**IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

CASE NO:375/2013

**Reportable**

In the matter between:

**COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE** **Appellant**

**and**

**TERRAPLAS SOUTH AFRICA (PTY) LTD** **Respondent**

**Neutral Citation:** *SARS v Terraplas South Africa (Pty) Ltd* (375/2013) [2014] ZASCA 69 (23 May 2014).

**Coram:** NAVSA, MHLANTLA & LEACH JJA, VAN ZYL & MOCUMIE AJJA

**Heard:** 12 May 2014

**Delivered:** 23 May 2014

**Summary:** **Customs and excise – import duty – approach to tariff classification – prior decisions revisited and applied – plastic interlocking tiles for protection of turf surfaces in stadia not a floor covering contemplated in specific tariff heading – novelty of article not a consideration in interpretation exercise.**

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**ORDER**

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**On appeal from**: The North Gauteng High Court, Pretoria (Makgoka J sitting as court of first instance).

The following order is made:

1. The appeal is upheld with costs including the costs of two counsel.
2. The order of the court a quo is set aside and substituted with the following:

'The appeal in terms of s 47(9)(*e*) of the Customs and Excise Act 91 of 1964 is dismissed with costs, such to include the costs consequent upon the employment of two counsel.'

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**JUDGMENT**

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**Navsa JA (Mhlantla & Leach JJA and Van Zyl & Mocumie AJJA concurring):**

[1] This is an appeal directed at a decision of the North Gauteng High Court (Makgoka J), which upheld an appeal by Terraplas (Pty) Ltd (Terraplas) against a tariff determination made by the appellant, the Commissioner for the South African Revenue Service (the Commissioner), in terms of the provisions of s 47(9)*(a)*(i)(*aa*) of the Customs and Excise Act 91 of 1964 (the Act). The tariff determination in question was that certain plastic tiles imported by Terraplas were classifiable under tariff heading 3926.90.90. The high court upheld the contention by Terraplas that the tiles were inappropriately classified by the Commissioner and concluded that they ought rightly to have been classified under tariff heading 3918.90.40. I shall, in due course, deal with the tariff classifications and their implications. The question we have to answer is whether the high court was correct in the aforesaid conclusion. In what follows hereafter, the abbreviation 'TH' is sometimes used in substitution for 'tariff heading'.

[2] The present litigation is best understood in the light of the fact that the classification by the Commissioner would attract import duty at the rate of 10 per cent whilst the tariff heading contended for Terraplas and upheld by Makgoka J, would see an import duty of only 1,3 per cent being imposed. As Schutz JA, dealing with import duty on mutton, said in *Commissioner for Customs and Excise v Capital Meats CC(in liquidation)* 1999 (1) SA 570 (SCA), 'this is a case about money.'

[3] Terraplas conducts business as an importer and distributor of products described as 'terratile (terraflor) pitch protection tiles' and 'terratrak plus temporary driveable roadway tiles'. The tiles are imported from Terraplas PLC, Derby, United Kingdom. I shall for the sake of convenience and for present purposes refer to all of these products as 'the tiles'.

[4] The background leading up to the present appeal is set out in this paragraph and the paragraphs that follow. During November 2010, Terraplas instructed its clearing agent to enter two consignments of tiles for home consumption in terms of the provisions of the Act. In terms of the bill of entry, the tiles were entered under TH3918.90.20. The Controller of Customs, Cape Town, instructed the clearing agent to pass vouchers of correction to 'read 3918.90.40'. Terraplas lodged an internal administrative appeal against the tariff determination. In March 2011 the Controller of Customs in Cape Town informed Terraplas that the Commissioner determined the tiles to be classifiable under TH3926.90.90. In response Terraplas made use of the alternative dispute resolution procedure provided for in section 77I of the Act.

[5] On 19 August 2011 Terraplas was informed that the National Appeal Committee of the South African Revenue Services had, on 18 August 2011, confirmed the tariff classification of the tiles under TH3926.90.90. Before resorting to the litigation in the

court below, Terraplas gave notice as required in terms of s 96(1)*(a)* of the Act of the intended litigation.

