

In the Supreme Court of South Africa.
In die Hooggeregshof van Suid-Afrika.

(APPELLATE Provincial Division.)
(Provinsiale Afdeling.)

Appeal in Civil Case.
Appèl in Siviele Saak.

THE SECRETARY FOR CUSTOMS AND EXCISE Appellant,

versus

THOS. BARLOW AND SONS LIMITED Respondent

Appellant's Attorney Dep. S.A. (Bmftn.) Respondent's Attorney Geschick & Brundage

Appellant's Advocate Advokaat vir Appellant Respondent's Advocate Advokaat vir Respondent

Set down for hearing on 16-2-1970
Op die rol geplaas vir verhoor op

1.3.4.7.8.

Slayton J., Rumpff J.A., Miller J.A. - Concurring
Slayton J. & Rumpff J.A. - Dissenting

(T.P.D.),

Order per Rumpff J.A. - appeal is dismissed with costs (Trotter J.A. & Miller J.A. Concurring, Slayton J. & Rumpff J.A. Dissenting)

Bills Taxed.—Kosterekenings Getakseer.

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Date.
Datum.

Amount.
Bedrag.

Initials.
Paraaf.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE SECRETARY FOR CUSTOMS AND EXCISE Appellant

and

THOMAS BARLOW AND SONS LIMITED Respondent

CORAM: STEYN, C.J., RUMPF, BOTHA, TROLLIP, JJ.A. et
MILLER, A.J.A.

Heard: 16th February, 1970.

Delivered: 25TH MARCH, 1970.

J U D G M E N T

STEYN, C.J.:

The issue in this appeal is the liability of the respondent under the Customs and Excise Act, 1964 (Act No. 91 of 1964) as amended, for customs duty on so-called "Drott Go-Devils", alleged by the appellant to be crane lorries, liable to duty under heading 87.03 of Part 1 of the Schedule No. 1 to that Act, and by the respondent to be mobile cranes liable to duty under heading 84.22 of that Schedule. An initial contention by the appellant that two

models2/

models of these Go-Devils are liable to duty under heading 87.07 was abandoned at the hearing in the Court below.

The respective headings are the following:

84.22: "Lifting, handling, loading or unloading machinery, telphers and conveyors (for example, lifts, hoists, winches, cranes, transporter cranes, jacks, pulley tackle, belt conveyors and teleferics) (excluding machinery falling within heading No. 84.23)."

87.03: "Special purpose motor lorries and vans (such as breakdown lorries, fire-engines, fire-escapes, road sweeper lorries, snow-ploughs, spraying lorries, crane lorries, searchlight lorries, mobile workshops and mobile radiological units), but excluding the motor vehicles of heading No. 87.02."

In terms of sub-heading 40 under the first heading, the rate of duty on cranes is 7% and in terms of sub-heading 90 under the second heading the rate of duty on "Other vehicles", which would, in the context, include crane lorries, is 20%. Except perhaps for the mention of snow-ploughs which are not self-propelled, in heading 84.23, the exclusion in heading 84.22 is irrelevant for present purposes. The

exclusion3/

exclusion in heading 87.03 refers inter alia to "motor vehicles for the transport of persons, goods or materials."

Each of these "Go-Devils", of which there are three models, has as a base a heavy welded steel frame on wheels, on which an upper structure is mounted. This structure contains a vertical pillar or mast, a boom or jib, and a winch consisting of a drum with a cable wound around it and passing over a pulley at the end of the jib. At the end of the cable there is a hook. The jib can be extended and raised to a vertical position. The whole of this upper structure can be fully rotated about a vertical axis. This swivelling upper assembly is operated by means of a special self-contained tandem hydraulic pump driven off the engine which propels the base. It has the characteristics of a crane. The frame, which is rectangular, rugged and strong, has a flat upper surface in the shape of a platform or deck, described by the makers as "the exclusive carry deck." The upper structure is mounted on this flat surface. The frame further has four hydraulic outriggers, one at each corner,

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which serve, when lowered to the ground, to stabilise the whole structure for the lifting of a heavy load or the use of an extended jib. In one model the upper structure is outside and next to a cab, in another outside and next to an open operator's compartment, and in a third model, in front of and adjacent to such a compartment. Apart from the engine, the base or frame contains the usual automobile features, such as a gear box and controls for changing gears, for braking and for steering. The steering wheel is, of course, inside the cab or operator's compartment, and it may be assumed that the other controlling equipment, also that of the upper structure, is likewise operated from there. According to advertisements included in the record, the makers claim that "All Drott Go-Devil maximum capacity figures are mobile capacity figures: whatever you can lift you can move with." Crane capacity ranges from 2000 to 16000 lbs. In the case of two models the deck capacity is the same as the crane capacity and in the case of the other model it is twice as much. The platforms allow of transport, from the

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point of pick-up to the point of delivery, by carriage on deck instead of by suspension from the cranes.

Sec. 47 (8) (a) of the Act provides that the interpretation of Part 1 of Schedule No. 1, in which these headings occur, shall be subject to the Explanatory Notes to the Brussels Nomenclature issued by the Customs Co-operation Council, Brussels, from time to time. In deciding the issue raised, therefore, regard is to be had not only to the provisions of the Act and the Schedule, but also to these notes, as existing at the relevant time. Preceding the Schedule, there are certain notes. Under Note VIII, headed "Rules for the interpretation of this Schedule", there is the following :

"Interpretation of this Schedule shall be governed by the following principles:

(1) The titles of sections, 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

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or chapter notes"

This corresponds verbatim with Rule 1 of the Interpretative Rules of the Brussels Notes.

The heading 84.22 is in Section XVI of the Schedule. According to note 1 (f) to that section, it does not, inter alia, cover vehicles. From the terms of notes 2 to 6 it is apparent that this section is intended, generally, to cover machines. Note 7 states that for the purposes of the section notes, the expression "machine" means any machine, apparatus or appliance of a kind falling within this section. The same intention appears from the notes to Chapter 84. Of these, note 2 refers specifically, inter alia, to a machine or appliance which answers to a description in heading 84.22, and the latter, of course, deals expressis verbis with machinery.

The heading 87.03 is in Section XVII of the Schedule. In section note 4 there is an incidental reference to road vehicles and to motor vehicles. Note 1 of the chapter notes mentions vehicles. Of the headings in this

chapter7/

chapter, No. 87.01 deals with tractors, No. 87.02 with motor vehicles for the transport of persons, goods or materials, No. 87.03, as indicated above, with special purpose motor lorries and vans, Nos. 87.04, 87.05 and 87.06 with chassis fitted with engines, bodies (including cabs) and parts and accessories, for "the motor vehicles falling within heading No. 87.01, 87.02 or 87.03."

From the above it is clear that for present purposes the heading 87.03 is to be taken to cover motor vehicles and the heading 84.22 machines in each case of a particular kind. It is not contended that a "Drott Go-Devil" is an apparatus or appliance. This general distinction is confirmed by the Brussels Notes to these sections, chapters and headings. Some of these are of more particular relevance to the present dispute. They are the following:

In the notes to Section XVI, "Transport equipment (Section XVII)" is mentioned as one of the main exclusions from that section. Under the heading "Motors", there is the statement:

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"Electric motors or other power units for machinery of this section are classified with the relative machine:

(1) Provided they are fitted to the machine (i.e. actually incorporated in the machine, mounted on the framework, or on a bracket attached to the machine, or on a common base with the machine)."

A note to heading 84.22 explains, with reference to "self-propelled and other 'mobile' machines", that in general the heading covers not only fixed or stationary machines, "but (with certain exceptions referred to below concerning machines mounted on transport equipment of the type falling within Section XVII) also mobile machines, whether or not self-propelled." As one of the exceptions to this heading, the notes mention "Machines mounted permanently on lorry or similar automobile type chassis", and then proceed to explain:

"Cranes (e.g. breakdown cranes), conveyor-loaders, mechanical loaders, winches, ~~elevating platforms~~, etc., are often mounted on lorries or chassis, which are essentially complete and of the automobile type in that they contain all the

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essential automobile features including travelling motor, gear-box, controls for gear-changing, braking, steering. Such machines (i.e. lorries or chassis with the machines mounted thereon) are classified as a whole in heading 87.03 as special purpose vehicles, whether the lifting or handling machine is simply mounted on the vehicle or whether the machine and the vehicle constitute one integral mechanical unit.

