REPORTABLE

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 1042/2018

Before: The Hon. Mr Justice Binns-Ward

Hearing: 18 March 2020
Judgment: 30 April 2020

In the matter between:

TONELERIA NACIONAL RSA (PTY) LTD Applicant

and

THE COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE Respondent

JUDGMENT

(Transmitted by email to the parties' legal representatives and posted on SAFLII. The judgment shall be deemed to have been handed down at 10h00 on Thursday, 30 April 2020.)

BINNS-WARD J:

Introduction

[1] The applicant, Toneleria Nacional RSA (Pty) Ltd, appeals in these proceedings against the classification for customs duty purposes by the Commissioner of the South

African Revenue Service ('SARS') of certain wooden products imported by the applicant. The appeal is brought in terms of s 47(9)(e) of the Customs and Excise Act 91 of 1964 ('the Act'). The goods were produced by the applicant's parent company, Toneleria Nacional LTDA, which is incorporated in Chile. As its name suggests, Toneleria Chile is a cooperage.[1] Amongst other things, it makes oak barrels for use by winemakers in the storage and maturation of wines.

[2] The goods in issue, samples of which were made available for inspection by the court at the hearing, consist of flat-planed planks of oak that have been measured in various sizes and carpentered especially so that they can be suspended in containers of wine (usually steel containers) during the maturation process. The wood is specially selected and treated so as to mimic, if suspended in a certain way in wine contained in a steel container, the maturating effect of an oak barrel. The mimicking effect is achieved by using the same type of specially selected oak as would have been used to make staves for the assembly of barrels and subjecting it to a closely comparable process of seasoning and 'toasting'. The planks are designed to be suspended from frames that are specially made to ensure that the planks are fully immersed in the wine but held so that they do not come into contact with the lees at the bottom of the container. They provide a cheaper alternative for winemakers to achieve certain flavouring and character effects than the ever more expensive oak barrels traditionally used for such purposes.

[3] The Commissioner initially determined, in terms of s 47(9)(a) of the Act, that the imported goods should be classified under tariff heading ('TH') 4421.90.90, which applies to goods designated as '*other articles of wood*'. After the applicant objected, he then amended the classification to TH 4409.29.90, which refers to '*Wood (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rebated, chamfered, V-jointed, beaded, moulded, rounded or the like) along any of its edges, ends or faces, whether or not planed, sanded or end-jointed: other – other*'. Just before the institution of the current proceedings the Commissioner indicated that he intended to revert to his original classification, but he has not yet formally done so. According to the first mentioned classification the goods would bear duty at 20 percent of their dutiable value in terms of Chapter IX of the Act, and according to the second mentioned classification at

[1] The Commissioner's counsel pointed out, with reference to a passage in *The Oxford Companion to Wine*, 3ed (OUP, 1994) s.v. '*cooperage*' (page number not supplied), the French for 'cooperage' is '*la tonnellarie*'. In Spanish, the word is '*toneleria*'; see Collins, Online Spanish - English Dictionary.

10 percent. The applicant contends that the goods fall to be classified under TH 4416.00. TH 4416.00 relates to '*Casks, barrels, vats, tubs and other coopers' products and parts thereof, of wood, including staves*'. If the goods are indeed properly classified under TH 4416.00, they are duty free.

[4] The appeal turns on statutory interpretation; more especially, of the relevant tariff headings as they appear in Schedule 1 to the Act. This falls to be undertaken in accordance with certain precepts laid down in the Act and explained in the pertinent jurisprudence. If the classification contended for by the applicant is not upheld, the Commissioner's determination prevails.[2]

[5] Part I of the Schedule to the Act consists of a comprehensive list of commodity groups. The list is compiled and maintained in accordance with the World Customs Organisation's Harmonized Commodity Description and Coding System, which is a nomenclatural system commonly referred to as the 'Harmonized System'. It comprises 22 sections made up of 99 chapters, some of which have sub-chapters. As Trollip JA described in *Secretary for Customs & Excise v Thomas Barlow and Sons Ltd* 1970 (2) SA 660 (A) at 675D-E, '*Within each chapter and sub-chapter the specific type of goods within the particular class is itemised by a description of the goods printed in bold type. That description is defined in the Schedule as a "heading"* [viz. what I have referred to as 'tariff headings']. *Under the heading appear sub-headings of the species of the goods in respect of which the duty payable is expressed. The Schedule itself and each section and chapter are headed by "notes", that is, rules for interpreting their provisions*'. Part I of the Schedule is preceded by an introductory section entitled 'General Notes', which include (as Item A) the 'General Rules for the Interpretation of this Schedule'. They are part of the 'notes' mentioned by Trollip JA as heading the Schedule itself. I shall use the acronym 'GRI' when referring to the General Rules.

[6] Section 47(8)(a)(i) of the Act provides, insofar as relevant, that the interpretation of any tariff heading or tariff subheading in Part 1 of Schedule 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*'. The section and chapter notes are, as mentioned, part of the

[2] See s 47(9)(b) of the Act, and cf. *The Heritage Collection (Pty) Ltd v Commissioner, South African Revenue Service* 2002 (6) SA 15 (SCA) at para. 9.

Schedule; the Explanatory Notes are not. GRI 1[3] provides that '*the titles of Section, 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 any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the … provisions*' of GRI 2-6.

[7] The character and role of the Explanatory Notes (commonly called 'the Brussels Notes') in the interpretation of Part I of the Schedule were described in *Thomas Barlow and Sons* supra, at 675F – 676D, as follows:

> It is clear that the … grouping and even the wording of the notes and the headings in Schedule I are very largely taken from the Nomenclature compiled and issued by the Customs Co-operation Council of Brussels. That is why the Legislature in sec. 47(8)*(a)* has given statutory recognition to the Council's Explanatory Notes to that Nomenclature. These Notes are issued from time to time by the Council obviously, as their name indicates, to explain the meaning and effect of the wording of the Nomenclature. By virtue of sec. 47(8)*(a)* they can be used for the same purpose in respect of the wording in Schedule I. 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.
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> Note VIII to Schedule I sets out the 'Rules for the Interpretation of this Schedule'. Para. 1 says:
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> > '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.' [4]
>
> 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:
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> > '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.'
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> 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

[3] See Item A of the 'General Notes' to Schedule I. It essentially replicates the General Rules for the Interpretation of the Harmonised System.

[4] Now Item A of the 'General Notes' to Schedule I (see note 3, above). GRI 1 now reads in relevant part as set out in para [6], above.

> 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.

