THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 647/09

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE — **Appellant**

and

PLASMAVIEW TECHNOLOGIES (PTY) LTD — **Respondent**

Neutral citation: **CSARS v Plasmaview Technologies (Pty) Ltd (647/09) [2010] ZASCA 135 (1 October 2010)**

Coram: Mpati P, Cloete, Lewis and Tshiqi JJA and Bertelsmann AJA

Heard: **2 SEPTEMBER 2010**

Delivered: **1 OCTOBER 2010**

Summary: Customs and excise – tariff determination – complete television sets – whether importer may claim rebate.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Prinsloo J sitting as court of first instance).

1. The appeal is allowed with costs, including the costs of two counsel.

2. The order of the court below is set aside and replaced with the following:

   'The appplication is dismissed with costs, including the costs of two counsel.'

JUDGMENT

BERTELSMANN AJA (Mpati P, Cloete, Lewis and Tshiqi JJA concurring)

[1] The appellant is the Commissioner for the South African Revenue Service, appointed in terms of the South African Revenue Service Act 34 of 1997. He is responsible for inter alia the administration of the Customs and Excise Act 91 of 1964. The respondent is Plasmaview Technologies (Pty) Ltd (Plasmaview) a company.

[2] The Commissioner appeals against a judgment and order of the court below (Prinsloo J North Gauteng High Court Pretoria) which reviewed and set aside what was said to be a determination, dated 27 July 2006, allegedly made by him in the exercise of the powers conferred upon him by the Act.

[3] Plasmaview had imported fully assembled televisions sets with plasma or liquid crystal display (LCD) screens from Korea during 2006. These sets were

declared under tariff heading 8528.21.20 which allowed a full rebate under rebate item 460.16.

[4] Plasmaview relied on a tariff determination dated 20 December 2005 as justification for declaring the television sets in the above manner. The tariff determination was made at a stage when it imported the screens and TV tuners separately. This determination was referred to as 'Plasma 1' in the court below and this nomenclature will be retained in this judgment. The fully assembled TV sets were only imported once a copy of 'Plasma 1' was made available to the respondent.

[5] On 27 July 2006, the author of that tariff determination, Mr Pool, amended his reasons for classifying the screens without tuners under tariff heading 8528.21.20, but did not amend the determination that that tariff heading applied to the screens in the condition he had considered them. He did not inform the respondent of this amendment, which is referred to as 'Plasma 2'.

[6] When the Commissioner investigated the importation of the assembled television sets through his Post Clearance Inspection (PCI) team from about May 2006, his officials concluded that the fully assembled television sets had been cleared incorrectly and assessed the respondent by issuing two schedules in the amounts of R 8 924 191, 69 and R 6 591 987, 90 respectively, representing both underpaid duty and VAT.

[7] Believing that 'Plasma 2' had formed the basis upon which these assessments were made, Plasmaview lodged an appeal against them and at the same time launched a review application to have this supposed determination set aside. In the same proceedings, Plasmaview applied for a declaratory order that the amounts assessed were not owing to the appellant.

[8] The court below accepted that 'Plasma 2' represented a determination that, in the absence of prior notice to Plasmaview, amounted to administrative action that was unfair to it and granted the relief sought. The Commissioner was ordered to pay costs, including those of senior counsel.

[9] The Commissioner on appeal disputes the finding that 'Plasma 2' is a determination; argues that it therefore does not constitute administrative action and submits that the declaratory order should not have been granted. The appeal is with the leave of the high court.

<u>The salient facts</u>

[10] During 2005, the respondent imported eight consignments of LCD screens from Korea into South Africa. The port of entry was East London. The screens were described by the respondent as computer monitors with 81cm or 94 cm screens. They were cleared as 'input display units for automatic data processing' under tariff heading 8471.60, under which they would not have attracted any customs duty.

[11] One of the SARS officials, Mr Putter, inspected the eight consignments. He found screens that were not fitted with TV tuners on importation, but were equipped with the tuners very soon after they had been delivered to the respondent’s agents in East London.

