THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 442/2017

In the matter between:

THE COMMISSIONER FOR THE

SOUTH AFRICAN REVENUE SERVICE **APPELLANT**

and

THE SOUTH AFRICAN BREWERIES (PTY) LTD **RESPONDENT**

Neutral citation: *The Commissioner for the South African Revenue Service v The South African Breweries (Pty) Ltd* (442/2017) [2018] ZASCA 101 (27 June 2018)

Coram: Ponnan, Wallis and Dambuza JJA and Davis and Rogers AJJA

Heard: 7 May 2018

Delivered: 27 June 2018

Summary: Revenue – Section 47 of the Customs and Excise Act 91 of 1964 – Classification of products for determination of excise duty rate – General Rules of Interpretation restated – classification of goods primarily on explanatory notes incorrect – appeal dismissed.

ORDER

On appeal from: Gauteng Division, Pretoria (Hughes J).

1 Save as set out in para 2, the appeal is dismissed with costs such costs to include the costs of two counsel.

2 Paragraph 3 of the order of the high court is set aside and substituted by the following:

'The said tariff determinations are replaced with tariff determinations in terms of Tariff Heading 2206.00.90 in Part 1 Schedule 1 to the Act and the Tariff Item 104.17.90 in Part 2A of Schedule 1 to the Act, from the date of the respondent's determination'.

JUDGMENT

Dambuza JA (Ponnan and Wallis JJA and Davis and Rogers AJJA concurring)

[1] This appeal concerns the correct classification of certain products for purposes of excise duty payable under the Customs and Excise Act 91 of 1964 (the Act). The products, known as 'flavoured alcoholic beverages or FABs', are manufactured by the respondent, the South African Breweries (Pty) Ltd (SAB), a manufacturer and distributor of alcoholic beverages.

[2] On 30 October 2013 the appellant, the Commissioner for the South African Revenue Service (the Commissioner), in the course of discharging his duties as the administrator of the Act, made a written determination in terms of s 47(9*)(a)(i)*[1] of the Act for purposes of assessment of excise duty payable in respect of the FAB's. In the determination, which was effective from 30 October 2011, the FAB's were classified

[1] In terms of s 47(9)*(a)* the Commissioner may determine in writing the tariff headings, tariff subheadings or tariff items of any Schedule under which any goods manufactured in the Republic shall be classified.

under tariff heading TH2208.90.22 and were therefore taxable under tariff item 104.23.26 in Part 2A of Schedule 1 to the Act. An appeal by SAB, in terms of s 47(9)(e) of the Act, against the determination, was upheld by the Gauteng Division of the High Court, Pretoria (Hughes J) (the high court). In effect the high court found that, as had been contended by SAB, the FAB's were classifiable under TH2206.00.85. That court then issued the following order:

'1 The appeal is upheld with costs such costs to include the employment of three counsel, two being senior counsel;

2 The respondent's tariff determinations of 30 October 2013, in terms of which the products referred to hereunder, were determined to fall within Tariff Heading 2208.90.22 in Part 1 of Schedule 1 to the Customs and Excise Act 91 of 1964 (the Act) and also under Tariff Item 104.23.26 of Part 2A of Schedule 1 to the Act is set aside:

2.1 Brutal Fruit Mango

2.2 Brutal Fruit Litchi

2.3 Brutal Fruit Strawberry

2.4 Brutal Fruit Peach

2.5 Brutal Fruit Lemon

2.6 Sarita Dry

2.7 Sarita Ruby Dry

2.8 Redds Original

2.9 Redds Dry

2.10 Blake & Doyle Premium and

2.11 Skelter's Straight

3. That the said tariff determinations be replaced with tariff determinations in terms of Tariff Heading 2206.00.85 in Part 1 of Schedule 1 to the Act and the Tariff Item 104.17.22 in Part 2A of Schedule 1 to the Act, from date of determination until 27 February 2013 and from there under TH22.06.90.

