



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

**Reportable
Case No: 301/2022**

In the matter between:

**SILVERBACK TECHNOLOGIES CC
OMNICO (PTY) LTD
CYTEK CYCLE DISTRIBUTORS CC**

**FIRST APPELLANT
SECOND APPELLANT
THIRD APPELLANT**

and

**COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICE**

RESPONDENT

Neutral citation: *Silverback Technologies CC & Others v Commissioner, South African Revenue Service (301/2022) [2023] ZASCA 128 (09 October 2023)*

Coram: PETSE AP and MABINDLA-BOQWANA and WEINER JJA and MALI
and MASIPA AJJA

Heard: 03 May 2023

Delivered: 09 October 2023

Summary: Revenue – customs duty – importation of bicycle parts for use in assembling bicycles – classification of such parts as constituting the essential character of a bicycle under tariff heading 8712.00.10 confirmed on further appeal.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mokoena AJ sitting as court of first instance):

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

JUDGMENT

Petse AP and Mali AJA (Mabindla-Boqwana and Weiner JJA and Masipa AJA concurring):

Introduction

[1] The present litigation involves a trilogy of cases that were heard together in the Gauteng Division of the High Court, Pretoria (the high court). They essentially raise the same question of law and fact that can conveniently be dealt with in a composite judgment. They primarily concern the classification, for purposes of customs duty, of certain bicycle parts imported into the country for use in assembling bicycles in order to determine the appellants' liability for import duties, if any.

[2] Section 47(1)¹ of the Customs and Excise Act² (the Act) provides, amongst other things, that customs duty is payable on certain goods imported into the country in accordance with the provisions of Part I of Schedule I (the Schedule) to the Act. The appeal raises the question whether the goods in question, ie. bicycle parts, as presented upon importation bear the essential character of a bicycle or are merely parts or accessories of a bicycle. The significance of this distinction lies in the fact that bicycle parts that bear the essential character of a bicycle are liable, under tariff heading 8712.00 of Part I of Schedule I to the Act, for import duties of 15 per cent of

¹ Section 47(1) reads:

'Subject to the provisions of this Act, duty shall be paid for the benefit of the National Revenue Fund on all imported goods, all excisable goods, all surcharge goods, all environmental levy goods, all fuel levy goods and all Road Accident Fund levy goods in accordance with the provisions of Schedule No. 1 at the time of entry for home consumption of such goods.'

² Customs and Excise Act 91 of 1964.

their value. By contrast, parts and accessories that lack the essential character of a bicycle are exempt from customs duty.

The parties

[3] The first appellant, Silverback Technologies CC (Silverback) is a close corporation registered in terms of the Close Corporations Act.³ It conducts business as an importer into and distributor of bicycle parts and accessories in the Republic of South Africa (RSA). The second appellant, Omnico (Pty) Ltd (Omnico), is an incorporated entity in terms of the company laws of the RSA. It, too, conducts business as an importer of bicycle parts for local distribution. Similarly, the third appellant, Cytek Cycle Distributors CC (Cytek Cycle) is a close corporation, which, as part of its name suggests, conducts business as an importer of bicycles and their parts for local distribution. For convenience, these parties will collectively be referred to as the appellants. But when it is convenient to refer to any one of them individually we shall do so by their respective names.

[4] The Commissioner for the South African Revenue Service (SARS) features as a respondent in each of the three cases. For convenience, we shall refer to the respondent as either the Commissioner or SARS, depending on the context.

Litigation history

[5] At different times during 2016 and 2017 the appellants independently instituted legal proceedings in the high court against the Commissioner. For its part, Silverback sought orders against SARS, *inter alia*, in the following terms:

'1. That the Respondent's tariff determinations (annexed to the Founding Affidavit as annexures "SV3", "SV4" and "SV6" determining the products under issue under tariff heading 8712.00.10, be set aside and replaced with a tariff determination under tariff heading 8714.19.

2. Alternatively to the above, that the tariff determination be set aside and replaced with a determination that the products are classified under TH8714.99 or further alternatively per corresponding part under TH8714.9.'

³ Close Corporations Act 69 of 1984.

[6] In view of the fact that the principal issue for determination in all three cases overlapped, they were heard together in the high court pursuant to a directive issued by the Acting Deputy Judge President.

