THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 764/2021

In the matter between:

SAMSUNG ELECTRONICS SA (PTY) LTD **APPELLANT**

and

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

Neutral citation: *Samsung Electronics SA (Pty) Ltd v The Commissioner for the South African Revenue Service* (Case no 764/2021) [2022] ZASCA 126 (28 September 2022)

Coram: PONNAN, PLASKET and HUGHES JJA and MOLEFE and SIWENDU AJJA

Heard: 30 August 2022

Delivered: 28 September 2022.

Summary: Customs and Excise Act 91 of 1964 – classification of smartphone as a ‘telephone for cellular networks’ for customs duty.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mngqibisa-Thusi J, sitting as court of first instance):

The appeal is dismissed with costs, including those of two counsel.

JUDGMENT

Ponnan JA (Plasket and Hughes JJA and Molefe and Siwendu AJJA concurring):

[1] The question that arises for determination in this appeal is whether the Samsung Galaxy S7, commonly referred to as a smartphone (the product), is a 'telephone for cellular networks' or 'other apparatus for the transmission or reception of voice, images or other data'.

[2] The amount of customs duty payable upon importation depends on the tariff heading (TH) or sub-heading in Part 1 of Schedule 1 to the Customs and Excise Act 91 of 1964 (the Act), under which the product is to be classified. The respondent, the Commissioner for the South African Revenue Service (the Commissioner), is empowered by s 47(9)*(a)*(i)*(aa)* to determine tariff headings or subheadings under which imported goods shall be classified. On 27 September 2017, the Commissioner notified the importer of the product, Samsung Electronics SA (Pty) Ltd (the appellant), of a tariff determination made the previous day that the product, which had been imported and entered on a bill of entry dated 4

October 2016, was to be classified under TH 8517.62.90 as ‘machines for the reception, conversion and transmission or regeneration of voice, images or other data’ (the first determination). The effect of the first determination meant that the product attracted no ad valorem duty upon importation.

[3] Section 47(9)*(d)*(i)*(bb)* empowers the Commissioner to amend or withdraw any determination, if it was made in error, and make a new determination. On 20 November 2017, the Commissioner notified the appellant that he was considering withdrawing the first determination with retrospective effect. On 11 April 2018, the Commissioner did indeed withdraw the first determination as having been made in error, and determined that the product would be classified under tariff heading 8517.12.10 as ‘telephones for cellular networks or for other wireless networks, designed for use when carried in the hand or on the person’ (the second determination).

[4] The appellant unsuccessfully appealed against the second determination to the Gauteng Division of the High Court, Pretoria (the high court) under s 47(9)*(e)* of the Act. The matter was heard by Mngqibisa-Thusi J on 11 and 12 November 2019. Sixteen months were to elapse before the learned judge delivered judgment on 18 March 2021, in which she upheld the Commissioner’s second determination. The further appeal to this Court is with her leave.

[5] The appeal is concerned with the proper interpretation of the competing tariff headings in Part 1 of Schedule 1 of the Act. The essence of the dispute between the parties is whether, prior to 1 April 2018, the product was correctly

classifiable under TH8517.62.90 (as contended by the appellant) or TH8517.12.10 (as contended by the Commissioner).

[6] Section 47(8)*(a)* of the Act provides, *inter alia*, that the interpretation of any tariff heading or tariff subheading in Part 1 of Schedule 1, the general rules for the interpretation of Schedule 1 and every section note and chapter note in Part 1 of Schedule 1, shall be subject to the International Convention on the Harmonized Commodity Description and Coding System (the Harmonised System) done in Brussels on 14 June 1983 and the explanatory notes to the Harmonised System issued by the Customs Co-Operation Council, Brussels (now known as the World Customs Organisation (WCO)) from time to time. The Harmonised System is a multipurpose international product nomenclature developed by the WCO. It serves as the basis for customs tariffs and for the compilation of international trade statistics of over two hundred countries (of which 158 countries are contracting parties to the Convention) and economies. It comprises more than 5000 commodity groups; each identified by a six-digit code, arranged in a legal and logical structure and is supported by well-defined rules to achieve uniform classification. The maintenance of the Harmonised System is a WCO priority and includes measures to secure uniform interpretation of the Harmonised System and its periodic updating in the light of developments in technology and changes in trade patterns.[1]

