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SOUTH AFRICA / JUDGMENT

## Sava Di Bella Bathroom Accessories CC t/a Prima Bella Bathroom Accessories v Commissioner for the South African Revenue Service (65155/2011) [2021] ZAGPPHC 640 (29 September 2021) [2021] ZAGPPHC 640

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COURT

North Gauteng High Court, Pretoria

BEFORE

N Janse Van Nieuwenhuizen

CASE / FILE NUMBER

65155/2011

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### Source record

IN THE

HIGH COURT OF SOUTH AFRICA(GAUTENG DIVISION, PRETORIA)

REPUBLIC

OF SOUTH AFRICA

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED

DATE: 29 SEPTEMBER 2021  
Case  
Number: 65155/2011  
SAVA  
DI BELLA BATHROOM ACCESSORIES CC T/A PRIMA BELLA BATHROOM  
ACCESSORIES  
Applicant  
And  
THE  
COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES.  
Respondent

## JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] This is an appeal in terms of section 47(9)(e) of the Customs and Excise Act, 91 of 1964 (“the Act”) against a tariff determination issued by the respondent on 30 July 2019 in respect of glass shower enclosures (“the products”) imported by the applicant.

## INTRODUCTION

- [2] Section 47 of the Act provides that customs duty shall be payable in accordance with the provisions of Schedule 1. In casu Chapter 70: GLASS AND GLASSWARE under Section XIII of Part 1 of Schedule 1 is applicable.
- [3] The Commissioner classified the products as TH 7007.19, whilst the applicant contends that the products should be classified as TH 7020.00.
- [4] Tariff heading 70.07 pertains to SAFETY GLASS, CONSISTING OF TOUGHENED (TEMPERED) OR LAMINATED GLASS. Sub-heading 7007.1 pertains to Toughened (tempered) safety glass and 7007.19 to “other” such glass that is not “of size and shape suitable for incorporation in vehicles, aircraft, spacecraft or vessels” referred to in 7007.11.
- [5] The applicant contends that the products should be classified under tariff heading 70.20, sub-heading 7020.00 being OTHER ARTICLES OF GLASS.

## APPROACH

[6] In order to establish under which tariff heading or sub-heading the product should be classified a three-stage process is used, to wit:

6.1 firstly, the interpretation of the words used in the headings and sub-headings and relative section and chapter notes and explanatory notes which may be relevant;

6.2 secondly, the nature and characteristics of the products are considered; and

6.3 finally, the heading which is most appropriate to the products is selected.

[See: International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise 1985

(4) SA 852 A at 863 G-H.]

## CLASSIFICATION PROCESS

## INTERPRETATION

[7] Section 47(8)(a) of the Act provides for the interpretation of Part 1 of Schedule 1 and the relevant portion reads as follows:

*“8(a) The interpretation of-*

(i) any tariff heading or tariff subheading in Part 1 of Schedule No.1;

(ii) .....

(iii) the general rules for the interpretation of Schedule No. 1; and

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

shall be subject to the International Convention on the Harmonized Commodity Description and Coding System done Brussels on 14 June 1983 and to the Explanatory Notes to the Harmonized System issued by the Customs Co-operation Council, Brussels (now known as the World Customs Organization) from time to time.”

[8] As set out aforesaid, tariff heading 70.07 refers to SAFETY GLASS, CONSISTING OF TOUGHENED (TEMPERED) OR LAMINATED GLASS.

[9] “Toughened (tempered) glass” is explained in the notes to tariff heading 70.07 as:

(1) Glass obtained by reheating pieces of glass until they are soft but not soft enough to lose their shape. The glass is then cooled rapidly by appropriate processes (thermal toughened glass).

(2) Glass whose strength, durability and flexibility have been substantially increased by a complex physical-chemical treatment (e.g., ion-exchange) which may include a modification of the surface structure (commonly known as (“chemically toughened glass”).

