**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA**

 **GAUTENG DIVISION, PRETORIA**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

 **24 March 2023**

 DATE SIGNATURE

CASE NUMBER: A2/2021

In the matter between:

THE COMMISSIONER FOR THE SOUTH **APPELLANT**

AFRICA REVENUE SERVICE

and

PEARLSTOCK (PTY) LTD **RESPONDENT**

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**JUDGMENT**

**TLHAPI J**

**INTRODUCTION**

[1] This is an appeal to the full bench of this court against a determination by

Collis J, in which she upheld the respondent’s tariff appeal in terms of section 47(9)(e)

of the Customs and Excise Act 91 of 1964 (“The Act”). The appellant’s

(Commissioner’s) Internal Appeal Committee, had initially classified certain imported

polymers of vinyl chloride panels (“PVC Panels”) under Tariff Heading (“TH”)

3916.20.90 (which attracted an 18% customs duty). The earlier determination by the

Commissioner was replaced by the court *a quo* with a classification of the product as

contended by the respondent under TH 3921.12 (which attracted a 10% customs

duty*).*

[2] Section 47 (9)(a)(i) of the Act provides that the Commissioner may determine the tariff head (TH) heading and sub-headings under which imported goods are to be classified. Such determination is subject to an appeal to the high court before a single judge and such appeal constitutes a hearing *de novo,* with or without additional evidence[[1]](#footnote-1).The appeal before Collis J was such a hearing *de novo.*

[3] The first issue in this appeal concerns the classification or the interpretation of

the TH of the goods, that is, of the PVC panels, which were imported by the

respondent and which could be used as ceiling or wall panels. The parties presented

competing THs. The question was whether the PVC Panels were “*cellular”* in

‘design and structure’ as contended by the respondent and as upheld by the court *a*

*quo,* thus falling under TH 3921.12, or, whether the PVC used to produce the panels,

although appearing to be externally ‘*cellular in construction’,* were not necessarily

“*cellular”* as contended by the Commissioner, thus falling under TH 39.16. A sample

of the product was made available to this court for viewing. Also to be determined was

the admissibility of the evidence of Professor John which was relied upon by the

Commissioner. The appeal is with leave of the court *a quo.*

**BACKGROUND**

[4] The respondent’s clearing agents Worldnet Logistics (Pty) Ltd had on

importation of the PVC panels described them on the customs declaration form as

*“Other Plates, Sheets, Film, Foil and Strip, of Plastics, Other: of polymer of vinyl*

*chloride Product: PVC WALL PANEL"* under TH 3921.90.47, which attracted

customs duty at the rate of 10%. On 5 May 2016 the Commissioner’s officials at the

port in East London stopped a consignment of the PVC Panels and on inspection

determined that the respondent ought to have entered the panels under TH 3925.90

attracting customs duty at the rate of 20%.

[5] The clearing agent submitted a D51 application for determination by the

Commissioner at its Head Office and the classification under TH 3925.90 by the

officials in East London was confirmed. It turned out later to both the Commissioner

and respondent that their description of the goods differed and that the ‘TH’ utilized

was incorrect. Respondent as per photo attached, annexure ‘FA2’ contended that

the PVC panels were of cellular construction or appearance, as seen from the

vertical cardboard partitions joining the top and bottom walls of the product. The

Commissioner on the other hand disagreed and contended that the description by

the respondent ignored the specific technical ‘definition of the word cellular when

used in relation to PVC products’ and that the imported goods did not fall under this

definition. It was contended that it was the PVC plastic used to produce those goods

which determined whether or not the goods were cellular. A thermal and microscopic

analysis had to be conducted. The goods appeared to have been manufactured

‘through extrusion and that they had rectangular shapes throughout the panel. In

paragraph [72] of the founding affidavit the respondent stated”

“The PVC panels are manufactured by the process of extrusion, i.e. the composite

material making up the product (principally PVC resin and calcium carbonate) are

shaped by forcing the mixture through a die at high temperature……..The finishes to

both annexure FA16 and FA17 being identified as “white matt” and “grey stripe”

respectively, are printed on the panels in a separate process after extrusion.”

[6] Although the Commissioner appeared to have conceded in answer that the

product had an external cellular appearance, denied that the product was ‘cellular

PVC’ in the technical sense. In the answering affidavit as at paragraph 2.7 the

Commissioner places reliance on expert evidence as to the meaning of the term

“cellular” as it is contended that “Cellular” ‘had a specific technical meaning in

relation to PVC products. The respondent contended in reply that according to the

scheme of the Act expert evidence was not admissible to prove the meaning of

words used in the Act.

[7] Consequently the clearing agent launched a further internal administrative

appeal in terms of section 77A of the Act. It was common course between the

appeal committee and the respondent that the TH 39.25 was not applicable to the

the goods concerned. The respondent did not abandon its contention that the correct

‘TH’ for the PVC panels were to be classified under 3921.12. The appeal committee

disagreed and contended that the correct classification was ‘TH’ 3916.20.90

attracting a customs duty of 18%.

