IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 27898/2015

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED:

In the review application of:

BCE FOOD SERVICE EQUIPMENT (PTY) LIMITED Applicant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

Coram: WEPENER J

Heard: 31 August 2017

Delivered: 12 September 2017

Summary: Customs and Excise. Review of determination made by Commissioner. Such distinct from appeal procedure provided for in Customs and Excise Act, the latter which does not oust a common law review. Condonation for the late filing of a review granted when not opposed on any factual basis. Review of decision or determination subject to ordinary principles of review. In order to rely on the ground that the decision maker failed to furnish any or inadequate reasons an aggrieved person should utilise the provisions of s 5(1) of PAJA, unless 5(5)(6) applies and the automatic furnishing or reasons is applicable.

JUDGMENT

WEPENER J:

[1] The applicant seeks to review a decision of the respondent. The applicant elected not to pursue any rights that it may have had to appeal the decision under s 47(9)(e)[1] of the Customs and Excise Act.[2] There are four questions to be answered: if such review is competent, should the applicant be granted an extension of time to launch the review in terms of s 9(2) of PAJA,[3] it having commenced review proceedings some months after the period prescribed by PAJA for such proceedings to be instituted, having lapsed.[4] The next question is whether review proceedings are competent, and whether the decision of the respondent falls to be reviewed, and if so, whether to replace the respondent's decision or refer the matter back for reconsideration.

Delay

[2] There is no issue that the applicant exhausted all its internal remedies. What it did not do was to institute these proceedings within the 180 days after the relevant date

[1] 'An appeal against any such determination shall lie to the division of the High Court of South Africa having jurisdiction to hear appeals in the area wherein the determination was made, or the goods in question were entered for home consumption.'

[2] Act 91 of 1964.

[3] Promotion of Administrative Justice Act 3 of 2000.

[4] Section 7 of PAJA requires a party to institute review proceedings not later than 180 days of the date from the date of conclusion of proceedings in terms of internal remedies.

when the internal remedy was concluded and the decision given. The last internal remedy pursued by the applicant was a second internal administrative appeal. This was concluded by 22 April 2014. The one hundred and eighty day period provided for in s 7(1)(a) of PAJA within which proceedings to review the adjudication are to be instituted, expired on 18 October 2014. The review application was launched on 20 April 2015, a few months later. Counsel for the applicant, correctly in my view, submitted that the question whether it is in the interests of justice to condone a delay depended entirely on the facts and circumstances of each case.[5] The explanation furnished by the applicant, brief as it may be, is set out in some detail.[6] The first ground calls for a value judgement as to what is 'not excessively' late. The respondent elected not to answer the factual allegations of the applicant in its answering affidavit by attempting to force the applicant's case into an appeal under s 47(9)(e) of the Customs and Excise Act. The respondent was content to say that a tariff appeal was instituted within a year from the date of the termination of the alternative dispute resolution process and that indeed, the proceedings in this court were launched within one year from the date in compliance with the provisions of the Customs and Excise Act. In heads of argument it is stated thus:

> 'In the premises the present application was instituted timeously'.

The refusal of the respondent to accept that the applicant sought a review and its insistence that these proceedings are appeal proceedings in terms of s 47(9)(e) has led

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[5] *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) para 20.

[6] '62.1 The application has not been brought excessively late.

62.2 This application has been brought within the one-year prescription period provided for in section 96(1)(b) of the Customs and Excise Act for causes of action arising out of the provisions of that Act.

62.3 BCE has had to give SARS one-month notice of its intention to institute legal proceedings. The Notice was given on 17 December 2014. In response, on 15 January 2015. SARS gave notice that it stood by its Tariff Determination of 17 August 2011.

62.4 The application was further delayed by two weeks in March 2015 as I underwent surgery for a broken knee and I was involved in financial year-end work: I was the person at the applicant who could provide the information necessary for the drafting of this application.

62.5 There is no prejudice to SARS in the small delay in bringing the application The dispute is determinable on the documents available to the parties and is not dependant on the vagaries of witnesses' testimony or other sources of possible unreliability.

