IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

Case number: 16910/2009

Date: 2 June 2011

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED
....
DATE SIGNATURE

In the matter between:

DISTELL LIMITED Applicant

and

THE COMMISIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

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JUDGMENT

PRETORIUS J,

This application is an appeal in terms of section 47(9)(c) of the Customs and Excise Act, 91 of 1964 (the Act). There is also an application by the respondents to apply for leave to file further affidavits, which application is opposed by the applicant. The applicant launched an application for certain

evidence to be struck out from the respondent's papers on the grounds that it is hearsay, irrelevant and not evidence by experts. The respondent opposed this application.

The respondent submitted in its' heads of argument that the applicant came to court with *"unclean hands"*. Mr Puckrin, for the respondent, indicated at the start of the proceedings that the respondent abandons the argument and will not deal with it at all during argument before court and it should be ignored.

Mr Puckrin, for the Commisioner, argued that the court cannot entertain the appeal. The products in issue are produced in South Africa. The production of these products is covered by the Liquor Products Act, 60 of 1989 and the Customs Act.

Section 5(3) of the Liquor Products Act provides:

> *"(3) No person shall, either before, during or after completion or termination of the alcoholic fermentation referred to in subsection (1) (b) -*
>
> > *(a) add to or remove from the juice of fresh grapes or the wine produced therefrom, any substance other than a substance prescribed for this purpose; and*
> >
> > *(b) so add or remove a substance so prescribed, otherwise than in accordance with the prescribed manner or conditions."*

The result is that such a product, from which more than undesirable flavours

have been removed, can not be termed "wine". Should a party proceed to call such a product "wine" it will be committing a crime. Therefore the court should not assist the applicant to contravene section 5(3) of the Liquor Products Act.

The respondent submits that in order to qualify under Tariff Headings 22.04; 22.05 or 22.06, more flavour than is allowed by the Liquor Products Act is removed from the wine and the product is still classified as wine results in a criminal offence will be committed by the applicant.

This court has not been tasked to decide whether the "stripped wine" has resulted in the applicant using the term "wine" illegally. I make no finding on this issue as another court may or may not deal with it at a later stage.

Mr Joubert, on behalf of the applicant, requested the court to firstly deal with the application to file further evidence and the application for striking out. This was opposed by the respondent. The court decided that, as these matters are so intertwined that the court cannot deal with these two further applications separately, that it should be argued at the same time as the main application and will be dealt with in the judgment.

The further affidavits:

The court deals with the application to have further affidavits submitted as this will have an impact on the rest of the case. The respondent applied to have further affidavits admitted. The applicant had served and filed the founding papers during March 2009. On 2 November 2009 amended founding papers

were served and filed during July 2010 and the replying affidavits were served and filed during August 2010.

The respondent served further affidavits on the applicant during February 2011 and these are the affidavits that the respondent requests the court to accept as evidence. The respondent requires the leave of the court to file further affidavits as three sets of affidavits have already been filed. The applicant is opposing this application. The court has to consider and decide the matter as it is in the discretion of the court to allow the further affidavits. In **Africa Oil (Pty) Ltd v Ramadan Investments 2004 (1) SA 35 NPD** Moleko J held at 38 I – J:

> *"Normally in motion proceedings three sets of affidavits are allowed and no further affidavits may be filed without leave of Court. Such leave is in the discretion of the Court and such discretion is to be exercised judicially upon consideration of the facts in each case. In Herbstein and Van Winsen Civil Practice of the Supreme Court of South Africa at 359 it is stated that leave of Court will only be granted in special circumstances or if the Court considers such a course advisable.* ***Special circumstances exist where something unexpected or something new emerges from applicant's replying affidavit. There must be a satisfactory explanation which negatives mala fide as to the reason why the information was not placed before the court at an earlier stage.***" (Court's emphasis)

The court will not grant leave to file further affidavits if there was *mala fides* for

not placing the information before Court in the first instance. Should new issues arise from the affidavits filed which do not constitute a reply, the court will not grant leave to file further affidavits. The court must also be satisfied that the filing of further affidavits will not prejudice the applicant.

In **Standard Bank of South Africa v Sewpersadh 2005 (4) SA 148 C** at 154 the court set out the legal principles governing the acceptance of further affidavits:

> *"The Court will exercise its discretion to admit further affidavits only if there are special circumstances which warrant it or if the Court considers such a course advisable. (See Rieseberg v Rieseberg 1926 WLD 59; Joseph & Jeans v Spitz and Others 1931 WLD 48.) In Bangtoo Bros and Others v National Transport Commission and Others 1973 (4) SA 667 (N) it was held among other things that a litigant* ***who seeks to serve an additional affidavit is under a duty to provide an explanation that negatives mala fides or culpable remissness as the cause of the facts and/or information not being put before the Court at an earlier stage. There must furthermore be a proper and satisfactory explanation as to why the information contained in the affidavit was not put up earlier, and what is more important, the Court must be satisfied that no prejudice is caused to the opposite party that cannot be remedied by an appropriate order as to costs.*** *"* (Court's emphasis)