[7] We pause here to mention that the proceedings in the high court were in truth appeals in terms of s 47(9)(e)⁴ of the Act against tariff determinations issued by the Commissioner pursuant to s 47(9)(a)⁵ of the Act against each one of the appellants. Also in contention in these proceedings were certain guidelines to which the Commissioner had regard in making his determinations.

[8] The issue to be determined by the high court was formulated by the parties as follows: whether the products, as presented on importation, are bicycles as such or parts and accessories of bicycles. Thus, in essence, the outcome of the litigation was to a large degree dependant on the proper interpretation of the General Interpretation Rule (GIR) 2(a) read with the relevant tariff heading and relative interpretation notes. The high court was therefore called upon to determine what constitutes the essential character of a bicycle in the light of the bicycle parts imported by the appellants, having regard to the most appropriate tariff heading. In this regard, it bears mentioning that according to GIR 2(a),⁶ an incomplete or unfinished article, including an article that is unassembled or disassembled, shall, for purposes of determining liability for import duties, be classified as a complete article. However, this is subject to the rider that such an article, in its condition as presented on importation, bears the essential character of the finished or complete article.

⁴ Section 47(9)(e) of the Act reads:

'An appeal against any such determination shall lie to the division of the High Court of South Africa having jurisdiction to hear appeals in the area wherein the determination was made, or the goods in question were entered for home consumption.'

⁵ Section 47(9)(a) of the Act reads:

'The Commissioner may in writing determine—

(aa) the tariff headings, tariff sub-headings or tariff items or other items of any Schedule under which any imported goods, goods manufactured in the Republic or goods exported shall be classified'.

⁶ General Interpretation Rule 2(a) reads:

'Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this Rule), presented unassembled or disassembled.'

[9] At the outset, it bears mentioning that before the high court, the appellants expressly disavowed any reliance on the expert evidence⁷ presented by them.⁸ They also brought applications (in all three cases) in which they sought that certain expert evidence presented by or on behalf of the respondent be struck out.⁹ We shall revert to the applications to strike out later.

[10] The main and interlocutory applications all served before Mokoena AJ. The learned Judge dismissed all of these applications in a composite judgment delivered in January 2022.¹⁰ The present appeal is against the dismissal of the appeals and is before us with the leave of the high court.

[11] As to the expert evidence presented by SARS, the learned Judge held that it was relevant and admissible on account of the fact that the court itself lacked the requisite skill to determine, without the aid of experts, how 'a bicycle is made up and functions and, the nature and characteristics of its components.' The learned Judge then proceeded to point out that Mr Du Toit (SARS's expert) could differentiate 'between two types of bicycles and their respective purpose' and how 'the different components which are part of the bicycle' work. And that because Mr Du Toit's credentials as a bicycle expert were not in dispute there was no cogent reason why the court should not have regard to his expert evidence. With respect to the expert evidence of Mr Stickells, the high court held that it supported, in material respects, that of Mr Du Toit. And although the appellants had disavowed any reliance thereon, such evidence remained part of the papers. Thus, so the high court concluded, absent its withdrawal or expungement, the high court was not only not at liberty, but also duty bound to consider it.

[12] Reverting to the merits of the case, the high court stated that they raised the question as to 'what the essential character or essence of a bicycle is.' It then adverted to SARS' answering affidavit in which the following assertion is made:

⁷ This was the expert evidence contained in the affidavit of Mr Graeme Stickells filed in the cases of Omnico and Cytek Cycle on the grounds that it constituted opinion evidence and therefore inadmissible on account of it being irrelevant.

⁸ No expert evidence was presented on behalf of Silverback.

⁹ This was the expert evidence presented by Mr Du Toit on behalf of SARS on the grounds that it was irrelevant and therefore inadmissible.

¹⁰ As consequential relief, the high court ordered the appellants to pay excise duty on the imported goods as previously determined by the Commissioner.

'The Respondent elaborated in its Answering Affidavit and said:-

"The guideline incorporates the six main bicycle components identified above. The frame and fork are required to be present. This is so because they are the "core components" to which all other components are attached. Also, these two components are central in recognising the product as a bicycle, both in design and appearance. Regarding the other components, the Commissioner is of the view that the presence of any two of those components (together with the frame and fork) would be sufficient to capture the essence of a bicycle." ' (Emphasis added by the high court.)