This glass cannot be worked after manufacture because of the internal stresses set up by the processing and it is therefore always produced in the shapes and sizes required before tempering.”

and

*“A characteristic of toughened safety glass is that under the effect of shock it breaks into small pieces without sharp edges or even disintegrates, thus reducing the danger of injury from flying fragments.”*

- [10] It is common cause that the glass shower enclosures consist of toughened glass.
- [11] In support of their differing views both parties rely on the explanatory notes to tariff heading 70.07. The following explanatory notes have for ease of reference been numbered:

11.1 Explanatory note 1:

*“Because of these qualities these types of glass are used in motor car windscreens and windows, in doors, in ships’ portholes, in protective goggles for industrial workers or drivers, and for eyepieces for gas masks or drivers’ helmets....”*

11.2 Explanatory note 2:

*“However, curved glass having the character of clock or watch glasses or of a kind used for sunglasses is classified in heading 70.15. Safety glass incorporated in other articles thus in the form of parts of machines, appliances or vehicles is classified with those machines, appliances or vehicles; similarly, goods containing lenses of safety glass fall in heading 90.04.”*

11.3 Explanatory note 3:

*“Articles of toughened (tempered) glass and glass-ceramics, other than those of a kind used for purposes mentioned above, are classified according to their individual character (e.g., toughened tumblers, borosilicate baking dishes and glass-ceramic plates in heading 70.13).”*

Applicant’s case:

- [12] The applicant contends that explanatory note 1 indicates the types of uses for “safety glass”.
- [13] Once the safety glass is, however, incorporated in another article, explanatory note 2 exclude the articles from classification under tariff heading 70.07.
- [14] Similarly articles which are made of safety glass are, by virtue of explanatory note 3, excluded from classification under tariff heading 70.70.
- [15] In view of the aforesaid, the applicant submits that articles which are no longer safety glass only, but incorporates safety glass or are made of safety glass are excluded under tariff heading 70.07 and should be classified according to their character.
- [16] In amplification of the aforesaid submissions, the applicant contends that goods in the Harmonised System is, as a general rule, arranged in order of the degree of manufacture, to wit: raw materials, unworked products, semi-finished products, and finished products.
- [17] Bearing the aforesaid in mind, tariff headings 70.02 to 70.05 predominantly deal with unworked glass; tariff heading 70.06 with glass of headings 70.03 to 70.05, worked to some degree; tariff heading 70.07 with safety glass; tariff headings 70.08-70.19 with specified articles of glass and glassware, followed by tariff heading 70.20 which deals with other articles of glass, which are not covered by the tariff headings preceding it.

[18] Lastly, the explanatory note to tariff heading 70.20 clearly provides that the articles of glass remain classifiable under this heading, even if combined with material other than glass, provided they retain the essential character of glass articles.

#### Respondent's case

[19] In respect of the first two explanatory notes, the respondent submits that:

19.1 windscreens and windows are complete articles made of safety glass. The fact that they are “only” safety glass does not cause them to be manufactured articles;

19.2 glass to be used in goggles, masks etc. are lenses or eyepieces, complete articles of glass; and

19.3 the fact that the products contemplated are generically referred to with reference to their use, does not detract from the fact that they are complete “articles” manufactured from safety glass. Because of their intended use they are not classified with reference to their final identity (e.g. windscreens, lens, etc), but with reference to the type of glass from which they were manufactured, i.e. safety glass.

[20] It thus becomes clear that an article of heading 70.70:

20.1 only loses its 70.07 (safety glass) identity;

20.2 only becomes classifiable elsewhere;

once it has been incorporated in another product.

[21] Lastly, the phrase “those of a kind” in the third explanatory note makes it clear that the tariff heading is not limited to those articles specifically identified in the first explanatory note, but also cover articles of the same kind.

#### NATURE AND CHARACTERISTICS OF THE PRODUCTS

[22] The products are glass shower enclosures, presented on importation in retail packaging in knock-down kit for assembly at the site of the installation. Assembly on site entails fixing the different parts of the enclosure to an acrylic tray or a mortar base.

[23] Although some enclosures consist of only one glass panel, the majority of the enclosures consists of two or more sides of glass, with the one side being a fitted glass door which swings open or slides open. In some instances, the enclosures are partly or completely framed with aluminium and in other instances frameless.

