the product.

iii) The consequence, Mr. Puckrin referred during argument to it as "absurd", of regarding and classifying the wine coolers as "**mixtures of fermented beverages and non-alcoholic beverages**" will be that all products containing water would no longer be classifiable as that product, but would be that particular product mixed with a "**non- alcoholic beverage**".

iv) It follows that, both as a matter of logic and principle, the wine coolers should be classified in the same category as ciders.

c) **<u>Tariff Heading 21.06</u>**:

i) Tariff Heading 21.06 deals with "**Food Preparations**" and according to Explanatory Note (7) to Tariff Heading 2106.90 the heading includes, among others:

"**(7) Non-alcoholic or alcoholic preparations (not based on odoriferous substances) of the kind used in the manufacture of various non-alcoholic or alcoholic beverages. These preparations can be obtained by compounding vegetable extracts of heading 13.02 with lactic acid, tartaric acid, citric acid, phosphoric acid, preserving agents, foaming agents, fruit juices, etc.. The preparations contain (in whole or in part) the flavouring ingredients which characterize a particular beverage. As a result, the beverage in question can usually be obtained simply by diluting the preparation with water, wine or alcohol, with or without the addition, for example, of sugar or carbon dioxide gas. Some of these products are specially prepared for domestic use: they are also widely used in industry in order to avoid the unnecessary transport of large quantities of water, alcohol, etc. As presented, these preparations are not intended for consumption as beverages and thus can be distinguished from the beverages of Chapter 22.". (My emphasis)**

ii) The first part of the Crown process (dealt with in paragraph [47] c) supra) i.e. before the addition of water, undoubtedly results in an "**alcoholic preparation**" as contemplated by Tariff Heading 2106.90.

d) Explanatory Note (7) to Tariff Heading 2106.09, which explains the purpose of the alcoholic preparation and the process by which it is "**converted**" into a beverage, clearly explains that the conversion process is brought about "**by diluting**" - as opposed to mixing - the preparation with water or wine.

e) According to Distell's expert, Mr. Green, the Crown, Bernini and Tiffany's products "**are blended as concentrates that are further diluted with water**…" (my emphasis) - exactly the process contemplated by Tariff Heading 21.06.09 as explained by Explanatory Note (7) thereto.

f) The practical and legal effect of the evidence of Mr. Green is that the second phase of the Crown process (i.e. the addition of water) constitutes:

i) the process contemplated by Tariff Heading 21.06 (i.e. the conversion of a concentrate into a beverage by the addition of water);

ii) "**diluting**" and not "**mixing**".

g) The two blending processes (described in paragraphs [47] c) and [47] d) are essentially the same:

i) The practical and legal effect of the two processes not being treated as the same (i.e. if the Ginger Fizz process is regarded as constituting the mixing (as opposed to the blending) of the two concentrates) would be that the Ginger Fizz and River Dew products would be classifiable as "**mixtures of fermented beverages**" whilst the Crown, Bernini and Tiffany's would be classifiable as "**mixtures of fermented beverages and non-alcoholic beverages**" – a patently absurd result as Mr. Puckrin put it.

ii) As with any other legislation, the Tariff Headings and the Explanatory Notes thereto are to be interpreted in accordance with a presumption against an absurd result. (Section 47(8) of the Act; E A Kellaway, **Principles of Legal Interpretation: Statutes, Contracts and Wills**, Butterworths at 356).

[49] In paragraph 32.5 of the heads of argument filed on behalf of the appellants the argument is advanced that if water is a "**non-alcoholic beverage**" for purpose of TH22.06 it is this part of the tariff heading which would provide the most specific description of the wine coolers and that it would be so whether the wine component were regarded as falling under TH22.04 or TH22.05. This is, however, not correct. The coolers in issue are much more than just a mixture of wine and water and they are totally new products that have wine and water as their main constituents by volume.