[13] After making reference to various guidelines,¹¹ the high court concluded that the bicycle parts imported by each of the appellants bore the essential character of a bicycle. Thus, so the high court held, the appellants were liable to pay customs duty on the articles imported by them as determined by the Commissioner. It was therefore on that footing that the appeals were dismissed.

Discussion

[14] As will have become readily apparent from what has been said thus far, this appeal is about import duty. In particular, it concerns the question whether the bicycle parts imported into the country by the appellants, properly classified, rightly attracted import duties. To answer this question, it is necessary first to determine which one between two tariff headings, namely tariff heading 8712.00¹² and 8714.9¹³ is applicable. If the imported goods are classified under tariff heading 8712.00.10, import duty will be payable. By contrast, if tariff heading 8714.9 is applicable, the relevant goods will be free of duty on importation. In order to classify the goods, in this instance bicycle parts, one must ask whether the parts, viewed collectively when assembled, have the essential character of a bicycle.

[15] It bears mentioning at this juncture that the relevant explanatory note to Chapter 87 states as follows:

¹¹ The guidelines are referenced in para 27 below.

¹² Tariff heading 8712.00 reads:

'Bicycles and other cycles (including delivery tri-cycles), not motorised.'

Sub-heading 8712.00.10 reads:

'Bicycles.'

¹³ Tariff heading 8714.9 reads:

'Other.'

Sub-heading 8714.91 reads:

'Frames and forks, and parts thereof.'

'An incomplete or unfinished vehicle is classified as the corresponding complete or finished vehicle provided it has the essential character of the latter.'

Then GIR 2(a), in turn, provides three examples of an incomplete or unfinished vehicle. For present purposes it is sub-paragraph (C) that has a bearing on what is at issue in this appeal. It reads:

'(C) A bicycle without saddle and tyres.'

[16] Classification of goods for purposes of import duties as between different tariff headings is 'a three-stage process'. This is what Nicholas AJA said in *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise*.¹⁴ The learned Judge of Appeal explained that the first stage involves interpretation, namely, '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.' Secondly, it involves the 'consideration of the nature and characteristics of those goods', and, thirdly, 'the selection of the heading which is most appropriate to such goods.'¹⁵

[17] Insofar as the first stage of the process is concerned, we need only state that the principles to be applied and the proper approach to adopt in the interpretation of statutory instruments (and any written document for that matter) are well settled. Thus, no useful purpose would be served by rehashing the oft-quoted passage from the judgment of this Court in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.¹⁶ Suffice it to state that in *Endumeni* this Court reiterated that the process of interpretation is a unitary and objective exercise that pays due regard not only to the text but also to the context and purpose of the document being interpreted.¹⁷

¹⁴ *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise* [1985] ZASCA 87; [1985] 2 All SA 596; 1985 (4) SA 852 (A) (*International Business Machines*).

¹⁵ *Ibid* at 863 B-C.

¹⁶ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18 (*Endumeni*).

¹⁷ See also: *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC) para 28; *Road Traffic Management Corporation v Waymark (Pty) Limited* [2019] ZACC 12; 2019 (5) SA 29 (CC) paras 30-32.

[18] The relevant interpretive principles were usefully summarised recently by the Constitutional Court in *Minister of Police and Others v Fidelity Security Services (Pty) Limited*¹⁸ thus:

'(a) Words in a statute must be given their ordinary grammatical meaning unless to do so would result in an absurdity.

(b) This general principle is subject to three interrelated riders: a statute must be interpreted purposively; the relevant provision must be properly contextualised; and the statute must be construed consistently with the Constitution, meaning in such a way as to preserve its constitutional validity.

(c) Various propositions flow from this general principle and its riders. Among others, in the case of ambiguity, a meaning that frustrates the apparent purpose of the statute or leads to results which are not businesslike or sensible results should not be preferred where an interpretation which avoids these unfortunate consequences is reasonably possible. The qualification "reasonably possible" is a reminder that Judges must guard against the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.

(d) If reasonably possible, a statute should be interpreted so as to avoid a lacuna (gap) in the legislative scheme.¹⁹

Cautioning that the triad of the text, context and purpose should not be used in a mechanical fashion, this Court in *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*²⁰ said the following:

'It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined.²¹

[19] It is against the foregoing backdrop that we now turn to deal with what is at the core of this appeal. As already mentioned above, the central issue is whether the learned Judge erred in upholding the determination made by the Commissioner, namely that the bicycle parts imported by the appellants had the essential character of a bicycle and, therefore, subject to payment of import duties.