[6] Terraplas, as it was entitled to in terms of s 47(9)(*e*) of the Act, appealed the decision referred to in paragraph 5 to the high court. The high court first considered the nature of the tiles. In this regard it is instructive to take into account the description provided by Terraplas itself. The tiles are described as follows:

'The tiles imported by the applicant are manufactured by way of injection moulding from 100% virgin high-density polyethylene (HDPE). Each tile has dimensions of 1m x 1m x 30mm, and the tiles are pinned together in blocks of four, being 2m x 2m, and shipped on pallets. The tiles are especially designed to cover and protect the turf floor in stadiums, when they are being used, either wholly or partially, for non-sporting events. They allow for the passage of air and light, and create a moist atmosphere under the tile, without any noticeable build-up of heat, which are essential elements of keeping natural grass healthy and green.

The tiles are clipped together to form a solid, hard-wearing floor for events ranging from full-stadium concerts to small on-field gatherings, marquee flooring or dance floors. The tiles are suitable for use on both natural and synthetic turf foundations. The tile floors enable the installation of chairs, staging and other equipment, and can support forklifts and other heavy moving equipment.'

The photographs that appear hereafter are the best depiction of the product in question. The descriptions by the manufacturers that appear alongside the photographs are also helpful.

[7] In a further document apparently distributed by Terraplas, and on which it relied when making its case in the court below, the following description of the tiles appears:

'[T]erratile is the latest system manufactured in the UK by Terraplas plc – the **World's No. 1 Turf Protection company**. It is designed to protect the turf playing area at Stadiums when they are being used for non-sporting events.

It allows the passage of air and light and creates a moist atmosphere under the tile, without any noticeable build-up of heat – essential elements for keeping natural grass healthy and green.

It is also designed to prevent rubbish & non-desirable liquids from passing through to the turf – whether natural or artificial.'

The attributes and physical characteristics of the tiles, as described in this and preceding paragraphs, are common cause.

[8] Having considered the nature of the tiles, Makgoka J went on to have regard to the tariff classification relied upon by the contesting parties. First, he had regard to the tariff classification upon which the Commissioner made his determination, namely, TH3926.90.90. In doing so he took into account at the outset tariff heading 39.26 which reads as follows:

'OTHER ARTICLES OF PLASTICS AND ARTICLES OF OTHER MATERIALS OF HEADINGS 39.01 TO 39.14'

The subheadings then refer to various articles, inter alia, as follows:

'3926.10 - Office or school supplies

3926.20 - Articles of apparel and clothing accessories (including gloves, mittens and mitts)

.20 - Protective jackets and one-piece protective suits, incorporating fittings for connection to breathing apparatus

.90 - Other

3926.30 - Fittings for furniture, coachwork or the like

3926.40 - Statuettes and other ornamental articles

3926.90 - Other

. . .

.90 - Other.'

[9] The high court then went on to note the tariff classification contended for by Terraplas, namely, TH3918.90.40. That included considering it within tariff heading 39.18:

'39.18 FLOOR COVERINGS OF PLASTICS, WHETHER OR NOT SELF-ADHESIVE, IN ROLLS OR IN THE FORM OF TILES; WALL OR CEILING COVERINGS OF PLASTICS, AS DEFINED IN NOTE 9 TO THIS CHAPTER:

3918.10 - Of polymers of vinyl chloride

3918.90 - Of other plastics

.20 - Of polyethylene terephthalates, not self-adhesive

.30 - Of silicones

.40 - Of other condensation, polycondensation or polyaddition products

.90 - Other.'

[10] The high court was of the view that the issue for determination was whether the tiles were 'floor coverings' as contemplated by tariff heading 39.18, and went on to say:

'On the one hand, the commissioner contends that the turf surface of a stadium is not a floor, and on the other, that the same surface, when covered by the tiles, is a floor. This is clearly untenable.'

Later, the court below agreed with the submission on behalf of Terraplas that the interpretation contended for by the Commissioner was too restrictive. It went on to conclude that the appropriate tariff heading was that proposed by Terraplas, namely 3918.90.40. Makgoka J upheld the appellants appeal with costs, 'concomitantly setting aside of the commissioner's tariff determination'.

[11] Section 47 of the Act provides for duty to be paid in terms of Schedule 1 of the Act. The Republic of South Africa is a party to the General Agreement on Tariffs and Trade and is a member of the World Customs Organisation, which employs the International Harmonized System referred to in the Act. Part 1 of Schedule 1 to the Act, comprising the section and chapter notes, the General Rules for the Interpretation of the Harmonized System and the tariff headings, is a direct transposition of the nomenclature of the Harmonized System. In *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd* 1970 (2) SA 660 (A) at 675D, this court described the Schedule as being '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'.