On the other hand, the present heading includes self-propelled cranes, etc., in which the crane, etc., unit houses one or more of the essential automobile features referred to in the preceding paragraph."

As to Section XVII, in which the heading 87.03 falls, the Brussels section notes mention as an exception: "Certain mobile machines (see Part II below)." Part II, which is headed "Self-propelled or Other mobile machines", contains the following observations:

"Many machines or equipment (in particular of the type falling within Section XVI) can be mounted on the vehicle chassis of Section XVII; the classification of the resultant mobile machine depends on various factors, in particular on the type of base For the classification of

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mobile machines formed by mounting equipment on vehicle chassis of Chapter 86 or 87, reference should be made to the Explanatory Notes on headings 86.06, 87.01, 87.03, 87.07 and 87.14."

The notes on heading 87.03 commence with the statement that it "covers motor vehicles specially constructed and equipped with various devices to enable them to perform certain special non-transport functions; i.e., the primary purpose of the vehicles of the present heading is not the transport of persons or goods." One of the items enumerated as included in the heading, is: "Crane lorries (i.e., cranes mounted on motor vehicle chassis of sturdy construction)." With reference to "Lorries, etc., fitted with other machinery", there is the following:

"It should be noted that to be classified in this heading, lifting and handling machinery, earth levelling, excavating and boring machinery, etc., must be mounted on lorries or chassis which are essentially complete and of the automobile type in that they contain all the essential automobile features including a travelling motor, gear-box, controls for gear changing, steering mechanism and braking mechanism.

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However, self-propelled cranes, excavators and other machines, in which the crane, etc., unit houses one or more of the essential automobile features referred to above, remain classified in Section XVI, whether or not the whole can travel on the road under its own power.

The present heading also excludes self-propelled wheeled machines in which the chassis and machine are constructed to form an integral unit (e.g., self-propelled motor graders). In this case, the vehicle does not consist of a machine mounted on a chassis, but the chassis and machine are integrated to form a unit which may even incorporate all the essential automobile features referred to above."

The factors for determining classification under heading 87.03 mentioned in the first paragraph of this note, correspond with those stated in the first paragraph of the note on heading 84.22, quoted above, describing the cranes etc. which are excluded from the latter heading and classified as a whole under the first mentioned heading. The first factor is that the machine must be mounted on a lorry or on a chassis. This factor is not only stressed in the first paragraph of the note on heading 87.03, but, as will be

apparent12/

apparent from the passages quoted above, the mounting of the machine on a chassis is repeatedly mentioned in the notes dealing with the distinction between mobile machines and these special purpose vehicles. The second factor, stated in language almost identical, is that, in the case of a machine mounted on a chassis, the chassis must be essentially complete and of the automobile type. The completeness and type are particularised. They are present if the chassis contains all the essential automobile features, including a travelling motor, a gear-box, controls for gear-changing, and the controls or mechanisms for steering and braking. These features would, of course, ordinarily be present also in a lorry.

There are also certain differences between the two paragraphs. The note on heading 84.22 purports to be an elucidation of "Machines mounted permanently on lorry or similar automobile type chassis." The word "similar" does not occur in the note on heading 87.03. On behalf of the respondent it was contended that its connotation in the

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words quoted is to restrict the meaning of "chassis" to a chassis which is similar to the ordinary lorry chassis. In other words, if the superstructure is removed, what remains must at least resemble such a chassis. That the word "similar" imports resemblance, must be conceded, but the nature and extent of the resemblance must be gathered from the context. In my view the context in the phrase quoted indicates that the similarity contemplated does not lie simply in the structural appearance of the chassis, but rather in the feature of being of a similar automobile type. This is confirmed by these first paragraphs, both of which define the automobile type by reference to the abovementioned features without any mention of structural appearance.

Another difference is that in terms of the paragraph on the earlier heading the exclusion from that heading applies whether the machine "is simply mounted on the vehicle or whether the machine and the vehicle constitute one integral ^{MECHANICAL} unit." The contrast conveyed appears to be between a separate complete machine mounted on the vehicle and a machine mounted

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on the vehicle but connected with it in such a way that components essential to the operation of the machine are added to or incorporated in the mechanism of the vehicle, as would presumably be the case where the machine is driven by the engine of the vehicle. There is no statement to the same effect in the paragraph on the later heading.

The second paragraphs of these respective notes likewise correspond, and lend emphasis to the importance of all the essential automobile features being contained in the chassis of the special purpose vehicle. If the special purpose unit, such as a crane unit, houses one or more of them, the whole is to be classified under the earlier heading in Section XVI. The paragraph under the later heading adds that this is so, whether or not the whole can travel on the road under its own power. The reference in both paragraphs is to self-propelled cranes etc., which suggests that they deal with special purpose units able to move under their own power, i.e. with the case where the whole constitutes a single mobile machine, whether or not all the automobile features

or only some of them are contained in the crane, excavator or other special purpose structure as such.

The note on the later heading adds a paragraph which does not appear in the note on the earlier heading. It deals with the exclusion from the later heading of self-propelled wheeled machines in which the chassis and machine are constructed to form an integral unit. It is not clear whether this is a description of a separate category of machines, as indicated by the emphasis on the words "also excludes", or simply an elaboration of the first and second paragraphs. I am inclined to think that it is the latter. The reference to "wheeled" machines serves no purpose as a criterion identifying a separate category. The second paragraph quite clearly also deals with such machines. As pointed out above, the concept of being self-propelled already suggests a single mobile machine, i.e. an integral unit. The special reference to the structural integration of chassis and machine, does serve as an illustration of how a single self-propelled machine may be formed, more particularly in

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relation to a chassis not of the automobile type described in the first paragraph. In relation to a chassis of that type, it could hardly have been intended that by reason of such integrated structure alone, the whole is to be regarded as a machine, even if the special purpose structure does not house a single essential automobile feature. From the second sentence of this added paragraph, which negatives one of the criteria described in the first paragraph and affirms the exclusionary characteristic mentioned in the second paragraph, i.e. the housing of one or more of such features in the special purpose unit, it would rather seem that this paragraph does no more than describe what would clearly be a self-propelled lifting or handling machine, inasmuch as the machine part is not mounted on a chassis but constructed in one piece with it so as not to be distinguishable as a separate unit, with the result that all the essential automobile features may be incorporated in the single integrated structure, as in the case of self-propelled motor graders. This would distinguish such a structure from the "one integral^{MECHANICAL} unit" of machine17/

machine and vehicle mentioned in the first paragraph of the note under the earlier heading. The latter would, I consider, be present where the machine and the vehicle, although still distinguishable units, are, as indicated above, integrated by the incorporation in the mechanism of the vehicle of components essential to the operation of the machine, as in the case where the machine is driven off the engine of the vehicle. The power unit would not, as contemplated in the note on "Motors" under Section XVI, belong to the machine but to the vehicle. That such an integration does not turn the whole into a self-propelled machine, appears from the inclusion under heading 87.03, according to the Brussels Notes, of "Searchlight lorries, consisting of a searchlight mounted on a vehicle, with current usually supplied by a generator driven by the vehicle motor."

In this connection it is necessary to refer also to the notes under heading 87.01 relating to tractors. Also "machines mounted on tractor type bases" are excluded from heading 84.22. In a note, under the latter heading, on this

exclusion18/

exclusion, it is said:

"On the other hand, the present heading covers self-propelled machines in which the propelling base, the operating controls, the working tools and their actuating equipment are specially designed to form an integral mechanical unit. This applies, for example, to a propelling base resembling a tractor, but specially designed, constructed or reinforced to form an integral part of a machine performing one or more of the functions mentioned in this heading (lifting, handling, etc.)"

