

SOUTH AFRICA / JUDGMENT

**Promed Technologies (Pty) Ltd v
Commissioner for the South African
Revenue Services (Customs and Excise)
(D806/22) [2023] ZAKZDHC 27 (26 May 2023)
[2023] ZAKZDHC 27**

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Chetty

CASE / FILE NUMBER

D806/22

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

CASE

NO: D806/22

In

the matter between:

PROMED
TECHNOLOGIES (PTY) LTD
APPLICANT
and
COMMISSIONER
FOR THE SOUTH AFRICAN
REVENUE
SERVICES (CUSTOMS AND EXCISE)
RESPONDENT

This

judgment was handed electronically by transmission to the parties'
representatives by email. The date and time for hand
down is deemed
to be on 26 May 2023 at 10:00

ORDER

The

following order shall
issue:

1.
The application is dismissed with costs,
including that of senior counsel.

JUDGMENT

Chetty J:

- [1] The issue raised in this application is whether the applicant, having imported certain goods into the country on the understanding that such goods would not attract import duties, may now be permitted to return the seized goods by way of export to the supplier under supervision of the respondent, and whether it may do so without the payment of any duty to the respondent. The position of the respondent is that the Customs and Excise Act 91 of 1964 ('the Act')

does not confer a discretion on the Commissioner for the South African Revenue Service ('the Commissioner') to release

seized goods without payment of duty. The Commissioner contends that the applicant may elect either to abandon the goods, in which event they will be disposed of by the Commissioner, or request the release of the goods, but only upon the payment of duty in terms of s 93(1) of the Act.

[1]

- [2] The facts are briefly that the applicant, as an importer of medical equipment and personal protective equipment ('PPE'), sourced goods from its supplier in China for import into South Africa and arranged for it to be cleared through a clearing agent. It is not disputed that the applicant is aware that the importation of certain goods attracts import duties, at the same time being aware that certain other goods are exempt from duty.

- [3] Acting on this knowledge, the applicant in July and September 2021 imported goods described as '41 000 100% Polyethylene Disposable Coverall XXXL Size (820 cartons) and 1000 100% Polyethylene Disposable Coverall XXL Size (20 cartons)'. The clearing agent completed the SAD500 Customs Declaration form citing the commodity code as '39262020(2)'. The tariff heading used was for goods that do not attract import duty, as in the case of PPEs. This was consistent with the instructions of the applicant to the clearing agent.

- [4] The goods landed at the Durban Harbour in October 2021 and were seized by the respondent's officials on the basis that an incorrect tariff description had been used in the clearing of the goods. Instead of the tariff heading '39262020(2)' which was used, the correct and applicable heading which ought to have been used (according to the respondent) was '621010906'. This tariff heading attracts import duty of 40 percent. In defence of it using the incorrect tariff heading, the applicant secured a letter from the Chinese supplier stating that due to new staff which it employed, the incorrect overalls were shipped to the applicant. In the alternative, it is contended that the goods were sent by 'mistake'. Mr Lombard, who appeared on behalf of the applicant, submitted that the factual enquiry to be embarked on is

whether the applicant's

declaration on the SAD500 form was deliberate, false or with intent to deceive.[2] In the absence of such proof, it was submitted that it cannot be said that the applicant dealt with the imported goods 'contrary to the provisions of the Act'.[3]

- [5] It is of significance that the goods ordered, as per the invoice, are described on an information sheet provided by the supplier as being 'suitable for the clinical medical staff to work in contact with potentially infectious patients' blood. ∴ The material used in the construction of the item is described as "PP + PE" (polypropylene + polyethylene breathable film) composite material, which is composed of hat, jacket and pants. The coverall is stitched and then the tape is heat sealed by machine'.
- [6] Those acting on behalf of the applicant contended that the goods ordered and imported comprised disposable coveralls with 'breathable apparatus' and that they were assured that the goods purchased were 'duty free'. On that basis, the applicant contended that it could not pay the 40 percent import duty levied against the goods and requested that the goods be exported back to their supplier in China under Customs supervision. It was submitted that in such an event, there would be no prejudice to the Commissioner as the goods would not have 'entered' the country and that once the supplier received the goods in China, it would pass on a credit to the applicant. This is on the assumption that the applicant had been supplied with the incorrect goods. The invoices attached to the papers indicate that the applicant paid an amount of R28,7 million for the goods.
- [7] The respondent did not accede to the request of the applicant pointing out that the description of the goods ordered as per the purchase orders are 100% polyethylene disposable coverall. These are precisely the goods supplied and which were subsequently seized. On that basis, there is no ground for the contention that the incorrect goods were supplied. Finally, to the extent that the applicant blames its supplier for sending the 'incorrect goods', the respondent pointed out that the obligation rests on the importer (the applicant) to conduct its own due diligence with regard to goods imported into the country and the attendant cost and duty implications. The argument of the applicant that the 'incorrect goods' were landed in South Africa must therefore fail.
- [8] In light of the above conclusion reached by the Commissioner, it informed the applicant that the incorrect tariff heading used constituted a false declaration[4] for the purposes of s 84(1) of the Act.[5] In terms of different categories of goods as contained in the International Harmonised Commodity and Coding System (the Harmonised