4 The products Blake & Doyle Premium and Skelter's Straight are not subject to the tariff determination of 30 October 2013

5 The respondent is ordered to pay the qualifying fees of the expert witnesses William John Simpson and the costs of Reading Scientific Services Ltd Laboratory, Qualtech (IFBM) Laboratory, AromaLAB AG Laboratory, Cara Technology Laboratory, Lorraine Geel and Christina Stephanie Leighton inclusive of expert's fees of the experts employed by the applicant locally and abroad.'

[3] The Commissioner appeals against the judgment of the high court, leave having been granted by that court. Having found that the FABs fell to be classified under TH2206.00.85 the high court granted leave to the Commissioner to appeal to this Court because of what it considered to be a conflict between the judgments of Miller AJA and Trollip JA in *Secretary for Customs and Excise v Thomas Barlow and Sons Ltd*.[2]

[4] From 2001 the FABs had been the subject of various determinations by the Commissioner. By September 2006 all of them were classified under TH2206.00.90, tariff item 104.17.22. On 30 October 2013 that classification was revised to TH2208.90.22 and therefore taxable under TH104.23.26. It is this last determination that is contested. SAB insists that the FABs should be classified under TH2206.

The legal framework

[5] The applicable legal framework is the following: Section 47(1) of the Act regulates, amongst other things, the levying of various taxes, including customs and excise duty, on all imported and excisable goods, in accordance with the provisions of schedule 1 thereto.[3] That schedule is divided into four parts corresponding to the four categories of goods mentioned in the charging provision. Part 1 imposes customs duty. Part 2 imposes, amongst others, specific and *ad valorem* excise duties. The FABs under consideration in this appeal are not imported and therefore do not attract customs duty. However, under s 37(1) of the Act excise duty is payable in respect thereof. Their classification in Part 1 of Schedule 1 is relevant, as the tariff items appearing in Part 2A of that Schedule (which stipulates excise payment rates for goods manufactured locally) refer back to the tariff headings and classification in Part 1.[4]

[6] Part 1 of Schedule 1 is divided into 21 sections and 97 chapters. This is intended to provide a comprehensive system of classification for all possible categories of goods and goods within each category. Classification of goods within

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[2] *Secretary for Customs and Excise v Thomas Barlow and Sons Ltd* 1970 (2) SA 660 (SCA).
[3] See the preamble to the Act.
[4] In terms of s 37(1) of the Act excise duty is payable in respect of goods manufactured in a customs and excise warehouse. It is not in dispute that the FABs in question are such goods.

the chapters is determined by 'the objective characteristics and properties of the goods'.[5] Within the chapters, classification of goods is further refined according to specified headings (the Tariff Headings (TH)) and sub-headings. As happened in this case, at times the Commissioner and taxpayers are not in agreement as to the applicable tariff heading in respect of specific goods. Section 47(8)*(a)* regulates the relevant interpretative regime as follows:

'**47 Payment of duty and rate of duty applicable**

(8)*(a)* The interpretation of─

(i) any tariff heading or tariff subheading in Part 1 of Schedule 1;

(ii) *(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 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 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.'

[7] Classification of goods between the headings in Part 1 of Schedule 1 is determined according to the prescripts of the general interpretative rules applicable to the whole of Part 1. Goods are classified according to the terms of the headings and the relevant section and chapter notes. The tariff headings within the chapters mirror the nomenclature of the Harmonized System established by an international convention to which South Africa is a signatory. The operation of the Harmonized System falls under the purview of the World Customs Organisation. In that system each heading is identified by a four digit code, of which the first two represent the chapter number and the last two the position of the heading in the chapter. The Harmonized System also prescribes general rules to ensure uniform interpretation.

[5] *Commissioner, South African revenue Services v Komatsu Southern Africa (Pty) Ltd* 2007 (2) SA 157 (SCA) para 8.

These rules establish step by step classification principles and are applied in hierarchical fashion.