Under the heading 87.01 there is a corresponding note, under the caption "Tractors fitted with other machinery", mentioning as examples of such an integral mechanical unit "loaders, bulldozers, motorised ploughs, etc." To this is added:

"As a general rule, propelling bases forming an integral part of a machine designed for handling, excavating, etc., can be distinguished from the tractors of the present heading by their special constructional features (shape, chassis, means of locomotion, etc.). For propelling bases of the

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tractor type, various technical features relating essentially to the structure of the complete unit and to equipment specially designed for functions other than hauling or pushing should be taken into consideration. For instance, the propelling bases not covered by the present heading incorporate robust elements (such as supporting blocks, plates or beams, platforms for swivelling cranes, etc.) forming a part of or fixed, generally by welding, to the chassis body framework to carry the actuating equipment for the working tools. In addition, such propelling bases may comprise several of the following typical parts: powerful equipment with built-in hydraulic system for operating the working tools; special gear-boxes"

The emphasis in these notes is on special design and special construction. The first sentence of the inclusionary note under heading 84.22, and, by inference, also, the corresponding note under heading 87.01, refer to integrated machines which are self-propelled, i.e. to integral mobile units. A high degree of integration is apparent from the special design of everyone of the specified components to fit together to form an integral mechanical unit. This leads to

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the inference that also here, as in the case of machines described in the added note under heading 87.03, chassis and machine would be so integrated that the machine could not be said to be mounted on an automobile type chassis. There is no mention of essential automobile features, but as the machines here dealt with are self-propelled integral units, it may be assumed, I think, that at least some of these features, if not all of them, would be incorporated in the specially integrated unit. The second sentence of this inclusionary note does not seem to deviate from this general concept. The examples mentioned in the corresponding note under heading 87.01, viz. loaders, bulldozers and motorised ploughs, would fall in the same category as the self-propelled motor graders referred to in the added note under heading 87.03. In the result, I am unable to detect any material difference between the specially designed integration in these inclusionary and corresponding notes and the integration described in the added note under heading 87.03. The added note, quoted above, under heading 87.01, does not seem to take the matter any further. It is concerned with tractor type bases of integrated machines21/

machines, i.e. self-propelled machines, and, as technical features to be taken into consideration, with the special constructional features of the complete unit and the specially designed functional equipment. The injunction to consider such features does not mean that they are necessarily decisive. In regard to the special construction and design, it must be born in mind, moreover, that the first inclusionary note under heading 87.03 likewise speaks of vehicles "specially constructed and equipped with various devices" to enable them to perform certain functions, and that crane lorries are under that heading described as cranes mounted on motor vehicle chassis of sturdy construction. That indicates that the mere presence of sturdy or robust elements of construction is not a decisive criterion of distinction. They may point to integration, but what really matters is the extent of integration, i.e. whether it has progressed to the point where the result is a single complete mobile machine, in which the propelling base and the functional machinery are no longer distinguishable as separate units so constructed that

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the machine part is attached to the base in order to render it mobile and to enable it to operate by the transmission of power from the engine of the base. For the determination of the extent of integration in the present case, it is evident, I think, that the effect on classification of the automobile features detailed under heading 87.03 cannot be excluded or regarded as of lesser account. I should add that if there should be any substantial relevant difference between the criteria enumerated under heading 87.01 and those mentioned under heading 87.03, the latter should in my opinion prevail. These headings deal with different kinds of vehicles and if different exclusionary tests of integration are embodied in the notes, that would justify the inference that the classification under each is intended to follow the lines indicated under the particular heading and not those under the other heading.

I turn then to the classification of these Drott Go-Devils. The question is whether they are machines, covered by Section XVI of the Schedule, within the description

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of "lifting, handling, loading or unloading machinery" in heading 84.22, or motor vehicles covered by Section XVII, within the description of "special purpose motor lorries" in heading 87.03. The mere fact that they are mobile and self-propelled does not make them the one or exclude them from the other. In terms of the relevant notes, a motor vehicle would be, and a machine could be, both mobile and self-propelled. They are constructed to serve a dual purpose, viz. to function as cranes and also as transport vehicles specially designed to carry conveniently and safely whatever they lift. The second purpose is clearly subsidiary to the first. They are not intended to transport what they have not lifted, and would be used for transport only over the distance from the point of pick-up to the point of delivery. In spite of the claim that one of these Go-Devils is capable of a speed of 28 miles per hour, it may be assumed that that would in the ordinary course be over relatively short distances. It could be a matter of yards, but it could also be a matter of miles, for instance from a quarry or railway station to a construction site some distance24/

distance away from it. Their primary purpose (as is said of special purpose vehicles in a note under heading 87.03) is not the transport of goods, but to the limited extent indicated, they do, (as the note implies may be the case with such vehicles) in fact have such a secondary purpose. That cannot be said to be decisive. On the one hand, a special purpose crane lorry within the terms of the latter heading could no doubt be so constructed as not to have any vestige of a deck or platform for the carriage of lifted goods. On the other hand it is not difficult to conceive that a crane machine within the terms of heading 84.22 could be constructed with a "carry deck" similar to those here in question. This secondary purpose is not, however, altogether without significance for present purposes. It is, I consider, one of the factors to be taken into account, inasmuch as it tends to place these Go-Devils more appropriately within the general category of road vehicles or motor vehicles. They are obviously constructed for use not only in sheds or yards, but also for use on the road, and more so than the more

conventional25/

conventional crane lorries with no special transport equipment. They are not road vehicles to the same extent as motor vehicles for the transport of persons or goods, but the same is to be said with greater force of the more conventional crane lorries and more particularly of fire engines, fire escapes and searchlight lorries, mentioned in heading 87.03, which would also use the roads but would not, in the ordinary course at any rate, perform any function at all on the road, except the incidental function of carrying the special purpose equipment from one place to another.

In appearance, the chassis of these Go Devils are of a special type and they are specially constructed to stand the stresses and strains of the loads they are intended to lift and carry. This may be a relevant consideration, but as already indicated, it does not in itself provide a conclusive test. The chassis of vehicles under heading 87.03 would naturally be adjusted to the kind of superstructures they are to carry and to support when functioning, and might well be fitted also with outriggers. Of more importance is

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the manner of special construction, i.e. whether it results in a single fully integrated machine, or in a composite thing, consisting of a vehicle with a machine mounted on it. As to this feature, Terrence Duggan, a qualified engineer, in an affidavit lodged by the respondent, deposes as an expert: "In each case the crane is mounted on a heavy welded steel frame." Each crane is situated on a portion of the carry deck forming part of the steel frame, and could be detached from the frame by the loosening of bolts. What would then be separated from the frames would be the superstructures constituting the cranes, together with the special hydraulic pumps by which they are operated. The whole structure does in each case in fact consist of a machine mounted on a chassis. When the superstructures are removed, what would be left would be chassis with a cab or an operator's compartment. The chassis would not only contain the engines which drive the hydraulic pumps and propel the bases with their superstructures, but also the other essential automobile features detailed in the Brussels Notes. Not a

single one of them is housed in any of the crane structures as such. While there is a measure of integration which may in a sense be said to have produced integral structures, the vehicles and machines are still clearly distinguishable units and having regard to the other factors of major importance to be taken into account, the conclusion that these Go-Devils are machines to be classified under heading 84.22 does not appear to be justified. In my opinion they are, because of the considerations mentioned above, special purpose motor vehicles to be classified under heading 87.03 as crane lorries.

I would allow the appeal with costs, including the fees consequent upon the employment of two counsel, and alter the order of the Court a quo to dismiss the application with costs.

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S T E Y N, C.J.

BOTHA, J.A. - Concurs.

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between:-

THE SECRETARY FOR CUSTOMS & EXCISEAppellant.

AND

THOMAS BARLOW & SONS LIMITEDRespondent.

Coram: Steyn, C.J., Rumpff, Botha, Trollip, JJ.A. et
Miller, A.J.A.

Heard: 16th February, 1970. Delivered: 25th March, 1970.

J U D G M E N T.

MILLER, A.J.A.:-

I have come to the conclusion that the appeal
should be dismissed for the reasons which follow.

I do not propose to recapitulate the facts or to
set out in full the terms of the relevant statutory provisions
and notes, which are contained in the judgment of the
learned Chief Justice, except where it may be necessary
or desirable to do so for the sake of clarity or ease of
reference.

The starting point for the investigation of the

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issue raised by this case is Rule VIII of the "Rules for the Interpretation of this Schedule," which precede the schedule to the Act. It is expressly stated in Rule VIII that the titles of sections, chapters and sub-chapters are provided for ~~case~~ of reference only and that, for legal purposes, classification is to be determined according to the terms of the headings and any relative section or chapter notes. This rule is repeated in Rule 1 of the Interpretative Rules of the Brussels Notes. But since section 47(8)(a) of the Customs and Excise Act (No.91 of 1964) expressly provides that the interpretation of the schedule "shall be subject to" the Brussels notes, it is necessary, at the outset, to deal briefly with the nature and purpose of those notes.

