

REPUBLIC OF SOUTH AFRICA

CASE NO.529/96

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between

COMMISSIONER FOR CUSTOMS AND EXCISE APPELLANT

AND

CAPITAL MEATS CC (IN LIQUIDATION) FIRST RESPONDENT

FEDECOSA (PTY) LIMITED

SECOND

RESPONDENT

BEFORE: VIVIER, HOWIE, SCHUTZ, STREICHER JJA and

MELUNSKY AJA

HEARD: 21 SEPTEMBER 1998

DELIVERED: 25 SEPTEMBER 1998

SCHUTZ JA

## JUDGMENT

### SCHUTZ JA:

This is a case about money. If the goods imported are to be classified as frozen mutton (to put the matter loosely) the customs duty is 400c per kg. On the other hand, if the classification is prepared mutton (again I put the matter loosely) the rate is 3c per kg. The provenance of the mutton is Australia or New Zealand. The statute under which duty is leviable is the Customs and Excise Act 91 of 1964 ("the Act").

Schedule 1 of the Act sets out the rates of duty payable on the vast variety of goods which are the subject of international trade. Goods are systematically grouped in sections, chapters and sub-chapters. The titles to these divisions are

provided for ease of reference only. The interpretation of the schedule for purposes of classification must be effected, first, with reference to the headings and their sub-headings falling under the chapters and sub-chapters. These headings give brief descriptions of the goods. The second source of interpretation is the notes to each section or chapter. These notes are a guide to interpretation.

The schedule also includes some general rules and notes for the purposes of classification. What I have said about the process of classification may be derived from the schedule itself, as also the lucid descriptions of it by Trollip JA and

Miller AJA in *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd*

1970 (2) 660 (A). Once a meaning has been given to the potentially relevant

words, and the nature and characteristics of the goods have been considered the

heading most appropriate to such goods must be selected: *International Business*

*Machines SA (Pty) Ltd v Commissioner for Customs and Excise* 1985 (4) SA 852

(A) at 863 G-H. For the purposes of answering the questions raised in this appeal

no more need be said on the law.

The appellant, the Commissioner for Customs and Excise, contends that the appropriate item for the goods imported is to be found in chapter 2 as item 0204.42, which reads:

"02.04 Meat of sheep or goats, fresh, chilled or frozen:

0204.4 Other meat of sheep frozen:

0204.41 Carcasses and half-carcasses

0204.42 Other cuts with bone in." (*My italics*)

Item 02.04 is a heading and item 0204.42 is an example of a sub-heading.

The respondents, Capital Meats CC (now in liquidation) and Fedeco SA (Pty) Ltd, contend that the appropriate item is 1602.90.90, which is contained in chapter 16. In part item 16.02 reads:

"16.02 Other prepared or preserved meat, offal or blood:

1602.90 Other, including preparations of blood of any animal: .10 Pastes

.20 Homogenised composite food preparations .50 Seasoned or marinated .90 Other." (My italics)

The manner in which the imported product was packaged was not in dispute. Mutton carcasses were cut into six portions, comprising forequarters, hindquarters and middle sections. The portions were then chilled but not frozen. Bread crumbs were applied manually. The moisture on the surface of the meat facilitated their adhesion. Thereafter the portions were placed in plastic wrappings which were packed in cartons. The meat was then frozen and transported by sea. When later opened the product presented itself as frozen raw mutton with bread crumbs stuck to it. There were also loose bread crumbs in the boxes. Those crumbs which did adhere to the meat could easily be removed by manual wiping or brushing.

The court a quo held for the respondents, so that the lower rate was found to apply. That court granted leave to appeal to this court.

The explanatory notes to the chapter notes of chapter 2 provide the

following guidance on whether goods fall under that chapter or chapter 16:

"Distinction between meat and meat offal of this Chapter and those of Chapter 16.

This Chapter covers meat and meat offal in the following states only, whether or not they have been previously scalded or similarly treated but not cooked:

- ( 1 ) Fresh (including meat and meat offal, packed with salt as a temporary preservative during transport).
- ( 2 ) Chilled, that is, reduced in temperature generally to around 0 °C, without being frozen.
- ( 3 ) Frozen, that is, cooled to below the product's freezing point until it is frozen throughout.
- ( 4 ) Salted, in brine, dried or smoked.

Meat and meat offal, slightly sprinkled with sugar or with an aqueous solution of sugar are also classified in this Chapter.

Meat and meat offal in the states referred to in Items (1) to (4) above remain classified in this Chapter whether or not they have undergone tenderising treatment with proteolytic enzymes (e.g., papain) or have been cut, chopped or minced (ground). In addition, mixtures or combinations of products of different headings of the Chapter (e.g., poultry meat of heading 02.07 covered with pig fat of heading 02.09) remain classified in this Chapter.

Meat and meat offal not falling in any heading of this Chapter are classified in Chapter 16, e.g.:

- (5) Sausages and similar products, whether or not cooked (heading 16.01).
- (6) Meat and meat offal cooked in any way (boiled, steamed, grilled, fried or roasted), or otherwise prepared or preserved by any process not provided for in this Chapter, including those merely covered with batter or bread crumbs, truffled or seasoned (e.g., with pepper and salt), as well as liver pastes and pates (heading 16.02).