62.6 The merits of the application are strong. The seasoning in support of BCE's reasoning is cogent.

62.7 The outcome of this application is not relevant only to the past consignments of the toasters. BCE intends to continue to import the toasters and SARS' tariff classification will continue to have an impact on BCE in the future.'

it to a misguided approach to the matter. Be that as it may, the allegations made by the applicant in support of the order extending the time period for the launching of these proceedings are uncontested and indeed the respondent was content to deal with the matter. It does not allege any prejudice to it, should the matter be heard and finalised. The respondent's confusion as to whether the matter was an appeal in terms of s 47(9)(e) or a review in terms of PAJA, appears in para 1 of its heads of argument as follows:

> 'The applicant instituted a review application in terms of which the honourable court is asked to review and set asset aside a tariff determination made by the respondent on 18 March 2011 in terms of the provisions of section 47(9)(a) of the Customs and Excise Act, 91 of 1964, the tariff determination and the Act'.

The respondent finally appreciated that it was indeed a review application despite persistently referring to s 47(9)(e) of the Customs And Excise Act.

[3] The respondent consequently half-heartedly appreciated that the applicant was indeed seeking a review of its decision. It was then argued that the review proceedings were not available to the applicant and that the applicant's remedy was limited to one in terms of s 47(9)(e), ie, an appeal as is provided for in the section.

[4] What stands out in the application for an extension of time are three factors which, in my view, sways a decision to grant the extension of time to the applicant. Firstly, the respondent did not contest the allegations set out by the applicant, neither in its answering affidavit nor in heads of argument (of which three versions were filed before this court). Secondly, it is not disputed that there is no prejudice to the respondent should the extension of time be granted. This is so as a result of the fact that the respondent was of the view that the 'appeal' was indeed brought within the time limits authorised by the Customs and Excise Act. Having regard thereto, the application was not launched excessively late. Thirdly, it is uncontested that the outcome of the application is not only relevant to the past consignment of toasters imported by the applicant, but due to its intention to continue importing the items with the result that the respondent's classification will continue to impact on the applicant's imports in the future. This too, is an undisputed fact. The applicant explained its failure to act

immediately. The applicant's failure to fully set out each and every detail in regard to its delay during February 2015 is, in my view, when weighed up against the uncontested evidence, insignificant if regard is had to the fact that the future imports by the applicant will be affected by the classification or determination made by the respondent. It is therefore in the interests of justice that the time period provided for in PAJA be extended to the date when these proceedings were instituted.

[5] When the applicant served its replying affidavit upon the respondent, instead of serving it upon the respondent's attorney, it was served upon the respondent at its offices. When this was discovered the applicant served its replying affidavit on the respondent's attorney, albeit several months later. The initial service effected directly upon the respondent due to an inadvertence led to no prejudice to the respondent and none was argued to exist. In the circumstances I grant condonation for the late, if it was indeed late, filing of the replying affidavit.

Review or appeal

[6] Despite initially ignoring the applicant's sole reliance on review procedure, the respondent eventually submitted argument that such procedure is not available to the applicant and that the applicant was bound to utilise the appeal procedure provided for in s 47(9)(e) of the Customs and Excise Act. It is common cause that the determination by the respondent constitutes administrative action – the respondent conceded so much in its heads or argument and during argument in court.[7] I need therefore not say anything further about this issue.

[7] Section 47 bestows a right on a party, which right would not have existed but for the provisions of the section. There is no common law or other legislative provisions which an aggrieved party could employ in order to challenge a determination of the respondent, save of course for a common law review or the provisions of PAJA. There is no indication in the Customs and Excise Act that the provisions of PAJA have been ousted and that an aggrieved party is limited to the appeal procedure provided for in

[7] 'A tariff determination will constitute administrative action as defined by PAJA if it is against the importer….' Respondent's heads of 31 July 2017 para 15.

that Act. The test is whether the legislation obliges and restricts an aggrieved person to utilise the remedy provided for in that legislation.[8] No such construction can be placed on s 47 of the Customs and Excise Act and there is no language contained in the Act that leads to a conclusion that the legislature has confined a complainant to the particular statutory remedy. The decisions on which the respondent relied during argument[9] in support of the contention that a party may not utilise the provisions of PAJA, do not say that and it would have been surprising if they did deprive an aggrieved person of the rights afforded him or her in terms of PAJA and the Constitution.[10] Kriegler J said as follows:[11]

> 'It is important to have clarity about the effect of the mechanism created by ss 33 and ss 33A of the Act. Were it not for this special "appeal" procedure, the avenues for substantive redress available to vendors aggrieved by the rejection of their objections to assessments and decisions by the Commissioner would probably have been common-law judicial review as now buttressed by the right to just administrative action under s 33[12] of the Constitution, and as fleshed out in the Promotion of Administrative Justice Act.'

