



IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case no 368/2001
REPORTABLE

In the matter between

Lewis Stores (Pty) Ltd

Appellant

and

The Minister of Finance

First Respondent

The Commissioner of the South African Revenue Service

Second

Respondent

Before: Howie, Schutz, Streicher, Brand JJA and Lewis AJA

Heard: 2 September 2002

Delivered: 6 September 2002

Customs duty – classification – whether pots and pans plated with gold

JUDGMENT

SCHUTZ JA

[1] The issue in this case is whether certain imported pots and pans are plated with gold.

[2] The appellant is the importer, Lewis Stores (Pty) Ltd (hereinafter ‘the importer’). The first respondent is the Minister of Finance. He abides the result. The second respondent is the Commissioner for the South African Revenue Service. He is responsible for the levying and collection of customs duty. I shall refer to him as ‘Customs’.

[3] Before setting out the statutory provisions relevant to this case I would adopt a passage from the judgment of Trollip JA in *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd* 1970 (2) SA 660 (A) at 675D-F explaining the structure of that part of the Customs and Excise Act 91 of 1964 (the Act) with which we are concerned. Trollip JA stated:

‘The duty which is payable is set out in Schedule 1 of 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 goods each covers. Within each chapter and sub-chapter the specific type of goods within the particular class is itemised by 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.’ (Emphasis supplied.)

[4] The sub-headings relevant to this case appear in Chapter 73 of Part 1 of

Schedule 1 to the Act in the following context:

	'73.23 Table, Kitchen or Other Household Articles and Parts Thereof, of Iron and Steel; Iron or Steel Wool; Pot Scourers and Scouring or Polishing Pads, Gloves and the Like, of Iron or Steel:		
		
	7323.10	Iron or steel wool	
		
	7323.93	Of stainless steel:	
	.20	Hollowware for kitchen or table use (<i>excluding those plated with precious metal</i>)	30 %
.90	Other		20 %
.....	' (Emphasis supplied.)		

[5] The item 73.23 above is a heading and the succeeding item 7323.93 is a sub-heading. The later sub-sub-headings 7323.93.20 and 7323.93.90 are the ones relevant to this case. The parties are agreed that the pots and pans have to be classified under the one or other of these sub-sub-headings. This is so because they are hollowware made of stainless steel, the only question being whether they are plated with a precious metal – in this case gold. The percentages 30 % and 20 % reflect the different rates of duty applicable to the two items. Customs contends for the higher rate (item 20) and the importer for the lower (item 90).

[6] The first 'note' that is of importance is contained in Schedule 1 of the Act under the heading 'General Notes'. It is numbered A.1 and reads in its setting:

- 'A General Rule for the interpretation of this Schedule
Classification of goods in this Schedule shall be governed by the following principles:
1. The titles of Section, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined

according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions:

In the *Thomas Barlow* case (above) Trollip JA commented upon these words (at 675H-676A):

‘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.’

[7] Rule 6 under the ‘General Notes’ deals with sub-headings in these terms:

‘For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis matandis*, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this Rule the relative section and chapter notes also apply, unless the context otherwise applies.’

[8] Also relevant to the interpretation of the sub-headings are the ‘explanatory notes’ published by the World Customs Council, Brussels (formerly the Customs Co-operation Council, Brussels). Section 47 (8) (a) of the Act provides that the interpretation of a heading or subheading ‘shall be subject to’ these notes. In *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise* 1985 (4) SA 852 (A) Nicholas AJA held (at 864A-C) that these notes are not to be regarded as peremptory injunctions, as all that s47 (8) requires is that an interpretation should conform to, and not be contrary to, the Brussels notes. One of these notes which is relevant to this case reads:

‘These articles (falling under heading 73’23) may be cast, or iron or steel sheet,

plate, hoop, strip, wire, wire grill, wire cloth, etc., and may be manufactured by any process (moulding, forging, punching, stamping, etc.). *They may be fitted with lids, handles or other parts or accessories of other materials provided that they retain the character of iron or steel articles.*’ (Emphasis supplied.)

[9] In the *International Business Machines* case (above) Nicholas AJA further stated (at 863G-H):

‘Classification as between headings is a three-stage process: first, interpretation – the ascertainment of the meaning of the words used in the headings (and relevant section and chapter notes) which may be relevant to the classification of the goods concerned; second, consideration of the nature and characteristics of those goods; and third, the selection of the heading which is most appropriate to such goods.’