[8] The Commissioner filed a supporting affidavit accompanied by a report by

Professor John (Prof John) of the Council for Scientific and Industrial Research

(“CSIR”). After conducting tests and analysing the panels “a sample of vinyl chloride”

she concluded that the panel does not conform to the common technique used for

manufacturing cellular PVC and that the panels were not cellular as contended by

the respondent[[2]](#footnote-2) and therefore could not fall under TH 3921.12. The purpose

of the report was to give expert evidence, for establishing the meaning attributed to

‘cellular’ in the first stage of the interpretation process. The respondent on the other

hand introduced evidence that explained the process of manufacture of the panels.[[3]](#footnote-3)

[9] The competing tariff heads are the following:

**Tariff Head Article Description**

**39.16 - Monofilament of which any cross section**

 **Dimension exceeds 1mm, Rods, Sticks and**

 **Profile Shapes, whether or not surface-worked**

 **but not otherwise worked, of Plastics**

3916.10 Of polymers of ethylene

 3916.20 Of polymers of vinyl chloride

 3916.90 Of other plastics

This heading covers monofilament of which any cross-sectional dimension exceeds 1mm, rods, sticks and profile shapes. These are obtained in the length in a single operation (generally extrusion) and they have a constant or repetitive cross section, from one end to the other. Hollow profile shapes have a cross-section different from that of tubes, pipes and hoses of heading 39.17 (see Note 8 to this Chapter),

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 **39.21 Other plates, Sheets, Film, Foil and Strip, of**

 **Plastics**

 **-Cellular**

3921.11 Of polymers of styrene

 3921.12 Of polymers of vinyl chloride

 3921.13 Of polyurethanes

 3921.14 Of regenerated cellulose

 3921.19 Of other plastics

 3921.90 Other

This heading covers plates, sheets, film, foil and strip, of plastics, **other than** those of heading **39.18, 39.19 or 39.20** or of **Chapter 54.** It therefore covers only cellular products or those which have been reinforced, laminated, supported or similarly combined with other material. (For the classification of plates etc. combined with other materials, see the General Explanatory Note)

**THE LAW**

[10] Duty is paid to the Commissioner on all goods imported into the Republic

of South Africa in terms of Schedule 1 to the Act.[[4]](#footnote-4) The interpretation of Schedule 1 is

to conform to the classification of goods as determined by the International

Harmonized Systems as provided in the Act[[5]](#footnote-5), that is, the General Rules of

Interpretation applied to the headings, sub-headings, related codes, chapter and

section notes. The section and chapter notes have legal application and the

explanatory notes are only used to guide and supplement or compliment the

meaning of the headings and sub-headings.

[11] In disputes the primary role of the court is to establish the meaning of the

headings to the imported goods, as stated in *Secretary of Customs and Excise v*

*Thomas Barlow & Sons Ltd* [[6]](#footnote-6), in a three-staged process according to the principles

in *International Business Machines SA (Pty) Ltd v Commissioner of Custom and*

*Excise*[[7]](#footnote-7) stated below:

1) Interpreting the meaning of the words contained in the relevant headings

and notes;

2) Considering the nature and characteristics of the goods;

3) Determining which heading is most appropriate in encapsulating the

technical properties and uses of the goods.

As indicated in the Barlow matter the explanatory notes guide, explain and

supplement the meaning of the headings, section and chapter notes and do not

‘contradict or override them’.

‘

[12] Mr Meyer for the Commissioner conceded in argument that the principles of

legal interpretation as expounded in *National Joint Municipal Pension Fund v*

*Endumeni Municipality*[[8]](#footnote-8) had to be applied, even though he had not specifically

addressed these principles in both the main and supplementary heads of argument

or explained how the principles had to be applied in interpreting the tariff heads. He

contended that in interpreting the classification of the goods, the principles in

Endumeni, together with those provided for in the nomenclature to the Harmonized

Systems, as incorporated in legislation provided in Section 47(8)(a) had to be

applied. Particularly relevant to this matter were 47(8)(a)(i) and 47(8) (a)(vi) and the

general rules in the first Schedule to the Act. He emphasized the importance of first

stage in the process of interpretation[[9]](#footnote-9) before progressing to the second and third

stages.

[13] Mr Vorster for the respondent wished to emphasize that under the General

Rules of Interpretation, the explanatory notes in Rule 1 provided that the titles were

for ease of reference only and had no legal bearing and, that classification shall be

determined according to the terms of ‘the heading, section or chapter notes, subject

to the explanatory note. With regard to the principles in Endumeni, it was the

interpretation of the ordinary language and syntax in the tariff heads together with

the context which were of importance, without ignoring the relevance of the role

played by the rules of the harmonized systems in our law. In the alternative the

respondents relied on Rule 3(a) and 3(c)[[10]](#footnote-10), in particular the latter rule because as

prescribed, the tariff heading 39.21 was the last in contention.

[14] Supplementary heads of argument were filed on behalf of the Commissioner

in order to address the deficiency in discussions pertaining to the classification

process of the TH 3921 in the main heads of argument, in that the main heads

failed to deal with the context within which the word “cellular” had to be interpreted,

(paragraphs 3.4;3.5, and 5). The purpose was to address the recent judgment

regarding interpretation in the first two stages of the classification process, especially

the context within which the word ‘cellular’ was to be interpreted in TH 3921.1. He

contended that it was imperative that firstly the meaning in the tariff headings be

interpreted, followed by a determination as to the nature and characteristics of the

product as dealt with in *Commissioner SARS v Toneleria Nacional RSA (Pty) Ltd*[[11]](#footnote-11).