System’)[6] the tariff heading 3926.20.20(2) pertains to an article described as ‘protective jackets and one piece protective suits, incorporating fittings for connection to breathing apparatus.’ In contrast, tariff heading 6210.10.90 (6) refers to garments described as ‘other’. Even on the applicant’s version, the product description of the imported items, provided by the supplier, makes no reference to the garments having fittings for breathing apparatus. The goods, according to the Commissioner, therefore attract duty of 40 percent.

[9] Section 39(1)(a) of the Act requires the ‘person entering any imported goods’ to ensure the correctness of the particulars and the purpose of the goods. Section 40(1)(b) provides that no entry shall be valid unless the goods have been properly described in the entry. In terms of s 44(1) liability for duty on any goods shall commence from the time when such goods are deemed to have been imported into the Republic. In this instance, it would commence from the dates when the containers were discharged from the vessel. Once it became clear to the respondent’s officials that the goods were declared under an incorrect tariff heading,[7] the goods were seized in terms of s 87 (1) read with s 88(1)[8] of the Act, which empowers the Commissioner to seize goods liable to forfeiture. Although the applicant was advised of the appeal

procedure available to it in s 47(9)(e), it elected to institute legal proceedings to challenge the decision of the Commissioner contending that it be entitled to have the seized containers released for onward ‘export’ to its supplier in China. The applicant did not seek to review the decision of the Commissioner for any ground under the Promotion of Administrative Justice Act 3 of 2000. It simply claims an entitlement to return the goods to its supplier, without advancing the basis for this right either in the Act or the Constitution.

[10] The Commissioner contends that the applicant breached the Act in that what was declared on the bill of entry was certainly not what was ordered. The goods were therefore ‘dealt with contrary to the provisions of the Act’, resulting in their seizure. This conclusion undermines the supposed explanation for the application, essentially blaming the supplier for shipping the incorrect goods. As stated earlier, what was ordered by the applicant is exactly what was delivered.

[11] Insofar as the applicant’s contention that it was led to believe that the goods imported would be exempted from customs duty is concerned, based on the information given to it by the supplier based in China, the following commentary in LAWSA[9] is relevant:

‘The test to be applied to determine which is the appropriate heading is an objective one. In the absence of a reference to it in the Act or its Schedules, any knowledge of the importer’s purposes and intentions, as well as those of the supplier, in so far as these may be gathered from invoices, correspondence, names or descriptions which the parties apply to the goods must, therefore, be excluded from consideration. What the parties choose to call the goods or what the importer does with them after importation are not relevant considerations. Were such an approach not to be taken and regard were to be had to the parties’ intentions, it would be possible to apply different headings to the same articles according to the different intentions proved.’ (footnotes

omitted).

[12] These views are underscored in *Durban North Turf (Pty) Ltd v Commissioner, South African Revenue Service* 2011

(2) SA 347 (KZP) where the court reaffirmed the position that the test for classification is an objective one, with the goods being classified ‘as they are at the time of importation.’[10] The court stated in paragraph 36:

‘. . . goods are characterised by their objective characteristics and not by the intention with which they were made, nor the use to which they may be put. In *Commissioner, South African Revenue Service v The Baking Tin (Pty) Ltd* [2007

(6) SA 545 (SCA)] at 548 G-H, the court held that –

“ . . . It is well-established that the intention of the manufacturer or importer of goods is not a determinant of the appropriate classification for the purpose of the Act. Thus the purpose for which they are manufactured is not a criterion to be taken into account in classification.”

[13] In *Commissioner, South African Revenue Services v Komatsu Southern African (Pty) Ltd* 2007

(2) SA 157 (SCA) para 8, the court said the following regarding the process of classifying of goods:

‘The legal principles applicable to tariff classification and the manner in which they should be interpreted and applied have been expounded in a number of cases. Nicholas AJA, in *International Business Machines* set out the principles governing the process of classification 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.”