[8] The Harmonized System plays a secondary role in the process of interpretation. The basic principles of statutory interpretation are to be invoked as a primary tool for determining the meaning applicable in the identification of taxable dutiable FABs. The starting point is that the language of the Schedule must be considered in context and given a sensible meaning.[6] The following useful approach articulated by Trollip JA in *Thomas Barlow* was affirmed by this court in *Distell Ltd and Another v Commissioner of South African Revenue Service* as follows:

'In *Secretary for Customs and Excise v Thomas Barlow and Sons Ltd* Trollip JA referred to Rule 1 of the Inerpretative Rules which states that the titles of sections, chapters and sub-chapters are provided for ease of reference only and that, for legal purpose, 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'.

[9] In *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise*[7] this Court identified the following three stages in the 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'.

[10] It is not in dispute that the FABs in question in this case are classifiable under Chapter 22 in Part 1 of Schedule 1. That chapter bears the heading 'Beverages, spirits and vinegar'. A chapter explanatory note clarifies that the goods in that chapter

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[6] *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun (Edms) Bpk* 2014 (2) SA 494 (SCA) at paras [10] to [12].

[7] *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise* 1985 (4) SA 852 (SCA).

fall into four main groups: water and non-alcoholic beverages and tea, fermented alcoholic beverages (beer, wine, cider, etc); distilled alcoholic liquids and beverages (liquors, spirits, etc) and ethyl alcohol, and vinegar and substitutes for vinegar.

[11] Within Chapter 22, FABs are classified under tariff headings TH22.03 to TH22.06 and in TH22.08. Tariff heading TH22.03 bears the heading 'Beer made from malt', TH22.04 relates to 'wine of fresh grapes, including fortified wines, grape must other than that of heading TH22.09', and TH22.05 relates to 'Vermouth and other wine of fresh grapes flavoured with plants and aromatic substances'. As already stated the dispute in this appeal is whether the SAB FABs are classifiable within TH22.06 or TH22.08.

[12] In relevant part the headings read as follows until 27 February 2013. TH22.06:

'**Other fermented beverages (for example, cider, perry, mead, sake); mixtures of fermented beverages and mixtures of fermented beverages and non-alcoholic beverages, not elsewhere specified or included**.

2206.00.05 - Sparkling fruit or mead beverages; mixtures of sparkling fermented beverages derived from the fermentation of fruit or honey ; mixtures of sparkling fermented fruit or mead beverages and non-alcoholic beverages

2206.00.15 - …

2206.00.85 - Other, mixtures of fermented beverages and mixtures of fermented beverages and non-alcoholic beverages, unfortified, with an alcoholic strength not exceeding 9 per cent by volume.

2206.00.90 - Other'

With effect from 27 February 2013 item 2206.00.85 was amended to read: 'Other mixtures of fermented fruit beverages or mead beverages and non-alcoholic beverages, unfortified, with an alcoholic strength of at least 2,5 per cent by volume but not exceeding 15 per cent by volume'.

[13] Tariff heading TH22.08 reads:

'**Undenatured ethyl alcohol of an alcoholic strength by volume of less than 80% vol; spirits, liqueurs and other spirituous beverages:**

2208.20 - Spirits obtained by distilling grape wine or grape marc

2208.30 - Whiskies

2208.40 - Rum and other spirits obtained by distilling fermented sugar-cane products obtained by distilling fermented sugar cane products
2208.50 - Gin and Geneva
2208.60 - Vodka
2208.70 - Liqueurs and cordials
2208.90 - Other'.

[14] The definitions of 'fermentation' and 'distillation' processes as set out in SAB's founding affidavit are not in dispute. Therein 'fermentation' is described as 'the transformation of carbohydrates, particularly sugars, into other compounds by microorganisms (without involvement of oxygen). An example of fermentation is the formation of ethanol and carbon dioxide by yeast, together with lesser amounts of glycerol and other by-products of fermentation as a result of their degradation of sugars. Alcoholic fermentation is usually effected by yeast belonging to the genus Saccharomyces'.