[8] In *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise* 1985 (4) SA 852 (A), at 863G, the proper process of classification of goods in terms of Part I of Schedule I was expounded by Nicholas AJA, in a passage that has been applied consistently in the subsequent jurisprudence, 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 such goods. [5]

[9] There are no pertinent section notes, and the chapter notes contain nothing of assistance to determine the current matter. The Explanatory Notes pertinent to TH44.16 provide as follows:

> This heading is restricted to containers which are the product of the coopers' trade, that is those of which the bodies are composed of staves with grooves into which the heads and bottoms are fitted, the shape being maintained by hoops of wood or metal.
>
> Coopers' products include casks of various kinds (tuns, barrels, hogsheads etc.) whether tight (for wet goods) or slack (for dry goods), as well as vats, tubs etc.
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> These goods may be disassembled or partly assembled, and are sometimes lined or coated inside.
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> The heading also covers staves and all other wooden products, finished or not, recognisable as parts of coopers' products (e.g. barrelheads, hoopwood cut to length and notched at the ends for assembly).
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> The heading also includes unfinished staves (stavewood), that is, the strips of wood used for forming the sides, heads or bottoms of barrels or other coopers' products. Such stavewood may be in the form of:
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> (1) Strips cleft from sectors of tree trunks along the direction of the medullary rays. Such cleft staves may also be further flat sawn on one of the principal faces, the other face being merely trued by axe or knife.
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> (2) Sawn staves **provided** that at least one of the two principal faces is concave or convex, such curved surfaces being produced by sawing with a cylindrical saw.

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[5] In *Distell Ltd and Another v Commissioner of South African Revenue Service* [2010] ZASCA 103 (13 September 2010); [2011] 1 All SA 225 (SCA), at para. 22, it was held that there was '*no reason to regard the order of the first two stages as immutable*'.

The heading excludes:

(a) Wood which is sawn flat on both principal faces (**heading 44.07** [i.e. 'Wood sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or end-jointed, of a thickness exceeding 6 mm'] **or 44.08** [i.e. Sheets for veneering (including those obtained by slicing laminated wood), for plywood or for similar laminated wood and other wood, sawn lengthwise, sliced or peeled, whether or not planed, sanded, spliced or end-jointed, of a thickness not exceeding 6 mm']).

(b) Containers made of staves fixed to the heads and bottoms by nailing (**heading 44.15** [i.e. 'Packing cases, boxes, crates, drums and similar packings, of wood; cable-drums of wood; pallets, box pallets and other load boards, of wood; pallet collars of wood').

(c) Casks etc. cut to shape for use as furniture (e.g. tables and chairs) (**Chapter 94**).

Were the goods 'staves' within the meaning of that word in the tariff heading?

[10] The products that were imported by the applicant are categorised by the producer as 'staves'. They are marketed under the descriptors 'InserStaves', 'ShortStaves' and 'MiniStaves', and distinguished from each other according to size. A cursory search on the internet confirms the uncontested averments in the applicant's founding affidavit that articles of this nature are widely advertised by cooperages as 'barrel alternatives' for the maturation of wine. It is also apparent that their appellation as 'staves' is commercially common practice.[6] I have, however, not been able to find any dictionary definition that recognises that nomenclature.

[11] It is clear from the context that the word 'staves' in TH44.16 bears its ordinary meaning, denoting an item of wood cut in lengths from which the sides of barrels and similar containers are made.[7] The items in issue in the current case were not produced for that purpose and, being flat planed on both their principal faces,[8] do not have that character.

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[6] See e.g. https://www.boutes.com/en/produits/gamme/staves/ (accessed on 4 April 2020) and http://www.garonnaise.com/en/our-range/ (accessed on 4 April 2020). In my view it is as permissible in the modern age for a court to use the internet to independently investigate the usage of words as it was traditionally for it to consult a dictionary. For recent examples of judges referring in their judgments to their internet searches in various contexts see *Polokwane Local Municipality v Granor Passi (Pty) Ltd and Another* [2019] ZASCA 5 (1 March 2019); [2019] 2 All SA 307 (SCA) at para. 34; *Bergrivier Municipality v Beck* [2019] ZASCA 38 (29 March 2019); 2019 (4) SA 127 (SCA) at para. 46 and *Prince v President of the Law Society of the Cape of Good Hope* [2002] ZACC 1 (25 January 2002); 2002 (2) SA 794 (CC); 2002 (3) BCLR 231 at para. 58 (note 7).

[7] 'Stave': '*any of the lengths of wood fixed side by side to make a barrel, bucket, or other container'* (Oxford Dictionary of the English Language); '*any of the narrow strips of wood or narrow iron plates placed edge to edge to form the sides, covering, or lining of a vessel (such as a barrel) or structure*' (Merriam-Webster Online Dictionary).

[8] There was no contention in the current case that the goods were of the character covered by TH44.07, so I have left out of consideration that their plank like appearance might trigger exclusion (a) in the Explanatory Notes to TH4416.00. Exclusion (a), according to its tenor, pertains to goods susceptible to classification under

There is accordingly no merit in the argument advanced, albeit faintly, by the applicant's counsel that they fall to be categorised as 'staves' within the meaning of that word in the tariff heading.

Were the goods 'other coopers' products' within the meaning of the term in the tariff heading?

[12] The principal contention by Mr *van Rooyen* SC, who (together with Mr *Cilliers*) appeared for the applicant, was that the goods in question fell to be classified in terms of TH44.16 under the rubric '*other coopers' products*'. Mr *van Rooyen* supported his contention by stressing that the evidence demonstrated that there is what the deponent to the founding affidavit called '*a fundamental and very important distinction between cooperage and mere carpentry*'. And the products in issue, he submitted, bear the hallmarks of cooperage.

[13] In this regard it was highlighted that the exercise of choosing the timber suitable for use in wine maturation is the same regardless of whether the wood is used for making barrels or 'staves'. It is sourced from oak varieties that grow in France (*Quercus Petraea* or *Quercus Robur*) or the United States of America (*Quercus Alba*)). The variety is selected individually for barrels or 'staves' that impart distinguishable characteristics to the wine with which it is used. The American oak, for example, gives an 'aromatic contribution' that is too powerful for wooded wines requiring 'only subtle hints of oak'. The age of the oak is also important. In the case of French oak, for example, a minimum of 180 years' tree-growth is required to give the tight grain that is sought after for wine-making. The process of selection is peculiar to cooperage, as distinct from, say, the selection of oak for making furniture.

[14] Once acquired, the oak - whether it be intended for ultimate use in the manufacture of wine barrels or 'staves' for the maturation for wine - undergoes a very similar process of seasoning, consisting of stacking, watering and drying processes that are peculiar to the preparation of timber for use by coopers. The products, whether barrels or staves, are then