It 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 intentions 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.’

[14] Accordingly, irrespective of any bona fide belief held by the applicant that the goods it intended to import would not attract import duties, the applicant has not been able to mount any challenge to the decision of the Commissioner to classify under the tariff heading 6219.10.90(6), and the consequent imposition of 40 percent duty. As stated earlier, the applicant chose not to launch an appeal against the classification decision of the Commissioner.

[15] The applicant submits that the decision of the Commissioner is 'objectively oppressive'. Essentially, the applicant advocates for the right of an importer to return commercial goods to a supplier, but without having to pay duties. To do otherwise would entail the applicant having to pay duties without any commercial benefit accruing to it, where the goods are to be returned to the supplier. To this end, the applicant contends that the decision to seize the goods was arbitrary and invalid. This contention however is without merit as the Constitutional Court in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*

[2002] ZACC 5; 2002

(4) SA 768 (CC), para 14-15 said the following in defence of the Commissioner:

'[14] Liability for imported goods commences from the time when goods are deemed to be imported into the Republic. Duty is payable at the time of entry for home consumption of such goods. An importer of goods has to complete the requisite forms, produce a bill of entry as prescribed, and pay the customs duty within the time prescribed for making due entry

[15] It is important to note that the Act is premised on a system of self-accounting and self-assessment. There exists no viable

method by which the Commissioner can keep track of all goods imported that might result in customs duty being payable under the Act, and whereby such duties may be collected automatically. The Commissioner therefore verifies compliance through routine examinations and inspections and through action precipitated by suspected evasion.'

[16] The Constitutional Court went to add in paragraph 16 that '[t]he correct amount of customs and excise duty can only be determined if goods are classified under the correct tariff heading. . . .'. It continued to say the following in paragraph 17 in relation to the applicant's protestations of having to first pay duties and then contest the imposition thereof:

'Such determination will be subject to appeal to a High Court, but any amount due in terms of the determination shall be deemed to be correct and shall remain payable so long as the determination is in force. An appeal may be brought within one year of such

determination. The appeals procedure envisaged by the above sections is based on the widely accepted principle relating to the recovery of fiscal claims of “pay now, argue later”. The provisions of section 39(1)(b) that payment of duty is to be made on delivery of the bill of entry is qualified by the following proviso:

“ . . . Provided that the Commissioner may, on such conditions, including conditions relating to security, as may be determined by him, allow the deferment of payment of duties due in respect of such relevant bills of entry and for such periods as he may specify.” (footnotes omitted)

[17] The position adopted by the applicant is somewhat curious. It was submitted in argument that for the purposes of the relief it seeks, the applicant takes no issue with the categorisation by the respondent’s official that the goods were declared under an incorrect tariff heading. The explanation of the applicant is that, as the wrong or incorrect goods were shipped by the supplier, it should be allowed to return them to the supplier. As appears from this judgment, no statutory or lawful authority exists for the Commissioner to act in this manner. The applicant however is not stripped of its rights to legal recourse. To the extent that it contends that incorrect goods were shipped by its supplier (due to an error owing to new staff being employed), the applicant can pay the 40 percent duty imposed by the Commissioner and upon the goods being returned to China, sue the supplier for the amount of the penalty on grounds of negligence. The release of the goods

however is dependent on the applicant establishing good cause in terms of s 93(1) of the Act.

[18] Mr Pammenter SC, who appeared on behalf of the respondent, submitted that what the respondent was effectively doing was analogous to a motorist caught speeding on a public road. Upon being issued with a fine for the commission of an offence, the motorist seeks to avoid payment, offering instead to go back to the point from where his journey commenced. Neither the traffic officer, in the example cited, nor the Commissioner (in terms of the Act) is entrusted with a discretion to ignore the contravention. Section 43(7)(b) sets out the various steps to be taken where goods which have been seized are to be forfeited. The return of goods to a foreign supplier is not an option contemplated in the Act. Put differently, the applicant has not been able to point to any lawful basis, let alone any provision of the Act, for the relief it seeks. It was further submitted that even if the Commissioner was imbued with discretion, no good reasons have been advanced for the exercise of such a discretion in favour of the applicant. In the result, it is not for the court to create a discretion for the Commissioner where the legislation expressly did not consider conferring such in the Act.