In **Stein Brothers Ltd v Dawood and Another 1980 (3) SA 275 W** le Roux J

held at 282 C:

> *"I am of the view that litigation of this nature is not a game; that the object of all litigation is to arrive at the truth and at a fair, just and expeditious solution and that,* ***when a fourth and fifth set of affidavits have been placed before a Court, it is clearly entitled to look at them and should not shut its eyes to facts which may lead to a just decision of the matter by reason of the existence of a mere technicality."*** (Court's emphasis)

In **Simmons NO v Gillbert Hamer and Co Ltd 1963 (1) SA (NPD) 897** at 906 Caney J found:

> *"I believe that it is desirable not to be bound inflexibly to rules of procedure unless compelled to this by the clear language of the law, and that the present day tendency is away from formalism in procedure and* ***in the direction of assuring that justice is done by allowing, whenever necessary, amendments to pleadings and the admission of further evidence, whether oral or on affidavit, subject to the absence of prejudice to the other party not remediable by an appropriate order as to costs."*** (Court's emphasis)

Mr Puckrin, for the respondent, argued that almost all the evidence had been introduced in the answering affidavits to which the applicant had responded. The remainder of the evidence was necessitated by the new evidence in the replying papers of the applicant according to the respondent.

Although the respondent was satisfied that the Messrs Fridjhon and Taylor were suitably qualified to give their expert evidence, the respondent sought to strengthen their evidence by introducing the affidavit of Dr Croser in which he responded to Mr Fridjhon's findings relating to the nature and characteristics of wine and fortified wine. The respondent's counsel argued that this was necessary as the applicant had attacked the expertise of Mr Fridjhon. The respondent argued that, in any event, if the evidence cured defects in the respondent's case, it must be material and should be allowed so that the court can consider all the facts in deciding the case as set out in the **Simmons** case *(supra)*.

The respondent submitted that Mr de Wet's evidence was totally misleading and therefore it was necessary to deal with the Siebrand case which was decided by the European Court of Justice. The court will take note of the Siebrand decision, but will be aware that the European Court of Justice's ruling cannot bind this court. The same will be considered in relation to the World Customs Organisation (WCO) latest voting.

I must agree with Mr Puckrin that the *"new"* evidence is limited and cannot be regarded as having been shaped to *"relieve the pinch of the shoe."*

Both parties are *ad idem* that the matter should be finalised rather sooner than later. I have taken all the above aspects into consideration and listened carefully to both counsel's arguments. I find that there are special circumstances warranting the admission of the further affidavits by the

respondent and that this will enable the court to decide the application and so to ensure that justice is done. I cannot find that there will be any prejudice to the applicant by allowing these affidavits as the applicant has already replied to them and dealt extensively with them in the heads of argument and during argument on the merits.

The applicant has already replied to the further affidavits. All the relevant facts are thus before the court. It is my opinion that all the relevant papers were filed and served prior to the hearing of the application and in the interest of justice it should be allowed.

The striking out application:

Rule 6(15) provides:

> *"The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and own client. The court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be granted."*

It is clear from the wording of the rule that the court has a discretion in an application to strike out matter from an affidavit. Two requirements must be satisfied before the court will strike out the matter as requested. The first is that the matter sought to be struck out must be vexatious, scandalous or irrelevant. The second is that the court must be satisfied that if such matter is not struck out the applicant will be prejudiced.

In **Beinash v Wixley 1997 (3) SA 721** at 734 A-B Mahomed CJ held:

> *"I am not persuaded that Beinash suffered any prejudice if this allegation, or any other allegation contained in the impugned paragraphs of the founding affidavit, was not struck out. No such prejudice was relied upon in argument.* ***The application was heard by a Judge and not by any layperson. He was able to disabuse his mind of any vexatious, scandalous or irrelevant matter contained in the affidavit.*** *"* (Court's emphasis)

In **S v Bertrand 1975 (4) SA 142 (CPD)** Broeksman AJ held at 149 B –D:

> *"I think it appears from the cases cited above that where lay or expert opinion as to the nature of a substance or liquid is tendered and not left unchallenged there must at least be sufficient evidence as to the extent of the witness' experience in or knowledge of the substance in question, the process of reasoning adopted by the witness in arriving at his conclusion and, where appropriate, the methods adopted in order to ascertain the identity of the substance or liquid in question in order to enable the court to determine whether it can safely act on the witness' evidence.* ***The sufficiency of the evidence in any particular case will naturally be dependent upon the circumstances peculiar to such case.*** *"* (Court's emphasis)

And in **S v Adams 1983 (2) SA 577** at 586 Hoexter JA found:

> *"By toelating en evaluering van opiniegetuienis is daar sekere vereistes*

waaraan voldoen moet word. Die basiese vereistes is die getuie se bevoegdheid om hoegenaamd 'n opinie oor die betrokke onderwerp te waag."