The Brussels notes consist in the main of explanatory comment which often takes the form of including or excluding, in relation to a particular heading, objects or kinds of object which are named or described. Not infrequently, reasons are stated for the inclusion or exclusion of particular kinds of object and examples given to illustrate the point which is sought to be made. Essentially, the purpose of the notes.

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is to lend aid in the often difficult task of classification. In the field with which this case is concerned, it would appear that to meet the requirements of industry in many parts of the world, there have been devised and produced a seemingly endless variety of vehicles, machines and equipment. They are sometimes closely related, yet subtly different, and for that reason defy accurate classification by means of comprehensive definition. Hence the explanatory comments, the inclusions and exclusions, the illustrations by way of example or reason, which are to be found in the Brussels notes. The very form of those notes suggests that they were intended to serve as a guide, pointing the way to the desired or intended classification. Yet, by resorting to specific inclusions and exclusions, they sometimes appear to assume the form of peremptory injunctions. It seems to me to be important, when a classification is being made "subject to" the Brussels notes, to distinguish between such of the notes as include under or exclude from a particular heading, clearly identifiable objects, whether they are identified by name or description, and notes which are explanatory and broadly

indicative of the desired or intended classification. In the former class, where the exclusion or inclusion relates to clearly identified objects, difficulty might arise in the event of a direct and irreconcilable conflict between the inclusion or exclusion enjoined by the notes, and the terms of the relevant headings. In such a case, despite the paramountcy of the headings and the section and chapter notes, it might be that an express inclusion or exclusion in the Brussels notes would prevail, on the ground that failure to obey it would be to disregard the statutory injunction to interpret the headings "subject to" the Brussels notes. It is not necessary to express a definite opinion on that question, which I do not think arises here. It is sufficient to say that, generally speaking, in all but those cases, the Brussels notes appear to serve as guides and aids to the classification properly to be made in accordance with the terms of the headings read with the relevant section and chapter notes.

Turning now to the headings which are involved in this dispute, the type of machinery contemplated by 84.22 is

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that to which cranes indubitably belong and indeed, "cranes" and "transporter cranes" are specifically mentioned in the heading. By contrast, the heading of 87.03 shows that it is concerned with motor lorries and vans which have a "special purpose". One of the special purposes specially named in the heading, however, relates to the use of a crane, for "crane lorries" are included amongst the "special purpose motor lorries" with which the heading is concerned. Hence, of course, the difficulty in this case: are the "Drott Go-Devils" mobile cranes (which are clearly included under 84.22) or are they "crane lorries", which fall under 87.03 ?

The link between the two headings is forged only by the reference in 87.03 to "crane lorries". Apart from that connecting link, it is clear that essentially different concepts are involved in the two headings; the first, (84.22) deals with a large variety of machines, whereas the second (87.03) is fundamentally concerned with motor lorries and vans. It is of paramount importance to keep this difference in the foreground of the consideration of the dispute, for, if the headings are to play the important part they are

6/ expressly

expressly required to play in the classification, the decision must ultimately depend upon whether the "Drott Go-Devils" are to be classified as machines, or as lorries (or vans).

The argument advanced on behalf of the appellant depended very largely upon the terms of the Brussels notes with reference to the two relevant headings. It was said that those notes clearly indicated that the "Drott Go-Devils" were to be classified under 87.03 as "crane lorries", mainly because of the nature or type of their chassis which, though they might differ from those of conventional or usual lorries, fell within the "definition" contained in the Brussels notes. (to which I shall hereafter refer, simply, as the "notes" - if notes other than the Brussels notes are referred to, I shall otherwise specify them). Since it is my opinion that the relevant notes, when read together, point to the opposite conclusion, it is necessary to examine them in some detail.

Under heading 84.22, certain "exceptions" in relation to mobile machines are listed and explained in the notes. Exception (b)(2) contains the exclusion strongly relied upon by the appellant. It is the note which excludes

"Cranes (eg. breakdown cranes)etc." from 84.22 and includes them under 87.03, but only if they are

" mounted on lorries or chassis which are essentially complete and of the automobile type in that they contain all the essential automobile features including travelling motor, gear-box, controls for gear-changing, braking, steering. "

Such machines are to be classified under heading 87.03 as special purpose vehicles, whether the "lifting or handling machine" is simply mounted on the vehicle or whether the machine and the vehicle constitute one integral mechanical unit. An addition to that note indicates that if the crane unit on such a machine, "houses one or more of the essential automobile features" referred to, the classification is under 84.22, not under 87.03. The terms of exception (b)(2) clearly postulate two fundamental requirements for exclusion of what may appear to be a mobile crane from 84.22 and its inclusion under 87.03:-

(1) the chassis must be essentially complete and of the automobile type in that it contains "all the essential automobile features:", and,

(2) the crane must have been "mounted" upon such lorry or chassis, and the result will be the same whether

the crane was "simply" mounted or whether, as a result of the mounting, the machine and the vehicle "constitute one integral mechanical unit."

Turning then to the heading (87.03) under which exception (b)(2) says that such "machines" must be included, we find that the notes explain that what are covered by that heading are "motor vehicles specially constructed and equipped to enable them to perform special non-transport functions", so that "the primary purpose of the vehicles of the present heading is not the transport of persons or goods". I fully agree with what is said by ~~my brother~~ Rumpff, J.A., in his judgment, concerning the significance and connotations of this note in regard to the nature of the vehicle which is contemplated by heading 87.03. It is to be emphasized, moreover, that item No.7 in the list of items included in the note under 87.03, reads "Crane lorries (i.e. cranes mounted on a motor vehicle chassis of sturdy construction)". The notion earlier expressed in exception (b)(2) that the crane must be "mounted" on a chassis, is therefore repeated.

Following upon the list of items to be included

9/ under

under heading 87.03, there appears a note entitled "Lorries, Etc. Fitted with Other Machinery." It is necessary, for purposes of this judgment, to reproduce in full the first three paragraphs of that note. The fourth is not relevant. For the sake of convenience, I shall number the three paragraphs, which are not numbered in the note. They read as follows:

" (1) It should be noted that, to be classified in this heading, lifting and handling machinery, earth levelling, excavating and boring machinery, etc., must be mounted on lorries or chassis which are essentially complete and of the automobile type in that they contain all the essential automobile features including a travelling motor, gear-box, controls for gear changing, steering mechanism and braking mechanism.

(2) However, self-propelled cranes, excavators and other machines, in which the crane, etc., unit houses one or more of the essential automobile features referred to above, remain classified in Section XVI, whether or not the whole can travel on the road under its own power.

(3) The present heading also excludes self-propelled wheeled machines in which the chassis and machine are constructed to form an integral unit (e.g., self-propelled motor graders). In this case, the vehicle does not consist of a machine mounted on a chassis, but the chassis and machine are integrated to form a unit which may even incorporate all the essential automobile features referred to above. "

It will be observed that paragraph (1) of this note, in substance if not in precisely the same words, echoes the idea expressed in the first part of exception (b)(2) under heading 84.22. The theme here, as there, is that the "lifting machinery" must be "mounted" on lorries or chassis of the automobile type and similar language is used to indicate what, for purposes of that part of the note, an essentially complete automobile type chassis is. Paragraph (2) of this note in turn echoes the idea expressed in the last part of exception (b)(2), where the theme is that self-propelled cranes fall under 84.22 (Chapter XVI) if "the crane unit houses one or more of the essential automobile features." What the exception says in regard to 84.22 is therefore substantially affirmed by paragraphs (1) and (2) of the note under ^{87.03}~~83.07~~, with particular reference to the concept^{ep/} of "mounting" a crane upon a particular type of chassis.