[8] Indeed, Kriegler J was at pains to make it clear that an aggrieved party is not limited to the remedies created in the legislation:

> 'But, and this is crucial to an understanding of this aspect of the case, the Act nowhere excludes judicial review in the ordinary course. The Act creates a tailor-made mechanism for redressing complaints about the Commissioner's decisions but leaves intact all other avenues of relief'.

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[8] See *Madrassa Anjuman Islamia v Johannesburg Municipality* 1917 AD 718 at 727.

[9] *Pahad Shipping CC v Commissioner, SARS* [2010] 2 All SA 246 (SCA); *Levi Strauss SA (Pty) Ltd v The Commissioner for the South African Revenue Service* 20923/2015 – unreported judgment of Murphy J of the Gauteng Division, Pretoria.

[10] These two cases did not deal with reviews but with what was permissible in an appeal under the Customs and Excise Act.

[11] *Metcash Trading Ltd v Commissioner, South African Revenue Service and Another* 2001 (1) SA 1109 (CC) para 33.

[12] Section 33 of the Constitution provides that:
'(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair' and
'(2) Everyone . . . has the right to be given written reasons'
where rights 'have been adversely affected by administrative action'.

The applicant disavowed reliance on appeal procedure and all arguments advanced by the respondent as if this an appeal and based on the provisions of s 47(9)(e), fall by the wayside.

Review

[9] The decision, which is the subject of the review, is the tariff determination of the respondent regarding toasters which the applicant imported into South Africa. I need not refer to the history of each step of the process as the end result of the classification of imported goods under a tariff heading for purposes of Chapter V of the Customs and Excise Act is the determination and administrative action which is to be judged.[13]

[10] The determination complained of as being reviewable is contained in a letter of demand of 12 July 2012, the letter of findings dated 26 April 2012 and a tariff determination dated 17 August 2011. Although the respondent takes a different view of what constitutes the determination, nothing turns on it as the issue is the fact that the respondent declared that the toasters fall under the tariff heading TH8516.72 in Part 1 of Schedule 1 of the Customs and Excise Act. I refer to this classification as tariff 8516.

[11] After completing all the internal remedies available to it, the applicant launched these proceedings, as it is obliged to do, pursuant to Rule 53 of the Rules of this court. It called upon the respondent to dispatch to the registrar its record of proceedings together with such reasons as the respondent desires to make. The respondent ignored the provisions of Rule 53 and filed an opposing affidavit as if the matter is an appeal under s 47 of the Customs and Excise Act. It nevertheless, furnished some reasons for the determination which the applicant seeks to review, in its affidavit. I need say little about the respondent's submission that it need not have complied with the provisions of Rule 53 which, according to its submission, has been 'overtaken' by more recent

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[13] *Commissioner for the South African Revenue Service v Plasmaview Technologies (Pty) Ltd* [2011] 2 All SA 235 (SCA) paras 29:
'[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.'

legislation, being PAJA. There is no merit in this submission. Rule 53 regulates the manner in which review proceedings are brought before a review court. It has not been overtaken or amended by PAJA. One does not find any provision in PAJA where such an overtaking can be inferred from. PAJA and the Rules of procedure are complementary. The failure by the respondent to furnish a record of the decision leaves the court with the record as set out by the applicant. This, of course, results in that most, if not all, of the evidence contained in the answering affidavit attempting to force the matter into appeal procedure, is of no value in these review proceedings, save that the reasons furnished by the respondent are properly before the court. The applicant complained that the respondent failed to furnish reasons for the decision when it made the determination, or at least furnished woefully inadequate reasons. But the applicant does not explain its own failure to call for reasons under the provisions of PAJA.[14] There is no general duty on officials to furnish reasons for every decision without more,[15] thus the enactment of the provisions of s 5(1) of PAJA which entitles one to the right to reasons and it has not been shown that this matter is on the list of administrative actions which requires the automatic furnishing of reasons.[16] The failure to request reasons, in my view, disentitles the applicant to rely on a review ground that the respondent failed to furnish reasons or furnished inadequate reasons in this matter per se. The respondent's reasons contained in the answering affidavit and furnished pursuant to the provisions of Rule 53, are properly before me. They are the reasons why the respondent arrived at the tariff classification having regard to the legal prescripts and facts of the matter.