[12] Putter was of the view that the LCD screens were dutiable. He referred the question of the tariff applicable to these items to his head office, which determined that the screens were incomplete reception apparatus for television sets, attracting customs and *ad valorem* duty. They were classified under tariff heading 8528.21.30. This classification, it was common cause, constituted a determination in terms of s 47(9)(a)(i)(aa)of the Act ('the LCD determination'). Plasmaview duly amended the

tariff heading under which these screens became subject to duty by submitting correcting vouchers in respect of the eight consignments.

[13] While importing LCD screens, Plasmaview also imported 11 consignments of plasma screens. Its agent requested Pool, a tariff specialist employed at that time at the Commissioner's head office, to determine the correct tariff applicable to these screens. Pool concluded on 20 December 2005 that the plasma screens were 'reception apparatus for television' and ought to be cleared under tariff heading 8528.21.20.

[14] This tariff heading reads:

Head-ing	Sub-Heading	CD	Article Description	Statistical Unit	Rates of Duty			Reference
					General	EU	SADC	
85.28	8528.2 8528.21		Reception Apparatus for Television, Whether or Not Incorporating Radio-broadcast Receivers or Sound or Video Recording or Reproducing Apparatus; Video Monitors and Video Projectors: _* Refer to General Rebates of Customs Duties and Fuel Levy 460.16 Temporary Rebates of Customs Duties_ _* Refer to Ad Valorem Excise Duties from Page 691_ —Video monitors: = Colour:					
	.10	2	- With a screen size exceeding 3m x 4..........	u	free	free	free	
	.20	5	- With a screen size not exceeding 3 m x 4	u	25%	22%	free	A1/1/1273 w.e.f. 1/1/05

			m					

[15] Pool added that it was the view of his office that 'television monitors are video monitors' and that 'television receivers incorporating screens . . . qualify as video monitors'. He motivated his determination in part as follows:

'CLASSIFICATION:

To qualify as a television set, a video monitor must either incorporate a tv tuner or be otherwise designed for completion into a television set. No evidence of this nature has been presented by your office. Classification within TH 8528.21.20 cannot be challenged on the basis of the available information.

It should be noted that it is in any event the position of this office, in line with the Explanatory Note to heading 85.28, that television monitors are video monitors and would qualify for entry under rebate item 460.16, providing that they comply with all the other requirements of the rebate item. EN 85.28 reads in pertinent part: "This heading covers television receivers (including video monitors and video projectors)" . . . . The meaning of this syntax could hardly be plainer: included under television receivers are video monitors and video projectors.

. . . .

HOLDING

TH8528.21.20 applies to the goods at issue. They are admissible under rebate item 460.16 insofar as they comply with all the other requirements of this rebate item.

<u>Tariff Determination</u>

Tariff Code 8528.21.20/460.16

Determination

Reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus; video monitors and video projectors: Video monitors: Colour: With a screen size not exceeding 3m x 4m Video monitors: Provided that a certificate from the South African Bureau of Standards is presented at the time of entry that the video monitors have more than 600 resolution lines.

Description

Plasma screens (42 inch) not incorporating tv tuners: PV 4201 S and PV 4201

. . . .'

[16] By virtue of this determination, these screens qualified for a full rebate of duty under rebate item 460.16. Pool's advice was sent to the respondent's clearing agents by way of an e-mail on 3 January 2006. Plasmaview then applied to the

Controller at East London on 5 January 2006 for leave to substitute the bills of entry of the LCD screens to reflect tariff heading 8528.21.20 rather than 8528.21.30, in order to qualify for the full rebate. This request was granted on 13 March 2006 subject to the payment of penalties.

[17] It must be emphasised that the plasma screens to which Plasma 1 applied were imported, as the LCD screens had been up to that time, without TV tuners. Upon receiving Pool's determination, Plasmaview arranged with the manufacturer in Korea to fit both the LCD as well as the plasma screens with TV tuners, so that they were imported as fully assembled television sets. The assembled sets were imported from January 2006. The full rebate was claimed under rebate item 460.16 as before.