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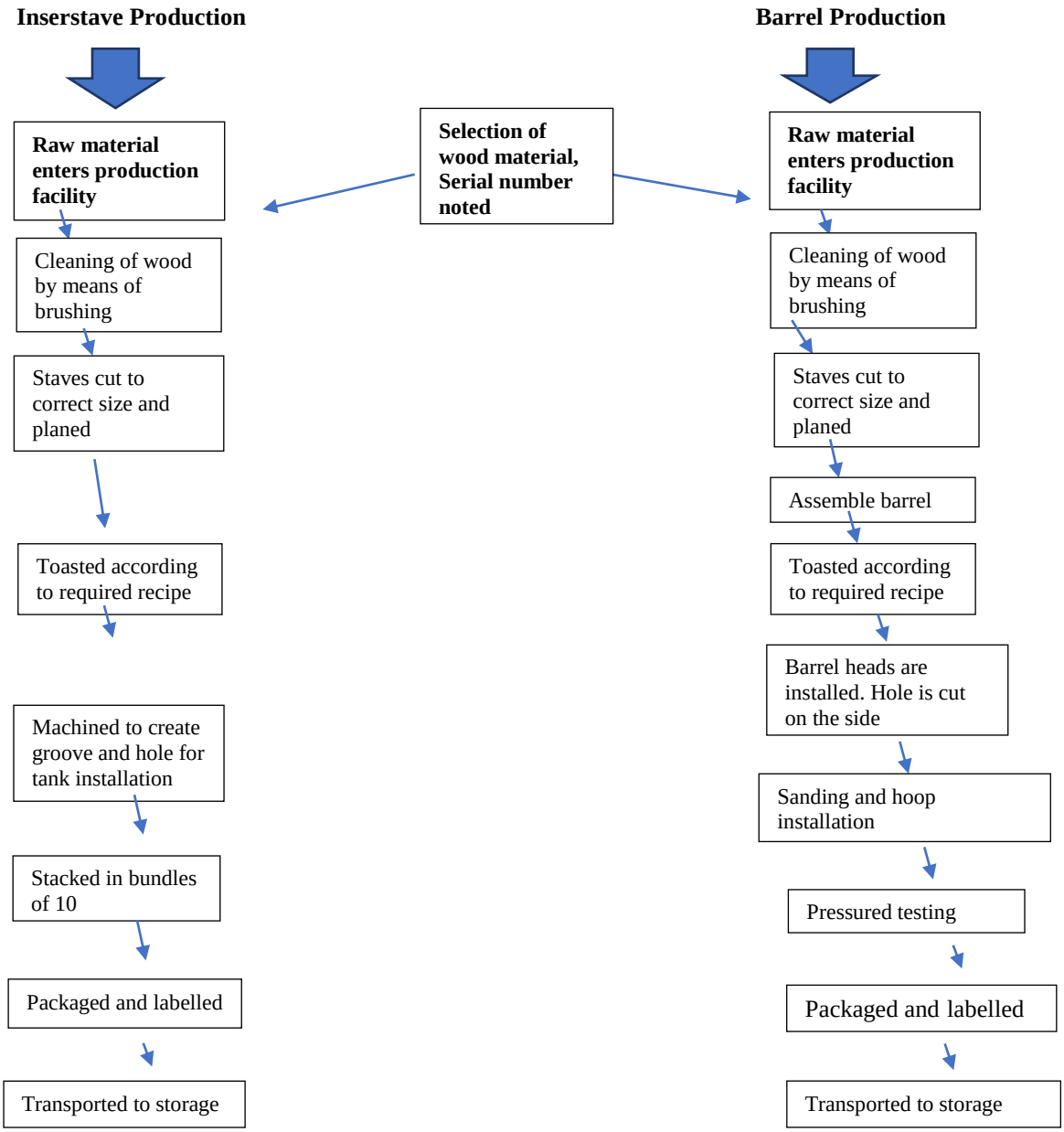
TH44.07. As mentioned, the Commissioner has veered between classifying them under TH 4421.90.90 and TH 4409.29.90. It is evident from the documentation attached to the applicant's founding affidavit (and confirmed in the answering affidavit) that the Commissioner considered classification under TH44.07, but decided that only the 'Viniblocks' imported by the applicant fell under that classification. Goods under 44.07 are duty free.

‘toasted’ to order. The applicant illustrated the extent of the correlation of the respective production processes by way of the following graphic comparison:



[15] Mr *van Rooyen* also stressed what he termed 'the functional equivalence' of the finished items. The 'staves' serve the same purpose as barrels; just at a much lower cost. The evidence is that the combined effect of an increased global demand for wooded wines, the premium on the availability of suitable timber, as well as increasing environmental sensibilities, has made the use of traditional wooden barrel products economically unfeasible, except for the 'so-called super-premium wines i.e. wines at the absolute pinnacle of the quality hierarchy'.[9]

[9] This is borne out by a passage in an extract from *The Oxford Companion to Wine*, supra, s.v. '*Cooperage today*' (page number not supplied) attached to the Commissioner's supplementary heads of argument.

[16] The evidence also established that the items are not amenable for use for anything other than wine maturation. The toasting process to which the planks are subjected renders them fragile and easily broken. So fragile are they that there is a significant rate of breakage when they are freighted. They also have to be specially packaged, individually piece by piece, in a way that allows for the optimal preservation of the character imparted by their treatment in the cooperage process. Not only does the selection and production process result in a uniquely distinguishable item in the sense that the finished product is not a plank of oak that might be used for any of the multiple purposes to which an ordinary plank of oak might be put, it also results in a product that is significantly more expensive than an ordinary plank of oak.

[17] Now, when considering what might be denoted by the term '*other coopers' products*' in TH 44.16, the point of departure must be from what a cooper is, for 'coopers' products' is a generic term covering all of the things that coopers produce. The *Oxford Dictionary of the English Language* defines a '*cooper*' as '*a maker or repairer of casks and barrels*' and gives the origin of the word as being the Middle Low German '*küper*' from '*küpe*' meaning 'tub or barrel'. The other well-known English language dictionaries give essentially identical definitions. Traditionally, everything that coopers made would be some form of container like a cask, barrel, vat or tub. From that perspective, one can readily understand the sense in the statement in the relevant explanatory note that TH 44.16 '*is restricted to containers which are the product of the coopers' trade*'. But is a barrel substitute or alternative that is now commonly produced by coopers, using many of their traditional skills and methods, not also a modern day 'coopers' product'? And do the Explanatory Notes have the effect of precluding such a determination? Those are the critical questions that have to be answered in resolving the issue of tariff classification in the current case.

[18] In answering these questions it is important to be mindful of the considerations noted, for example, in *Commissioner, South African Revenue Service v Komatsu Southern Africa (Pty) Ltd* [2006] ZASCA 156 (26 September 2006); 2007 (2) SA 157 (SCA); [2007] 4 All SA 1094, that '[i]*t is clear from the authorities that the decisive criterion for the customs classification of goods is the objective characteristics and properties of the goods as determined at the time of their presentation for customs clearance. This is an internationally recognised principle of tariff classification. The subjective intention of the designer or what the importer does with the goods after importation are, generally, irrelevant considerations. But they need not be because they may, in a given situation be relevant in determining the*

nature, characteristics and properties of the goods'.[10] Ms *Kilmartin*, who (together with Ms *Mayosi*) appeared for the Commissioner, stressed the first mentioned consideration in seeking to discount the relevance of the evidence adduced by the applicant concerning the method of production and intended use of the imported 'staves'. Ms *Kilmartin* argued that it is only in matters such as that exemplified by the circumstances in *Smith Mining Equipment (Pty) Ltd v The Commissioner South African Revenue Service* [2013] ZASCA 145 (1 October 2013); 2013 JDR 2224 (SCA) that such evidence could be relevant.