Mr Meyer argued that the court *a quo* had misdirected itself as at paragraphs [44] to

[47] of the judgment by commencing with the second stage of interpretation which

concerned the nature and characteristics of the product and by neglecting to maintain

a clear distinction between the first and the second stages of the classification.

[15] Mr Vorster on the other hand presented a *Distell* SCA judgment[[12]](#footnote-12) which he said

was in conflict with *Toneleria supra,* and which dealt with similar issues. He contended

that the Distell judgment was not referred to in *Toneleria,* regarding the sequential

order of interpretation process as formulated in International Business Machines

*supra.* Furthermore, that the court *a quo’s* judgement preceded *Toneleria* and that it

served no purpose to be critical of the manner in which the court *a quo* dealt with

the classification process, by first considering the second stage, the nature and

characteristics of the product. In *Distell* Heher J stated that ‘there is no reason to

regard the two stages as immutable’[[13]](#footnote-13) and he commenced the process by considering

the second stage first. In my view the two matters are distinguishable. *Distell* dealt with

the classification of “coolers” (whether coolers were fermented beverages or not /

whether water is a non-alcoholic beverage) and, *Toneleria* dealt with the classification

of oak barrels used for storage in wine making.

[16] As I see it, there is no explanation in *Distell* on a reading of the preceding

paragraphs, while relying on the principles in International Business Machines, why

Heher J made the comment, except for the fact that in the Distell matter he found it

convenient to deal with the second stage first.[[14]](#footnote-14) In my view this preference does not

mean that he disavowed the importance of the well-established manner of dealing with

the three staged process sequentially or that there were conflicting judgments. In a

plethora of cases the three-stage process has been applied even in the most recent

*Toneleria* at paragraph [4].

[17] In the judgement of the court *a quo,* when dealing with the interpretation of the

meaning of the words, it is stated that the wording of chapter headings 39.16 and

39.21, paragraphs [42] and [43] ‘do not provide guidance as to the meaning of the

word ‘cellular’, or how ‘cellular’ is to be interpreted within the context of the sub-

headings in TH 39.21. Furthermore, it is suggested that even the explanatory notes

did not give guidance. Having regard to this statement, it does not seem to me that

there was an interpretation by the court *a quo* of what ‘cellular’ meant within the

process of the first stage, which in my view should have been dedicated to interpreting

the tariff head and subheadings that go with it. Without giving an interpretation as

required in the first stage on the meaning of “Cellular” by applying the principles of

*Endumeni* together with the chapter notes and explanatory notes, the court, by

observing the product made a definite finding on the nature and characteristics of the

goods, which was a process to be embarked upon in the second stage of

interpretation, which required that objective facts be placed before the court when

classifying the product. The following was stated.

“[47] …this court has had the benefit of observing an example of the ‘goods’

under discussion. Having regard to the objective characteristics of the example

given to the court, it is a far stretch to contend that the example of the panel

handed to the court is neither a sheet or plate of plastic. This is the point of

departure for the court and it ought to have been the point of departure for the

respondent’s officials on the date of importation when such tariff classification

was made.”

[18] In my view this approach is similar to the one commented upon by Wallis J in

*Tonelaria*, where he discouraged the conflation of the first and second stages in the

process of interpretation.[[15]](#footnote-15) As correctly conceded by Mr Voster, this court was not

prevented from applying the three-stage process sequentially as found in International

Business Machines *supra,* as all the necessary information which was before the court

*a quo* is in the record of appeal.

**AN INTERPRETATION AND MEANING OF ‘CELLULAR’**

[19] Before dealing with the interpretation of the tariff heads in annexure ‘A’,

annexed to the respondent’s heads of argument, Mr Meyer’s exposition of the chapter

notes in section V11, Chapter 39 of the Harmonized Systems (as adopted in section

48 (8) of the Act), with the explanatory notes under heading ‘General’ drew attention

to the Chapter Notes 1, 6, 8, 9 and 10 which sought to find the meaning of the

expressions ‘plates sheets, film and strip applicable in TH 39.20 and 39.21. As I see

it, this was to establish whether the expression ‘plate’ could also be referred to as a

‘panel’, which was an expression used by the respondent to describe the

manufactured product as PVC panels in the Declaration Form and founding affidavit,

as shall be dealt with later.

[20] Mr Vorster emphasized the importance of distinguishing between the raw

material or substances on the one hand from other articles or products manufactured

from the raw material[[16]](#footnote-16). He contended that in this instance manufactured products

included panels and that it was the classification of the finished product made of such

raw material which had to be determined and to which ‘cellular’ was applicable.

[21] The pre-amble to the General Explanatory Note to chapter 39 provided that the

chapter covers ‘substances called polymers and semi-manufactures and articles

thereof provided they are not excluded by Note 2 to the chapter.’

[22] It was common cause between the parties that:

(i) Chapter 39 Note 1 refers to ‘plastics’ being the raw material in tariff heads

39.01 to 39.14 ‘which are capable of being formed under external

influence… by moulding, casting, extruding, rolling or other process into

shapes which are retained on the removal of the external influence. The

Chapter was divided into two sub-chapters, sub-chapter 1 dealt with Plastics

in their ‘Primary Form’ (raw material) and sub-chapter 11 related to ‘Articles

Thereof’ (products manufactured from the different types of plastics). The

tariff heads under contention, 39.16 and 39.21 fall under sub-chapter 11.