[18] Pool's view that television receivers were screens that without tuners qualified as video monitors for a full rebate was not uncontroversial and was debated with him by his colleagues. On 27 July 2006, Pool amended the 'Law and Evidence' portion of 'Plasma 1'. This document is 'Plasma 2'. In essence, Pool changed his stance that television receivers could be classified under tariff heading 8528.21. This change in his approach was not communicated to Plasmaview until October 2006.

[19] The determination made on 20 December 2005, identifying the applicable tariff heading as 8528.21.20 for screens that had not been equipped with TV tuners, was not affected by Pool's amended comments.

[20] During May 2006, unaware of Pool's original determination and unaware of 'Plasma 2', Ms Spies of the SARS PCI in Johannesburg began an inspection and audit process into Plasmaview's imports of television sets and the possible underpayment of duty and tax in respect thereof. These imports came to Spies' notice as part of an ongoing investigation into imports of television sets generally, when the repayment claims lodged by the respondent with the Controller in East London after Pool's determination were inspected.

[21] Suspecting that duty had been underpaid, Spies telephoned a Plasmaview representative to inform her of the inspection and pending audit and to request relevant documentation from the company. This call was made on 23 May 2006. The

discussion was confirmed by e-mail the same day. The respondent provided the documentation Spies had called for.

[22] Further literature on the screens was requested in writing on 9 June 2006. Some of it was delivered to Spies the next day. The balance was to be supplied at a personal meeting between Spies and Plasmaview's representatives. This meeting was held on 5 July 2006. Spies informed the respondent of her prima facie view that duty had been underpaid. Respondent handed a copy of 'Plasma 1' to Spies, placing reliance upon this document for the proposition that complete television sets could be imported under full rebate of duty.

[23] On 29 September 2006, after having discussed the respondent’s importation of television sets with her colleague Lester Millar, and having been provided with a copy of 'Plasma 2', Spies served a notice of intention to demand outstanding duties on Plasmaview, based upon the prima facie evidence in her possession. This notice invited the company to make representations in respect of the alleged liability for underpaid duty. On 2 October 2006, Plasmaview reacted to Spies' notice by letter, placing reliance on Pool's original determination, Plasma 1, which was annexed to the letter together with the LCD determination.

[24] On 5 October 2006, the customs supervisor of East London gave notice to Plasmaview of his intention to revoke the authorisation to present substituted bills of entry relating to the LCD screens because of the fact that the Johannesburg PCI Office had discovered that the imported screens had been declared under the incorrect tariff and did not qualify for a rebate. Plasmaview was invited to make representations before 3 November 2006 why this step should not be taken.

[25] A meeting on 4 October 2006 followed at which the respondent was provided with a copy of 'Plasma 2'. On 23 October 2006, Plasmaview, through its attorneys, gave formal notice in terms of s 47(9)(e), read with s 96(1)(a)(i) of the Act, of its intention to appeal against 'the determination' of 27 July 2006, which it had identified as the cause of the demand for underpaid duties. At the same time, representations were made to the Commissioner's Pretoria office in an effort to persuade the latter to abandon the claim.

[26] Spies was unaware of the submissions made to the Pretoria office. She issued the schedules reflecting the claim for underpaid duties and tax on 9 November 2006 and had them delivered on 13 November 2006.

[27] Although the respondent had delivered its notice of appeal and its representations to SARS in October 2006, almost a year passed before the review, the appeal and the application for a declaratory order were launched in one application. Negotiations between the parties conducted prior to litigation had come to naught.

[28] The court below upheld the respondent's contention that 'Plasma 2' was a determination, constituted unfair administrative action and granted the orders referred to above. The commissioner challenges these findings and contends that 'Plasma 2' is no determination at all, but merely an amendment of the motivation that Pool provided in 'Plasma 1'. The Commissioner adopts the stance that the claim for underpaid duties is not based upon 'Plasma 2' but upon the schedules produced by the PIC team.

Is 'plasma 2' a determination?