[7] As observed in *Commissioner for the South African Revenue Service v Toneleria Nacional RSA (Pty) Ltd*:

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[1] See World Customs Organization *What is the Harmonized System* available from http://www.wcoomd.org/en/topics/nomenclature/overview/what-is-the-harmonized-system.aspx. See also World Customs Organization *The new 2022 Edition of the Harmonized System has been accepted* available from http://www.wcoomd.org/en/media/newsroom/2020/january/the-new-2022-edition-of-the-harmonized-system-has-been-accepted.aspx

'The Harmonised System . . . is constructed on the basis that from the outset it includes all products in the course of trade, whether in existence or still to be invented and manufactured. In other words, there are no gaps that need filling or updating. Every product is capable of being classified using the process of classification described above. If a product is thought to sit uncomfortably within the applicable tariff heading or subheading, that may justify an approach to the Harmonised System Committee of the World Customs Organisation for a revision of the relevant tariff heading or sub-heading, but that is not a matter for a national court. The Harmonised System is the product of international agreements between states, and like any international agreement it should as far as possible be interpreted uniformly by national courts. It should not be subjected to an approach to interpretation the proper purview of which is purely domestic legislation.'[2]

[8] The General Rules for Interpretation that are referred to in s 47(8)*(a)* of the Act: (i) are applied in a hierarchical fashion – rule 1 takes precedence over rule 2, rule 2 over rule 3 etc.; (ii) establish classification principles which, unless the text of headings, sub-headings or section or chapter notes otherwise require, are applicable throughout the Harmonised System nomenclature; and (iii) provide a step-by-step basis for the classification of goods within the Harmonised System so that, in every case, a product must first be classified in its appropriate 4-digit heading, then to its appropriate 1-dash sub-division within that heading and only thereafter to its appropriate 2-dash sub-heading under the 1-dash sub-division. This principle applies without exception throughout the Harmonised System.

[9] Interpretative Rules 1, 3 and 6, which are relevant for present purposes, provide:

Rule 1

[2] *Commissioner for the South African Revenue Service v Toneleria Nacional RSA (Pty) Ltd* [2021] ZASCA 65; [2021] 3 All SA 299 (SCA); 2021 (5) SA 68 (SCA) para 25.

‘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:’

Rule 3

‘When by application of Rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

(c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.’

Rule 6

‘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 mutandis, 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 requires.’

[10] As it was put in *Distell Ltd v Commissioner of South African Revenue Service*:

'In *Secretary for Customs and Excise v Thomas Barlow and Sons Ltd* Trollip JA referred to Rule 1 of the Interpretative Rules which states that the titles of sections, chapters and sub-chapters are provided for ease of reference only and 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 and (unless such headings or notes otherwise indicate) according to paragraphs 2 to 5 of the Interpretative Rules. He pointed out that this rendered the relevant headings and section and chapter notes not only the first but also the paramount consideration in determining which classification should apply in any particular case. The Explanatory Notes, he said, merely explain or perhaps supplement the headings and section and chapter notes and do not override or contradict them. In *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise*, Nicholas AJA identified three stages in the tariff classification process:

"first, interpretation – the ascertainment of the meaning of the words used in the headings (and relative 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."

There is no reason to regard the order of the first two stages as immutable.'[3]

[11] The competing tariff sub-headings in this case are:

'8517.12 - Telephones for cellular networks or for other wireless networks'

'8517.62 - Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus.'

The full heading of TH 8517 is:

'Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network) (excluding transmission or reception apparatus of heading 84.43, 85.25, 85.27 or 85.28).'

This is broken down at the fifth digit as follows:

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[3] *Distell Ltd and Another v Commissioner of South African Revenue Service* [2010] ZASCA 103; [2011] 1 All SA 225 (SCA) para 22.