¹⁸ *Minister of Police and Others v Fidelity Security Services (Pty) Limited* [2022] ZACC 16; 2022 (2) SACR 519 (CC).

¹⁹ *Ibid* para 34; see also *Chisuse and Others v Director-General, Department of Home Affairs and Another* [2020] ZACC 20; 2020 (6) SA 14 (CC) para 52.

²⁰ *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA).

²¹ *Ibid* para 25.

[20] It is apposite at this juncture to mention that in the high court the appeal of Silverback was by agreement between the parties selected as a test case. It was further agreed that the outcome of the Silverback appeal would also bind Omnico and Cytex Cycle.

[21] It is common cause between the parties that on 31 July 2015 Silverback imported a consignment of bicycle parts comprising the following:

Frame; fork; front derailleur; handlebar; complete brake set (ie. brake levers, cables, brake blocks and callipers); stem; grip; crank set (chainwheel and the two pedal arms); shifters; bottom bracket parts; saddle, seat posts; cables and or complete gear and brakes.

[22] Taking our cue from what Nicholas AJA said in *International Business Machines*,²² we are enjoined to consider at this point the second stage in the classification process, namely the nature and characteristics of the goods imported by Silverback. On this score, we record that the parties are in agreement as to the meaning of a bicycle.

[23] It is common cause that Silverback, Omnico and Cytex Cycle imported a wide variety of bicycle parts. And that none of these consignments contained bicycle wheels. Nevertheless, in terms of GIR 2(a), an incomplete or unfinished article, including an article that is unassembled, shall, for purposes of determining whether import duty is payable in respect of such article, be classified as a complete article if in its incomplete state as presented on importation, 'it bears the essential character' of a complete or finished article, such as a bicycle in this instance. We shall elaborate on this later.

[24] In making his determination as to whether customs duty was payable in respect of the consignments of imported bicycle parts, the Commissioner had regard to two relevant tariff headings, namely tariff headings 8712.00.10 and 8714.9. The former essentially provides that 'bicycles and other cycles, including delivery tricycles, that are not motorised are subject to customs duty of 15%.' And the latter,

²² See footnote 14 above.

in turn, provides that 'parts and accessories of vehicles under headings 87.11 to 87.13' are not subject to payment of customs duty.

[25] The all-embracing contention advanced by the appellants, briefly stated, is that on a proper interpretation of the wording of tariff heading 8712.00 read with the relevant chapter, section and explanatory notes, wheels are the indispensable components that give a bicycle its essential character. Absent the wheels, so the argument went, the collection of parts under consideration in these proceedings are but parts and accessories of bicycles which, as a result, lack the essential character of a bicycle. According to the appellants the wheels, together with the other parts, are what give a bicycle its essential character.

[26] For his part, the Commissioner contended that the nub of the issue is 'whether the collection of the imported parts represents the essential character of a bicycle'. In elaboration, the Commissioner submitted that in the context of the facts of this case the essential character of a bicycle ought to be determined with reference to all the components making up the consignments. Viewed in that light, counsel emphasised, the collection of the parts imported by the appellants were undoubtedly an embodiment of the essential character of a bicycle.

[27] The Commissioner further bolstered his case by employing the guidelines of Her Majesty's Revenue and Customs (HMRC), the European Union and the United Kingdom. HMRC referred SARS to the Combined Nomenclature Explanatory Note (CNEN) issued by Europe. The CNEN is contained in Regulation 2015/C 076/01. The Official Journal of the European Union, insofar as it pertains to this appeal, reads:

'8712.00 Bicycles and other cycles (including delivery tricycles), not motorised

This heading includes incomplete bicycles that have essential characteristics of complete bicycles (general rule 2(a) for the interpretation of the Combined Nomenclature).

An incomplete bicycle, whether or not assembled, is to be classified under heading 87 12 00 if it consists of the frame, the fork and at least two of the following components:

- a set of wheels;

- a crank-gear (see the explanatory note subheading 87 14 96 30);
- a steering unit (including handlebar and handlebar stems);
- a brake system.'