[12] The applicant's case is that the respondent committed an error of law;[17] that irrelevant considerations were taken into account and relevant considerations not considered;[18] there was arbitrary or capricious decision making;[19] the decision was

[14] PAJA s 5(1): '(1) Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.'
[15] See the discussion by Hoextra: Administrative Law in South Africa, 2nd Ed pp 464-466.
[16] PAJA s 5(6)
[17] PAJA s 6(2)(d).
[18] PAJA s 6(2)(e)(iii).

irrational;[20] and the decision was taken for inadequate reasons.[21] All these complaints are spelt out in the founding affidavit and the respondent's answering affidavit baldly denies that the respondent failed to comply with the prescripts of PAJA. The test then is whether the applicant has shown that any of the review grounds were present when the decision was made.

[13] The applicant conducts business as an importer and distributor of catering equipment which is sold to wholesalers and retailers in South Africa. The item in issue is a six-slot bread toaster. The applicant's classification of the toasters would allow for it to be imported duty free. On the customs declaration form the applicant recorded the toaster as commodity code 8419.81.00 (1), which I hereafter refer to as tariff 8419. On 18 March 2011 the respondent directed that the tariff heading be amended to tariff 8516. No reasons were given for this classification that resulted in the applicant then being liable for a 20% rate of duty. The applicant objected to this tariff. On 25 March 2011 the respondent stated that its ruling remained in force. Again, no reasons were furnished for this decision. The applicant instituted an internal administrative appeal that appears to have been unresolved although the respondent's view is that it was indeed resolved. On 17 August 2011 the respondent made a tariff determination in which it was indicated that the correct tariff code for the toasters remained 8516. On 22 November 2011 the applicant requested the respondent to reconsider the tariff determination. The respondent failed to respond to the request. On 25 November 2011 the applicant applied for alternative dispute resolution in relation to the respondent's tariff determination pursuant to the provisions of s 77I of the Customs and Excise Act. On 31 May 2012 the respondent wrote to the applicant that the National Appeal Committee had found that the applicant's submissions were not compelling and it therefore ruled that the tariff heading 8516 was applicable. No reasons were furnished for this ruling.

[14] In the interim the respondent decided to advise the applicant that it had contravened certain provisions of the Customs and Excise Act due to the applicant having declared goods under an incorrect tariff heading. Nothing turns on this as the

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[19] PAJA s 6(2)(e)(vi).
[20] PAJA s 6(2)(e)(ii).
[21] PAJA s 5.

applicant launched a second internal administrative appeal. This too was unsuccessful. A follow up alternative dispute resolution ended unresolved. On 17 December 2014 the applicant, as it was obliged to do, addressed a notice in terms of s 96(1)(a)(i)[22] of the Customs and Excise Act of its intention to bring a review proceeding. The applicant however, failed to request the respondent to furnish reasons for its decision. The response by the respondent was that it stood by its tariff determination.

[15] In this court the applicant submitted that the tariff determination furnished by the applicant (8419) is applicable to toasters not for domestic use, whilst the respondent's determination (8516) is for toasters for domestic use. The respondent in supplementary heads of argument, forwarded to my registrar shortly before the hearing, submitted that the parties 'misdirected' themselves as to the correct classification of the toasters and that the correct classification should be tariff 8516 for the reasons set out in the heads of argument. These heads can, of course, not form the reasons for the respondent having concluded what the tariff was when it did make the determination. However, if a decision maker comes to the correct conclusion even for the incorrect reason, I am of the view that the decision should not be reviewable as it results in a correct decision.

[16] This necessitates an investigation into the classification of the toasters – if it results in tariff 8419, the respondent is and was incorrect in the determination. If it results in tariff 8516, the respondent was correct despite it having failed to give reasons for the determination at the time of the determination.