[19] In *Smith Mining Equipment* the question was whether an imported vehicle known as a Kubota RTV Utility Vehicle fell to be classified under TH 87.09 as contended by the importer, viz. '*Works trucks, self-propelled, not fitted with lifting or handling equipment, of the type used in factories, warehouses, dock areas or airports for short distance transport of goods; tractors or the type used on railway station platforms; parts of the foregoing vehicles*'. The appeal court held that 'The central characteristic of vehicles falling under tariff heading 87.09 is not merely that they are used for the short transport of goods, but that they are "of the type used in factories, warehouses, dock areas or airports" for that purpose. The starting point for the enquiry must then be to establish what vehicles are of that type, which is a factual question, to be established by evidence. No doubt there is a range of vehicles used for that purpose in those locations, and it might be a matter of some difficulty determining what makes them 'typical', in which case the explanatory notes might be helpful, but a court is not in a position even to commence the enquiry without evidence of what those vehicles are.'[11]

[20] Whereas in *Smith Mining Equipment* it was the typical use of the goods in question that fell to be established by evidence on the facts, in the current case it is the matter of the range of products that coopers currently make. In the current matter, consideration of the appropriateness of classifying the 'staves' under TH 4416.00 turns critically on whether or not they might be considered as falling within the category of goods described as 'other coopers' products'. Leaving aside the effect of the Explanatory Notes, to which I shall come presently, I consider that whether a particular product is characteristically made by coopers or not is a question of fact that is amenable to proof by evidence. One cannot commence the enquiry without an answer to the question. The answer would have to include an indication that the means of manufacture is germane to, or closely bound up with the application of the

[10] At para. 8 (footnotes omitted).

[11] In para. 8.

skills of trade of, cooperage in the ordinary course. These are all matters of fact.[12] I have therefore concluded that the evidence adduced by the applicant as to the method of production and, and contextually with the latter, the purpose of the goods in question, is relevant to the enquiry as to their amenability to classification for import duty purposes under TH 44.16.

[21] The evidence establishes that the goods in question are produced by coopers using the skills and methods traditionally associated with the trade. There is no suggestion that goods of this sort are produced outside the cooperage artisanal trade. They are produced for use in the wine industry, with which cooperage is traditionally closely associated, for application for the same purpose as the barrels traditionally supplied to that industry by coopers. Their production is very evidently a manifestation of the cooperage trade's adaptation to changing market conditions. It does not matter that some wineries, like Maison Louis Latour, that operate their own inhouse cooperages produce only barrels, by reason that the winery concerned - presumably because it makes only premium wines - does not use the barrel substitute products made by other cooperages.[13] The fact that the 'staves' made by many cooperages as barrel substitutes differ in critical respects from the goods traditionally made by coopers does not mean that they are not coopers' products in today's world. Indeed, one might justifiably ask 'if they are not coopers' products, whose products are they?'

[22] The use in legislation of a generic term like 'coopers' products' makes the expression especially susceptible to construction in accordance with the 'always speaking' doctrine of interpretation.[14] As Lord Bingham of Cornhill observed in *Regina v. G & Anor*

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[12] As it is, exceptions (b) and (c) in the Explanatory Notes (see paragraph [9]) above appear to make matters concerning the mode of manufacture and adaptation for use of goods that might come into consideration under the heading issues of potential relevance.

[13] The respondent adduced evidence of one Bruno Pepin, the commercial director of Maison Louis Latour, in support of its contention that coopers' products were restricted to certain types of wooden container traditionally made by coopers. A Latour brochure was attached to Mr Pepin's affidavit. The brochure confirms that Latour's small cooperage employing '*only six highly skilled coopers*' uses '*only traditional manufacturing techniques … as opposed to production-line practices often found in larger cooperages*'. The brochure also claims that the barrels made in its cooperage that it does not use itself are '*exported to some of the finest wineries in the world*', which I understand to mean wineries making some of the finest wines in the world.

[14] The origin of the term 'always speaking' was described Lord Steyn in *Burstow R v. Ireland, R v.* [1997] UKHL 34 (24 July 1997); [1997] 4 All ER 225 (HL), at p.233 (All ER): '*It is undoubtedly true that there are statutes where the correct approach is to construe the legislation "as if one were interpreting it the day after it was passed:" The Longford (1889) 14 P.D. 34. Thus in The Longford the word "action" in a statute was held not to be apt to cover an Admiralty action in rem since when it was passed the Admiralty Court "was not one of His Majesty's Courts of Law:" (see pp. 37, 38.) Bearing in mind that statutes are usually intended to operate for many years it would be most inconvenient if courts could never rely in difficult cases on the current meaning of* statutes. *Recognising the problem Lord Thring, the great Victorian draftsman of the second half of the last century, exhorted draftsmen to draft so that "An Act of Parliament should be deemed to be always speaking":*

[2003] UKHL 50 (16 October 2003); [2003] 4 All ER 765 (HL),[15] whilst the meaning cannot change, since a statute is '*always speaking*', '*the context or application of a statutory expression* [in this case, 'coopers' products'] *may change over time*'. In another decision of the House given a few months earlier, Lord Bingham expressed the position as follows: '*There is, I think, no inconsistency between the rule that statutory language retains the meaning it had when Parliament used it and the rule that a statute is always speaking. If Parliament, however long ago, passed an Act applicable to dogs, it could not properly be interpreted to apply to cats; but it could properly be held to apply to animals which were not regarded as dogs when the Act was passed but are so regarded now*'.[16]

[23] A practical illustration of the application of the doctrine is provided in the House of Lords' decision in *Fitzpatrick v. Sterling Housing Association Ltd* [1999] UKHL 42 (28 October 1999); [1999] 4 All ER 705 (HL) in which, in the 1990's, the question was whether a same sex couple constituted a 'family' within the meaning of that word in the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The majority answered the question affirmatively. In the course of his Opinion, Lord Slynn of Hadley said '*It is not an answer to the problem to assume . . . that if in 1920 people had been asked whether one person was a member of another same-sex person's family the answer would have been 'No'. That is not the right question. The first question is what were the characteristics of a family in the 1920 Act and the second whether two same-sex partners can satisfy those characteristics so as today to fall within the word 'family'. An alternative question is whether the word 'family' in the 1920 Act has to be updated so as to be capable of including persons who today would be regarded as being of each other's family, whatever might have been said in 1920*'.[17] In *Yemshaw v London Borough of Hounslow* [2011] UKSC 3 (26 January 2011);

Practical Legislation (1902), p. 83; see also Cross, Statutory Interpretation, 3rd ed. (1995), p. 51; Pearce and Geddes, Statutory Interpretation in Australia, 4th ed. (1996), pp. 90-93. In cases where the problem arises it is a matter of interpretation whether a court must search for the historical or original meaning of a statute or whether it is free to apply the current meaning of the statute to present day conditions. Statutes dealing with a particular grievance or problem may sometimes require to be historically interpreted. But the drafting technique of Lord Thring and his successors have brought about the situation that statutes will generally be found to be of the "always speaking" variety: see Royal College of Nursing of the United Kingdom v. Department of Health and Social Security [1981] AC 800 for an example of an "always speaking" construction in the House of Lords'.

[15] In para. 29.

[16] *Quintavalle, R (on the application of) v Secretary of State for Health* [2003] UKHL 13 (13 March 2003); [2003] 2 All ER 113 (HL), in para. 9.