When we turn to paragraph (3) of the note to 87.03, however, we find what appears to be a final word with reference to the question of classification under 87.03. Paragraph (3) says clearly, and with deliberate emphasis (the words

"also excludes" which I have underlined in reproducing paragraph (3) above, are printed in the original text in thick black print which stands out) that "self-propelled wheeled machinery in which the chassis and machine are constructed to form an integral unit" do not fall under 87.03. Not content with this, the note goes on to explain why it is that such "integral unit" does not fall under 87.03. The reason is that in a case where the machine has been "constructed to form" an integral unit, it does not "consist of a machine mounted on a chassis". The return to the concept of a machine being mounted on a chassis is revealing. Throughout, as I have pointed out, the characteristic of a "special purpose lorry" has been described, in effect, as an essentially complete chassis of the automobile type on which a machine has been "mounted". Now paragraph (3) gives special ^hemphasis _^ to that characteristic, by advancing the absence of the feature of "mounting" as a reason for non-inclusion under 87.03 ^{of} _^ a machine constructed to form an integral unit. As I read paragraph (3), in the light of all that has preceded it, it was specially included in the notes to indicate clearly that

whatever the nature of the chassis and even if it might hitherto have appeared, in terms of the preceding notes, that a particular machine might be classifiable under 87.03, such machine was not to be so classified if it was "constructed to form" an integral unit and did not merely "consist" of a machine mounted on a chassis.

The word "consist", in that context, supports the view I have expressed, for it is used in contra-distinction to "constructed to form ...". The words "consist of", in the context of paragraph (3), postulate that the thing has not necessarily been planned or designed or constructed as a whole, but has resulted in a "whole" because of the joining of the two consisting parts. In short, if the thing merely consists of a machine mounted on a chassis it is not affected by paragraph (3), even if the chassis and machine "constitute an integral mechanical unit", (see exception (b)(2) above) as opposed to having been "constructed to form" an integral unit. But if it was "constructed to form" an integral unit - if the purpose or intent was to produce or manufacture an entity or unit for use as such - then it is very much affected.

by paragraph (3). The element of intent or purpose seems to me to be ^anecessary part of the concept of "constructed to form an integral unit". Whenever the inquiry is whether a thing has been created as a whole or an integral unit, the purpose or intention in the creation is relevant and "in many instances it is the determining element." (see, ~~purely~~, by way of analogy, per Innes, C.J., in MacDonald Ltd. vs. Radin N.O. and Another, 1915 A.D. 454 at p. 467; and compare Standard-Vacuum Refining Co. vs. Durban City Council, 1961(2) S.A. 669 (A.D.) at p. 677). It seems to me, with respect, that whether or not paragraph (3) is to be regarded as creating a separate category of machines, its effect is to qualify and explain what has gone before in regard to classification under 87.03, such qualification relating to purpose or intent in the construction of the "machine", i.e. whether it was "constructed to form" an integral unit or whether it simply consists of a chassis upon which has been mounted a machine. This, moreover, is not the only occasion in the notes where design or purpose is to be regarded as a relevant, if not a decisive factor. Examples are to be found especially under

heading 87.01 which deals with tractors fitted with other machinery, an aspect which has been dealt with by the learned Chief Justice, Rumpff, J.A., and Trollip, J.A., in their respective judgments. For the purposes of classification under 87.03, therefore, the decisive question is not whether the chassis is of the defined automobile type, nor whether a particular automobile feature happens to be housed in the "machine unit", but whether the chassis and machine were constructed to form an integral unit.

Paragraph (3) of the note now under consideration is exclusionary, relative to 87.03, and there is added to the terms of exclusion an explanatory comment. The explanation, moreover, furnishes a strong guide to what must be excluded, particularly when it is remembered that the choice for purposes of classification is between a heading which deals with machinery and a heading which ~~interms~~ terms deals essentially with motor lorries and vans, more particularly "special purpose" lorries or vans. The "Drott Go-Devils" have few features which are characteristic of a lorry or van. In the technical and artificial sense of the identificatory

definition of a "chassis of automobile type" contained in exception (b)(2), they may have such a chassis, but when an inference is to be drawn from them as to the purpose of the construction, it seems to me that such inference must be that they were created as mobile machines, i.e. as mobile cranes, and not as lorries, whether for special purposes or ~~not~~, at all. It is true that they are able to "carry what they lift" and that they may be able to convey goods for some distance at modest speed, but there is no reason why a mobile crane should lose its identity because it is so constructed that it is also able to carry what it lifts from the place of lifting to the place of deposit. Having regard to the photographs of the "Drott Go-Devils" produced in evidence and the detailed description of them in the affidavits of the experts, it does not appear to me that the crane in any of the models may accurately be said to have been "mounted" upon a lorry with the intention that such lorry^o may thereby serve a special purpose. I find myself unable to say that any of the Drott Go-Devils merely "consist of a machine mounted on a chassis"; the evidence afforded by their appearance,

function and use rather indicates, to my mind, that they were "constructed" (and designed, planned and intended) to form an entity or integral unit for the purpose of use as a mobile crane with the added advantage of having carrying capacity. The word "mount", when used as a verb in the context in which it is used in the notes, means, simply, "to set or place upon an elevation". (Oxford English Dictionary) I would say that the "Drott Go-Devils" crane has not merely been set or placed upon the base, but ab initio "belonged" there as an integral part of the whole conception.


The only argument advanced by appellant's counsel in regard to paragraph (3) of the note was that it did not serve to exclude the machine from 87.03 because the machine was not "built as one integral machine with no clearly separable units." The words which I have underlined are not, of course, contained in paragraph (3) of the note or in any other note or provision. It is, I think, a fallacy to regard inseparability as a necessary characteristic of anything "constructed to form an integral unit", for that entirely loses sight of the importance of the elements of intention, purpose and design.

Physical divisibility or severability is not incompatible with an intention to create an entity or an integral unit, although the ease or difficulty of severance may be a factor to be taken into account when inferring what the purpose or intent of the constructor was. (see, again, per Innes, 6.J. in MacDonald's case, supra, at p. 467 and per van Winsen, A.J.A. in the Standard-Vacuum case, supra, at p. 679.) Counsel's argument was that it is not a matter of great difficulty to remove the crane from the base, as indeed it may not be. This is neither decisive nor, having regard to the machines with which we are concerned, ^{do I regard it as} ~~it is~~ persuasive. It is clear that if the crane were to be removed, the base (which appears in any event to be quite unlike the platform or carrying deck of a characteristic lorry or van) would remain as an extraordinarily heavy frame with, in the case of two of the models, a large hole in it where the base of the removed crane had been integrated with it. Whether or not it is ~~permissible, purely for the purposes of determining whether~~ a chassis is of the automobile type as described and defined in exception (b)(2), to have regard to the conventional or

usual lorry and chassis, it is surely permissible and necessary to have regard to the ordinary connotation of the word "lorry" when paragraph (3) of the note under 87.03 is in issue, for that is a relevant factor in determining the purpose and intention underlying the construction of the unit. I fully agree with what is said by both Rumpff, J.A., and Trollip, J.A., regarding the ^{ordinary connotation} ~~essential features~~ of a motor lorry and the significance thereof when it is sought to bring the "Drott Go-Devils" within the terms of heading 87.03, which deals specifically and pointedly with "motor lorries and vans". I think that Mr. Duggan, a mechanical engineer who was a deponent in the proceedings in the Court below, correctly appraises the situation when he says that the frames of the "Drott Go-Devils" are by no means conventional or normal lorry frames but that the "lifting, loading and unloading" elements of the machine are "integrated with the heavy frame to form an integral unit and in particular a mobile crane".

That is the "unit" which was imported by the respondent, as it was designed, planned and constructed by the manufacturer, and that entity or integral unit, in my

judgment, falls to be classified for purposes of the Act
as a mobile crane under heading 84.22, not as a special
purpose motor lorry under 87.03. I accordingly agree
with the order proposed by Rumpff, J.A.



MILLER, A.J.A.

IN THE SUPREME COURT OF SOUTH AFRICA.

APPELLATE DIVISION.

In the matter between:

THE SECRETARY FOR CUSTOMS & EXCISE APPELLANT.

AND

THOMAS BARLOW & SONS LIMITED RESPONDENT.

Coram: Steyn, C.J. Rumpff, Botha, Trollip, JJ.A.

et Miller A.J.A.

Heard: 16th. February 1970.

Delivered: 25th. March 1970.

J U D G M E N T.

TROLLIP, J.A.

I think that the appeal should be dismissed
for the following reasons.