#### Applicant's case

[24] The applicant contends that, on importation, the glass shower enclosures presented for customs clearance in a knockdown kit, are not safety glass but articles of glass, classifiable under tariff heading 70.20.

- [25] The respondent submits that in the case of a single panel product the panel is simply installed. In the case of multi-walled kits, the panels are connected to each other prior to installation process. The installation in both instances effectively cause the panel/s to be “incorporated” in the building, thereby creating a shower enclosure.
- [26] In principle there is no difference between a windscreen, a window and a glass panel to be incorporated in a vehicle or a building.

#### SELECTION OF THE MOST APPROPRIATE HEADING

- [27] Both parties rely on the General Rules for the Interpretation of the Harmonized System (“GRI”) in support of their conflicting views.
- [28] The applicant contends that the products, as presented upon importation, are unassembled glass shower enclosures. In the premises, GRI 2(a) and 2(b) read with the applicable explanatory notes apply.
- [29] GRI 2(a) reads as follows:

*“Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article or finished [or falling to be classified as complete or finished by virtue of this rule], presented unassembled or assembled”.*

- [30] The relevant explanatory note to Rule 2(a) provides as follows:

*“The first part of Rule 2(a) extends the scope of any heading which refers to a particular article to cover not only the complete article but also that article incomplete or unfinished, provided that, as presented, it has the essential character of the complete or finished article.”*

*“The second part of Rule 2(a) provides that the complete or finished articles presented unassembled or disassembled are to be classified in the same heading as the assembled article. When goods are so presented, it is usually for reasons such as requirements or convenience of packing, handling or transport.”*

- [31] GRI 2(b) reads as follows:

*“Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of Rule.”*

- [32] The explanatory note to Rule 2(b) provides as follows:

*“The rule concerns two or more materials or substances. The headings to which it refers are headings in which there is a reference to a material or substance (e.g. heading 05.07-Ivory), and headings in which there is a reference to goods of a given material or substance (e.g., heading 45.03-articles of natural cork). It will be noted that the Rule only applies if the headings or Section or Chapter Notes do not otherwise require...”*

- [33] Thus and although tariff heading 70.07 refers to a material or substance, being safety glass, and the framed shower enclosures being compromised of two materials, the exclusionary notes referred to above disqualifies the products from being classified under tariff heading 70.07 in terms of GRI 2(b). The products are articles of toughened (tempered) glass as envisaged in the exclusionary provision of the explanatory note.
- [34] The classification of the products should, according to the applicant, be determined by the article incorporating safety glass, to wit glass shower enclosures. The only tariff heading applicable is, therefore, tariff heading 70.20, being “other articles of glass”.
- [35] Furthermore, the glass shower enclosures consist predominantly of safety glass and has thus the essential character of glass as envisaged in GRI 2(a).
- [36] The respondent’s submissions are based on the principle that the same or similar products must be classified under the same tariff heading.
- [37] The respondent differentiates between single glass shower enclosures and multi panel glass shower enclosures. Because single glass panel enclosures are the same as a windscreen or a window, in that it does not form part of the product into which it is incorporated, it should be classified under tariff heading 70.07 in accordance with GRI 1.

- [38] GRI 1 reads as follows:

*“The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions.”*

- [39] In respect of multi panel glass enclosures the respondent agrees that GRI 2(a) applies.
- [40] However, and because the classification of multi-panel shower enclosures in terms of GRI 2(a) causes the products to be classified under tariff heading 70.20, it would be non-sensical and unbusinesslike to classify it as such as it would cause the same final products to be classified under different headings. The respondent relies on the interpretation rules contained in *Natal Joint Pension Fund v Endumeni Municipality* 2012 (4) SA 593 SCA in support of the aforesaid contention.