[29] A determination for purposes of Chapter V of the Act is the end result of the classification of imported goods under the correct tariff heading: *Colgate Palmolive (Pty) Ltd v Commissioner, South African Revenue Service* 2007 (1) SA 35 (N) para 1; *Commissioner, South African Revenue Services v Komatsu Southern Africa (Pty) Ltd* 2007 (2) 157 (SCA) para 8 and the authorities there cited.

[30] The provisions of Chapter V of the Act were summarized by Cloete JA in *Commissioner, South African Revenue Service v Trend Finance (Pty) Ltd & another* 2007 (6) SA 117 (SCA) para 5:

‘Chapter V deals with clearance of goods and liability for payment of duties. Every importer of goods is obliged in terms of s 38(1) to make due entry of those goods in terms of s 39. That latter section requires the person entering any imported goods for any purpose to

deliver a bill of entry to the controller in the prescribed form; to declare that the particulars contained in the bill of entry are correct; and to pay all duties due on the goods. Section 40(1) provides that no entry shall be valid unless the true value of the goods on which duty is leviable or which is required to be declared under the provisions of the Act, has been declared; a correct invoice has been produced to the controller in the case of goods consigned to any person in the Republic; and the correct duty has been paid. Section 44(6)(c) provides that in all cases except those specifically mentioned, the liability for duty on any imported goods is that of the importer or owner of such goods (or any person who assumes such liability for any purpose under the provisions of the Act). Section 44(10) provides that any duty for which any person is liable in terms of s 44 shall be payable upon demand by the Commissioner. Section 47 provides that duty shall be paid on all imported goods in accordance with the provisions of Schedule 1.'

[31] 'Plasma 1' identifies, through the accepted process of classification – see *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise* 1985 (4) SA 852 (A) at 863F–864C – the heading under which the imported screens should be classified. 'Plasma 2' differs from 'Plasma 1' only in respect of the amended comment prepared by Pool under the heading 'Law and Analysis', in which he suggests that a plasma screen or a LCD screen incorporating a TV tuner could '… never be regarded as a video monitor', and could not qualify for a rebate under item 460.16. The tariff determination made in respect of the screens (without tuners) in December 2005 was expressly not altered by the amended comment. The date of the original determination was not affected and the document specifies that it (still) applies to plasma screens not incorporating TV tuners.

[32] 'Plasma 2' is therefore no tariff determination. Once this fact is established, it is clear that the claim for underpaid duties does not, and could not, arise from the amended comment prepared by Mr Pool.

The review of 'Plasma 2'

[33] As 'Plasma 2' is not a determination, it is not a decision capable of being reviewed, nor can an appeal be lodged in terms of s 47(9)(e) against its contents. The court below erred in this regard. Counsel for the respondent was constrained to concede during argument that the high court's findings could not be supported.

The importation of complete TV sets

[34] 'Plasma 1' was prepared at a stage at which the respondent imported screens without TV tuners, with specific reference to plasma screens. Section 47(9)(a)(iii) of the Act reads:

'Any determination made under this subsection shall operate –

(aa) only in respect of the goods mentioned therein and the person in whose name it is issued…'

[35] It is common cause, as I have said, that the respondent, once it received 'Plasma 1', imported both LCD and plasma screens with TV tuners already fitted by the Korean manufacturer. It therefore began to import complete TV sets.

[36] While screens imported without tuners were at the time correctly classified under tariff heading 8528.21.20, qualifying for a full rebate under rebate item 460.16 – see *CSARS v LG Electronics* (428/09) [2010] ZASCA 79 (28 May 2010) – the determination fell away once the nature of the imported item changed. Not only did 'Plasma 2' therefore not amend the earlier determination, it simply did not apply any longer to the respondent's imports once the tuners were fitted prior to shipment of the sets to South Africa. This fact was overlooked in the judgment appealed against.

The schedules prepared by the PIC

[37] Ms Spies prepared two schedules relating to bills of entry submitted by the respondent in respect of the screens imported during 2005 and 2006. The schedules were prepared in the exercise of the powers granted to the appellant by section 47(9)(a) and 47(11):

'(9) (a) (i) The Commissioner may in writing determine-

(aa) the tariff headings, tariff subheadings or tariff items or other items of any Schedule under which any imported goods, goods manufactured in the Republic or goods exported shall be classified; or ….