[10] Taking interpretation first, the expression hollowware for kitchen or table use, made of stainless steel, is clear. The expression ‘plated with gold’ has been the subject of argument. By whatever process it is achieved, the notion of gold plating is plain enough. But must the whole be plated and if not the whole, where must the plating be? These questions, should they arise, are not answered by the exclusionary words used in 7323·93·20, ‘those plated with precious metal’, because they tell of plating, but not of its location or extent. However, I would think that if one says that a thing is plated the ordinary meaning conveyed is that it is all plated. The SOED gives as the first two meanings of the verb ‘to plate’ the following: ‘1. *To cover*, or overlay with plates of metal, for ornament, protection, or strength; *to cover* (ships, locomotives, etc.) with armour-plates. 2. *To cover* articles made of the baser metals with a coating of gold or silver; also iron with tin’ (emphasis

supplied). This second meaning is the one that must govern in this case. The provision in the Brussels notes concerning lids, handles, other parts and accessories, is of assistance. But before proceeding it is necessary to describe the goods. Such a description is relevant also to the second and third enquiries, as it is the essence of the second and necessary for an approach to the third.

[11] The goods imported consist, first, of a 12 piece set consisting of a frying pan and 11 pots, and, secondly, of a 12 litre stock pot, having the same construction and design as the pots in a set. The pots and their lids and the pans are made of stainless steel. It is to be emphasised that the hollowware in the narrow sense, that is the pot or pan without a lid or handle, is made of stainless steel and bears no gold plating. The handles and lid knobs are made of bakelite and they are partly gold plated, but overall the aureate sheen is dim. The plating is very thin, but that is of no matter as it is there. The mass of the gold is some 0,0008 % of the total mass of the pot and lid but, again, it is there. The plating is said to cover roughly 10 % of the external surface area of the pot and lid and roughly 5 % of the total surface area internal and external (although to my unskilled eye the percentages are even less). Although the pot sets are advertised in print and by television as a 'Gourmet Gold Cookware Set', the packaging emphasises their stainless steel nature and expounds the benefits of the same. So much for the second stage of the classification, the consideration of the nature and characteristics of the goods.

[12] I come to the third stage, the selection of the most appropriate heading. If I had first had sight of one of the products with an eye unbedevilled by learned

argument, I do not think that it would have occurred to me to call it gold-plated. I think I would have called it a stainless steel pot and might have added that the handles and the knob on the lid were decorated with gold plate. And if I had bought one as a gold-plated pot without first having seen it I would have been offended to have received a steel pot with some golden trimmings but no gold plating. It would, in my opinion, be more appropriate to call the pot a steel pot, albeit with trimmings, than to call it a pot plated with gold.

[13] Mr Puckrin, for Customs, has also placed emphasis on the note quoted in para [8] above. He contends that the pot itself (the hollowware) is the essential article, and that it is not plated with gold at all. Ergo. I agree with Mr Puckrin's argument that if only the handles and the knob are plated, they are, in terms of the note, to be regarded as mere ancillaries that cannot enoble the character of the entire article.

[14] The importer relies on some American decisions, to the effect that it is sufficient if the plating is not an 'insignificant or negligible part'. See, for instance, *Saji & Kariya Co et al v United States* (No 1907). 9 Ct Cust Appls 78 (1919). The legislation there considered is not identical to that before us and in any event we are not bound by these decisions. When I look at the products before us, the plated area is indeed negligible and, as I have said, it would not have occurred to me to call them gold-plated. But the case against the importer is even stronger. Given the ordinary meaning of the word 'plated', the matter is to be approached the other way round. Unless the unplated area is insignificant a

product could not properly be said to be plated.

[15] Accordingly, I am of the view that the correct tariff description is contained in 7323.93.20, so that the higher duty of 30 % is attracted.

[16] Very correctly, both counsel agreed to play the ball instead of the man. By this I mean that they agreed that if a decision on the tariff classification went against the importer that would dispose of the appeal. This had the effect of rendering unnecessary of decision some very complicated arguments which were addressed to us and which I need not describe. At the root of them was the operation of s47(11), as it was in 1998. For the importer it was argued before us that there had been no determination at all by Customs in respect of the goods still in contention. However, much as the parties may have been at odds below, everybody, including the judge, was of the view that an appeal against a determination was being argued. I say this merely to warn that in the future Conradie J should not be seen as having decided any more than what he did decide – namely what the correct tariff classification was. In my opinion he was correct on that score, and, that being so, his order was the correct one and does not need to be disturbed or altered in any way.

[17] The appeal is dismissed with costs, including the costs of two counsel.

W P SCHUTZ

JUDGE OF APPEAL

CONCUR

**HOWIE JA
STREICHER JA
BRAND JA
LEWIS AJA**