## DISCUSSION

- [41] The rules pertaining to the interpretation of documents have been set out in *Natal Joint Pension Fund v Endumeni Municipality* 2012 (4) SA 593 SCA at par [18]:

*“[18] ... The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.[1] The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’,[2] read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”*

- [42] Bearing the aforesaid in mind, the words used in the explanatory notes need to be examined first.
- [43] Explanatory note 3 excludes articles of toughened glass that are used for a different purpose than “those of a kind used for the purposes mentioned above” from classification under tariff heading 70.07.
- [44] The “purpose” for which articles of safety glass under this heading is used appears in explanatory note 1, to wit “in motor car windscreens and windows, in doors, in ship’s portholes, in protective goggles for industrial workers or drivers, and for eyepieces for gas masks or drivers’ helmets”.
- [45] The respondent’s contention that an article only becomes classifiable elsewhere once it has been incorporated in another product is, therefore, not correct. An article of glass is also excluded from being classifiable under heading 70.07, if such article is not used for the purposes mentioned in explanatory note 1, e.g., toughened tumblers.
- [46] The nature and character of the products has been set out in detail supra. The purpose of the glass enclosures is to contain water whilst the shower is used. In order to achieve this purpose different configurations of glass panels manufactured of toughened glass is used of which some is encased in aluminium.
- [47] It is a finished product presented in a knockdown kit for assembly on site.
- [48] The enclosures do not need to be “incorporated” into another product, as contended for by the respondent, but once assembled is merely installed.

- [49] Bearing the aforesaid in mind, the question arises whether tariff heading 70.07 or 70.20 is the most appropriate tariff heading.
- [50] The respondent correctly admits that GRI 2(a) applies to the multi panel glass shower enclosures and that the most appropriate tariff heading would therefore be 70.20.
- [51] The respondent's reasoning, notwithstanding the aforesaid and in an endeavour to "fit" the glass shower enclosures, so to speak, under tariff heading 70.07, by singling out one of the types of enclosures, is nonsensical.
- [52] The submission does not take the purpose of the shower enclosures and the fact that the bulk of the enclosures consists of more than one panel, into account.
- [53] In admitting that the bulk of the products should be classified under tariff heading 70.20, the next logical step, insofar as the respondent might be correct that a single panel enclosure is distinguishable from the multi-panel enclosures, is to apply the principle relied upon by the respondent that the same or similar products should be classified under the same heading.
- [54] In the result, I agree with the applicant that the most appropriate tariff heading is 70.20.

#### Costs

- [55] Costs should follow the cause. The parties agreed that the employment of two counsel is justified and such an order will follow.

#### ORDER

- [56] In the premises, I grant the following order:

1. The Respondent's Tariff Determination dated 21 June 2019 is set aside and replaced with the following Tariff Determination:

#### Tariff Determination

Tariff Code: 7007.20

Determination: Other articles of glass.

Description: Shower enclosures.

2. The respondent is ordered to pay the costs of the application, which costs includes the costs of two counsel.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD PER COVID19 DIRECTIVES: 31 August 2021

(Virtual hearing.)

DATE DELIVERED PER COVID19 DIRECTIVES: 29 September 2021

## APPEARANCES

Counsel for the Applicant

Advocate J.P. Vorster SC and

Advocate H.J. Snyman

Instructed by:

Shepstone & Wylie Attorneys

Counsel for the Respondent:

Advocate J.A. Meyer SC and

Advocate M. Tjiane

Instructed by:

Gildenhuis Malatji Incorporated

- [1] Described by Lord Neuberger MR in *Re Sigma Finance Corp* [2008] EWCA Civ 1303 (CA) para 98 as an iterative process. The expression has been approved by Lord Mance SCJ in the appeal *Re Sigma Finance Corp* (in administrative receivership) *Re the Insolvency Act 1986* [2010] 1 All ER 571 (SC) para 12 and by Lord Clarke SCJ in *Rainy Sky SA and others v Kookmin Bank* [2011] UKSC 50; [2012] Lloyds Rep 34 (SC) para 28. See the article by Lord Grabiner QC 'The Iterative Process of Contractual Interpretation' (2012) 128 LQR 41.
- [2] Per Lord Neuberger MR in *Re Sigma Finance Corp* [2008] EWCA Civ 1303 (CA) para 98. The importance of the words used was stressed by this court in *South African Airways (Pty) Ltd v Aviation Union of South Africa & others* 2011
- (3) SA 148 (SCA) paras 25 to 30.

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