[50] In paragraph 34 of the appellants' heads of argument an argument is advanced to the effect that the tariff headings in TH22.01 to TH22.06 were plainly concerned with liquids for consumption by humans, the very first item in it being unsweetened water,

including natural water (but excluding water which would not be potable, such as seawater) and that this strongly indicates that the word "**beverage**" should be understood to be any liquid for consumption by humans, including natural water. Mr. Puckrin in response to this argued that the submissions were wrong for two reasons:

a) the only Tariff Headings in the Nomenclature that provide for, and deal with water are Tariff Headings 22.01 and 22.02. That means that water not fit for human consumption is to be classified under Tariff Heading 22.01; and

b) Explanatory Note (A) to Tariff Heading 22.01 expressly states that it includes clarified and purified water, an explanation that clearly presupposes that unclarified and unpurified water are to be classified thereunder.

I am of the opinion that Mr. Puckrin is correct.

[51] In paragraph 35 of the appellants' heads it is contended that water is to be regarded as a "**beverage**" which contention is solely founded on General Explanatory Note (A) to Chapter 22 which provides that one of the product groups covered by this chapter is "**(W)ater <u>and other</u> non-alcoholic beverages and ice**". (My emphasis.) Mr. Puckrin argued that the argument was misconceived and that the "**other**" used there does not render water a species of the genus "**other non-alcoholic beverages**" and he submitted that, if regard is had to the provisions of the relevant tariff headings, the appellants' argument will have the effect of the Explanatory Notes overriding the tariff headings – a result that will be in flagrant breach of the principles enunciated in the Thomas Barlow case at 675G/H – 676F):

> **"It is of importance, however, to determine at the outset the correct approach to adopt in interpreting the provisions of the Schedule and in applying the explanations in the Brussels Notes. Note VIII to Schedule 1 sets out the 'Rules for the Interpretation of this Schedule'. Para. 1 says:**
> **'The titles of sections, 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 or notes do not otherwise indicate, according to paras. (2) to (5) below.'**
> **<u>That, I think, renders the relevant headings and section and chapter notes not only the first but the paramount consideration in determining which</u>**

classification, as between headings, should apply in any particular case. Indeed, right at the beginning of the Brussels Notes, with reference to a similarly worded paragraph in the Nomenclature, that is made abundantly clear. It is there said:

'In the second provision, the expression 'provided such headings or Notes do not otherwise require' (that is the corresponding wording of the Nomenclature) is necessary to make it quite clear that the terms of the headings and any relative section or chapter notes are paramount, i.e., they are the first consideration in determining classification.'

It can be gathered from all the aforegoing that 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 and doubtful cases. But in using them one must bear in mind that they are merely intended to explain or perhaps supplement those headings and notes and not to override or contradict them. They are manifestly not designed for the latter purpose, for they are not worded with the linguistic precision usually characteristic of statutory precepts; on the contrary they consist mainly of discursive comment and illustrations. And, in any event, it is hardly likely that the Brussels Council intended that its Explanatory Notes should override or contradict its own Nomenclature.

Consequently, I think that in using the Brussels Notes one must construe them so as to conform with and not to override or contradict the plain meaning of the headings and notes. If an irreconcilable conflict between the two should arise, which in my view is not the case here, then possibly the meaning of the headings and notes should prevail, because, although sec. 47 (8) (a) of the Act says that the interpretation of the Schedule 'shall be subject to' the Brussels Notes, the latter themselves say in effect that the headings and notes are paramount, that is, they must prevail. But is not necessary to express a firm or final view on that aspect."

(My emphasis.)

[52] Mr. Puckrin also argued that as formulated, the conclusion drawn by the appellants in paragraph 35 of their heads to the effect that ice is not an alcoholic beverage. This led, according to him, to the further absurd result that if water is frozen it would cease to be a beverage, but would regain its character as a beverage the moment it starts to melt.