And further:

"...is 'n verdere belangrike vereiste dat die getuie die gronde vir sy opinie moet aanstip. In R v Jacobs 1940 TPD 142 verklaar Regter RAMSBOTTOM op 146 - 7:

"In cases of this sort it is of great importance that the value of the opinion should be capable of being tested; and unless the expert witness states the grounds upon which he bases his opinion it is not possible to test its correctness, so as to form a proper judgment upon it."*"*

Mr Puckrin, for the respondent, argued that no submission was ever made that the applicant will be prejudiced should the court not strike out the requested paragraphs from the various affidavits by Mr Fridjhon, Dr Taylor, Mr Millar, Mrs Jonker and Mr Croser. I have read all the papers carefully and could not find any submissions to the effect that the applicant would be prejudiced should the court not strike out the evidence as requested. There is no averment in Mr Joubert's heads of argument as to the prejudice the applicant would suffer if the said paragraphs are not struck out.

The applicant has not persuaded the court on a balance of probabilities that it will suffer prejudice if the relevant evidence is allowed, as the applicant did not

address the issue of prejudice. There is further no reason to strike out the paragraphs relating to the opinions of Mr Fridjhon, Mr Taylor and Dr Croser. The Court finds that all three these witnesses are competent expert witnesses which set out their experience in the liquor business adequately. The court accepts that they have sufficient experience and evidence regarding the products in issue. The court accepts their evidence as that of experts. The court also finds that they have laid a proper basis for their opinions. The applicant applied for certain paragraphs of Mr Taylor's evidence to be struck out as it is, according to Mr Joubert, for the applicant, hearsay evidence. I cannot agree as Mr Taylor is commenting on Mr Fridjhon's evidence which is before court in any event. The application to strike out this evidence is dismissed.

The only evidence to be struck out is Ms Jonker's affidavit as conceded by the respondent.

The issue:

In the main application the applicant seeks an order:

"1. That the Respondent's tariff determinations in terms of which the products referred to hereunder were determined to fall under tariff heading 2208.90.20 in Part 1 of Schedule 1 to the Custom and Excise Act 91 of 1964 and to fall under tariff item 104.20.40 in Part 2A of Schedule 1 to the said Act be set aside:

1.1 Angels' Share Cream;

1.2 Delgado Supremo;

1.3 GoldCup Creamy Vanilla;

1.4 Barbosa;

1.5 GoldCup Banana Toffee;

1.6 Zorba;

1.7 Nachtmusik;

1.8 Mokador;

1.9 Alaska Peppermint;

1.10 Copperband;

1.11 VinCoco;

1.12 Clubman Mint Punch;

1.13 Viking;

1.14 Castle Brand;

1.15 Brandyale.

2. That the Respondent's tariff determinations be replaced with tariff determinations in terms of which the said products are determined to fall under tariff heading 2204.21.40, ***alternatively*** *2204.21.50,* ***alternatively*** *2205.10,* ***further alternatively*** *2206.00.90 in Part 1 of Schedule 1 to the said Act and in tariff item 104.15.04,* ***alternatively*** *104.15.06,* ***further alternatively*** *104.17.22 in Part 2A of Schedule 1 to the said Act."*

This application deals with the determination of the correct tariff headings for the following products produced by the applicant in South Africa:

"*(i) Angels' Share Cream*

(ii) Delgado Supremo

(iii) GoldCup Creamy Vanilla

(iv) Barbosa

(v) GoldCup Banana Toffee

(vi) Zorba

(vii) Nachtmusik

(viii) Mokador

(ix) Alaska Peppermint

(x) Copperband

(xi) VinCoco

(xii) Clubman Mint Punch

(xiii) Viking

(xiv) Castle Brand

(xv) Brandyale'"

The purpose of the correct tariff headings is to determine the excise duty payable in terms of the Customs and Excise Act. The applicant contends that these products have always been regarded as wine based aperitifs and were historically classified by the Commissioner under Tariff Heading 22.04 which determines:

"22.04 – Wine of fresh grapes, including forftified wines; grape must other than that of heading 20.09."

and:

"(I) Wine of fresh grapes

The wine classified in this heading is the final product of the alcoholic fermentation of the must of fresh grapes.

The heading includes:

(1) Ordinary wines (red, white or rosé).

(2) Wines fortified with alcohol.

(3) Sparkling wines. These wines are charged with carbon dioxide, either by conducting the final fermentation in a closed vessel (sparkling wines proper), or by adding gas artificially after bottling (aerated wines).

(4) Dessert wines (sometimes called liqueur wines). These are rich in alcohol and are generally obtained from must with a high sugar content, only part of which is converted to alcohol by fermentation. In some cases they are fortified by the addition of alcohol, or of concentrated must with added alcohol. Dessert (or liqueur) wines include, inter alia, Canary, Cyprus, Lacryma Christi, Madeira, Malaga, Malmsey, Marsala, Port, Samos and Sherry. "

The heading includes fortified wines which had been fortified with alcohol and are thus regarded as fermented beverages.