[17] Compare also the illustration given by Lord Hoffmann in *Birmingham City Council v. Oakley* [2000] UKHL 59 (29 November 2000); [2001] 1 All ER 385 (HL), at p. 396 (All ER): '*I quite agree that when a statute employs a concept which may change in content with advancing knowledge, technology or social standards, it should be interpreted as it would be currently understood. The content may change but the concept remains the*

[2011] 1 All ER 912 (SC), Lady Hale, echoing what Lord Steyn had acknowledged previously in *R v Ireland* supra,[18] pointed out that there are statutes that fall to be to be construed 'as if one were interpreting it the day after it was passed' and explained that in determining the scope for the application of the 'always speaking' interpretative approach '[t]*he essential question, as it was in Fitzpatrick, is whether an updated meaning is consistent with the statutory purpose*'.[19]

[24] The 'always speaking' principle of statutory interpretation is also applied in Australia. It was expressly endorsed in a 4-1 majority judgment by the High Court of Australia in *Aubrey v The Queen* [2017] HCA 18 (10 May 2017); (2017) 260 CLR 305. At para. 29, the majority held '*The approach in this country allows that, if things not known or understood at the time an Act came into force fall, on a fair construction, within its words, those things should be held to be included. Thus in Lake Macquarie Shire Council v Aberdare County Council, Barwick CJ considered whether the word "gas" in English legislation was confined to coal gas or whether it extended to liquefied petroleum gas. The only form of gas which was in common use for lighting and heating at the time the statutes were enacted was coal gas. Barwick CJ held that although the connotation of the word "gas" was fixed, its denotation could change with changing technology*'.[20]

[25] The earliest reference by name to the doctrine that I have been able to find in our case law was in *Fourie and Another v Minister of Home Affairs and Another* [2004] ZASCA 132 (30 November 2004); [2005] 1 All SA 273 (SCA), in which it was held, in the peculiar context of that case, which concerned the interpretation of the Marriage Act, that it did not find a basis for application. In *Malcolm v Premier, Western Cape Government NO* [2014] ZASCA 9 (14 March 2014); 2014 (3) SA 177 (SCA); [2014] 2 All SA 251, however, Wallis

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same. The meaning of the statutory language remains unaltered. So the concept of a vehicle has the same meaning today as it did in 1800, even though it includes methods of conveyance which would not have been imagined by a legislator of those days. The same is true of social standards. The concept of cruelty is the same today as it was when the Bill of Rights 1688 forbade the infliction of "cruell punishments". But changes in social standards mean that punishments which would not have been regarded as cruel in 1688 will be so regarded today'.

[18] Note 14 above.

[19] In paras. 25-27.

[20] Footnotes omitted. In *Lake Macquarie Shire Council* [1970] HCA 32; (1970) 123 CLR 327, dealing with the import of the word 'gas' in the Local Government Act, 1919-1969 (N.S.W.), Barwick CJ (Menzies J concurring, Windeyer J *dubitante*) said, at paras. 13-14, *'...no doubt in 1906, gas denoted coal gas, because no other form of gas for lighting and heating was in common use. Nonetheless the connotation of the word "gas" may not be so described. The Act here speaks of "gas", not of coal gas. In my opinion, it thus selects the genus, and not any particular species of gas.*
14. I can see no reason why, whilst the connotation of the word "gas" will be fixed, its denotation cannot change with changing technologies.'

JA, referring to the principle, remarked '*There is obvious sense in this approach when a court is confronted with a novel situation that could not have been in the contemplation of the legislature at the time the legislation was enacted. Courts can then, in the light of the broad purpose of the legislation, current social conditions and technological development, determine whether the new situation can properly, as a matter of interpretation, be encompassed by the language. But, … they cannot use the principle to extend legislation relating to dogs to cats, however desirable such an extension may seem. In other words the principle has limits, but subject to that qualification and the case by case working out of those limits, I see no reason why, in appropriate cases, South African courts should not invoke it, particularly in the light of our present constitutional order in terms of which statutes are to be construed in the light of constitutional values*'.[21]

[26] Mr *van Rooyen* relied on the judgment of Rogers J in *Van Deventer and Another v Nedbank Ltd* [2016] ZAWCHC 31 (30 March 2016); 2016 (3) SA 622 (WCC) in support of his contention that the 'always speaking' principle should be applied in the construction of the expression 'other coopers' products' in this case. In *Van Deventer*, the court was willing to allow, as one of two alternative lines of reasoning that led to the same result, that the word 'company' in s 13(1)(g) of the Prescription Act 68 of 1969 might be construed to include a close corporation, being a closely comparable form of corporate entity of a sort that had not existed when the statute was enacted.[22]

[27] That the market for coopers' products has changed, and in recent times become almost entirely related to the wine and spirit industry, is related in the extracts from *The*

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[21] In para. 11. Of course, the proper approach to the interpretation of a statutory provision applies indistinguishably irrespective of whether it is a court or an administrator, like the Commissioner, that has to undertake the exercise. It is also important, I think, not to conflate the 'always speaking' principle with the enjoinder in s 39(2) of the Constitution. The concepts are quite distinct, even though their application might, depending on the context, discretely lead to the same statutory construction.

[22] The relevant provisions of s 13(1) for the purposes of that case read as follows:

'(1) If

…

(g) the debt is the object of a claim filed against the estate of a debtor who is deceased or against the insolvent estate of the debtor or against a company in liquidation or against an applicant under the Agricultural Credit Act, 1966;

…

(i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the date on which the relevant impediment referred to in paragraph (a), (b), (c), (d), (e), (f), (g) or (h) has ceased to exist,

the period of prescription shall not be completed before a year has elapsed after the date referred to in paragraph (i).'

Oxford Companion to Wine[23] that the Commissioner's counsel put in with their supplementary heads of argument. Some of the passages bear quoting to illustrate the point, and also because they bear out the appositeness of evidence being adduced as to what coopers currently produce in a changed environment. It has to be borne in mind, however, that the reference book was published in 1994, and is therefore already some quarter of a century behind the times:

> **Cooperage**
>
> …
>
> *History*
>
> Until relatively recently coopers played an important role not only in the wine business but in myriad aspects of daily life. Almost all containers – buckets, barrels, tanks - were made by coopers from various woods …. Barrels were made to hold salted fish, flour, gunpowder, oil, turpentine, salt, sugar, butter, and many other household commodities since they retain liquids safely, keep the elements out, and are easy to manoeuvre.
>
> …
>
> During the 19th century coopering remained an important craft, but the advent of metal (and later plastic) containers ultimately reduced coopering to an adjunct of the drinks business. More than 1 million barrels were made for salted herring in Britain in 1913, for example, but by 1953 the number had dropped to around one-tenth of this figure and now this business is virtually extinct.
>
> American PROHIBITION had a dramatic impact on the sale of fine wines and spirits, and in turn on the cooperage business - particularly in the United States and also in the British Isles, where only those coopers working on beer barrels were unaffected. Before the Second World War, most beer barrels were made of wood and many breweries had their own cooperages, but by the early 1960s wooden barrels had been replaced by metal ones. In much of the wine industry too, wood was replaced by concrete, stainless steel, and other neutral materials particularly for larger tanks (see CONTAINERS).
>
> **Cooperage today**
>
> As wooden barrels are expensive to buy, use, and maintain, they tend to be used only for products whose sale price can justify such a major investment or, in the case of older containers, by those who have inherited them
>
> Cooperages are found wherever there is a wine or spirits business that needs barrels, notably in America, Scotland and France, but also in Italy, Spain, Portugal, Ireland, eastern Europe, Germany, Australia, and South Africa. They make new vats and barrels (see BARREL MAKING) and/or repair or maintain older barrels and vats (see BARREL MAINTENANCE and BARREL RENEWAL).
>
> There are no serious industry analysts of contemporary cooperage business, such as there are in the automotive or electronics industry, since it is effectively just a small part of the timber industry. Nor is there any official regulatory or inspection body as there is in the wine trade. Because of this, facts are few and rumour is rife.