The decision of the Harmonised System Committee made by the World Customs Organisation (WCO) is to the effect that the three configurations provided by SARS were classified in heading 87.12 by application of GIRs 1 and 2(a). Whilst the appellants complained about the approach adopted by the Commissioner in classifying the relevant goods, it is generally accepted practice that members of the WCO follow the same approach. However, it must be said that the guidelines are by their nature only of persuasive force and are not meant to substitute or override principles of interpretation.

[28] It is necessary at this juncture to make reference to s 47(8)(a) of the Act. It reads, to the extent here relevant, as follows:

'The interpretation of—

(i) any tariff heading or tariff subheading in Part 1 of Schedule No. 1;

...

(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.'

The effect of this, we observe, is that in determining the fate of this appeal, we must have regard not only to the provisions of the Act and the relevant Schedule thereto but also to the tariff headings or tariff sub-headings and Explanatory Notes.

[29] As to the invocation of the relevant heading, read with relative sections and chapter notes and section and chapter notes when classifying particular goods, Trollip JA cautioned in *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd*²³ that 'one must bear in mind that they are merely intended to explain or perhaps

²³ *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd* 1970 (2) SA 660 at 676C-D.

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.'

[30] What this Court said in *Commissioner for the South African Revenue Service v Toneleria Nacional RSA (Pty) Ltd*²⁴ in relation to the 'Harmonised System' bears repeating. The Court said that '[...t]he 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.'²⁵

[31] Counsel for the appellants sought to circumvent the unequivocal statement in *Toneleria*, quoted in the preceding paragraph, and contended that *International Business Machines* is still good law insofar as customs administration and international organisations are concerned and that the Harmonised System is not authoritative in a South African court until it is reflected in an explanatory note as the latter decision was not overruled by *Toneleria*. That may well be so, but this is an issue we need not venture into for present purposes. However, what is beyond question is that South Africa is a signatory to the 1983 Brussels Convention and is therefore bound by its terms. As the Harmonised System is a product of international agreements between states that seek to promote uniformity in international trade relative to customs duty, it is as well to remember that in interpreting the Act, sub-headings and explanatory notes, national courts are enjoined to prefer any reasonable interpretation of the legislation that is consistent with international law.²⁶

What is the essential character of a bicycle?

[32] We now come to the contentions advanced on behalf of the appellants in relation to what is at the core of this appeal and the authorities relied upon in support of those contentions. By way of prelude, we pause to observe that the appellants

²⁴ *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) (*Toneleria*).

²⁵ *Ibid* para 25.

²⁶ See s 233 of the Constitution which reads:

'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'

submitted in their heads of argument that the essential character of a bicycle must be determined with reference to the meaning of the words employed in the tariff headings. And that such words must be given their ordinary meaning in the light of their context. In *Autoware (Pty) Ltd v Secretary for Customs and Excise*²⁷ Colman J had occasion to consider, for purposes of customs duty, whether a certain type of vehicle was a panel van or an incomplete station wagon. The learned Judge found that the relative simplicity and low-cost modification was not a decisive criterion, because the enquiry does not turn on what the product was going to be or what it will be adapted to be. Rather, the court must consider what the product was at the time of importation.

[33] Colman J continued to say that the issue—

'... must be decided on the basis of the presence or absence, in the unmodified vehicle, of the essential features or components of a station wagon. . . What I mean by an essential feature of a station wagon is not a feature which is important, for one reason or another, or even one which is necessary for the proper functioning of a station wagon. I mean a feature which is essential in that it embodies the essence of a station wagon, and differentiate such a vehicle from others which are not station wagons.'²⁸

[34] Further, what this Court said in *Commissioner for the South African Revenue Service v L G Electronics SA (Pty) Ltd*²⁹ is instructive. Citing the statement by Colman J referenced in the preceding paragraph, this Court said:

'While it is clear that each determination must be according to the salient facts attaching to the goods in question (and, in particular, its objective characteristics), and while in one case an engine may properly be regarded as the essence of the goods, in another a frame or chassis may be sufficient to satisfy the test.'³⁰

[35] We interpose here to observe that some of the well-known English Dictionaries define a bicycle as a 'vehicle consisting of two wheels held by a frame

²⁷ *Autoware (Pty) Ltd v Secretary for Customs and Excise* 1975 (4) SA 318 (W).

²⁸ *Ibid* at 327G-328A.