The Commissioner for the South African Revenue Services determined that the above products are all classified under Tariff Heading 2208.90.28 in Part 1

of Schedule 1 to the Act and under Tariff item 104.20.40 in Part 2A of Schedule No 1 to the Act. Tariff heading 22.08 determines:

"Undenatured ethyl alcohol of an alcoholic strength by volume of less than 80 per cent vol; spirits, liquers and other spirituous beverages:

22.08.20 Spirit obtained by distilling grape wine or grape marc

22.08.30 Whiskies

22.08.40 Rum and other spirits obtained by distilling fermented sugar cane products

22.08.50 Gin and Geneva

22.08.60 Vodka

22.08.70 Liqueurs and cordials

22.08.90 Other."

These determinations as being classified under Tariff heading 22.08 were made by the respondent respectively on: 22 May 2007 - Angels' Share Cream; Delgado Supremo and GoldCup Creamy Vanilla; on 15 February 2008 - GoldCup Banana Toffee and Barbosa; on 15 September 2008 - Zorba, Nachtmusik, Mokador, Alaska Peppermint, Copperband, VinCoco, Clubman Mint Punch, Viking, Castle Brand and Brandyale.

The Commissioner thus classified these beverages as spirituous in nature in contrast to the applicant's contention that these beverages are fermented beverages and do not belong under Tariff Heading 22.08, but under Tariff Heading 22.04.

The applicant contends that the correct tariff heading for these beverages due to their fermented nature is 22.04, alternatively 22.05 which determines;

> *"22.05 – Vermouth and other wine of fresh grapes flavoured with plants or aromatic substances."*

And:

> *"This heading includes a variety of beverages (generally used as a aperitives or tonics) made with wine of fresh grapes of heading 22.04, and flavoured with infusions of plant substances (leaves, roots, fruits, etc.) or aromatic substances."*

The applicant contends that it may even, in the alternative, be classified under heading 22.06 which deals with:

> *"22.06 – Other fermented beverages (for example, cider, perry, mead); mixtures of fermented beverages and mixtures of fermented beverages and non-alcoholic beverages, not elsewhere specified or included.*
>
> *This heading covers all fermented beverages other than those in headings 22.03 to 22.05."*

The Legal Framework:

The court has to determine the correct heading for these products to be classified in terms of section 47 (9) (e) of the Act. Section 47 (9) (e) of the Act provides:

> *"An appeal against any such determination shall lie to the division of*

the High Court of South Africa having jurisdiction to hear appeals in the area wherein the determination was made, or the goods in question were entered for home consumption."

This appeal is heard as a *de novo* application. The court has to decide what the meaning of the words in the heading is; determine the nature and characteristics of the goods and select the most appropriate tariff heading.

In **Int Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise 1985 (4) SA 852 (A)** Nicholas AJA held at p 863 G – H regarding the process of classification:

"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."

Section 37(1) of the Act provides:

"37 Duties applicable to goods manufactured in a customs and excise warehouse. - (1) In respect of any goods manufactured in a customs and excise warehouse there shall be paid, subject to the provisions of section seventy-five , on entry for home consumption thereof, duty at the undermentioned rates, namely-

(a) *if such manufactured goods are not liable to excise duty, the customs rate of duty applicable in terms of Schedules 1 and 2 on any imported goods used in the manufacture of such manufactured goods and the excise rate of duty applicable in terms of Schedule 1 on any excisable goods used in the manufacture of such manufactured goods; and*

(b) *if such manufactured goods are liable to excise duty, the excise rate of duty applicable in terms of Schedule 1 on such manufactured goods."*

No customs duty is payable on the applicant's products as the products are not imported, but manufactured locally in customs and excise warehouses. The classification of goods in Part 1 of Schedule 1 to the Act must be taken into consideration as the tariff items in Part 2A of schedule No 1 to the Act refer back to the tariff headings in Part 1 of Schedule 1 to the Act. The tariff item on Part 2A of Schedule No 1 to the Act determines the relevant rate of duty which must be read with Part 1 of Schedule No 1.

In terms of section 47 (8) (a) of the Act provision is made that the interpretation of any Tariff Heading or Sub Heading in Part 1 of Schedule No 1, any Tariff Item in Part 2 of Schedule No 1, the General Rules for the Interpretation of Schedule No 1 and every section note and chapter note in Part 1 of Schedule No 1 are all subject to the explanatory notes and includes the Harmonized System's explanatory notes as issued from time to time by the World Customs Organisation in Brussels.

The question as to how the Harmonized System should be applied was determined and dealt with in **Secretary for Customs and Excise v Thomas and Sons Limited 1970 (2) SA 660 AD** per Trollip JA at 675H – 676 B :

> *"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.'
>
> ***That, I think, renders the relevant headings and section and chapter notes not only the first but the paramount consideration in determining which 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.'" (Court's emphasis)

Trollip J A found in to relation to the **Brussels Notes** at 676 B –F:

"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."