[23] Note 1 above.

[28] The Commissioner's counsel submitted that to hold that the goods were 'coopers' products' would not only go against the dictionary definition of a cooper's trade, but also fly in the face of the relevant Explanatory Notes. I have already held that what coopers make is a question of fact, and not a matter exclusively determined by dictionary definitions narrowly predicated on their traditional functions.[24] There is nothing in the statutory purpose of the wording used in the tariff heading that warrants restricting the import of the expression 'other coopers' products' to a particular period in time. All things considered, I also cannot conceive why the legislature would wish to distinguish for duty purposes the goods in issue here from oak barrels made for wine maturation purposes. They are made from the same material, by the same category of artisan, using methods that are in material part equivalent, and the end product serves the same purpose in an important respect.

Do the Explanatory Notes preclude the finding that the goods are 'other coopers' products'?

[29] The matter of the effect of the Explanatory Notes on the interpretation of the tariff heading raises more difficult questions. The Commissioner contends that to hold that the goods in issue are coopers' products would be incompatible with the indication in the Explanatory Notes that the tariff heading '*is restricted to <u>containers</u> which are the product of the coopers' trade*'. In this connection, Ms *Kilmartin* emphasised the dictum of Trollip JA in *Thomas Barlow and Sons* that the Notes should be construed in a manner that makes them read compatibly with, and not contradictory of, the text of the tariff heading.

[30] Ms *Kilmartin* has construed the Notes to connote that only containers, and not any other products, made by coopers are covered by the tariff heading. If one were to apply that construction, it would indeed result in a contradiction between the tariff heading and the Notes if the goods in issue, which are indisputably not containers, were to be classified as 'coopers' products'.

[31] Whilst the construction of the Notes contended for by the Commissioner's counsel is certainly tenable, it is, in my view, not the only feasible one. The Notes are also susceptible to being construed to convey that only wooden containers made in the ordinary course *by coopers* are covered by the heading and, by implication therefore, not other wooden

[24] Cf. *Commissioner for the South African Revenue Service v Terreplas South Africa (Pty) Ltd* [2014] ZASCA 69 (23 May 2014); [2014] 3 All SA 11 (SCA) at para. 19, with reference to *Seven Eleven Corporation of SA (Pty) Ltd v Cancun Trading No 150 CC* [2005] ZASCA 17 (24 March 2005); [2005] 2 All SA 256 (SCA); 2005 (5) SA 186, and the other authority cited in the latter case at para. 24.

containers such as boxes, trunks or coffins that are not ordinarily made by coopers in the course of their trade (and in fact are goods classified separately in other parts of the Schedule). Applying the dictum in *Thomas Barlow and Sons*, the latter construction should be preferred, for it would promote consistency and avoid any basis for contradiction. It would also give effect to the ordinary unrestricted connotation of the term 'other coopers' products' in the tariff heading. The construction pressed by Ms *Kilmartin* would require the term to be read as 'other *similar* coopers' products', whereas the words actually employed do not, by themselves, imply any such qualification. On the contrary, as the applicant's counsel pointed out, the adjective '*other*' has a primarily distinguishing connotation. Its primarily defined meaning in the *Oxford Dictionary of the English Language* is: '*denoting a person or thing that is different or distinct from one already mentioned or known about*'.

[32] But if I were wrong, and a situation of contradiction between the tariff heading and the Explanatory Notes were accordingly unavoidable, it would place the case in a context that the court in *Thomas Barlow and Sons* acknowledged might arise, but found it unnecessary on the facts of that matter to anticipate. At p. 676E-F of the judgment, Trollip JA stated in this regard: '*If an irreconcilable conflict between* [the Explanatory Notes and the tariff heading] *should arise, … then possibly the meaning of the headings and* [chapter] *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 it is not necessary to express a firm or final view on that aspect.*' Miller AJA, in turn, also treated of the question by way of an *obiter dictum* in the following contrasting terms at p. 679H-680B: '*The very form of those Notes suggests that they were intended to serve as a guide, pointing the way to the desired or intended classification. Yet, by resorting to specific inclusions and exclusions, they sometimes appear to assume the form of peremptory injunctions. It seems to be important, when a classification is being made "subject to" the Brussels Notes, to distinguish between such of the Notes as include under or exclude from a particular heading, clearly identifiable objects, whether they are identified by name or description, and Notes which are explanatory and broadly indicative of the desired or intended classification. In the former class, where the exclusion or inclusion relates to clearly identified objects, difficulty might arise in the event of a direct and irreconcilable conflict between the inclusion or exclusion enjoined by the Notes, and the terms of the relevant headings. In such a case, despite the paramountcy of the headings and the section and chapter Notes, it might be that an express inclusion or*

exclusion in the Brussels Notes would prevail, on the ground that failure to obey it would be to disregard the statutory injunction to interpret the headings "subject to" the Brussels Notes. It is not necessary to express a definite opinion on that question … . It is sufficient to say that, generally speaking, in all but those cases, the Brussels Notes appear to serve as guides and aids to the classification properly to be made in accordance with the terms of the headings read with the relevant section and chapter Notes'. (Emphasis in the original.)

[33] Counsel did not direct my attention to any subsequent authority in which the question left unanswered in *Thomas Barlow and Sons* had been definitively determined. The appeal court has, however, repeatedly reiterated the *paramountcy* of the tariff headings in the interpretative exercise undertaken when classifying imported goods for customs duty purposes.[25] In *Commissioner of the South African Revenue Services v Daikin Air Conditioning South Africa (Pty) Limited* [2018] ZASCA 66 (25 May 2018), the minority (Majiedt JA and Davis AJA) went so far as to hold that if the import of a tariff heading were clear and unambiguous, one would not even consider the Explanatory Notes.[26] It seems to me, with respect, however, that that proposition is inconsistent with the authority cited in support of it, and does not take sufficiently into account the effect of the injunction '*subject to*' in s 49(8)(a) that somewhat troubled Trollip JA and Miller AJA in the passages from their judgments in *Thomas Barlow and Sons* quoted in the preceding paragraph.