(ii) that the material in tariff heads 39.01 to 39.14 represented ‘Plastics in its

raw form (Liquids and Pastes) as explained in the chapter notes and that

nowhere in those tariff headings does the word ‘cellular’ in particular appear.

(iii) the tariff headings 39.16 to 39.25 cover semi-manufactured or specified

articles of plastics, as explained in the explanatory notes. Tariff head 39.16

referred to ‘Monofilament of which any cross-sectional dimension exceeds

1mm rods, sticks and profile shapes, whether or not surface-worked but not

 otherwise worked of plastics’

(iv) tariff heads 39.20 and 39.21 referred to ‘Other Plates, Sheets, Film,

Foil and Strip (other than those of Chapter 54)’ as explained in the chapter

notes, the tariff head 39.20 related to manufactured products of plastic non-

cellular and not reinforced, laminated supported or similarly combined with

other materials and,

(v) tariff head 39.21 related to manufactured products without mention of

‘cellular’. ‘Cellular is provided for in a sub-heading titled ‘-Cellular’ and

under which appear further sub-headings and also another sub-heading

3921.90 titled as ‘Other’ and that ‘Other’ referred to non-cellular products.

(vi) That the product in contention was manufactured from the raw material

PVC (polymers of vinyl chloride)

[23] Mr Meyer contended that it was not clear, when dealing with the explanatory

note referring to ‘Cellular Plastics’ under heading General’[[17]](#footnote-17) where the note

fitted in, unless it denoted that the expression needed to be used somewhere, that it

was there for a purpose. He alluded to the note that dealt with ‘Plastics and Textile

Combinations” from the explanatory notes under (d) described as ‘Plates, Sheets and

Strip of Cellular Plastic combined with textile fabrics as defined in Note 1 to Chapter

59), felt or nonwovens, where the textile is present merely for reinforcing purposes.’

He contended that between TH39.16 to TH39.25 the only place where ‘Cellular’ was

mentioned was in the sub-heading to TH39.21. It made no sense therefore for the

respondent to maintain that the explanation was not applicable to it because meaning

had to be given to the nature of the finished product. On the contrary the Commissioner

maintained that it was the nature of the plastic used to manufacture the finished

product that had to be looked at. He contended that if that was not the case, that is,

not applicable to the respondent then the explanatory note was nonsensical.

[24] Mr Vorster contended that reference to (d) in Chapter Note 1 under heading

‘Plastics and textile combinations’ only identified where ‘cellular plastics’ in their

primary form could be found. ‘Plastics’ could be “Cellular’ as appears in the

explanatory note to tariff heading 39.03 where it pertained to plastics in their primary

form. Although sub-heading 3903.11 referred to ‘expansible’, in the explanatory notes

to tariff heading 39.03 the expression ‘expanded’ meant cellular with a low bulk-density

meaning that it had gaps or cells dispersed throughout. Expanded appears as a

synonym to ‘cellular’ and ‘unexpanded’ as a synonym to ‘non-cellular’. Therefore, the

chapter note describing ‘cellular plastics’ was applicable also to both the raw material

and the product. This in my view should give the clarity to what Mr Meyer was seeking

when dealing with the heading “Cellular Plastics’.

[25] Sight should not be lost to the fact that in a preceding heading under ‘General

Arrangement of the Chapter’ it is explained that Headings 39.16 to 39.25 cover semi-

manufactures or specified articles of plastics and included in this group are the tariff

headings contended for by the parties as they fall under sub-chapter 11 . The language

and syntax of the tariff headings and subheadings read contextually with the section

and explanatory notes can only mean that cellular plastics in this context refers to the

product already manufactured, the finished product. (my underlining).

 [26] The dictionary meaning of the word ‘celluIar’ was referred to in the founding

affidavit, and in the judgment of the court *a quo.* The Commissioner did not place

reliance on the dictionary meanings*.* However, Mr Meyer now contended that the

Toneleria route was applicable[[18]](#footnote-18) where the dictionary meaning of the words in the

tariff heads was considered and he chose to deal first with the tariff head 39.21

contended by the respondent followed by 39.16 as contended by the Commissioner.

**TH 39.21 and sub-heading 3921.1 and TH 3916**

[27] I now deal with the interpretation given by both Counsel to the above tariff heads

and sub-heading. According to Mr Meyer the tariff head and the sub-heading had to

be interpreted first, by having regard to the meaning of the words attributed in the

TH39.21 as ‘Other plates, Sheets, Film, Foil and strip, of plastic’, which were words

that did not require a special explanation and that dictionary meanings applied. The

sub-heading 3921.1 had to have regard to the components in the tariff heading.

[28] In the declaration form, respondent while using the same description as the

tariff heading after the colon, described the product as a PVC Wall Panel. It was

contended by Mr Meyer that the court *a quo* had as at paragraphs [45] and [46] not

mirrored the description of the product as appeared in the declaration ‘FA1’.