(11) (a) Notwithstanding the provisions of subsection (10), any determination made under subsection (9) (a) as a result of or during the course of or following upon an inspection of the books, accounts and other documents of an importer, exporter, manufacturer or user of goods, shall, subject to the provisions of section 44(11)(c), be deemed to have come into

operation in respect of the goods in question entered for the purposes of this Act two years prior to the date on which the inspection commenced.

(b) The expression "inspection of any books, accounts and other documents", or any other reference to an inspection in this Act shall be taken to include any act done by an officer in the exercise of any duty imposed or power conferred by this Act for the purposes of the physical examination of goods and documents upon or after or in the absence of entry, the issue of stop notes or other reports, the making of assessments and any pre- or post-importation audit, investigation, inspection or verification of any such books, accounts and other documents required to be kept under this Act.'

[38] The schedules prepared by Spies are determinations as intended in the Act.

Alternative relief

[39] Once it was clear that the appeal had to succeed, respondent's counsel sought to rely on alternative relief envisaged during the hearing before the court below when Plasmaview was granted an amendment of the notice of motion. Prayer 5 was amended to include the words 'Annexures FA 17 and FA 18 [Spies' schedules] are hereby set aside and' before the original prayer 'it is declared that the amounts demanded by the respondent [the present appellant] from the applicant [the present respondent] in Annexures "FA 17" and "FA 18" to the founding affidavit, being respectively R8 924 191,69 (together with interest thereon) and R 6 591 987,90 (together with interest thereon), are not owing by the applicant to the respondent.' Although the amendment was granted *'provisionally',* the court below couched its declaratory order in the form in which it was worded originally.

[40] The Commissioner's reliance on the schedules was introduced into the court below by an additional affidavit filed without opposition. Although Plasmaview did file a further affidavit in reply to the additional affidavit, the schedules were not dealt with at all.

[41] Faced with these difficulties, Plasmaview's counsel requested the indulgence of a postponement in order to supplement the papers to enable it to deal with the schedules. The Commissioner objected. The schedules were not disputed in the court below, either in respect of the correctness of the calculations of duty and tax, or in respect of the validity of the decision to prepare them. There is no explanation before this court why, if these aspects were in issue, the dispute was not ventilated before and why available evidence was not placed on record. There is consequently no basis upon which a postponement could be granted.

[42] Finally, Plasmaview argued that the commissioner does have a discretion whether or not to apply the provisions of s 47(11) once an underpayment of duty is established. It sought a postponement for the purpose of making representations to the appellant to persuade him not to exercise the powers given to him in terms of this section. Again, the Commissioner opposed the request.

[43] From the wording of the section quoted above it would appear prima facie that the appellant has no discretion that would allow him not to apply its provisions. No postponement could alter this fact. But even if the appellant could exercise a discretion not to apply s 47(11), this issue was not raised in the court below. There is no basis upon which the appeal could be postponed to accommodate a request to make further representations at this stage. The remarks by Schutz JA in *McCarthy Retail Ltd v Short Distance Carriers CC* 2001 (3) SA 482 (SCA) paras 27 to 33 are applicable in this case. The postponement was sought at the last moment after the appeal had been conceded; no satisfactory reasons were advanced for the lateness of the hour at which it was sought; and the Commissioner has a right to have the appeal disposed of. The principal reason for refusing the postponement is the fact that it was sought in order to allow the respondent to create a cause of action where none existed when the appeal was heard. The request for a postponement could therefore not be entertained.

[44] 1. The appeal is allowed with costs, including the costs of two counsel.

2. The order of the court below is set aside and replaced with the following:

'The application is dismissed with costs, including the costs of two counsel.'

E BERTELSMANN

ACTING JUDGE OF APPEAL

APPEARANCES:

For appellant:	C Puckrin SC T Khatri Instructed by: The State Attorney, Pretoria The State Attorney, Bloemfontein
For respondent:	J P Vorster SC Instructed by: Wolvaardt Inc, Pretoria Matsepes Inc, Bloemfontein