The court has to take cognisance of the Section Notes and Chapter Notes as well as the General Rules for the Interpretation of the Harmonized System together with the relevant Tariffs Items. The Explanatory Notes to the Harmonized System which are issued by the World Customs Organisation must also be taken into account to determine which Tariff headings are applicable in this instance.

Section 47 (8) (a) of the Act provides:

"(8) (a) The interpretation of-

(i) any tariff heading or tariff subheading in Part 1 of Schedule 1;

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

(bb) any item specified in Schedule 2, 3, 4, 5 or 6;

(iii) the general rules for the interpretation of Schedule 1; and

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

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

It has been determined in Rule 1 of the General Rule of Interpretation that

"The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and relative Section of Chapter notes."

In the **Thomas Barlow case** *(supra)* it was decided that it is necessary to distinguish between Explanatory Notes which are broadly indicative of the desired classification and those which are set out as a peremptory injection which include or exclude *"clearly identifiable objects, whether they are identified by name or description."*

The court has to decide the meaning of the words used in the headings which may be relevant to classify the products of Distell. The section and chapter notes must be taken into consideration when considering the meaning of the words and whether it is applicable on the products in issue.

The Explanatory Notes to the Chapter Notes of Chapter 22 divides the products of Chapter 22 into 4 main groups. Distell contends that the relevant products in this application fall into

> *"(B) Fermented alcoholic beverages (beer, wine, cider etc.). (TH22.03 -22.06)"*

Distell further contends that the products in issue should be classified under tariff heading 22.04, which refers to wine of fresh grapes, including fortified wines. Fortified wines are included in this Tariff Heading.

Additional note 2 to Chapter 22 provides, *inter alia*,

> *"The expressions[s] 'unfortified wine' … shall be taken to mean wine … with an alcoholic strength not exceeding 16 per cent of alcohol by volume … and the expression[s] 'fortified wine'… shall be taken to mean wine … with an alcoholic strength exceeding 16 per cent of alcohol by volume."*

The Explanatory Note to tariff heading 22.04 (1) provides:

> *"(I) Wine of fresh grapes*

The wine classified in this heading is the final product of the alcoholic fermentation of the must of fresh grapes

The heading includes:

(1) Ordinary wines (red, white or rosè)

(2) Wine fortified with alcohol"

Explanatory Note (1)(4) to tariff heading 22.04 deals with dessert wines. It set out:

"*Dessert wines (something called liquer wines)*

These are rich in alcohol and are generally obtained from must with a high sugar content, only part of which is converted to alcohol by fermentation. In some cases they are fortified by the addition of alcohol, or of concentrated must with added alcohol. Dessert (or liqueur) wines include, inter alia, *Canary, Cyprus, Lacryma Christi, Madeira, Malaga, Malmsey, Marsala, Port, Samos and Sherry."*

In the example that Dr Loubser deals with he finds that Madeira is fermented to an alcoholic percentage from zero to 15% and then brandy is added to increase the percentage of alcohol to 19% or 20%. Madeira is still classified under tariff heading 22.04 notwithstanding the brandy being added. It must be emphasized that dessert wines are fermented and only alcohol or concentrated must with added alcohol are added to increase the percentage of alcohol. According to this evidence no colourants, flavourants or sweeteners are added to create Madeira.

The respondent argues that the product can no longer be classified as wine or fortified wine due to the fact that the wine has been stripped of the taste and flavour of wine and fortified by the addition of cane spirits to increase the alcohol percentage. The colourants, flavourants and sweeteners are then added and therefore it can be distinguished from dessert wines where no colourants, flavourants and sweeteners are added.

The **New Shorter Oxford English Dictionary** describes *"wine"* as:

> *"Alcoholic liquor product from fermented grape juice"*

and *"vinous"* as

> *"Of the nature of or resembling wine; made of or prepared with wine."*

The respondent, *inter alia,* relied on the findings in the matter of **Siebrand BU v Staatssecretaris van Financien** where the European Court of Justice considered the proper tariff classification of products made of a fermented beverage, namely cider, to which spirits, flavourant, colourants, sugar and cream had been added. In the **IBM case** Nicholas AJA held at 873H – 874A:

> *"Whatever may be the status of such a decision so far as customs administrations and international organisations are concerned, it is not, until it is reflected in an Explanatory Note, authoritative in a South African Court. Before that, it is no more than an expression of opinion which involves the interpretation of the relative tariff headings and the Notes relating thereto.*

> ***Under our system, questions of interpretation of the documents are matters of law, and belong exclusively to the Court.*** *On such questions the opinions of witnesses, however eminent or highly qualified, are (except in regard to words which have a special or technical meaning) inadmissible."* (Court's emphasis)

The Siebrand decision is not binding on South Africa in contrast to the Harmonised System which had been incorporated in the South African Customs and Excise Act, 1964 as schedules to the Act. Explanatory Notes derive their power by virtue of the provision of section 47(8)(a) of the Act.