[34] In my view it is significant that, although there would appear to have been a difference of emphasis in the *obiter dicta* of Trollip JA and Miller AJA, both judges used the adjective 'paramount' to describe the import of the tariff headings in relation to the other interpretative injunctions provided in the Schedule and the Explanatory Notes.[27] (It will be recalled that the word was quoted from the introduction to the Brussels Notes themselves.) 'Paramount' conveys, unambiguously, the notion of something being more important than anything else. Its use in the given context impels the understanding that where there is a conflict between the tariff heading and the Notes, the import of the tariff heading prevails. Such conclusion is also supported, I think, by the terms of GRI 1.[28]

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[25] Cf. e.g. *C:SARS v Terreplas South Africa* supra, at para. 15, and *Distell v C:SARS* supra, at para. 22.

[26] In para. 27.

[27] The appeal court has appeared to lean in favour of preferring the analysis of Trollip JA over that of Miller AJA in this regard; see *Commissioner for the South African Revenue Service v South African Breweries (Pty) Ltd* [2018] ZASCA 101 (27 June 2018) at para. 25.

[28] Quoted in paragraph [6] above.

[35] In their peculiar context in s 47(8)(a), the words '*subject to*' appear to me to denote that the Schedule falls to be interpreted as subject to the Harmonised System and the Explanatory Notes that relate thereto in the manner that the HS and the Explanatory Notes are generally intended to work together. Interpreting the provision in any other way would be irreconcilable with the apparent scheme of Schedule 1, including the GRI, and the established jurisprudence. It would not give a 'sensible' meaning in the sense referred to in the oft-cited *Endumeni* case.[29] Section 47(8)(a) cannot be sensibly understood to give the Explanatory Notes a standing equivalent to that of the tariff headings for the purposes of construction. It is in situations in which it is impossible to construe the Explanatory Notes consistently with the tariff headings that the function of 'paramountcy' necessarily comes to the fore.

Determination of the proper classification of the goods

[36] It is averred in the Commissioner's answering affidavit that the goods in issue do not qualify for classification under any of the tariff headings in chapter 44 of the Schedule between TH 44.01 and TH 44.20. It was for that reason that, upon reconsideration, he contended that they fall to be classified under TH 44.21. (A convincing explanation was given for the Commissioner's abandonment of the classification under TH 44.09.)

[37] As mentioned,[30] TH 44.21 applies to goods falling to be classified as '*other articles of wood*'. The pertinent Explanatory Notes state in relevant part:

> **4421.90 Other**
>
> This heading covers all articles of wood manufactured by turning or any other method, or of wood marquetry or inlaid wood, **other than** those specified or included in the preceding headings and **other than** articles of a kind classified elsewhere irrespective of their constituent material (see, for example, Chapter Note 1).
>
> It also covers wooden parts of the articles specified or included in the preceding headings, **other than** those of **heading 44.16**.
>
> The articles of this heading may be of ordinary wood or of particle board or similar board, fibreboard, laminated wood or densified wood (see Note 3 to this Chapter).
>
> The heading includes: … .

There follows a long list of examples, including items as diverse as sewing thread reels, rabbit hutches, theatrical scenery, and wooden pins or pegs for footwear.

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[29] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13 (16 March 2012); [2012] 2 All SA 262 (SCA); 2012 (4) SA 593, at para.18.

[30] In paragraph [3] above.

[38] Heading 44.21 cannot apply if the goods are 'other coopers' products' within the meaning of TH 44.16, as has been found. That much is confirmed by the first paragraph from the Explanatory Notes to TH 44.21, quoted above.

[39] For these reasons, I have concluded that the applicant's appeal should be upheld, and an order made substituting the Commissioner's classification of the goods with a determination that they be classified under TH44.16.

The ambit of the appeal

[40] The applicant has sought an order that customs duty tariff heading 4416.00 be declared to be applicable to the goods imported by it in container no. HLXU8500679 on 3 December 2015 and in container no.s HLBU1561490, HLXU8154806, GATU8747579 and HLBU1673926 on various dates between January and June 2016. The Commissioner has contended, however, that the appeal can be considered only in respect of the goods in the first mentioned container because the contents of the other containers were not described with any particularity in the founding affidavit.

[41] In my judgment, there is not much substance in the point. The appeal did not come out of the blue. It had a long history. The applicant's dispute with the Commissioner over the proper classification of the 'staves' commenced when the first mentioned container was stopped in December 2015. The applicant thereafter made provisional payments of the duty assessed by the Commissioner pending the resolution of the dispute. A process of alternative dispute resolution and internal appeal in terms of Chapter XA of the Act was engaged in over the following two years.

[42] It is clear from the correspondence exchanged between the parties during this period that it was understood that the determination of the dispute in respect of the first container would also be dispositive, at least insofar as their contents included 'staves', of the issue of the duty payable in respect of the other four containers identified in the applicant's notice of motion. It is also clear that the duty paid on the 'staves' in those containers was understood by both parties to have been paid provisionally pending the determination of the question raised in respect of the characterisation of the goods in the first container. The Commissioner did not demur when this was expressly recorded in a letter from the applicant's attorneys, dated 15 March 2017, in which a request was made for the deferment of the payment of duty claimed by SARS in respect of other imports of like goods.

[43] Furthermore, the notice given by the applicant to the Commissioner in terms of s 96(1)(a), as a prescribed precursor to the current proceedings, made it clear that the intended court proceedings were directed at the resolution not only of the dispute that had arisen in respect of the 'staves' in container HLXU850065679, but also in respect of those in four other containers identified as HLBU1561490, HLXU8154806, HLXU8154806, GATU8747579 and HLBU1673936. In the annexure to its notice in terms of s 96(1)(a) of the Act, in which the applicant set out its intended 'cause of action', a description of the dispute that had arisen in respect of the first container was followed by the following statement (in paragraphs 12-14):

> 12. The matter then proceeded to the alternative dispute resolution stage. However, that process did not yield a concrete outcome either way since it was terminated under Rule 7(g)(iv) of the rules promulgated under s 77I of the Act. (Toneleria was informed of this fact on 26 September 2016, which, in the light of s 96(1)(b), means that it has until 25 September 2017 to institute court proceedings.)
>
> 13. The overall dispute also came to cover further goods (staves) imported by Toneleria in the period from about 19 January 2016 to about 21 June 2016 (a second, third, fourth, and fifth container, respectively numbered HLBU1561490 HLXU8154806, GATU8747579 and HLBU1673926).
>
> 14 In respect of these further four containers, Toneleria made the relevant provisional payments but did not pursue an internal administrative appeal since the relevant provisional payments were made subject to the final outcome of the already existing overall tariff classification dispute (as was made clear in various paragraphs of the document '*Grounds for Alternative Dispute Resolution*' which Toneleria submitted on or about 7 July 2016 in the course of pursuing the latter procedure).