[15] Distillation is the 'process by which the components of a liquid mixture are separated from one another on the basis of a difference in their boiling point. This is achieved by heating the mixture to selectively vaporise the components, followed by re-condensing the resulting vapours. In production of distilled spirits, it is the primary method of separating ethanol from the aqueous solutions of alcohol derived from fermentation of sugars by yeast'. So in the production of alcoholic beverages, distillation is a further process – after fermentation – in order to achieve a higher alcohol concentration.

The opposing contentions

[16] In classifying the FAB's under TH22.08, the Commissioner relied on explanatory note 14 in that heading which provides for the inclusion of 'alcoholic lemonade' thereunder. The expert evidence established that the FABs would qualify as 'alcoholic lemonade' as that term is understood in the trade. It was argued that because alcoholic lemonade (which is mentioned in TH22.08) can be produced by either fermentation or distillation, the absence of distillation in the production of the FABs could not be the basis for exclusion from TH22.08. Further, for the FABs to qualify for classification under TH2206.00.85 (as contended for by SAB) each of the

components (alcoholic and non-alcoholic) had to be beverages in their own right. In this case the FABs were not a mixture of two main components; they were merely flavoured alcohol produced by adding ingredients (eg flavourants, colourants, sweeteners) to the base alcohol. Instead of a true non-alcoholic component as contemplated in TH22.02, the non-alcoholic components were only a preparation as contemplated in TH21.06 (read with explanatory note 7 in the relevant sub-heading). For these submissions the Commissioner relied on General Rule of Interpretation 1 (GRI 1), alternatively GRI 4.

[17] SAB on the other hand contended that the FABs were fermented alcoholic beverages which could only be properly classified under TH22.06 (with the corresponding tariff item 104.77). That tariff heading provides for all fermented beverages other than those not resorting under TH22.03, TH22.04 and TH 22.05. The argument was that the FABs were mixtures of a fermented beverage and a non-alcoholic beverage and should thus be classified under TH2206.00.85 until 27 February 2013 and under TH2206.00.90 thereafter, and had not been specified or included elsewhere (in the chapter). They contained no distilled alcohol and could not be classified under TH22.08. (The reason for SAB's acceptance of the change in classification as from 27 February 2013 is that, with effect from that date, classification under TH2206.00.85 required the fermented beverage to be the product of fermented fruit whereas the FABs are made from fermented maize.)

[18] In support of this argument SAB referred to the uncontested evidence concerning the the production process of the FABs. (1) The first stage, which is outsourced to Tongaat Hulett due to economic and efficacy considerations, entails the production of dextrose syrup from maize. Maize is soaked and heated to allow starch, protein and oil portions to be separated. The starch portion, now a wet 'slurry', is heated to 'gelatinise' it, and then treated with enzymes derived from microorganisms. The sugars are concentrated by evaporation and thereafter delivered to SAB's breweries as unfermented dextrose syrup. (2) The next production stage takes place at the SAB breweries' 'Brewhouse' and 'Cellars' areas at Chamdor, Newlands and Prospecton. There the dextrose syrup is diluted with water. The sugars released at this stage are fermented by yeast to produce ethanol, carbon dioxide, glycerol and flavour compounds. The carbon dioxiode formed during

fermentation is retained, resulting in a mildly carbonated alcoholic base. The alcoholic base is produced at ‘high gravity’ (either 12.3% or 7.6% alcohol by volume (ABV). (3) The third phase involves the addition of various non-alcoholic components by an in-line process in which the components are added to the alcohol base in a particular sequence as the liquid flows through the pipeline. These additions include water (to standardise the base at 7% alcohol content), carbon dioxide (to supplement the carbonation from the fermentation process), flavourants, stabilisers, acidity regulators, colourants and so forth. Some of these additives are in liquid form, so that the end-product has an alcohol content ranging from 4.5% to 5.5% depending on the particular FAB.