[19] The applicant complains that it is an innocent party who has been sent the wrong product by its supplier. It wishes to return the goods against a claim for a refund. According to the applicant the penalty imposed by the Commissioner would impose a ‘double penalty’ against an innocent party. As I have for the reasons above stated, the applicant has not made out a case for the relief it seeks. Moreover, the fact that the applicant may be ‘innocent’ in the entire episode does not exonerate the goods from forfeiture. In this regard in *Secretary for Customs and Excise and Another v Tiffany’s Jewellers Pty (Ltd)* 1975 (3) SA 578 (A) at 587F-H

the court said the following:

‘It is significant that such lack of consent or knowledge does not apply to the goods. These remain liable to forfeiture. The wording in sec. 87(1) indicates that the goods become liable to forfeiture, wherever they may be, if the prohibited or irregular acts have been committed, no matter who commits them, whereas in the other sections it is the act of the individual who commits the offence in relation to particular goods which causes those goods to be liable to forfeiture. This means that under sec. 87(1) . . . it matters not whether the owner exported or attempted to export the goods in contravention of the law. No doubt, if circumstances exist which show that the true owner is innocent, e.g. where a thief seeks to export stolen goods, the Secretary [now the Commissioner] will exercise his discretion in terms of sec.

93. Hence, for the purposes of this case, even assuming Tiffany’s [the owner of the goods, which comprised diamonds] was in no way party to the wrongful conduct of Favaro [who committed an offence under the Act in respect of the diamonds], the diamonds were liable to forfeiture.’ (my italics)

[20] In the result, I make the following order:

The application is dismissed with costs, including that of Senior Counsel.

Chetty J

Appearances

For the Applicant: W D Lombard Instructed by: ANSG Attorneys Address: 40 Prince Street, Athlone Park Amanzimtoti Tel: 031 904 1630 Email: aradhana@adsgattorneys.co.za c/o VA Juggernath & Associates Suite 302, 303 Brohil Building 76 Mathews Meyiwa Road For the Respondent: C J Pammenter SC Instructed by: Linda Mazibuko & Associates Address: 231/233 Mathews Meyiwa Morningside Ref: Mr Mazibuko/tm/SARS22.2.FN1) Tel: 031 303 1006 Email: linda@qinet.co.za Date reserved: 3 March 2023 Date of Delivery: 26 May 2023

[1] Section 93(1) and (2) of the Act is set out below: 93. Remission or mitigation of penalties and forfeiture.- (1) The Commissioner may, on good cause shown by the owner thereof, direct that any ship, vehicle container or other transport

equipment, plant, material or other goods detained or seized or forfeited under this Act be delivered to such owner, subject to- (a) payment of any duty that may be payable in respect thereof; (b) payment of any charges that may have been incurred in connection with the detention or seizure or forfeiture thereof; and (c) such conditions as the Commissioner may determine, including conditions providing for the payment of an amount not exceeding the value for duty purposes of such ship, vehicle container or other transport equipment, plant, material or goods plus any unpaid duty thereon. (2) The Commissioner may, on good cause shown mitigate or remit any penalty incurred under this Act on such conditions as the

Commissioner may determine.

[1] Section 93(1) and (2) of the Act is set out below:

93. Remission or mitigation of penalties and forfeiture.-

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equipment, plant, material or other goods detained or seized or forfeited under this Act be delivered to such owner, subject to-

- (a) payment of any duty that may be payable in respect thereof;
 - (b) payment of any charges that may have been incurred in connection with the detention or seizure or forfeiture thereof; and
 - (c) such conditions as the Commissioner may determine, including conditions providing for the payment of an amount not exceeding the value for duty purposes of such ship, vehicle container or other transport equipment, plant, material or goods plus any unpaid duty thereon.
- (2) The Commissioner may, on good cause shown mitigate or remit any penalty incurred under this Act on such conditions as the

Commissioner may determine.

[2] See *Commissioner of the South African Revenue Service v Formalito (Pty) Ltd* [2006] 4 All SA 16 (SCA) para 8 to 9 where the following view was expressed: '[8] The proper interpretation of section 44(11)(a)(i) depends in no small part on the meaning to be ascribed to the word "false". According to the Concise Oxford English Dictionary, the word "false" in its narrower sense means "deliberately intended to deceive" and in its wider sense "not according with truth or fact". It follows that "false" could mean untrue in an objective sense as