'8517.1 – Telephone sets, including telephones for cellular or for other wireless networks'
'8517.6 – Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local area or wide area network)'.

8517.62, which is a subheading of 8517.6, refers to 'Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus'. The selection in TH 8517.62.90 of 'other' is the identification of the product as an unspecified machine under this heading.

[12] It was said in *Commissioner, SARS v Komatsu Southern Africa (Pty) Ltd (Komatsu)*:

'It is clear from the authorities that the decisive criterion for the customs classification of goods is the objective characteristics and properties of the goods as determined at the time of their presentation for customs clearance. This is an internationally recognised principle of tariff classification. The subjective intention of the designer or what the importer does with the goods after importation are, generally, irrelevant considerations. But they need not be because they may in a given situation be relevant in determining the nature, characteristics and properties of the goods.'[4]

[13] In *Commissioner for the South African Revenue Service v The Baking Tin (Pty) Ltd*, this Court had occasion to clarify the last sentence of the quoted excerpt from *Komatsu*, which had been invoked in support of the argument that 'the intention of the designer, or the use to which the goods are put, may affect what appear to be the objective characteristics of the goods and thus change their classification.' It did so in these terms:

[4] *Commissioner, South African Revenue Service v Komatsu Southern Africa (Pty) Ltd* [2006] ZASCA 156; [2007] 4 All SA 1094 (SCA); 2007 (2) SA 157 (SCA) para 8.

‘It seems to me, however, that the court was suggesting no more than that light may be thrown on the characteristics of the article by subjective factors. The principle remains the same: it is not the intention with which they are made, nor the use to which they may be put, that characterise the containers in question. It is their objective characteristics. Thus the mere fact that the containers are regarded as disposable by The Baking Tin, and perhaps other suppliers and manufacturers in the chain, does not necessarily make them disposable by nature.’[5]

[14] Notwithstanding an unnecessarily voluminous record, the appellant’s case rests on the following two essential propositions: first, although the product performs the function of a cellular telephone, it is a multifunctional machine; and, second (and this is linked to the first), by reason of its multifunctional nature, the product’s principal function is not that of a telephone for cellular networks. In the alternative, if the principal function cannot be identified, the invocation of general rule 3(c) requires a tariff heading with a later numerical order.

[15] The appellant accordingly contends that it is necessary to identify a ‘principal function’ and that in interpreting ‘telephones for cellular network’ the correct starting point is to identify a meaning for a ‘telephone’ from dictionaries and to then marry that to the concept of ‘cellular network’. However, the context requires an interpretation to give meaning to the expression ‘telephones for cellular networks’ as one composite concept rather than interpreting the word ‘telephone’ in accordance with its historical meaning, whilst simply ignoring the expression ‘cellular networks’. In this regard, it is important to recognise that whilst recourse to authoritative dictionaries is a permissible and often helpful method available to courts to ascertain the ordinary meaning of words, judicial interpretation cannot be

[5] *Commissioner for the South African Revenue Service v The Baking Tin (Pty) Ltd* [2007] ZASCA 100; [2007] SCA 100 (RSA); [2007] 4 All SA 1352 (SCA); 2007 (6) SA 545 (SCA) para 13.

undertaken, in the words of Schreiner JA, by 'excessive peering at the language to be interpreted without sufficient attention to the contextual scene'. [6]

[16] The appellant ignores to a large extent the wording of TH 8517.60 and the explanatory notes to the tariff heading or that most of the 'other functions' of the product are completely unrelated to TH 8517.60. Thus, in attempting to identify a 'principal function' the appellant overlooks the objective characteristics of the product, which identify that the product's principal function is a telephone for cellular networks. The appellant's analysis, commences with the use of dictionaries, some dating to the 1980s to explain the meaning of a 'telephone'. It focuses on the transmission and reception of sound or voice/speech as the defining feature of a telephone. Whilst this may well have been true at the time of the grant of a patent to Alexander Graham Bell in the late 19th century, what a telephone is and what a telephone does has changed with the evolution of technology. The definition of a 'telephone' advanced by the appellant relates to the early technology referred to as 'plain old telephone service (POTS)'. Telephony has since evolved to digital telephony – the communication of digital data, where voice is digitised and transmitted as data, which gave rise to VoIP (Voice over Internet Protocol) technology.