The duty which is payable is set out
in Schedule No. 1 to the Act. This Schedule is a massive
part of the statute in which all goods generally handled
in international trade are systematically grouped in
Sections, Chapters, and Sub-Chapters, which are given
titles indicating as concisely as possible the broad class

of /2.

of goods each covers. Within each Chapter and Sub-Chapter the specific type of goods within the particular class is itemised by a description of the goods printed in bold type. That description is defined in the Schedule as a "heading". Under the heading appear sub-headings of the species of the goods in respect of which the duty payable is expressed. The Schedule itself and each Section and Chapter are headed by "notes", that is, rules for interpreting their provisions.

It is clear that the above grouping and even the wording of the notes and the headings in Schedule No. 1 are very largely taken from the Nomenclature compiled and issued by the Customs Co-operation Council of Brussels. That is why the Legislature in Section 47 (8) (a) has given statutory recognition to the Council's Explanatory Notes to that Nomenclature. These Notes are issued from time to time by the Council obviously, as their name indicates, to explain the meaning and effect of the wording of the Nomenclature. By virtue of section 47 (8) (a) they can be used for the same purpose in respect of the wording in Schedule No. 1. It is of importance, however, to determine

at the outset the correct approach to adopt in interpreting the provisions of the Schedule and in applying the explanations in the Brussels Notes.

Note VIII to Schedule No. 1 sets out the "Rules for the Interpretation of this Schedule".

Paragraph 1 says:

"The titles of sections, 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 or notes do not otherwise indicate, according to paragraphs (2) to (5) below".

That, I think, renders the relevant headings and section and chapter notes not only the first but the paramount consideration in determining which classification, as between headings, should apply in any particular case. Indeed, right at the beginning of the Brussels Notes, with reference to a similarly worded paragraph in the Nomenclature, that is made abundantly clear.

It is there said:

"In the second provision, the expression 'provided such headings or Notes do not otherwise require' (that is the corresponding wording of the Nomenclature) is necessary to make it quite clear that the terms of the headings and any relative

Section or Chapter Notes are paramount, i.e, they are the first consideration in determining classification".

It can be gathered from all the foregoing that 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 and doubtful cases. But in using them one must bear in mind that they are merely intended to explain or perhaps supplement those headings and notes and not to override or contradict them. They are manifestly not designed for the latter purpose, for they are not worded with the linguistic precision usually characteristic of statutory precepts; on the contrary they consist mainly of discursive comment and illustrations. And, in any event, it is hardly likely that the Brussels Council intended that its Explanatory Notes should override or contradict its own Nomenclature. Consequently, I think that in using the Brussels Notes one must construe them so as to conform with and not to override or contradict

the /5.

the plain meaning of the headings and notes. If an irreconcilable conflict between the two should arise, which in my view is not the case here, then possibly the meaning of the headings and notes should prevail, because, although section 47 (8) (a) of the Act says that the interpretation of the Schedule "shall be subject to" the Brussels Notes, the latter themselves say in effect that the headings and notes are, paramount, that is, they must prevail. But it is not necessary to express a firm or final view on that aspect.

I therefore turn at once to the interpretation of the relevant headings and notes. The following machinery is grouped under heading 84.22 in Chapter 84 of Section XVI:

"Lifting, handling, loading or unloading machinery, telphers and convey^{ors}ers (for example, lifts, hoists, winches, cranes, transporter cranes, jacks, pulley tackle, belt conveyors and teleferics) (excluding machinery falling within heading No. 84.23)".

Those terms are sufficiently wide to include a mobile crane that, incidentally to its principal function of lifting things at various places, can also transport the thing that it lifts. That was indeed not

contested. Consequently, it was common cause that the "Drott Go-Devils" in the present case would fall under this heading unless they are excluded from it by the Section or Chapter notes. Now paragraph 1 (k) of the notes to Section XVI excludes therefrom "Vehicles, aircraft, ships or boats, of Section XVII". The only vehicles relevant are those described in the first three headings of Chapter 87 of that Section. They are -(leaving out irrelevant portions) -

- "87.01: Tractors whether or not fitted with power take-offs, winches or pulleys.
- 87.02: Motor vehicles for the transport of persons, goods or materials (including sports motor vehicles) excluding those of heading No.87.09. (The latter heading relates to motor and similar cycles).
- 87.03: Special purpose motor lorries and vans (such as breakdown lorries, fire-engines, fire-escapes, road sweeper lorries, snow-ploughs, spraying lorries, crane lorries, search-light lorries, mobile workshops and mobile radiological units), but excluding the motor vehicles of heading No. 87.02.

According to paragraph 1 of the notes to Chapter 87, "tractors are deemed to be vehicles constructed essentially for ^{hauling} ~~handling~~ or pushing another vehicle, appliance or load, whether or not they contain subsidiary provision

for /7.

for the transport, in connection with the main use of the tractor, of tools, seeds, fertilisers or other goods". Hence, to determine whether or not heading 87.01 applies, one must have regard to the main purpose for which the vehicle was constructed and designed. The same applies to heading 87.02. "Motor vehicle" there is a wide term ^{ordinarily} meaning any wheeled conveyance propelled by a motor and constructed and designed for the purpose of transporting persons, goods, or materials. Heading 87.03, which is the crucial one in this case, requires closer examination. "Motor lorry" and "motor van" are much narrower concepts than "motor vehicle". According to the Oxford English Dictionary "lorry" is "a long flat wagon without sides running on four low wheels". But, I think, the modern basic conception of a "motor lorry" is a motor vehicle constructed and designed for the purpose of transporting goods or materials by means of an open, flat platform with or without sides; and a "motor van" is a similar vehicle, constructed and designed for a similar purpose, except that its platform or carrying portion is covered in (cf, Oxford English Dictionary, sv. "van"). Hence the purpose for

which the thing in question was constructed and designed is of fundamental importance in determining whether it is a vehicle, and if it is, whether it must be classified under heading 87.01, 87.02, or 87.03. See Kommissaris van Doeane en Aksyns v. Mincer Motors Bpk. 1959 (1) S.A. 114 (A.A.) at p. 121 D-F. and Falkiner v. Whitton 1917 A.C. 106 (P.C.), a decision on the ^{then} ~~the~~ Australian Customs Duty Act. In the latter case the item "motor cars, waggons, and lorries" had to be construed. At p. 110 Lord Atkinson said:

"The term 'motor car' suggests the idea of a vehicle that is designed and intended to carry one or more persons The terms 'motor waggon' and 'motor lorry' connote vehicles of much the same character, save that both are specially designed, intended and fashioned for the carriage of goods each of the three having this characteristic, that it is designed and intended to carry as a load something in addition to its own equipment".

Consequently I think that "special purpose motor lorries and vans" simply means lorries and vans to which some special equipment has been added so that they can be used for a special purpose. It is immaterial, in my view, whether the addition is made merely by attaching the special /9.

special equipment to a complete or incomplete motor lorry or van, or by some measure of adaption or substitution of part of its completed structure, so long as the vehicle in question retains its essential or fundamental character of a motor lorry or van. That accords too with the principle of interpretation set out in paragraph 5 of the notes to Section XVII:

"An incomplete or unfinished article of this Section is to be classified as the corresponding complete or finished article, provided it has the essential character of such complete or finished article".

The whole foundation therefore for the application of heading 87.03 is a complete or near-complete motor lorry or van, i.e., a motor vehicle that was originally constructed ^{and} ~~or~~ designed for the purpose of transporting goods or materials on some kind of open or covered-in platform. It is because of that fundamental vehicular feature that, despite the addition of the equipment for the special purpose, the thing is still ^{regarded as} ~~deemed to~~ retaining the character of a vehicle. Indeed, it would have qualified for classification under heading 87.02 ~~but~~, as a motor vehicle /10.

vehicle, but, because its "special purpose", achieved by the addition of the special equipment, now replaces its original purpose, it is expressly excluded from that heading and put into its own category in heading 87.03; but it still remains a vehicle. Consequently, a "crane lorry", which is specially^{ly} given under that heading as an example of a "special purpose motor lorry", means a complete or near-complete motor lorry in the above sense to which a crane has been added by attachment, adaptation, or substitution in the manner described above.