Furthermore, that there was no reference to the word ‘panel’ in the nomenclature of

the harmonised system as at Chapter 39. Although the Commissioner did not initially

rely on dictionary meanings, counsel has now conceded that they were applicable and

based, on Toneleria he considered the following dictionary meanings to the description

of the products in the tariff head:

1)The dictionary meaning of

 -plate – was “*a sheet of metal or wood, glass or plastic,”* and that the word

 ‘plate’ did not relate to products which were not flat.[[19]](#footnote-19)

-‘film’ was “ a thin sheet of (usually plastic and usually transparent) material used to

 wrap of cover things”,[[20]](#footnote-20)

 -‘ foil “ “*a very thin sheet of metal, used esp. for wrapping food*,[[21]](#footnote-21) and “*a*

 *very which sheet of metal”[[22]](#footnote-22)*

In the main heads of argument a definition of ‘Cellular’ and another ‘Extrude’ is

provided:

-Extrude –“ *to force, press, or push out and “to shape a substance, such as metal or*

*plastic) by forcing through a die”[[23]](#footnote-23)* , and

*-Cellular,2 Of pertaining to, characterised by, or consisting of biological cells; of a*

*plant) lacking the distinct stem, leave, etc….2. of or pertaining to cell of a monastery,*

*prison, etc… 3 of or having small compartments, cavities or division of areas; porous;*

*(of fabric or garment ) having an open texture….. Designating or pertaining to a mobile*

*telephone system that uses a number of shortrange radio stations to cover the area it*

*serves, the signal being automatically switched from one station to another as the user*

*travels about …..”( my underlining)*

[29] The crux of his argument in dealing with the first leg of interpretation was that

that there was a difference between ‘plate’ and ‘panel’ and the fact that the product

was referred to as a panel did not translate into a plate. The dictionary defined plate

as a solid piece of plastic which was not a designed 3 dimensional configured product.

In dealing with the second leg of interpretation, that is on the nature and characteristics

of the product he contended that the product (panel) was not flat, but was a 3

dimensional product consisting of two panels connected by ribs. No dictionary

meaning of panel was considered by him, I suppose because it is not mentioned in

Chapter 39.

[30] Mr Meyer developed his motivation for the admission of Prof Johns expert evidence from her analysis of tariff head 39.21 and the explanatory note. She maintained that plastic had microscopic internal bubbles not visible externally. Since the note covered only “cellular products or those which have been reinforced laminated, supported or similarly combined with other material, see General Explanatory Note”, the ordinary dictionary, encyclopaedia meaning of the word cellular was of general application and not helpful in determining where cellular plastics found relevance according to the version of the respondent. Under the general notes under the heading Plastics and ‘textile combinations’ products covered by the chapter included:

(a) felt impregnated, coated ….. with plastics;

(b) textiles fabrics and non-wovens…embedded in plastics;

(c) textile fabrics impregnated……with plastics;

(d) plates sheets and strip of cellular plastics combined with textile fabrics (as

 defined in Note 1 to Chapter 59.(my underlining)

[40] He contended that (a) –(c) above were not relevant, that ‘cellular plastics’ under

these notes acquired a technical meaning and that ‘cellular’[[24]](#footnote-24) had to be interpreted by

Prof John’s explanation of its composition, if it had to find relevance within ‘plastics’ of

a cellular nature. He contended that tariff head 39.16 was the only tariff head

contended for by the Commissioner as the one referred to under (d); that cellular can

only refer to the plastics and not the final product. Furthermore, the founding affidavit

as at paragraphs [71] and [72] explains the method of manufacture by extrusion as

complying with the Chapter Note 1 where the product was manufactured by forcing

out the two plates with the ribs under once process.

[41] Mr Vorster contended that the principles in *Endumeni* required the meaning of

the tariff heads to be established by first applying the ordinary rules of grammar and

syntax and interpreting them in context. I understand him to mean a single process. In

this instance he said, it was how the words were used or put together in the tariff

heading that was important. He contended that it was how the words first ‘of

plastic’ interpreted contextually having regard to the manufactured product, chapter

and explanatory notes were interpreted, then followed by an interpretation of the

significance of ‘Cellular’ in the subheading’ and ‘Other’ in as far as it related to ‘non-

cellular’ product, how these were used in relation to the manufactured product. He

contended that all the tariff headings from tariff head 39.15 onwards related to articles

which have been manufactured ‘of plastics’. (my underling)

[42] An example was given of tariff head 39.20 which precedes 39.21 which is

contended by the respondent. TH 39.20, referred first, to the articles manufactured of

‘plastics’ followed by the word ‘non-cellular,’ (Other plates, sheets, film, foil and strip,

‘of plastics’, non-cellular’,). It was contended that in using the ordinary language and

syntax, if the author wished to refer to non-cellular plastics the word non-cellular would

have preceded the word plastics. The same would have applied with TH 39.21, if the

author wished to refer to cellular plastics in the tariff head, the word cellular would

have preceded plastics in the tariff heading (my underlining)

[43] In TH 39.21 the word ‘cellular’ is not mentioned but what is described are the

products manufactured of plastics. The word ‘cellular’ appears in the sub-heading

3921.1 under which appears sub-headings 3921.11 -3921.19. Both counsel were in

agreement that the word ‘Other’ below at 3921.90 after the sub-heading ‘-Cellular’

referred to ‘non-cellular’. (my underlining)

[44] Furthermore, Mr Vorster contended that if ‘cellular’ was used in the context of

the raw material then it referred to the raw material in its primary form (TH39.04

‘polymers of vinyl chloride …in primary form) which could be contrasted with products

manufactured from PVC as appears in 39.20 and 39.21. Therefore, if ‘cellular’ was

used in the context of the article, that is the product manufactured from the raw

material then it referred to the nature and characteristics of the product. He further

contended that the significance in the last sentence in the preamble to the explanatory

note under heading Plastics and textile combinations, ‘The following products are also

covered by this Chapter’ only identified that the products in (a) to (d) which were

covered by Chapter 39 and in (d) that the words relating to plates, sheets and strip

of ‘cellular plastics’ meant those raw materials 39.01-39.14 in Chapter Note 1. I agree

with this submission.