[12] In *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise* 1985 (4) SA 852 (A), this court had regard to the major conventions dealing with customs tariffs to which South Africa was a signatory. In relation to the convention on Nomenclature the aims were recorded:

'(*a*) to establish a common basis for the classification of goods in national customs tariffs;

(*b*) to facilitate comparison of the customs duties applicable in the various countries to all goods entering into international commerce;

(*c*) to simplify international customs tariff negotiations;

(*d*) to facilitate the comparison of international trade statistics;

(*e*) to provide governments and traders alike with a firm guarantee of the maximum uniformity in the classification of goods in national customs tariffs; and

(*f*) to facilitate international trade and thus to contribute to its expansion.'

[13] Mechanisms exist for appropriate steps to be taken to ensure international uniformity in the interpretation and application of the Nomenclature. Section 47(8)(*a*) of the Act states the following:

'The interpretation of –

3. any tariff heading or tariff subheading in Part 1 of Schedule No. 1;

4. (*aa*) any tariff item or fuel levy item or item specified in Part 2, 5 or 6 of the said Schedule, and

(*bb*) any item specified in Schedule No. 2, 3, 4, 5 or 6;

(iii) the general rules for the interpretation of Schedule No. 1; and

(iv) every section note and chapter note in Part 1 of Schedule No. 1,

shall be subject to the International Convention on the Harmonized Commodity Description and Coding System done in Brussels on 14 June 1983 and to the Explanatory Notes to the Harmonised System issued by the Customs Co-operation Council, Brussels (now known as the World Customs Organisation) from time to time: Provided that where the application of any part of such Notes or any addendum thereto or any explanation thereof is optional the application of such part, addendum or explanation shall be in the discretion of the Commissioner.'

[14] So too, s 47(8)(*b*) provides:

'The Commissioner shall obtain and keep in his office two copies of such Explanatory Notes and shall effect thereto any amendment of which he is notified by the said Council from time to time and shall record the date of effecting each such amendment and any such amendment shall, for the purposes of this Act, be effective from the date so recorded.'

The ‘Council’ referred to in the subsection is, of course, the Council mentioned in the preceding subsection, namely the Customs Co-operation Council, Brussels, now known as the World Customs Organisation.

[15] In *Thomas Barlow* this court stated that the relevant headings and section and chapter notes are not only the first, ‘but the paramount consideration in determining which classification, as between headings, should apply in any particular case’. Rule 1 of the General Rules for the Interpretation of the Harmonised System states:

‘The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes . . . .’

It is necessary to record that this court has consistently taken the view that the explanatory notes in the Schedule may be used 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.

[16] An interpretation of Schedule 1, for the purposes of classification, is therefore effected first, with reference to the headings and their subheadings falling under the chapters and sub-chapters. The headings give brief descriptions of the goods. A second source of interpretation are the notes to each section or chapter which operate as a guide. The Schedule also includes general rules and notes for the purposes of classification. Once a meaning has been given to the potentially relevant words, the nature and characteristics of the goods must be considered and the heading most appropriate to such goods be selected.

[17] I turn to consider the submissions made in relation to the tariff heading relied upon by Terraplas, first set out in para 9 above and which I repeat here for convenience:

'39.18 FLOOR COVERINGS OF PLASTICS, WHETHER OR NOT SELF-ADHESIVE, IN ROLLS OR IN THE FORM OF TILES; WALL OR CEILING COVERINGS OF PLASTICS, AS DEFINED IN NOTE 9 TO THIS CHAPTER.'

It was submitted that one should first have regard to the dictionary definition of the word 'floor'. In the *Shorter Oxford English Dictionary* 'floor' is said to mean the following:

'**I** a level structure in a house or other building. **1** The layer of boards, bricks, tiles, stones, etc., covering the base of a room or other compartment; the lower surface of a room . . .

**II** A level space. **6** An artificial platform or levelled space designed for a particular activity . . .

**III** A surface as a foundation. **9** A surface on which something rests, a foundation.'

[18] In the founding affidavit by Terraplas in the court below it was contended that the tiles are primarily used to create a hardwearing floor area upon a level area which would otherwise be damaged by the activity which can safely take place on the tiled floor. The tiles are placed on the floor of a stadium or similar area. The stadium floor falls naturally within the various definitions of 'floor' which have been referred to above. Furthermore, so it was contended, the tiles, when laid in a stadium, constitute a protective covering and that it was a 'floor covering' in the natural sense of a covering which forms or acts as a floor.