It is clear from all the facts in the present case that the bases of the Drott Go-Devil machines were not constructed ~~or~~^{and} designed for the purpose of transporting goods or materials. Each was specially constructed and designed for the purpose of supporting a crane for the lifting of goods or materials and rendering it mobile so that it could easily and quickly operate at different places. It is true that it was also constructed and designed for the purpose of transporting the goods

that /11.

that it lifted, but that was purely incidental or secondary to its principal purpose. Consequently, in my view, according to the terms of the heading 87.03, the machines are not special purpose vehicles and are therefore not excluded from heading 84.22.

I now turn to the Brussels Notes. These have been fully canvassed in the judgments of the learned Chief Justice and my learned brothers Rumpff and Miller, and it is therefore not necessary for me to enter upon a full discussion of those parts that are relevant to this case. It suffices to say that I agree with the conclusions of Rumpff, J.A., and Miller, A.J.A. on the Brussels Notes, substantially for the reasons given by them. Those reasons show that the Brussels Notes, in their explanations of the relevant headings and notes are not contrary to but confirm my above interpretation of those headings and notes. I would just emphasize the following point about the Brussels Notes.

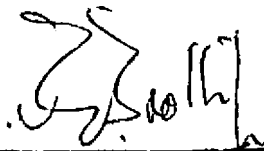
The expression "mounted on lorries or chassis which are essentially complete and of the automobile type in that they contain all the essential automobile features

including a travelling motor etc." was much debated at the Bar during argument. "Lorry^y" there obviously means a complete lorry^y, What follows about a "chassis etc." is, in my view, merely a discursive, illustrative, and perhaps cumbersome method of describing an incomplete motor vehicle, but one nevertheless having the essential or basic character of a motor lorry by reason of the nature and extent of the features mentioned; a near-complete lorry^y, as I called it above for the sake of convenience and brevity. The Brussels Notes could not have intended to widen the category of chassis there to include those of other vehicles, firstly because that would be contrary to the terms of the heading 87.03, which confine it to motor lorries (we are not concerned with motor vans at present), and, secondly, because that could lead to encroachment upon the ambit of other headings. Thus a machine mounted on a tractor base or a works truck chassis, being also essentially complete and of the automobile type, as many would probably be, would then fall

under /13.

under heading 87.03 instead of heading 87.01 or 87.07 respectively where they rightly belong. That could not have been intended. Lastly the fact that the Brussels Notes to heading 84.22 speak of "machines mounted on lorry or similar automobile type chassis" provides some support for that conclusion.

For those reasons I think that the appeal should be dismissed with costs.

A handwritten signature in dark ink, appearing to read 'J.A. Trollip', is written over a horizontal line.

TROLLIP, J.A.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE SECRETARY FOR CUSTOMS AND EXCISE Appellant

and

THOMAS BARLOW AND SONS LIMITED Respondent

CORAM: STEYN, C.J., RUMPFF, BOTHA, TROLLIP, JJ.A. et

MILLER, A.J.A.

HEARD: 16.2.1970.

DELIVERED: 25.3.1970.

J U D G M E N T

RUMPFF, J.A. :

The facts of this case and the statutory provisions which have to be considered are set out in the judgment of the learned Chief Justice. As has been stated, the question is whether the machines called "Drott Go-Devils" must be considered crane lorries under heading 87.03 of Part I of the Schedule to Act 91 of 1964 or lifting machinery (such as mobile cranes) under heading 84.22 of that Schedule. It is of importance to consider, inter alia, the wording of each heading

because/.....

because it is stated in Note VIII to Schedule I of the Act that: ".....for legal purposes, classification (as between headings) shall be determined according to the terms of the headings and any relative section or chapter notes"

Heading 87.03 applies to "Special purpose motor lorries and vans (such as crane lorries)". There obviously must be a difference between a mobile crane and a crane lorry for the purposes of headings 87.03 and 84.22 and the question is what constitutes the difference? On the face of it heading 87.03 concerns itself with motor lorries and vans, not used for the transport of persons or goods (which fall under heading 87.02), but used for some special purpose.

Going to the Brussels Notes, one finds that Section XVII, which, inter alia, includes heading 87.03, deals with all types of railway vehicles, other vehicles, aircraft and ships and floating structures subject to the exceptions referred to. In Note (II) it is stated that "many machines or equipment (in particular of the type falling within Section XVI) can be mounted on the vehicle chassis or on the

floating/.....

floating bases of Section XVII; the classification of the resultant mobile machine depends on various factors, in particular on the type of base". This then must be taken to be the most important distinguishing feature between a crane lorry and a mobile crane, namely the type of base used for each machine. In order to adjudge the type of chassis or base in a particular case one would ordinarily and primarily, I think, look at its design. According to the Brussels Notes to chapter 87 in Section XVII, the chapter covers the following vehicles (with the exception of mobile machines falling within Section XVI): Tractors (headings 87.01 and 87.07), motor vehicles designed for the transport of passengers or goods (heading 87.02), or for special purposes (heading 87.03), works trucks (heading 87.07), armoured fighting vehicles (heading 87.08), motor-cycles, cycles, certain invalid carriages (headings 87.09 to 87.11), baby carriages and invalid carriages other than motorised (heading 87.13), and other vehicles whether for traction by hand, by animals or by another vehicle (heading 87.14). Heading 87.01 deals with tractors and in the Brussels

Notes thereto there is to be found the first indication as to what is meant by, inter alia, a mobile crane. The Note reads as follows:

"For the purposes of this heading, tractors are deemed to be wheeled or tracked vehicles constructed solely or essentially for hauling or pushing another vehicle, appliance or load. They may contain subsidiary provision for the transport, in connection with the main use of the tractor, of tools, seeds fertilisers or other goods, or provisions for fitting with working tools as a subsidiary function.

The heading does not cover propelling bases specially designed, constructed or reinforced to form an integral part of a machine performing a function such as lifting, excavating, levelling, etc., even if the propelling base uses traction and/or propulsion for the execution of the function."

This indicates, in my view, that where a propelling base is specially designed to form an integral part of a machine performing a function such as lifting, that machine ought not to be considered as a vehicle under chapter 87, but as a lifting machine under heading 84.22. A similar approach is adopted in the Brussels Notes to heading 87.01, which heading covers "tractors whether or not fitted

With/.....

with power take-offs, winches or pulleys", where it is said:

"On the other hand the present heading does not cover the propelling bases of machines referred to, for example, in headings 84.22, 84.23 and 84.24, in which the propelling base, the operating controls, the working tools and their actuating equipment are specially designed for fitting together to form an integral mechanical unit"

Heading 87.02 deals with motor vehicles for the transport of persons, goods or materials and the Brussels Notes to this heading commence as follows: "This heading covers motor vehicles of various types designed for the transport of persons, goods or materials; it does not, however, cover the special purpose vehicles of heading 87.03..."

Under heading 87.02 a motor vehicle for the transport of persons, goods or materials would be, in terms of the Notes, a vehicle designed for such use. It will be noticed that in the Note to heading 87.02 quoted above, the design of the vehicle is specifically referred to.

The Note relating to heading 87.03 reads:

"This heading covers motor vehicles specially

constructed/....

constructed and equipped with various devices to enable them to perform certain special non-transport functions; i.e., the primary purpose of the vehicles of the present heading is not the transport of persons or goods."

The Notes continue as follows: "The heading includes: ... (7) Crane lorries (i.e. cranes mounted on a motor vehicle chassis of sturdy construction)."

In contrast to the use of the word "design" in the Notes to headings 87.01 and 87.02, the Notes to heading 87.03, quoted above, do not refer to a vehicle "designed" to perform special functions. The introduction of the concept "special purpose" relating to a lorry or a van, as is done in heading 87.03, presupposes, in my opinion, the existence of a lorry or van which is not used for the general purpose of transporting goods or people (under heading 87.02) but for a special purpose. The Note to heading 87.03 above refers to motor vehicles "specially constructed and equipped with various devices to enable them to perform certain special non-transport functions" and then adds: "the primary purposes of the vehicles of the present heading is not the transport of persons or goods". The wording of heading 87.03 and the Notes thereto

indicate/

indicate, in my opinion, that what is dealt with in heading 87.03 is not a vehicle designed for lifting goods but a van or lorry originally designed for the transport of persons or goods but which has been structurally altered and equipped with devices to perform another function, namely, a special non-transport function. The examples quoted in the Notes to 87.03 confirm the inference that the design of the base of the vehicle is of particular importance. The examples include motor breakdown lorries, lorries used for cleansing streets, lorries with built-in concrete mixers, mobile banks, etc. Of significance, I think, are the words used in the example of crane lorries, namely, "cranes mounted on a motor vehicle chassis".