also untrue to the knowledge of the maker of a statement. In the present context, as I see it, "false" must mean untrue to the knowledge of the maker of the statement. That narrower construction accords with the scheme of the section and gives proper effect to the distinction between 'incorrect' used in the first part of s 44(11)(a) and "false" as employed in subsection (i). Further, as was held in *R v Mahomed* 1942 AD 191 at 202: "the word 'false' when used in relation to a statement is more commonly used to mean "untrue to the knowledge of the person making the statement", than to mean 'incorrect'. In this case, to ascribe to the word 'false' its wider meaning – a meaning synonymous with 'incorrect' - would be absurd and illogical and do violence to the intention of the legislature. [9] Was the declaration false to the knowledge of Formalito? No discernible pattern consistent with a genuine error arising from the misapplication of the relevant tariff codes emerges on the papers. . . . An admittedly wrong tariff code was utilised resulting in an under-declaration of customs duty. Faced with such a query, Engelbrecht should simply have referred the clearing agent in question to SARS for a directive. Instead, undeterred that in truth there was no choice, he instructed his clearing agents to reflect tariff codes of his choosing on the bills of entry. . . .'

[2] See *Commissioner of the South African Revenue Service v Formalito (Pty) Ltd* [2006] 4 All SA 16 (SCA) para 8 to 9 where the following view was expressed:

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[9] Was the declaration false to the knowledge of Formalito? No discernible pattern consistent with a genuine error arising from the misapplication of the relevant tariff codes emerges on the papers. . . . An admittedly wrong tariff code was utilised resulting in an under-declaration of customs duty. Faced with such a query, Engelbrecht should simply have referred the clearing agent in question to SARS for a directive. Instead, undeterred that in truth there was no choice, he instructed his clearing agents to reflect tariff codes of his choosing on the bills of entry. . . .’

[3] Section 87(1) of the Customs and Excise Act 91 of 1964 (‘the Act’).

[4] 22(2) Laws 2 ed para 504.

[5] See s 84 of the Act: ‘84. False documents and declarations.-(1) Any person who makes a false statement in connection with any matter dealt with in this Act, or who makes use for the purposes of this Act of a declaration or document containing any such statement shall, unless he proves that he was ignorant of the falsity of such statement and that such ignorance was not due to negligence on his part, be guilty of an offence and liable on conviction to a fine not exceeding R40 000 or treble the value of the goods to which such statement, declaration or document relates, whichever is the greater, or to imprisonment for a period not exceeding ten years, or to both such fine and such imprisonment, and the goods in respect of which such false statement was made or such false declaration or document was used shall be liable to forfeiture.’

[6] 22(2) Laws 2 ed para 490: ‘The classification of goods according to part 1 of Schedule 1 to the Customs and Excise Act is a three-stage process: First is interpretation – the ascertainment of the meaning of the words used in the heading (and the relative section and chapter notes). Second comes consideration of the nature and characteristics of the goods

themselves. Third is the selection of the heading which is most appropriate to the goods. Maintaining a clear distinction between the first and second stages of the determination process is vitally important. Failing to observe the distinction has the result that the nature of the products is used to colour the meaning of the tariff heading.’ See *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise* 1985

[4] SA 852 (A) at 863G and *Heritage Collection (Pty) Ltd v Minister of Finance* 1981

(1) SA 437 (C) at 443H.

[7] See s 40 of the Act: ‘40. Validity of entries.-(1) No entry shall be valid unless- (a) (b) the goods have been properly described in the entry by the denomination and with the characters, tariff heading and item numbers and circumstances according to which they are charged with duty or are admitted under any provision of this Act or are

permitted to be imported or exported.’

[7] See s 40 of the Act: ‘40. Validity of entries.-(1) No entry shall be valid unless-

(a)

(b) the goods have been properly described in the entry by the denomination and with the characters, tariff heading and item numbers and circumstances according to which they are charged with duty or are admitted under any provision of this Act or are

permitted to be imported or exported.’

[8] See s 87 of the Act: ‘87. Goods irregularly dealt with liable to forfeiture.-(1) Any goods imported, exported, manufactured, warehoused, removed or otherwise dealt with contrary to the provisions of this Act or in respect of which any offence under this Act has been committed (including the containers of any such goods) or any plant used contrary to the provisions of this Act in the manufacture of any goods shall be liable to forfeiture wheresoever and in possession of whomsoever found: Provided that forfeiture shall not affect liability to any other penalty or punishment which has been incurred under this Act or any other law, or liability for any unpaid duty or charge in respect of such goods.

[9] 22(2) *Lawsa* 2 ed para 498. See also *African Oxygen Ltd v Secretary for Customs and Excise* [1969] 3 All SA 318 (T).

[10] *Durban North Turf (Pty) Ltd v Commissioner, South African Revenue Service* 2011 (2) SA 347 (KZP) para 35.

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Prepared on 11 October 2026 · Esheria