**Analysis**

[45] I am of the view that of significance is the ordinary language and syntax

interpreted contextually as used in the tariff heading, however, this should not

disregard the meaning attributed to the individual products in the tariff heading. Having

regard to the requirement that the goods must be described according to the relevant

tariff head, as I see it, the real contention as argued by Mr Meyer is that words “PVC

Wall Panel” (panel) used in the description in the declaration form, was not referred to

or explained anywhere in the nomenclature in particular where ‘cellular’ products were

referred to and that panel was not a plate. Mr Vorster objected to argument that the

panels were not plates as this was not clearly raised in the answering papers. I deal

with this later. (my underlining)

[46] True as contended by the Commissioner the fact that the product is described

as a panel does not translate it into a plate, however, my view is that the words should

not be isolated from the entire description of the product on the declaration form and

in the founding papers, which allude to the product as falling under the tariff head

contended for by the respondent (39.21- Other plates, sheets, film, foil of plastics of

polymer of vinyl chloride). If there was a difficulty in understanding the meaning of the

tariff heads and cellular by resorting to the ordinary language and syntax contextually

within the chapter and explanatory notes, then resort should be had to the dictionary

and encyclopaedia and, where the words used are technical so as to obscure the

ordinary language and syntax, then resort should be had to other sources and, expert

evidence could be relied upon to explain the nature and characteristic of the product.

In the founding papers and the judgment of the court *a quo* the dictionary meaning of

‘cellular’ was referred to[[25]](#footnote-25).

[47] Mr Vorster contended that the tariff heads had to be interpreted first so as to

establish the meaning of the words used and, that Mr Meyer had failed in his heads of

argument and in his submissions to deal with the application of the *Endumeni*

principles to the interpretation of the tariff headings. I am in agreement with this

proposition, in that, although there was a concession that the principles in *Endumeni*

were applicable, Mr Meyer in dealing with the tariff heads in contention preferred to go

the *Toneleria* route by first establishing the meaning of the words from dictionaries and

encyclopaedia and other sources without emphasising the application of the principles

of interpretation.

[48] Mr Vorster contended that the word ‘Cellular’ did not have a specialized

technical meaning as contended by the Commissioner, which justified reliance on

the expert evidence of Prof John, and which contention was at variance with

established and recognized authority as seen in *Crown Chickens (Pty) Ltd v Minister*

*of Finance*[[26]](#footnote-26) where it was held that the Customs and Excise Act was an “act of general

application across an extremely wide spectrum of commodities, it is not the sort of

legislation which has limited technical application which requires a special

understanding of technical language usage.” Mr Vorster contended that expert

evidence was allowed where its purpose was to give an interpretation to the nature

and characteristics of the product and where the court had pronounced that the word

to be interpreted was technical.

[49] It was therefore the court that had a duty to determine the meaning of cellular

and not the expert.[[27]](#footnote-27) In this instance the expert evidence should be disallowed

because the conclusion Prof John arrived at was actually her own interpretation or

understanding of the word ‘Cellular’. Having regard to the well-established principles

of interpretation the responsibility of interpreting and giving meaning to words in the

tariff head, and the process of interpreting was an objective one.[[28]](#footnote-28)

[50] It is trite that matters of interpretation with regard to the first stage as stated in

International Business Machines *supra* fall within the competence of the court having

regard to the rules of interpretation already referred to in *Endumeni*, the chapter and

explanatory notes. It was trite that classification of goods was the objective

characteristics determined at importation or presentation for customs clearance. Mr

Meyer conceded that the rules in *Endumeni* were relevant although not referred to

or dealt with by the Commissioner or in his heads of argument. My view is that

these rules were casually referred to without dwelling on the relevance of the ordinary

language, syntax and context.

[51] The Commissioner stated in the answering affidavit that resort was had to

expert evidence to explain the ‘technical’ meaning of ‘cellular’ in relation to PVC

products.[[29]](#footnote-29) This as the authorities now show does not require an analysis into the

composition of the product to establish or understand the meaning of ‘cellular’. The

dictionary, chapter and explanatory notes using the principles of interpretation

sufficed. In the main heads of argument Mr Meyer concedes at paragraph 5.8 that ‘the

explanation/ definition provided by the explanatory note to Chapter 39…accords with

the definition thereof in the New Shorter Oxford English Dictionary[[30]](#footnote-30) - ‘having small

compartments, cavities or division of areas’. As I see it the expert evidence of Prof

John in giving interpretation into the meaning of the word cellular was unnecessary

and is inadmissible

[52] In responding to the Mr Meyer’s supplementary heads of argument, Mr Vorster

objected to the introduction of fresh argument, that the products in contention ‘PVC

panels were not plates. It was contended that these issues were not properly

addressed in answer and that the respondent did not have the opportunity to reply.

Furthermore, that the notice of appeal did not address the definite finding as at

paragraph [47] of the judgment of the court *a quo*, that this being an appeal in the

narrow sense the Commissioner was confined to the record and the judgment. It

was contended that should the court allow the submissions, he proffered another

definition of plate[[31]](#footnote-31).