[44] Section 96(1)(a) of the Act provides:

> (i) No process by which any legal proceedings are instituted against the State, the Minister, the Commissioner or an officer for anything done in pursuance of this Act may be served before the expiry of a period of one month after delivery of a notice in writing setting forth clearly and explicitly the cause of action, the name and place of abode of the person who is to institute such proceedings (in this section referred to as the "litigant") and the name and address of his or her attorney or agent, if any.
>
> (ii) Such notice shall be in such form and shall be delivered in such manner and at such places as may be prescribed by rule.
>
> (iii) No such notice shall be valid unless it complies with the requirements prescribed in this section and such rules

The evident purpose of the notice required in terms of the provision is to afford the defendant or respondent parties in the contemplated proceedings notice of the nature of and basis for the claim(s) that it is intended to bring against them. The provision is not dissimilar from that found in other legislation concerning legal proceedings against other organs of state. The rationale is that the party against whom the contemplated proceedings are to be instituted should be provided with the opportunity to investigate and equip itself with the information that could enable it, as best advised, to pre-empt, concede or defend the claim. In my judgment, the notice in terms of s 96(1)(a) of the Act served by the applicant on the Commissioner adequately satisfied the objects of the provision. It made it clear enough, by explicit reference, that the relief to be sought in the contemplated proceedings, by way of an appeal in terms of s 47(9)(e) against the Commissioner's tariff determination, would pertain to the 'staves' in all five identified containers.

[45] However, inasmuch as the relief sought in terms of paragraphs 1 - 3 of the notice of motion refers indiscriminately to 'the goods' imported in the containers instead of to just the 'staves' imported in them, the orders sought are cast too widely. The evidence shows that the 'staves' were not the only items in the first container. The relief to be granted will therefore be formulated in a way that makes it clear that it pertains only to the 'staves' in the five containers.

Liquidation of the provisional payments made by the applicant

[46] The applicant has prayed for an order directing the Commissioner to repay to it the amount totalling R1 419 382,94 that it had paid provisionally as duty on the imported goods. Provisional payments constitute the furnishing by the importer of a form of security[31] to allow for the goods to be released pending the determination of a dispute concerning the classification of the goods to be cleared. It would seem that the payments concerned are held in suspense for the time being. In the event of the dispute being determined in a way that negatives the importer's initially alleged liability, the provisional payment is 'liquidated' by way of the release of the funds. The terms under which the provisional payments system is administered are regulated by SARS's Provisional Payment Policy, a copy of which was attached to the answering affidavit put in by the Commissioner.

[47] The Commissioner contends that any liquidation of the provisional payments made by the applicant is required to take place consistently with the Policy, which, amongst other

[31] Presumably in terms of s 107(2)(a)(i) of the Act.

matters, contemplates an application to the Controller by the party claiming the liquidation. As the payments were made in terms of the Policy, it seems to me that the Commissioner is correct in his contention that any liquidation of them should also take place in accordance with the Policy, and not pursuant to a judgment sounding in money against the Commissioner ancillary to the determination of an appeal. It was for this reason, as I understood her argument, that Ms *Kilmartin* submitted that the application for an order sounding in money against the Commissioner was 'premature' at this stage. The position is analogous to that which applies in respect of the payment of refunds regulated by ss 76 and 76B of the Act. In the case of a refund, the applicant would be obliged to make application for a refund to the Controller as contemplated by those provisions in the event of the determination by the Commissioner being amended by the court's decision; it would not be entitled to a judgment sounding in money against the Commissioner as an ancillary order to the order upholding its appeal.

[48] The Commissioner has raised an argument that the conditions for a liquidation of the provisional payments have not been satisfied. In view of my conclusion that the applicant is not entitled to a judgment against the Commissioner sounding in money – at least not in these proceedings – it is unnecessary to determine the Commissioner's contentions concerning compliance with the conditions. Suffice it to say that none of the difficulties concerning the liquidation of the provisional payments raised by the Commissioner appear to me to present insurmountable obstacles to their liquidation consequent upon the determination of the applicant's appeal. For example, I consider that the applicant's failure to apply for a liquidation of part of the provisional payments using 'vouchers of correction' after the Commissioner had amended his initial tariff determination from one carrying 20% duty to one attracting duty at 10% of dutiable value to be an irrelevant consideration in the context of the applicant's contention that neither of the Commissioner's determinations was correct, and its intention to seek a determination from the court that the goods fell to be classified under TH44.16. Without making any finding on the point, it seems to me in any event, that should the provisional payments for any reason no longer be amenable to liquidation, the consequently appropriated duty payments would, in such event, be susceptible to being refunded in terms of ss 76 and 76B of the Act.

[49] The relief sought in terms of paragraph 4 of the notice of motion for an order directing the Commissioner to pay to the applicant the sum of R1 419 382,94 will therefore

be refused, there being no implication thereby that the applicant is not entitled to obtain the release by the Commissioner of the provisional payments.

Application to strike out

[50] The applicant applied to strike out paragraphs 4.8 and 5 of the affidavit of Bruno Pepin that was filed by the Commissioner as part of the further sets of affidavits exchanged between the parties that were specially admitted by agreement between them. The application was brought on the basis that the impugned averments were inadmissible as evidence. The nub of their content was the deponent's opinion that the goods in issue did not constitute 'other coopers' products' 'as they cannot be used at all in the manufacturing of barrels or the repair of barrels', and that they were not staves within the meaning of that word in TH44.16. I agree that the opinion evidence is inadmissible in that it is irrelevant and in fact purports to presume on the preserve of the court to make its own determination on the import of a statutory provision. The Commissioner's counsel did not press any argument to the contrary with any enthusiasm. The application to strike out will therefore be granted. It played such a minor and incidental role in the proceedings that I do not intend to make it the subject of a separate costs order; the costs thereof shall therefore be treated as costs in the cause.

Costs

[51] The applicant has achieved substantial success in these proceedings. Nevertheless, the Commissioner has succeeded in resisting the claim for an order against him sounding in money. In the circumstances, I consider that it would be just and fair were the applicant to be awarded 80% of its costs of suit, including the fees of two counsel.

Order

[52] The following order is made:

1. The applicant's appeal in terms of s 47(9)(e) of the Customs and Excise Act 91 of 1964 ('the Act') is upheld.
2. It is declared that customs duty tariff heading 4416.00 contemplated in section 47(1) of the Act, read with Schedule 1 thereto, is applicable to the 'InserStaves', 'ShortStaves' and 'MiniStaves' produced by Toneleria Nacional LTDA (Chile) (hereinafter referred to as 'the goods') imported by the applicant in container no. HLXU8500679 on 3 December 2015 and in container no.s HLBU1561490,

HLXU8154806, GATU8747579 and HLBU1673926, respectively, between January and June 2016.

3. The respondent's amended determination that tariff heading 4409.29.90 applies to the goods is set aside and substituted with a determination that tariff heading 4416.00 applies to them.
4. The respondent shall accordingly deal with the customs clearance of the imported goods on the basis that they are importable free of import duty.
5. Paragraphs 4.8 and 5 of the affidavit of Bruno Pepin, jurat 19 June 2019, are struck out.
6. The relief sought in paragraph 4 of the notice of motion, as amended, is refused.
7. The respondent shall pay 80% of the applicant's costs of suit, including the fees of two counsel.

A.G. BINNS-WARD

Judge of the High Court

APPEARANCES

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