²⁹ *Commissioner for the South African Revenue Service v L G Electronics* [2010] ZASCA 79; 2012 (5) SA 439 (SCA).

³⁰ Para 15.

one behind the other, propelled by pedals and steered with handlebars attached to the front wheel.³¹

[36] Placing much store on definitions such as the one mentioned in the preceding paragraph, counsel for the appellants argued that wheels, in combination with a collection of some other parts, is what constitutes the essential character of a bicycle. In elaboration, counsel stressed that the essential character of a bicycle would be lacking where one or both wheels were absent. For this submission, counsel heavily relied mainly on the decision of the Australian Administrative Appeal Tribunal in *Toyworld Ltd and the Collector of Customs*.³² In *Toyworld* the Appeals Tribunal endorsed the contention that if one or both wheels are lacking whatever else remains will not have the essential character of a bicycle. Counsel for the appellants buttressed his argument with reference to s 233³³ of the Constitution that decrees that courts must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

[37] There are at least three insurmountable difficulties in the appellants' path. In the first place it is as well to remember that in interpreting any legislation our courts are enjoined to do so consistently with the Constitution. In addition, the expression 'the essential character of a bicycle' under consideration in this case must be interpreted purposively³⁴ and must also be properly contextualised.³⁵ The wording of the most appropriate heading, namely 8712.00 and the explanatory notes to Chapter 87, which must be read in conjunction with sub-heading 8712.00.10, are clear and unambiguous. GIR 2(a)(C), too, provides a clear example of an incomplete or unfinished vehicle (to be understood as a reference to a bicycle on the facts of this case).

³¹ See, for example, the Concise Oxford English Dictionary, Twelfth Edition by the Oxford University Press.

³² *Toyworld Ltd and the Collector of Customs* 1984 (7) ALD 67 (*Toyworld*).

³³ See footnote 26 above.

³⁴ *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining And Development Company Ltd and Others* [2013] ZACC 48; 2014 (3) BCLR 265 (CC); 2014 (5) SA 138 (CC) paras 84-86; *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (10) BCLR 1027 (CC); 2007 (6) SA 199 (CC) para 5.

³⁵ *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA); [2013] 3 All SA 291 (SCA) para 24; *KPMG Chartered Accountants (SA) v Securefin Limited and Another* [2009] ZASCA 7; 2009 (4) SA 399 (SCA) ; [2009] 2 All SA 523 (SCA) para 39; *Jaga v Dönges, NO And Another; Bhana v Dönges, NO And Another* 1950 (4) SA 653 (A) at 664E-H.

[38] Secondly, the appellants' reliance on s 233 of the Constitution is misplaced. Section 233 refers not to foreign law which is what *Toyworld* is all about. Rather, it explicitly refers to international law. There is a fundamental difference between international law on the one hand and foreign law on the other, a point that requires no elaboration.

[39] In the third place, the appellants' reliance on the decision of the Australian Administrative Appeal Tribunal in *Toyworld* is unavailing. This is so because in *Toyworld* the Appeal Tribunal undoubtedly placed great reliance on the important role of wheels which give a bicycle its functionality. But this is not what tariff heading 8712.00 read with GIR 2(a) and the explanatory notes to Chapter 87, on their proper interpretation, require.

[40] As already indicated, the relevant tariff heading – read in the context of GIR 2(a) (C) and explanatory notes in Chapter 87 – speaks not of a collection of parts constituting a bicycle. Rather, it speaks of parts that have 'the essential character' of a bicycle. Significantly, GIR 3(b)(viii) provides that the 'factor which determines essential character will vary as between different kinds of goods'. And by way of examples, it proceeds to, *inter alia*, state that this may be determined by the nature of the component, quantity or the role of the consistent material in relation to the use of the goods. Implicit in what GIR 3(b)(viii) says is that the nature and characteristics of the relevant goods must be determined. Thereafter, the most appropriate heading (and relative section and chapter notes) must be selected and applied.

[41] To our mind the distinction between that which constitutes a bicycle as a finished article on the one hand and what bears the essential character of a bicycle on the other hand is self-evident. In relation to the former the collection of the parts is transformed into a bicycle when assembled to produce a finished or complete product. By contrast, a collection of parts which do not produce a complete or finished product when assembled, may nevertheless have the essential character of the finished product. Differently put, whilst bicycle wheels, in combination with other parts, collectively make up a bicycle as a finished or complete article, their absence

does not have the consequence that the remaining parts will necessarily lack the essential character of a bicycle.