-plate – flat, comparatively thin, usually rigid sheet, slice, leaf, or a lamina of metal or

other substance, of more or less uniform thickness and even surface……”

[53] In classifying the product the difficulty is that the word ‘panel’ is not mentioned

in the Harmonized Systems nomenclature. The answering affidavit mentions that the

‘panel’ is not a plate and that it was not flat. Therefore, it is important for this court to

determine whether a panel is also a plate and whether it was cellular or non-cellular.

[54] Having established the meaning of cellular plastics the next stage is to examine

the product, the panel, which was the sample availed to the court. It is my view that

the New Shorter Oxford Dictionary offers a better definition of ‘plate and cellular’ and

that I would describe the sample (PVC panel) provided as a flat rigid plate of uniform

thickness made of plastics with compartments dispersed throughout.

[55] Reliance on classification under 39.16 by the Commissioner is based mainly on

the view that according to the respondent the product was manufactured by extrusion

which according to Mr Meyer meant that the plastics used to create the product were

not cellular. Mr Meyer in the supplementary heads contended that the products have

a profile shape. Mr Vorster objected to the introduction of the profile shape because

this had not been dealt with in the answering affidavit. My view is that referring to the

profile shapes loses sight of the fact that it is the tariff head contended by the

respondent in 39.21 which has to be interpreted first and that in that head no

mention is made of the word cellular but that it is only mentioned in the sub-heading.

[56] When referring to the manufacture of the product it became necessary to

establish whether a plate could also be referred to as a panel. Since the word panel is

not provided for in the nomenclature of the harmonized systems, it is still important to

find a place where this imported product could be classified. Ordinarily the product

should be classified in terms of GIR1, however provision is made for an exception

which is contended for by the respondent under GIR 3 (C). This rule provided that

goods should be classified in the heading which occurs ‘last in numerical order among

those which equally merit consideration’. I therefore for the above reasons recommend

that the appeal be dismissed.

[57] In the result the following order is granted

1. The appeal is dismissed with costs to include costs of two counsel.

 **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**TLHAPI J**

**JUDGE OF THE HIGH COURT**

**I agree,**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**KHUMALO J**

 **JUDGE OF THE HIGH COURT**

**I agree and It is so ordered.**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**MBONGWE J**

 **JUDGE OF THE HIGH COURT**

**APPEARANCES**

FOR THE APPELLANTS : ADV. J A Meyer SC and L G

 Kilmartin

INSTRUCTED BY : STATE ATTORNEY PRETORIA

FOR THE RESPONDENTS : ADV J P Voster SC

INSTRUCTED BY : SHEPSTONE & WYLIE

HEARD ON : 10 AUGUST 2022

DATE OF JUDGMENT : 24 MARCH 2023

1. Tikly and Others v Johannes N.O and Others 1963 (2) SA 588 (T) at 590F to 591A [↑](#footnote-ref-1)
2. “It has been stated in the founding affidavit that the PVC panels were manufactured by extrusion without the use of any chemical foaming agent/blowing agent. Based on the above tests, the panels cannot be termed as cellular. Thermal analysis did not show the presence of any blowing agent and microscopic analysis revealed the cross-section of the panel to be granular. To claim the panels as cellular, the panels needs to contain cells/cavities dispersed uniformly within the PVC matrix and not in the exterior structure of the panel. The analysis certificate supplied by the importer should include the processing technique which specifies the foaming/blowing method/agent used [↑](#footnote-ref-2)
3. Paragraph[72] of the founding affidavit “The PVC panels are manufactured by the process of extrusion, i.e the composite materials making up the product (principally PVC resin and calcium carbonate) are shaped into panels by forcing the mixture though a die at high temperature; [74] the PVC panels are thus manufactured under external influences by extruding as provided for in Note 1 to Chapter Note 39,” [↑](#footnote-ref-3)
4. Section 47(1) and Schedule 1 to the Act provides that the titles of section, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification (as between headings) shall be determined according to the terms of the headings and any relative section or chapter notes and provided such headings and notes do not otherwise indicate according to (2) to(5) below (as mirrored in the General Rules for the Interpretation of the Harmonized Systems)

 [↑](#footnote-ref-4)
5. Section 47(8)(a) provides guidelines for the interpretation of:

(i) “Any tariff heading or tariff subheading in Part 1 of Schedule 1;

(ii) ……….;

(iii) ……….;

(iv) Every section note and chapter note in Part 1 Schedule 1;