[19] Any one of a number of dictionary meanings of a word is not necessarily conclusive in the interpretation of words and phrases in statutes and documents. Meanings have to be determined contextually. Returning to tariff heading 39.18, it appears to me that it encompasses plastic articles which are in some way enhancements of existing floor surfaces. The floor coverings envisaged in tariff heading

39.18 would conceal an existing floor. The envisaged floor coverings are not in themselves regarded as a ‘floor’, hence the description in the tariff heading as floor coverings.

[20] It was contended on behalf of Terraplas that there is no justification in the tariff heading for the grouping together by the Commissioner of ‘floor’, ‘wall’ and ‘ceiling’, compelling the conclusion that ‘floor’ must be restricted to a ‘floor’ within a building. So, it was submitted, a self-standing single wall could be covered with a plastic covering catered for by the tariff heading relied upon by the Commissioner. An assumption in this regard in favour of Terraplas does not overcome what appears to be evident from the tariff heading itself, namely that in relation to walls and ceilings, as with floors, what appears to be in contemplation are enhancements to each of those surfaces, the use of which appears to extend beyond an immediate purpose, such as protective turf cover in a stadium for a singular event. Put more starkly, there is no basis upon which to conclude that the floor coverings referred to were intended to encompass the protection of turf in sports stadia. Put even more emphatically and decisively, a soccer, rugby or other pitch is not a floor. The ground at a stadium has cover – grass cover. The tiles are intended to preserve that grass cover and to enable it to continue to prosper. That the interlocking tiles constitute a floor of a very temporary nature does not qualify them as a floor covering.

[21] On behalf of the Commissioner, it was submitted that the words ‘whether or not self-adhesive’ within tariff heading 39.18 can only be read to mean that the tiles classifiable under this tariff heading have to, in some way, adhere to the floor. It was contended on behalf of Terraplas that the words ‘whether or not’ only meant that the plastic articles could be self-adhesive or not. It was submitted that the tariff heading did not exclude floor coverings that did not adhere to the floor but could merely be placed on it. In my view, as stated above, the articles in question were contemplated as articles that would, in some way, cover or conceal an existing floor. Whilst I prefer the view

propounded by the Commissioner, the reasons why the Commissioner's tariff determination is to be preferred are those stated in the preceding two paragraphs.

[22] Counsel on behalf of Terraplas urged us to consider that the Schedule in question contained a 'more or less static list' and to be careful not to force into a specific category an article that might not have been in the contemplation of its compilers. The contention was further that a novel article would not have been catered for and that we should bear this in mind in considering the appropriate classification. In dealing with this proposition it is necessary to point out at the outset that there was no evidence of any kind indicating when products of the kind in question were first introduced into international trade. The tiles are constructed of high-density polyethylene which is a plastic. Plastics and articles thereof are catered for as extensively as one would have thought possible under s VII of the Schedule and Chapter 39 where under the tariff headings in question reside. Simply put, there is no question of novelty. Questions of novelty of design are more appropriately addressed in patent infringement cases. The short answer to the proposition on behalf of Terraplas is that there are mechanisms to update lists and that catch-all categories such as the one proposed by the Commissioner, provided they are applicable, were resorted to to deal with articles not specifically catered for. There is no authority, nor would one expect there to be, indicating directly or even tangentially, that the novelty of an article renders a different interpretive process.

[23] In the light of those conclusions, and in the absence of any other specific tariff heading, the Commissioner's determination of 'other' under tariff heading 3926.90.90 is to be preferred.

[24] The following order is made:

The following order is made:

5. The appeal is upheld with costs including the costs of two counsel.

2. The order of the court a quo is set aside and substituted with the following:

'The appeal in terms of s 47(9)(*e*) of the Customs and Excise Act 91 of 1964 is dismissed with costs, such to include the costs consequent upon the employment of two counsel.'

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MS NAVSA

JUDGE OF APPEAL

APPEARANCES:

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| FOR APPELLANT: | Adv J A Meyer S.C. (with him L M Maite) |
| | Instructed by: |
| | The State Attorney, Pretoria |
| | The State Attorney, Bloemfontein |
| FOR RESPONDENT: | Adv. J P V McNally S.C. |
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