The tariff headings to TH22.07 do not apply, but the Explanatory Notes to TH22.07 are important, according to the applicant, as they provide guidance with regard to the meaning of the concepts used in TH22.08.

The Explanatory Notes to TH22.07 provide:

> *"Ethyl alcohol is the alcohol which occurs in beer, wine, cider and other alcoholic beverages. It is obtained either by fermentation of certain kinds of sugar by means of yeast or other ferments and subsequent distillation, or synthetically."*

TH22.08 deals with spirits produced by distilling, according to the Explanatory Notes which provide:

> *"(A) Spirits produced by distilling wine, cider or other fermented grain*

or other vegetable products, without adding flavouring; they retain, wholly or partly, the secondary constituents (esters, aldehydes, acids, higher alcohols, etc.) which give the spirits their peculiar individual flavours and aromas

(B) Liqueurs and cordials, being spirituous beverages to which sugar, honey or other natural sweeteners and extracts or essence have been added (e.g. spirituous beverages produced by distilling, or by mixing, ethyl alcohol or distilled spirits, with one or more of the following: fruits, flowers or other parts of plants, extracts, essences, essential oils or juices, whether or not concentrated)."

The **New Shorter Oxford English Dictionary** defines *"spirituous"* as:

"Of or pertaining to spirit or alcohol; containing (much) spirit or alcohol;"

Ethyl alcohol can be obtained either by fermentation and subsequent distillation or synthetically according to TH22.07. The applicant submits that TH22.08 only has application on spirits produced by distilling and not by fermentation. The applicant submitted that the products in issue are not liqueurs or cordials as set out in Explanatory Note B of TH22.08, as they are not spirituous beverages. In the Explanatory Note it is further set out that TH22.08 does not include:

"(a) Vermouths, and other aperitives with a basis of wine of fresh grapes (heading 22.05) "

It is clear that TH22.08 only applies to spirituous beverages and should the court find the products in issue to be fermented beverages TH22.08 will not be applicable.

Dr Loubser, on behalf of the applicant, who has a PhD in chemistry, explained that fermentation and distillation are two distinct processes. Dr Loubser has been employed as the Director: Quality Management and Research of the applicant for the past 14 years. He stated that distillation can lead to an alcohol content of 96% per volume, while fermentation cannot be utilized to obtain an alcohol content of more than 16%. In both instances the alcohol contained in the beverages is ethyl alcohol.

According to Dr Loubser the cane spirit is only added to increase the alcohol content and the addition thereof does not deprive the wine of its character and even when wine is fortified with spirits the essential character of the base character is not changed and is still wine.

He furthermore stated that by volume all the products in issue contain more wine than spirits and the wine component exceeds the spirit component. It is, however, admitted that the wine is stripped of taste and flavour. He contends that the addition of cane spirits during the production process only increases the alcohol content of the products in issue (except Zorba). Nowhere does the applicant explain why it is necessary to extract the flavour from the wine.

The court first has to determine the nature and characteristics of the products

in issue to enable the court to understand the importance of the words used in the headings.

Dr Loubser described the manufacturing process of the products. He submitted that the fortification of the wine by means of the neutral cane spirits does not cause the wine to lose the essential character of wine and that the gross content of the product is more wine than cane spirits. His contention is that the cane spirits is only used to increase the alcohol content of the products. He stated that the products in issue involves the mixing of fortified wine with a non-alcoholic beverage. He admitted that the absolute alcohol content of spirits in the product, with the exception of Brandy Ale, is higher than that of wine.

Mr Fridjhon's evidence regarding the organoleptic characteristics of the stripped wine, fortified wine and undiluted base mixture is based on a taste test. His conclusion is

> *"19.8 Based on the aforesaid my conclusion and opinion are the following:*
>
> *Organoleptically:*
>
> *19.8.1 the residual aromas and tastes left in the wine after subjecting it to the stripping process are insignificant and would definitely not be discernible in the final product;*
>
> *19.8.2 the perceptible difference between the stripped fortified wine and cane spirit diluted with water to approximately the same alcoholic strength is minimal;*

19.8.3 the residual vinosity left in the stripped wine is so insignificant that the product can no longer properly be termed "wine""

The applicant applied for the latter part of Mr Fridjhon's conclusion to be struck out. In **Crown Chickens (Pty) Ltd v Minister of Finance and Others 1996 (4) SA 389** at 394 and 395 the court held that:

> *"'The words* "motor cars" *in item 22 of the First Schedule to the Excise Act 62 of 1956 bear their ordinary meaning. Accordingly, in order to determine the B meaning of "motor car" in the item, evidence is irrelevant and inadmissible."*

I must agree with the applicant that it is for the court to decide and that words which have no technical meaning or application should be given the ordinary meaning. Therefore paragraph 18.3 of Mr Fridjhon's affidavit is struck out.