[53] The argument was advanced in paragraph 37 of the appellants' heads that in tariff

classification words must be given the meaning that the Harmonized Systems ascribe to them and that the word "**beverage**", as understood in TH22.06, and elsewhere in Chapter 22, includes natural water and that this being so, it is the end of the enquiry. Mr. Puckrin responded to this argument by stating that the conclusion drawn in this paragraph by the appellants was totally without substance and that the beverage referred to in Tariff Heading 22.06 was by necessary implication limited to natural water suitable for human consumption. He also submitted that the appellants were, however, correct when they say that words must be given the meaning that the Harmonized System ascribe to them. He further submitted that, in practice, that meant that the concept "**beverage**" referred to in Tariff Heading 22.06 was to be interpreted by having regard, and with reference, to all the other relevant provisions in the Harmonized System and the provisions of Tariff Headings 22.01 and 22.02 in particular. I am of the opinion that Mr.Puckrin is correct.

[54] In paragraphs 39 and 40 of the appellants' heads of argument reference was made to the Canadian case of **Perrier Group of Canada Inc v Canada** [1996] 1 FC 586 where that court had to consider whether Perrier was a "**carbonated beverage**" within the meaning of Part V of Schedule III. It was held to be so as a specifically carbonated beverage for excise purposes. The Canadian appeal court upheld the trial court's decision that it was. The court, however, recognised that in certain contexts the word "**beverage**" might have a narrower meaning, but held that it was certainly capable of a wider meaning which included natural water and that this was the meaning intended in the enactment. In that case the legislation was quite different to ours. The appellants also referred to an Australian case namely **Re Bristol-Meyers Company (Pty) Ltd. v Commissioner of Taxation** [1990] FCA 200 where it was held that a "**beverage**" was any liquid which is swallowed to quench thirst or for nourishment and that natural water falls squarely within this definition. In the latter case, for instance, the issue there was whether a particular product was a "**beverage**" rather than a medicine and that the product involved in that case was a "**prepared**" beverage and concerned wholly different legislation to ours. It is trite law that the interpretation of words or phrases in other cases (here also, in any case, in other jurisdictions) must be approached with extreme caution.

[55] In paragraph 43 of the appellants' heads of argument it was argued that wine coolers were mixtures falling under the second part of TH22.06 and accordingly the coolers could not (as the Commissioner would have it) be classified under the first part

of TH22.06. This argument pre-supposed that water is a "**non-alcoholic beverage**". Mr. Puckrin argued, however, that the appellants' argument was trumped by Explanatory Note (3) to the Tariff Heading 22.06, which provides "**the (first part of) heading includes hydromel vineux – mead containing added white wine, aromatics and other substances**."

[56] Paragraph 50.3 of the appellants' heads of argument reads as follows:

> "**Admittedly, the appellants' argument in respect of the wine coolers would imply that Hunters - which is a mixture of fermented apple juice and water - should like the wine coolers fall under the second part of TH22.06 rather than under the first part. However, in view of the applebased nature of Hunters, the error on Distell's part in failing to realise that the arguments in respect of the wine coolers applied with equal force to Hunters, is easy to understand."**

[57] Mr. Puckrin's response was that the appellants totally misconceived the argument:

a) because the first part of the Tariff Heading expressly includes cider as one of the "**other fermented beverages**", it simply does not qualify for classification in the second part; and
b) the argument was, accordingly, not that cider is being incorrectly classified, but that, by expressly providing for cider in the first part of the heading, the lawmaker clearly indicated that water is not to be regarded as a beverage and that the addition of water in order to dilute a product is not to be regarded as mixing.

I am in this regard also of the opinion that Mr. Puckrin is correct.

[58] I am, therefore, of the considered view that with regard to the aspects set out in paragraph [5] supra, the ruling of the court a quo, was, with respect, correct and that the appellants fail with regard to the classification issue and that the appeal should be dismissed with costs.

[58] I accordinghly make the following order:

> "The appeal is dismissed with costs, which costs shall include the costs of two counsel."

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P.Z. EBERSOHN
ACTING JUDGE OF THE HIGH COURT

I AGREE:

_____

G. WEBSTER J
JUDGE OF THE HIGH COURT

_____

L.M. MOLOPA J
JUDGE OF THE HIGH COURT

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