It should be noted that meat and meat offal of this Chapter remain classified here even if put up in airtight packings (e.g., dried meat in cans). In most cases, however, products put up in these packings have been prepared or preserved otherwise than as provided for in the headings of this Chapter and, accordingly, are classified in Chapter 16." (My italics)

The chapter notes to chapter 16 state:

"This Chapter does not cover meat, meat offal, fish, crustaceans, molluscs or other aquatic invertebrates, prepared or preserved by the processes specified in Chapter 2 or 3."

The note to heading 16.02 contains a partial counterpart to sub-paragraph (b) in the chapter 2 note already quoted. In

listing what does fall under heading 16.02 the following is included:

"(3) Meat and meat offal prepared or preserved by other processes not

provided for in Chapter 2, including those merely covered with batter or bread crumbs, truffled, seasoned (e.g., with both pepper and salt) or finely homogenised . . . (My italics)

"Truffled", according to the Shorter OED means "cooked, garnished, or stuffed with truffles". The notes contain a special definition of "homogenised preparations" which need not be quoted.

Referring only to the headings and sub-headings I would say that the goods are clearly "other meat of sheep frozen. . . other cuts with bone in" (i e item 0204-42) rather than "other prepared or preserved meat. .. other" (i e item 1602.90.90). Mr Joubert, who appears for the Commissioner argues, in the first instance, that this is already the end of the matter, that once meat has been preserved by freezing it falls under chapter 2. I find it unnecessary to decide the merits of this submission. The respondents, to the contrary, contend that there can be uncertainty whether the meat in question is frozen (in which case chapter 2 applies) or prepared (in which case chapter 16 applies) so that it is legitimate to



have regards to the phrase in the notes to chapters 2 and 16 "including those merely covered with bread crumbs." Stress is placed on the words "merely" and "including." The effect of the words, so it is contended, is to make the goods subject to chapter 16. The Commissioner, on the other hand, contends that the phrase does not have this effect when it is read in its context. He relies particularly on the words in the explanatory notes to chapter 2 "otherwise prepared or preserved by any process not provided for in this Chapter." This is his alternative argument, which I now address.

The word "otherwise" relates to the cooking of meat. The processes that are provided for in chapter 2 (and which consequently do not fall within the ambit of chapter 16) are salting for temporary preservation, chilling, freezing, salting, brining, drying, smoking, sugaring, tenderizing, cutting, chopping, mincing and mixing. Any other process for preparing or preserving meat falls under chapter 16. The words "prepared" and "preserved" read together with the word "process"

are, in my opinion, defining words which also govern what follows. Those

qualities of the first two of these words is emphasized by their use in heading

16.02 ("prepared or preserved meat").

The respondents argue that the effect of the word "including" is, as it were, to elevate the phrase "merely covered" etc out of the sentence and give it

substantive existence independent of the preceding words. In other words, the

contention is that once meat is covered with bread crumbs the enquiry is already

concluded, and there is no question of the subject matter of the phrase being part

of a wider class. I do not agree. In the words of the judgment in *Puerto Rico*

*Maritime Shipping Authority v ICC* 645 F 2d 1102,1112 n 26 (DC Cir 1981): "It

is houbok law that the use of the word including indicates that the specified list

... is illustrative, not exclusive" (quoted in *Gamer A Dictionary of Modern Legal*

*Usage* 2 ed 431). The effect of reading the passage in the notes in accordance with

this statement is that the included words are subject to the requirements of

preparation, preservation and process. One may speculate as to why they were mentioned and why they were qualified by the word "merely." The officers in the customs sheds are not normally equipped with treatises on the principles of statutory interpretation, and it may well have been considered that the cases mentioned might otherwise give rise to doubt. Truffling, in the sense of stuffing with truffles, or seasoning, with salt and pepper or some other seasoning, might be such marginal cases, deserving of clarification.

The important governing word is "prepared". Crumbing by the manual application of crumbs may be a process, particularly as salting is implicitly recognized as a process. Preservation is not, I think, relevant to this case, as a dusting with crumbs could hardly have a preservative purpose. The contrary was not argued. So that for the respondents to succeed such a process would have to amount to preparation. In relation to food the word "prepare", according to the Shorter OED, bears the meaning "To make ready for eating". In the context I

consider that this is the appropriate meaning, not the more general one preferred by the court a quo "To put beforehand into a suitable condition for some action . . ." etc. A crumbed pork chop or a wiener schnitzel made ready for cooking would have been prepared in the culinary sense. If the carcasses had been cut into serving portions and then crumbed the case might just have been arguable. But the scattering of crumbs on large hunks of meat would not be accepted as preparation by any cook worthy of the name and there is no word of evidence to lead us to a different view. However, the judge a quo opined that even if such crumbing might not prepare mutton for cooking, it might prepare it for the retail or wholesale trade. How this could be has not been demonstrated on the evidence and I cannot perceive any worthwhile preparation for this purpose, unless it be to reduce the trade price by reducing the duty. I would add that the conjoining of covering with bread crumbs and covering with batter fortifies the conclusion that what is contemplated is preparation for cooking and not something else.

My conclusion is that item 0204.42 is clearly the appropriate item.

Prior to the hearing of the appeal the first respondent was liquidated and a liquidator has been appointed. Mr Puckrin appeared for both the liquidator and the second respondent.

The appeal succeeds with costs, such costs to include the costs of employing two counsel.

The judgment of the court a quo is set aside and substituted with the following:

"The application is dismissed with costs, including the costs of the interlocutory application; all such costs to include the costs of employing two counsel."

W P SCHUTZ  
JUDGE OF APPEAL

CONCUR VIVIER JA HOWIE JA STREICHER JA MELUNSKY AJA