Although the respondent did not counter Dr Loubser's findings by placing any evidence before court regarding the science involved, the respondent contends that from Dr Loubser's explanation the court can draw a conclusion of how each product in issue is produced. The respondent argued that the court must consider the evidence of Mr Fridjhon although he is not a chemist, and his evidence is not based on academic qualifications, but the court must bear in mind that his evidence is based on 35 years experience in the wholesale and retail wine business. He also observed the production of these beverages at the invitation of the applicant and based his evidence on what

he personally observed. Mr Taylor's affidavit is an answer, according to him, to Dr Loubser's findings and not based on Mr Fridjhon's evidence. He is a biochemist from the United Kingdom. He is the managing director of a consultancy and analytical chemistry laboratory specialising in advising and rendering laboratory services to the liquor industry on a global basis.

According to Dr Loubser the fermentation process is the process by which yeasts convert sugar in grape juice to alcohol, which results in wine. A distilled product is obtained by the process of distillation of a fermented beverage. The fermented product is heated to evaporate the alcohol and to ensure the condensation of the alcohol fraction. This high strength alcohol fraction is used to produce spirituous beverages. According to Dr Loubser's evidence the character of a fermented product is determined by the sum total of its composition and not only by its flavour, whilst a distilled spirit is obtained by a process of distillation of a fermented beverage.

Mr van Niekerk, who is the general manager of Distell, explained that the wine selected to be used in the production of these products are quite distinct from top quality table wine. It is selected as it is low in flavour intensity, low in colour intensity, and low in acid, low in phenolics, high in alcohol and low in sulphur dioxide. According to Mr van Niekerk wine which has these characteristics is generally referred to in the industry as a neutral or base wine. He concedes that the base product for the products in issue still tastes and smells like wine, but that it is less prominent than that of table wine.

According to Mr de Wet these products had always been classified under Tariff Heading 22.04.

Mr Millar's evidence, on behalf of the respondent, submitted in answer to Mr De Wet's evidence that: *"I have verified our system which captures all tariff determinations and can state that no determinations for any of the products in question were made by the Commissioner under tariff heading 22.04, 22.05 or 22.06."*

The respondent argued that the distinction between *"spirits", "liqueurs"* and *"cordials"* and all *other "spirituous beverages"* deals with the spirituous beverages that wholly or partly retain the secondary constituence which gives them their flavours and aromas without adding any additional flavour. Notes (B) and (C) under TH 22.08 refer to spirituous beverages which are not contemplated in TH2208.20 to 2208.60. Explanatory Note (B) defines liqueurs as products sweetened and flavoured with natural ingredients. All other spirituous drink will be classified as *"other"* under TH2208.90. The respondent argued that the products in issue should be classified as "other" under TH2208.90.

Mr Fridjhon visited the applicant's plant where the production process was shown and explained to him. The process entails that the wine is *"stripped"* from its flavour and taste; the *"stripped"* wine is fortified by the addition of cane spirits to increase the alcohol percentage; then colourants, flavourants and sweeteners are added. This concentrate is later on diluted by additional

spirits and water and in some cases with cream.

According to Mr Fridjhon the *"stripped wine"* was *"very flat and there was a whiff of stale beery smell which I associate with oxidising, deteriorating, quite low alcohol solutions. There was a slight sense of heat on the palate, probably because of alcohol (always more evident when there is little dry extract or body) and a slight, elusive varnish whiff – though these were all features which needed to be sought out. Had I not been trying to distinguish between the different samples, it would have been fairly simply to say that this was a very bland solution with low but evident alcohol."*

After this stripped wine had been fortified with cane spirit he reported:

> *"It was perceptibly more spirituous and the slightly varnish and beery notes evident after the completions of filtration (T45) were now not in evidence at all."*

He tasted the stripped fortified wine with peppermint colourants and flavourants added and came to the conclusion:

> *"Here the mint flavour was overwhelming, so much so that it was simply impossible to identify the nature of the alcohol (viz stripped wine and/or water and cane spirit) in the product. I did not taste a mixture of flavourants, colourants and sweetener. However, based on the pungency of the product tasted I can with confidence state that the 'flavourants / colourants / sweetener' mixture did not resemble a cold drink e.g. a lemonade but was rather more medicinal in character."*

In other words this was not a mixture of a fermented beverage and a non-alcoholic beverage, but a new product. Mr Taylor's evidence as to the nature and characteristics of the same products are that the presence of spirits is essential to attain the required alcohol level and to preserve it, as well as to aid the stability of the added flavourant. He submitted that it was not necessary to use the stripped wine, as the same products could be produced by using neutral spirits as the alcohol base. Stripped wine, however, could not be used without adding neutral spirit as the required alcohol strength would not be attained. The unique characteristics of wine are not required in the end product.

The court now has to determine the appropriate basis for classifying the products in issue.