The analysis of the tariff to be applied

[17] Section 47(1) of the Customs and Excise Act provides for duty to be paid in accordance with the terms of Schedule 1 of the Act. South Africa is a member of the World Customs Organisation, which employs the International Harmonized System referred to in the Act. Part 1 of Schedule 1 to the Act, compromising the section and chapter notes, the General Rules for the Interpretation of the Harmonized System and

[22] '(1)(a)(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.'

the tariff headings, is a direct transportation of the nomenclature of the Harmonized System.[23]

[18] Section 47(8)(a) of the Customs and Excise Act states the following:

> '(8) (a) The interpretation of-
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> (i) any tariff heading or tariff subheading in Part 1 of Schedule 1;
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> (ii) . . .
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> (iii) the general rules for the interpretation of Schedule 1; and
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> (iv) every section note and chapter note in Part 1 of Schedule 1,
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> shall be subject to the International Convention on the Harmonized Commodity Description and Coding System done in Brussels on 14 June 1983 and to the Explanatory Notes to the Harmonised System issued by the Customs Co-operation Council, Brussels (now known as the World Customs Organisation) from time to time: Provided that where the application of any part of such Notes or any addendum thereto or any explanation thereof is optional the application of such part, addendum or explanation shall be in the discretion of the Commissioner.'[24]

[19] The relevant headings and section and chapter notes in Part 1 of the Schedule 1 are the paramount consideration in a determination which classification, as between headings, should apply in any particular case. The Explanatory Notes to a heading are

> 'merely intended to explain or perhaps supplement [the headings and section and chapter notes] and not override or contradict them.'[25]

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[23] *Commissioner for the South African Revenue Services v Terreplas South Africa (Pty) Ltd* [2014] 3 All SA 11 (SCA) para 11.

[24] Section 45(1) of the Customs and Excise Act provides that all imported goods shall be liable to such duties as may at the time of entry be levied upon such goods. The toasters were imported from August 2009 to August 2011. At this time the applicable edition of the Explanatory Notes was fourth edition (2007), which was replaced by the fifth edition (2012) (in operation from 1 January 2012). However, the editions are identical for present purposes.

[25] *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd* 1970 (2) SA 660 (A) at 675D-676D. Furthermore, Rule 1 of the General Rules for the Interpretation of the Harmonized System states: '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 of Chapter Notes. . . . '

Thus, the correct starting point is to examine the goods in relation to the proper meaning of the headings, together with any relevant section and chapter notes, rather than to resort to the Explanatory Notes at the outset.[26]

[20] The Supreme Court of Appeal has described the process of classification thus:

> '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.'[27]

[21] In the second stage of the classification process:

> '. . . 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.'[28]

[22] It is worth expanding on the central notion of the objective characteristics of the goods: Light may be thrown on the characteristics of the articles by subjective factors; but the principle remains that it is not the intention with which the articles are made nor the use to which they may be put, that characterise the articles in question – it is their objective to characteristics which do so.[29] Also, the manner in which goods are described in advertisements manuals and elsewhere, is irrelevant.

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[26] *The Heritage Collection (Pty) Ltd v Commissioner, South African Revenue Service* 2002 (6) SA 15 (SCA) para 10.
[27] *International Business Machines SA (Pty) Ltd v Commissioner for the Customs and Excise* 1985 (4) SA 852 (A) at 863F-G.
[28] *Commissioner, South African Revenue Services v Komatsu Sothern Africa (Pty) Ltd* 2007 (2) SA 157 (SCA) para 8.
[29] *Commissioner, South African Revenue Service v The Baking Tin (Pty) Ltd* 2007 (6) SA 545 paras 12 and 13:
'[12] The second difficulty with the reasoning of the High Court is 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. In *Commissioner, South African Revenue Services v Komatsu Southern Africa (Pty) Ltd* this Court said:

[23] Applying these principles, it is to be observed that tariff heading 8419 provides for:

> 'Machinery, plant or laboratory equipment . . . for the treatment of materials by a process involving a change of temperatures such a heating . . ., other that machinery or plant of kind used for domestic purposes; . . . . '

The relevant explanatory notes to tariff heading 8419, says the following:

> 'The heading covers only non-domestic equipment, except for the instantaneous or storage water heaters referred to in the Explanatory Note'.