[17] The Oxford English Reference Dictionary (2ed) (1996) defines a 'cellphone' as 'a small portable radio telephone having access to a radio system'. It contains no entry for mobile phone or smartphone. The Concise Oxford English Dictionary (11ed) (2004) defines both a 'cellphone' and 'cellular phone' as a 'mobile phone'. The same definition is to be found in the 12th edition (2006). A 'mobile phone', in

[6] *Jaga v Dönges N O and Another; Bhana v Dönges N O and Another* 1950 (4) SA 653 (A); [1950] 4 All SA 414 (A) at 423; *Fundstrust (Pty) Ltd (In Liquidation) v Van Deventer* 1997 (1) SA 710 (A) at 726H- 727B.

turn, is defined as ‘a portable telephone using a cellular radio system’.[7] And, a ‘smartphone’ is described as a ‘mobile phone which incorporates a palmtop computer or PDA (personal digital assistant)’.

[18] The description of the product as a smartphone is not the use of a colloquialism. The concept of a smartphone as a word in the English language has been established over a period of time relative to a rapidly evolving technology. It has come to be defined as:

‘a cell phone that includes additional software functions (such as email or an Internet browser)’;[8]

‘a mobile phone that can be used as a small computer and that connects to the internet’;[9] and

‘a mobile telephone with computer features that may enable it to interact with computerized systems, send e-mails, and access the web’.[10]

The 12th edition of the Concise Oxford English Dictionary describes it as -

‘a mobile phone that is able to perform many of the functions of a computer, typically having a relatively large screen and an operating system capable of running general-purpose applications’.

[19] A smartphone has thus come to be understood as a modern type of mobile phone or cellular phone. Contrary to the thesis advanced by the appellant, namely that a smartphone is an apparatus that has evolved to the point of no longer being a cellular phone, but rather some other apparatus that operates over a cellular network, the language of the appellant and the appellant’s literature produced in

[7] Similar meanings are ascribed to the word ‘cellphone’ in the the Merriam-Webster and Collins dictionaries. The former defines it as ‘a portable usually cordless telephone for use in a cellular system’ (https://www.merriam-webster.com/dictionary/cell%20phone) and the latter as ‘a phone that you can carry with you and use to make or receive calls wherever you are’ https://www.collinsdictionary.com/dictionary/english/cellphone.
[8] Merriam-Webster available from https://www.merriam-webster.com/dictionary/smartphone.
[9] Cambridge Dictionary available from https://dictionary.cambridge.org/dictionary/english/smartphone.
[10] Collins Dictionary available from https://www.collinsdictionary.com/dictionary/english/smartphone.

evidence indicate that a smartphone (including the product) is simply an evolved and more advanced cellphone than earlier cellphones.

[20] The explanatory notes of the tariff heading divide telephones into line telephone sets and telephones for cellular networks or for other wireless networks. The description of line telephone sets primarily accords with original telephony, the conversion of sound to signal, which is transmitted and the receipt of the transmission and conversion of the signal back to voice. However, the development of technology, which incorporates the capacity for reception and transmission of data such as the incoming caller's number, date, time and duration of call or that many of these devices utilise a microprocessor or digital integrated circuits for the operation, is also recognised. The correct approach (which is far more appropriate), is to give meaning to the expression 'telephones for cellular networks' as a single concept (which it is), rather than a combination of two concepts, namely that of a 'telephone' (with the meaning ascribed to it in an earlier era) conjoined with a 'cellular network'.

[21] The explanatory notes describe the second group as telephones for cellular networks and other wireless networks. They have as their key feature the reception and emission of radio waves, which are received and re-transmitted by base stations or satellites and includes cellular phones or mobile phones. The transmission is not limited to voice or voice conversions. From the inception of the early cellular phone operating on the GSM (Global System for Mobile Communication) network, a telephone for cellular network was capable of transmitting not only voice but also data and images. The appellant's expert acknowledges that text messages and pictures commonly known as SMS (Short

Message Service) and MMS (Multimedia Messaging Service) can be sent and received by means of the GSM network.