Application to strike out

[42] It remains to address two subsidiary issues advanced on behalf of the appellants. These relate to the expert evidence of both Mr Stickells and Mr Du Toit, the two expert witnesses called by the appellants and SARS respectively. With respect to the evidence of Mr Du Toit, it was submitted that the high court should never have relied on such evidence for two reasons. First, it was argued that Mr Du Toit was not an expert as he claimed. Secondly, it was submitted that what was presented as expert evidence was in truth opinion evidence which, by its very nature, was inadmissible. As to the first point the learned authors D T Zeffertt, A P Paizes and A St Q Skeen in *The South African Law of Evidence*³⁶ say the following:

'It is the function of the judge [including a magistrate] to decide whether the witness has sufficient qualifications to be able to give assistance. The court must be satisfied that the witness possesses sufficient skill, training or experience to assist it. His [or her] qualifications have to be measured against the evidence he or she has to give in order to determine whether they are sufficient to enable him or her to give relevant evidence. It is not always necessary that the witness's skill or knowledge be acquired in the course of his or her profession – it depends on the topic. Lack of formal training may indicate inadequate theoretical training but, in the circumstances of a particular case, this may be offset by practical experience. Thus, in *R v Silverlock* [1894] 2 QB 766 it was said that a solicitor who had made a study of handwriting could give expert evidence on the subject even if he had not made any professional use of his accomplishments.'

[43] In our view the appellants' argument falls to be rejected. There is nothing militating against the acceptance of Mr Du Toit's evidence as an expert witness. He asserted that he had acquired vast knowledge in bicycles through his extensive experience spanning some 30 years dealing with bicycles and their components. In the appellants' heads of argument, it was contended, that in his affidavit, Mr Du Toit did no more than merely express an opinion on matters that are in the exclusive domain of the court itself. This argument, too, must falter for the simple reason that, ultimately, at any rate it remains the task of the court to evaluate such evidence to

³⁶ D T Zeffertt and AP Paizes *The South African Law of Evidence* 3rd ed pages 337-338.

determine whether and to what extent the opinion expressed is founded on logical reasoning.³⁷

[44] Accordingly, taking a critical view of the tenor of Mr Du Toit's evidence, we can see no reason why reliance, albeit limited, cannot be placed on his views which are in no small measure aligned with those of Mr Stickells in certain material respects. With respect to the appellants' application to strike out Mr Du Toit's affidavit, it is well to remember that, as a general rule, a court will not grant an application for any matter to be struck out from any affidavit because such matter is irrelevant unless it is satisfied that the applicant will be prejudiced in his or her case if the alleged offending material is not struck out.³⁸ In the context of the facts of this case it is difficult to conceive of any prejudice that the appellants will suffer if their application is declined. And none has, in any event, been identified and articulated by the appellants.

[45] As to the evidence of Mr Stickells, it was argued that the high court erred in considering such evidence 'in circumstances where the appellants [had] indicated during argument that no reliance [was] placed on his evidence because [it] was inadmissible.' Moreover, it was emphasised that Silverback did not, for its part, rely on expert evidence at all. The point about the inadmissibility of Mr Stickells' expert evidence must fail for essentially the same reason already stated in relation to Mr Du Toit. The second contention that Silverback did not rely on expert evidence altogether cannot avail Silverback because all three appeals were, for convenience and by agreement, dealt with together on the basis that they involved the same question of law and based on facts as presented in the parties' affidavits.

Conclusion

[46] Therefore, for all the foregoing reasons the appeal must fail. In the result the following order is made:

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

³⁷ Compare: *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* [2001] ZASCA 12; 2001 (3) SA 1138 (A) para 36. There, the remarks were made in the context of a delictual claim; *Sentrachem Ltd v Prinsloo* 1977 (2) SA 1 (A) at 17A-D in which this Court held that the trial court was justified in regarding the respondent and his son as expert witnesses because of their sophisticated farming methods and scientific approach to farming.

³⁸ See Uniform Rule 6(15).

**X M PETSE
ACTING PRESIDENT
SUPREME COURT OF APPEAL**

**N P MALI
ACTING JUDGE
SUPREME COURT OF APPEAL**

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