Shall be subject to the International Convention on the Harmonized Commodity Description and Coding System done in Brussels ….and to the Explanatory Notes to the Harmonized System issued by the Customs Cooperation Council…..: 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.” [↑](#footnote-ref-5)
6. Secretary for Customs and Excise v Thomas Barlow & Sons Ltd 1970 (2) 660 (A)676B-676F “ ….the primary task in classifying particular goods is to ascertain the meaning of the relevant headings and section and chapter notes but in performing that task one should also use the Brussels Notes for guidance especially in difficult cases….they are merely intended to explain or perhaps supplement those headings and not to override or contradict them…..if an irreconcilable conflict between the two should arise…then possibly the meaning of the heading or notes should prevail” ; [↑](#footnote-ref-6)
7. International Business Machines SA (Pty) Ltd v Commissioner of Customs and Excise 1985(4)SA 852 (A) at 863G-H [↑](#footnote-ref-7)
8. 2012(4) SA 593(SCA) at [18] “Interpretation is the process of attributing meaning to the words used in a document,…..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 existences. 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. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible…..results or undermines the apparent purpose of the document……Be alert to, and guard against, the temptation to substitute what you regard as reasonable or sensible or the words actually used for to do so is to cross the divide between interpretation and divination…..The inevitable point of departure is the language….itself, read in context and having regard to is purpose….and the background to the preparation and production of this document.” [↑](#footnote-ref-8)
9. International Business Machines *supra* (first stage) [↑](#footnote-ref-9)
10. Rule 3 (a) the heading which provides the most specific description shall be referred to heading providing a more general description; 3(c) when goods cannot be classified by reference to 3(a) or 3 (b) they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration. [↑](#footnote-ref-10)
11. *Commissioner, South African Revenue Services v Toneleria Nacional RSA (Pty) Ltd* 2021(5)SA 68 (SCA) “[8] In accordance with the established taxonomy of classification the first step was to ascertain the meaning of tariff heading…..in this regard the judge said that it was ‘the typical use of the goods in question that fell to to be established by evidence of fact for the range of products that coopers currently make.’ Accordingly, so he held, whether or not a particular product is characteristically made by coopers is a question of fact that is amenable to proof by evidence. [9] In adopting this approach the judge fell into the error of conflating the first and second enquiries in the process of classification…….In the process of classification determining the meaning of the tariff is the essential first stage. Only thereafter does one proceed to the second sate of considering the nature of the product in issue to determine in the third stage whether they fall within the class of product identified in the tariff heading.” [↑](#footnote-ref-11)
12. *Distell Ltd and Another v Commissioner of South African Revenue Service* (416/09) [2010] ZASCA 103; [2011] 1 All SA 225(SCA) (13 September 2010) [↑](#footnote-ref-12)
13. Paragraph [22] [↑](#footnote-ref-13)
14. Paragraph [24] “In applying the three stages of tariff classification in this case it is convenient to consider first the nature and characteristics of the wine coolers, as without such an understanding the importance of the words in the headings may be lost or undervalued” [↑](#footnote-ref-14)
15. Paragraphs [8] and [9] of Toneleria *supra* [↑](#footnote-ref-15)
16. *Sava Di Bella Bathroom Accessories and the Commissioner for the South Africa Revenue Services* (66155/2011) [2021]ZAGPPHC 5640 (29 September 2021) [↑](#footnote-ref-16)
17. Cellular plastics are plastics having many cells (either open, closed or both), dispersed throughout their mass, they include foam plastics, expanded plastics and microporous or microcellular plastics. They be either flexible or rigid.

Cellular plastics are produced by a variety of methods. These include incorporating a gas into plastics (e.g. by mechanical missing, evaporation of a low boiling point solvent, degradation of a gas producing material), mixing plastics with a hollow micro-sphere (e,g, of glass or phenolic resin) sintering granules of plastic and mixing plastics with water or solvent-soluble material which ate leached out of plastics leaving voids. [↑](#footnote-ref-17)
18. Toneleria [12] by establishing first the meaning by use of dictionaries, encyclopaedia, reference books [↑](#footnote-ref-18)
19. [www.vocabulary.com](http://www.vocabulary.com) ; Kemtek Imaging Systems Ltd v Commissioner for Customs and Excise 13255/96 at 6, line 30-p7 line 11 ‘The dictionary meaning of the word plates is not a concept relating to material objects which are not flat” (my view is that here plate was being discussed in the context of photography that tariff heading 37.01 was being discussed and there is no explanation here that it also related to plates as discussed in chapter 39 TH39.20/39.21 ) [↑](#footnote-ref-19)
20. www.vocabulary.com [↑](#footnote-ref-20)
21. www.cambridge.org [↑](#footnote-ref-21)
22. [www.britannica.com](http://www.britannica.com) [↑](#footnote-ref-22)
23. Online Merriam -Webster dictionary at [www.merriam-webster.com](http://www.merriam-webster.com);

‘Cellular: The New Shorter Oxford English Dictionary [↑](#footnote-ref-23)
24. Founding Affidavit para 6.8 [↑](#footnote-ref-24)
25. Paragraph 57 of the founding affidavit: The New Shorter Oxford Dictionary defines cellular (of the variety of possible meanings the respondents contended for as”…E19 3 Of or having small compartment, cavities or divisions of area: porous (of a fabric or garment) having an open texture [↑](#footnote-ref-25)
26. 1996 (4) SA 389(E) at 394F-375F ; National Screen Print (Pty) Ltd v Minister of Finance 1978 (3) SA 501 (C) at 506 D-H [↑](#footnote-ref-26)
27. Selero (Pty) Ltd and Another v Chauvier and Another 1984(1)SA 128 (A) Corbett JA at page 139 [↑](#footnote-ref-27)
28. Endumeni *supra* para[18] [↑](#footnote-ref-28)
29. Para 2.7 and 6.9 [↑](#footnote-ref-29)
30. Definition of Cellular see foot note 23 has several meanings only one is compatible [↑](#footnote-ref-30)
31. New Shorter Oxford Dictionary (contrast this with the definition in footnote 19 [www.vocabulary.com](http://www.vocabulary.com) -plate was a sheet of metal, or wood, glass or plastic” and the word did not relate to products which were not flat,” [↑](#footnote-ref-31)