[24] Tariff heading 8516 provides for 'other electro-thermic appliances of a kind used for domestic purposes;' and one–dash subheadings under 8516 is 'other electro-thermic appliances' and the second two-dash subheading (8516) 'other electro-thermic appliances' provides for 'toasters'. To this end the parties are in agreement. And they are in agreement that the final question is to establish whether the appliance is of a kind used for domestic purposes. The respondent submitted that by specifically including 'toasters' *eo nomine* in a sub-heading under heading 8516, the legislature has confirmed that toasters are electro-thermic appliances of a kind used for domestic purposes.

[25] The determination to be made is whether it is used for domestic purposes – not whether it can possibly be used for domestic purposes. 'Used' should be read as

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"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 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."

[13] The last sentence of this passage is invoked by The Baking Tin in support of its argument that the intention of the designer, or the use to which the goods are put, may affect what appear to be the objective characteristics of the goods and thus change their classification. It seems to me, however, that the court was suggesting no more than that light may be thrown on the characteristics of the article by subjective factors. The principle remains the same: it is not the intention with which they are made, nor the use to which they may be put, that characterise the containers in question. It is their objective characteristics. Thus the mere fact that the containers are regarded as disposable by The Baking Tin, and perhaps other suppliers and manufacturers in the chain, does not necessarily make them disposable by nature.'

'normally used'.[30] The interpretation is, in my view, logical and finds support of the Canadian Trade Tribunal that in order to be considered as goods for 'domestic purposes' goods must be primarily for domestic household use,[31] a principle accepted by both the applicant and the respondent in this matter.

[26] The submissions placed before the respondent from the outset were that the toaster was imported to be sold to the catering and hotel industries, a fact which throws light on the characteristics of the toaster, but such is not the test.[32] In addition, it was argued that a six-slot toaster that produces six slices of toast at a time and a hundred and thirty rounds of toast every hour is not the norm or normally used in a South African household; nor is a toaster at a cost in excess of R2500 the norm for households in South Africa. But these 'facts' were either not placed before the Commissioner or not adequately so. Tariff 8516 provides for appliances 'of a kind used for domestic purposes'. In contrast, tariff 8419 provides for items which are 'only non-domestic equipment'. On the assumption that a bread toaster can be either used as non-domestic equipment or that it is of a kind used for domestic purposes, the question is whether it should be classified as the latter or former. Leaving aside evidence which may not be considered[33] the notes of classification requires that the heading which occurs last in numerical order,[34] will find application. That tariff is 8516.

[27] Without relying on the reasons furnished by the respondent in its answering affidavit, I find that the respondent correctly classified the toasters under tariff 8516. It did not make any error of law with the result that the decision or determination is neither reviewable on this basis, nor due to the alleged failure to furnish reasons. In my view the other grounds advanced[35] by the applicant do not overcome this conclusion. The result is that the final question posed, [36] does not arise. If regard is had to the reasons

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[30] See tariff heading 8419 where to words 'normally used in the household' and tariff heading 8516 where the words 'normally used in the household' are used.
[31] *Evenflo Canada Inc v President of Canada Border Services Agency* (19 May 2010), AP-2009-049 (CIT) para 68, available on the website of the Canadian International Trade Tribunal.
[32] *The Baking Tin* supra para 12-13.
[33] *The Baking Tin* supra.
[34] General Rules for the Interpretation of the Harmonizes System 3(c).
[35] Referred to in para 12 above.
[36] Para 1 above.

furnished by the respondent in the answering affidavit, that conclusion is strengthened overwhelmingly.

[28] The parties were in agreement that the costs of two counsel should be awarded to the successful party.

[29] I make the following order:

1. The late filing of the applicant's replying affidavit is condoned.

2. The time period provided for in PAJA for the launching of proceedings is extended to the date when these proceedings were instituted.

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

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Wepener J

Counsel for Applicant: C. Dreyer with A. Pantazis

Attorneys for Applicant: Fluxmans Attorneys

Counsel for the Respondent: A.J. Meyer SC with L. Pillay

Attorneys for Respondent: State Attorney Pretoria