[22] The evidence shows that cell phones were originally designed for simple voice communications. With the convergence of technology, most modern cell phones have additional capabilities to record spoken messages, send and receive text messages, take and display photographs or video, play music, surf the Internet, perform road navigation or immerse the user in virtual reality. The trend has thus been toward mobile phones that integrate mobile communication and computing needs. The appellant accordingly accepts that from the inception of cellular telephony the functionality of a cellular telephone includes not only the transmission and reception of voice but also the transmission and reception of images and other data.

[23] It follows in this context that the function of the telephone for a cellular network is not dictated only by ‘voice’. When reading the second part of TH 8517 and the reference to ‘other apparatus’ for the transmission and reception of voice, images or other data the context becomes apparent. This is that the first part refers to telephones for cellular networks that transmit and receive voice, images and other data, whilst what is contemplated in the second part of the heading is other apparatus, which like cellular telephones, transmit and receive voice, images and other data but are not telephones. The appellant appears to implicitly assume that the transmission and reception of images and other data is not a cellular telephony function and the fact that the product is capable of transmitting and receiving images and other data over the Internet generally demonstrates a function inconsistent with it being a telephone for a cellular network.

[24] The division of the tariff heading into two principal parts separated by the semi-colon followed by the words ‘other apparatus’ clearly indicates a mutually exclusive division. Telephones fall into the first part (8517.1) and what is covered by the second part (8517.6) are ‘other apparatus’ that is to say machines which are other than telephones. The significance of this is that if something is a telephone it cannot also be something ‘other than a telephone’. By reason of the context and wording, indicating that the divisions are mutually exclusive, a machine or apparatus cannot be prima facie classifiable under both 8517.1 and 8517.6. If it is prima facie classifiable under 8517.1, it cannot also be classifiable under 8517.6. This has an important consequence for the possibility of applying general rule 3. This, because general rule 3 can only be invoked where goods are prima facie classifiable under two or more headings. General rule 3 provides for cases in which there is an overlap – a product might arguably fall within the description of two different tariff headings. If the product is prima facie classifiable under 8517.1, there is no scope for an overlap because the context and express wording of TH 8517 does not allow for any overlap.

[25] The appellant seeks a classification under 8517.62.90 that the product is not a telephone for a cellular network but rather some sort of undefined other Internet browsing apparatus that is not a telephone. However, the objective characteristics of the product demonstrate that it is a telephone facility network: (i) the design is such that it is small enough to be carried in the hand or on the person with a large high resolution touch screen of approximately 5 inches (or 13 centimetres); (ii) it has a speaker at one end which is audible when placed against the operator’s ear and at the other end has a microphone to receive speech or voice from the

operator’s mouth; (iii) it has slots for the insertion of a sim card to operate as a telephone and communicate on a cellular network; and (iv) it has electronic keypads and software which enable the user to dial a telephone number to initiate a telephone call and to terminate a telephone call.

[26] The fact that the product can connect to the Internet and browse the Internet like a computer, either over a cellular network or WLAN (Wireless Local Area Network) does not make it more like a traditional laptop or desktop computer with which it shares Internet browsing functionality. Its size, construction and sim card capacity dictate that it is still a telephone. It is merely an advanced telephone following the natural progression of rapid technological advancement and although shares many features of communication technology common to computers, it clearly identifies as a telephone and not as some other apparatus.

[27] Accordingly, the most appropriate heading at the time of the determination was TH8517.12.10. It follows that the conclusion reached by the high court that the respondent’s second determination is correct, is inescapable. Consequently, the appeal must fail.

[28] In the result, the appeal is dismissed with costs, including those of two counsel.

V M PONNAN
JUDGE OF APPEAL

APPEARANCES

For appellant:	C E Puckrin SC (with J P Vorster SC)
Instructed by:	Cliffe Dekker Hofmeyr Inc, Sandton
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