The General Rule of Interpretation must be applied in this instance:

> *"1. The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determines according to the terms of the heading and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, …."*

The court must first decide whether the products are mixtures. It is clear from the process used by the applicant and demonstrated and explained to Mr Fridjhon that these beverages are not only a fermented beverage and cane

spirit mixed together. They are individually designed products each with a unique taste and characteristics. The court finds, that these beverages consist of several components but in each instance it is the spirits that give these products their essential character and these mixtures of fermented stripped wine, cane spirit, flavourants, colourants and sweeteners are new products.

The court then has to apply GRI 3(b) and Explanatory Note (viii) which provide:

> *"3.(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable."*

The respondent's argument is that the alcohol component that gives the products their essential character is the spirits and not the wine. It is clear that all the products in issue are fermented alcoholic based beverages, but can by no stretch of the imagination be wine. The addition of cane spirit, water, sweeteners, flavourants, colourants and cream in some instances, have caused new products to be created, which have lost all the aroma and taste of wine. Tariff Heading 22.04 can thus not be applicable.

The applicant requested the court to consider a determination under Tariff Heading 22.05. I cannot agree that this is an appropriate Tariff Heading for

the products in issue as it is common cause that these products are not *"Vermouth and other wine and fresh grapes flavoured with plants or aromatic substances."* The Explanatory Note under this heading makes it quite clear that this heading deals with *"a variety of beverages (generally used as aperitifs or tonics) made with wine of fresh grapes of heading 22.04 and flavoured with infusions of plant substances (leaves, roots, fruits, etc.) or aromatic substances."*

The addition of spirits, colourants, flavourants, sweetener and cream is not mentioned and therefore this heading could never be the appropriate heading as it only deals with beverages *"flavoured with infusions of plant substances (leaves) roots, fruit, etc"* or aromatic substances.

The applicant has requested the court to find that these products should be classified under Tariff Heading 22.06 should the court not find that TH 22.04 is appropriate. Here the products are *"mixtures of fermented beverages (wine or fortified wine) and non-alcoholic beverages (being mixtures comprising of water, sweetener, agents, flavourings, colourants, etc.) as intended in TH 22.06"* and *"essential character of the products is provided by its wine base and therefore they are fermented beverages."*

In **Distell Ltd v The Commissioner for South African Revenue Service (416/09) [2010] ZASCA 103 (13 September 2010)** at paragraphs 46 and 47 Heher JA held:

> *"When the court put to counsel that, properly interpreted, a 'fermented beverage' was one where the beverage was the end product of a*

fermentation process, he maintained his initial stance but conceded that if such should be the correct interpretation, 'the Commissioner has no argument'.

[46] A moment's reflection will demonstrate that the proposition put to counsel must be correct. The wine component is, of course, separately manufactured, anterior to use for any other purpose such as its adoption as a base for a wine cooler. The wine is, of itself, classifiable under TH22.04. By reason of a note to TH22.06 it is excluded from the scope of TH22.06 and is, therefore, not a 'fermented beverage' for the purpose of the heading. ***The recipe for each cooler shows that fermentation does not occur in the process and plays no role in bringing about the product. Thus, production of the coolers is devoid of any fermentation process and they are not 'fermented beverages' in the normal sense of the term.*** *That this is so is borne out by reference to the extensive examples in the notes to TH22.06 of the fermented beverages which are among those included.* ***In every case the beverage named is one which is the final product of a fermentation process, albeit enhanced by additives, as in the case of hydromel vineux.*** *As appellants' counsel submitted (see para 38(j) above) the absence of wine used in making 'other fermented beverages' from rebate item 620.05 is consistent with its exclusion from TH22.06."* (Court's emphasis)

I must agree with the respondent's argument that the beverages are produced

in a multiple stage process – two beverages are not mixed to get the relevant product. The colourant, flavourant and sweetener mixture cannot be described as *"lemonade like"* and does not constitute a non-alcoholic beverage.

I have dealt with the meaning of the words used in the headings having regard to the section and chapter notes and applying it to the products in issue. I have dealt with the evidence comprehensively and had found due to the nature and characteristics of the products that the products are mixtures and cannot be regarded as a final product of the alcoholic fermentation of the must of fresh grapes. Tariff Headings 22.05 and 22.06 cannot be the correct headings for the reasons set out above.

I come to the conclusion that the wine in the products in issue does not contribute to the organoleptic characteristics of the final products as it is neutral and therefore cannot give it its essential character.

The court finds all the products in issue as spirituous and as a result these products must resort under Tariff Heading 2208.90.20.

The order is:

1. The appeal is dismissed with costs, such costs to include the costs consenqent upon the employment of two counsel;
2. The application for filing further affidavits is granted, no order as to costs;

3. The striking out application is refused, except for Mrs Jonker's affidavit, no order as to costs.

_____

Judge Pretorius

Case number	: 16910/2009
Heard on	: 19 April 2011
For the Applicant	: Adv AP Joubert SC
	: Adv C Louw
Instructed by	: Cliffe Dekker Hofmyer
For the Respondent	: Adv CE Puckrin SC
	: Adv JA Meyer SC
	: Adv I Enslin
Instructed by	: The State Attorney
Date of Judgment	: 2 June 2011