That the intention was to cover motor vehicle chassis designed as such but augmented to perform special purposes also appears, I think, from the Notes to heading 87.03 which read as follows:

"LORRIES, ETC., FITTED WITH OTHER MACHINERY.

It should be noted that, to be classified in this heading, lifting and handling machinery, earth levelling, excavating and boring machinery, etc., must be mounted on lorries or chassis which are essentially complete

and/.....

and of the automobile type in that they contain all the essential automobile features including a travelling motor, gear-box, controls for gear changing, steering mechanism and braking mechanism.

However, self-propelled cranes, excavators and other machines, in which the crane, etc., unit houses one or more of the essential automobile features referred to above, remain classified in Section XVI, whether or not the whole can travel on the road under its own power.

The present heading also excludes self-propelled wheeled machines in which the chassis and machine are constructed to form an integral unit (e.g., self-propelled motor graders). In this case, the vehicle does not consist of a machine mounted on a chassis, but the chassis and machine are integrated to form a unit which may even incorporate all the essential automobile features referred to above.

It should be noted, however, that self-propelled snow-ploughs with built-in equipment always fall within the present heading."

The words of the first requirement confirm

that it is intended to refer to lorries or chassis which are essentially complete and of the automobile type (i.e. they must contain what is necessary for their self-propelling ability) on which are mounted lifting, etc., machines. The Notes refer to/.....

to the lorries and chassis which are essentially complete. Lorries and chassis are complete when they are designed as such, to be used for general purposes. The Notes draw a distinction between ^{a/} lorry or a chassis (which contains what is necessary for its self-propelling capacity) and a machine like a crane which is mounted on such lorry or van, on the one hand, and a mobile crane so designed with its propelling base as to form a complete unit on the other hand. The former is a "special purpose" vehicle, but not the latter. That this distinction is envisaged appears from the second paragraph of the Notes quoted above which reads:

"However, self-propelled cranes, excavators and other machines, in which the crane, etc., unit houses one or more of the essential automobile features referred to above, remain classified in Section XVI, whether or not the whole can travel on the road under its own power."

The third paragraph of the Notes reads:

"The present heading also excludes self-propelled wheeled machines in which the chassis and machine are constructed to form an integral unit (e.g., self-propelled motor graders). In this case, the vehicle does not consist of a machine mounted on a chassis, but the chassis and machine are integrated to form a/.....

a unit which may even incorporate all the essential automobile features referred to above."

This paragraph confirms the above view, I think, for it indicates that if the chassis is designed so as to form an integral unit with the lifting machine, the resultant unit is excluded from heading 87.03. If what is left after the lifting machine is separated from the base, is a chassis which was not designed for the transport of materials or goods, then, in my view, the base and lifting machine, before separation, constituted an integral unit.

Reading the relevant portions of the Notes together, I am of opinion that the following question must be asked: is the "Drott Go-Devil" machine a vehicle, the propelling base of which having been designed as a chassis for a lorry or van, but specially adapted and equipped to perform a non-transport function, in casu, a chassis, on which is specially mounted a lifting machine, or is it a chassis not designed for a lorry or van but designed as a mobile base for a lifting machine with which it forms an integral unit? To see if this is the correct question one should also refer, of

course, to the Notes to heading 84.22.

The second Note to heading 84.22 reads
as follows:

"SELF-PROPELLED AND OTHER 'MOBILE' MACHINES.

In general, the heading covers not only fixed or stationary machines, but (with certain exceptions referred to below concerning machines mounted on transport equipment of the type falling within Section XVII) also mobile machines, whether or not self-propelled."

In the exceptions referred to there
appears the following under (2):

"MACHINES mounted permanently on lorry or similar automobile type chassis. Cranes (e.g., breakdown cranes), conveyor loaders, mechanical loaders, winches, elevating platforms, etc., are often mounted on lorries or chassis, which are essentially complete and of the automobile type in that they contain all the essential automobile features including travelling motor, gear-box, controls for gear-changing, braking, steering. Such machines (i.e. lorries or chassis with the machines mounted thereon) are classified as a whole in heading 87.03 as special purpose vehicles, whether the lifting or handling machine is simply mounted on the vehicle or whether the machine and the vehicle constitute one integral mechanical unit.

On the other hand, the present heading includes self-propelled cranes, etc., in which the crane, etc., unit houses one or more of the essential automobile features referred to in the preceding paragraph."

Here the exception refers to lorry chassis or chassis of a similar automobile type on which a machine, for instance a lifting machine, is mounted. The exception indicates, in my view, that if the chassis is adapted by mounting the machine thereon, or to such extent that the vehicle and the machine constitute one integral mechanical unit, the vehicle is classified under heading 87.03.

Here again, reading the relevant Notes to heading 84.22 together, the question is whether the "Drott Go-devil" is a lifting machine mounted on "transport equipment of the type falling within section XVII". If it is not, it is a mobile crane under heading 84.22. Reading all the relevant Notes together, both under heading 84.22 and 87.03 and the context, consisting of other headings and Notes, it seems to me that the Legislature had in mind to include in heading 87.03 lorries or vans designed for general purposes i.e. for the transport of materials or goods, but whose chassis are adapted

to a lesser or greater degree so as to constitute a base for a specific purpose machine to be mounted thereon. If the machine is mounted on to that type of chassis or if the machine and that type of chassis form one integral unit, the chassis and the machine fall under heading 87.03. If the base is a chassis specially designed to carry a lifting machine and if such chassis without such lifting machine is not a chassis of a van or a lorry designed for the transport of goods or materials, then the machine is a mobile crane under heading 84.22.

As far as the evidence is concerned, there is an affidavit by a Mr. Duggan, a mechanical engineer with various additional qualifications, in which he states that he is familiar with the "Drott Go-Devil" machines and in which he, inter alia, says:

"The frames of the Drott Go-Devils are specifically designed for the purpose of supporting or carrying the crane and not as a general purpose frame on to which other bodies or machinery may be mounted. In particular the Drott Go-Devil frames have been made particularly heavy and rigid far more so than would be necessary for a convential lorry.

Likewise a Drott Go-Devil does not consist of a crane/.....

crane (or machine) on a lorry. If the crane were to be removed from any of the Models in question a conventional lorry would not remain. What would be left would be a very heavy and cumbersome self-propelled frame with limited platform area, of limited utility which would not be economically or satisfactorily used to perform the function of a lorry."

A Mr. Botha, who is also a mechanical engineer with certain additional qualifications, and who filed an affidavit in support of the respondent's contentions, does not deny the allegations by Mr. Duggan set out above, but adds that what would be left when the crane is removed would be a special transport unit. In a further affidavit Mr. Duggan makes the following allegations:

"Dr. Botha is correct in saying that were the crane to be removed the remaining framework could be used for transport of goods on the framework. This is certainly possible but the equipment so obtained would be neither convenient nor economical. Without the crane one is left with a heavy, clumsy travelling platform of limited surface area. In the case of each of models 160 RF2 and 85 RM2 there would in addition be a large circular hole in the platform (See: Annexures "L" and "M" to my previous Affidavit). Were any contractor to be offered such equipment for transporting goods he would treat the suggestion as ridiculous.

I repeat that the principal function of each of the models is that of lifting, loading or unloading goods. The transport function could be obtained more efficiently and economically in other ways and is secondary."

To which Mr. Botha replied that although it was correct to say that the vehicle was not primarily made for transport of goods it would be equally correct to say that it is not made primarily for the loading and off-loading of goods. Mr. Botha added that it was specially and primarily made for loading, lifting, transport and off-loading. In my opinion the base of the "Drott Go-Devil" has been "specially designed and constructed to form an integral part of a machine performing a function such as lifting" see Note quoted above, to heading 87.01. When the crane portion is removed, what would be left would be a clumsy and heavy frame on wheels, self-propelled, but certainly not designed as a lorry or van on which the crane was mounted or constructed.

I agree with the conclusions of Trollip, J.A. and Miller, A.J.A., and I am of opinion that the machines in

question fall under heading 84.22, and that the appeal
should be dismissed with costs.



RUMPFF, J.A.