[19] At no stage is there distillation. Hence glycerol, which is not found in distilled FABs, remains present in the fermented alcohol base. Further, unlike distilled products in which almost all flavour is stripped from the base component (save those associated with ethanol), SAB’s fermented beverage base has a ‘huge’ variety of flavour compounds and these contribute significantly to the flavours of the final FABs. Although there is a factual dispute on the papers as to whether and to what extent the alcohol base and the FABs retain any flavour peculiar to maize (as distinct from other plant sources of sugar), it is common cause that they have flavour characteristics distinctly attributable to the fermentation by yeast of the dextrose syrup. The evidence is further that the alcohol base and the FABs are markedly different from solutions of distilled spirit of equivalent alcohol strength.

[20] It followed therefore, contended SAB, that, by their nature, the beverage mixtures fell within TH22.06 (more particularly sub-heading 2206.00.85) as mixtures of ‘fermented alcoholic beverages and non-alcoholic beverages’. And, by virtue of GRI 1 , they should be classified under that tariff heading.

Correct classification

[21] In para 52 of *Distell* this Court held that:

‘In the specific context of TH22.06, the second half of the heading is directed at combinations of fermented beverages and non-alcoholic beverages which together result in a product which possesses a commercial or trade potential (as with all products in the tariff schedules)’.

[22] In this case it is significant that the Commissioner does not contend that the FABs are spirituous beverages. Nor is the 'fermented character' of the FAB in dispute. The Commissioner's argument rests not only on impermissibly subverting the heading to explanatory note 14 but also on misconstruing evidence. On the record, the evidence in this regard was that FABs can be produced in different ways; they can be made either from a non-distilled fermented base or from distilled spirit. Only where a FAB is made from distilled spirits can it be contemplated or included in TH22.08 as provided under explanatory note 14. Put differently, although 'alcoholic lemonade' in trade parlance may be capable of including FABs made from either fermented alcohol or distilled alcohol, in the context of TH22.08 an 'alcoholic lemonade' is a flavoured beverage conforming with the properties of beverages covered by TH22.08, ie made from distilled spirit or from ethanol which has otherwise lost the characteristics of fermented alcohol (this could occur by stripping processes not involving distillation).

[23] As stated above this court held in *Distell* that the headings are the first and paramount consideration in determining classification between headings. Where, as in this case, the distinctive feature (fermented beverage) of an FAB is clearly provided for in the tariff, it is impermissible to ignore the appropriate heading. While in this case the FABs may be capable of being classified under two headings, that would only serve to make Rule 3(a) of application and that rule would direct us to TH22.06. So whether classification is under GRI 1, on the footing that the FABs do not resort under TH22.08, or under Rule 3(a) on the basis that they may possibly fall under both 22.06 and 22.08, the outcome is the same.[8]

[24] General Rule of Interpretation 4, on which the Commissioner also relies, finds no application in this case. That Rule provides that:

'Goods which cannot be classified in accordance with the above Rules shall be classified under the heading appropriate to the goods to which they are most akin'.

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[8] Rule 3(a) says:
'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.'

It is clear that this Rule becomes relevant only when application of the preceding Rules (1, 2, and 3) does not yield any classification results. That is not the case here. The Commissioner has not alleged or shown that the goods cannot be classified by application of the preceding Rules.

[25] The main basis on which the Commissioner seeks to classify the FABs under TH22.08 (that is, the inclusion, under this heading, of 'alcoholic lemonade') creates a false conflict between heading TH22.08 and note 14 thereto. In *Thomas Barlow*, Miller AJA and Trollip JA[9] postulated instances of direct and irreconcilable conflict between an Explanatory Note and the terms of a relevant heading. But, it must be stressed that even in *Thomas Barlow* the conflict was hypothetical. In the end, the following principles enunciated by Trollip JA in that case have prevailed for almost five decades:[10]

'… [T]he primary task in classifying particular goods is to ascertain the meaning of the relevant headings and section and chapter notes, but, in performing that task, one should also use the Brussels Notes 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. 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. And, in any event, it is hardly likely that the Brussels Council intended that its Explanatory Notes should override or contradict its own Nomenclature. Consequently, I think that in using the Brussels Notes one must construe them so as to conform with and not to override or contradict the plain meaning of the headings and notes. If an irreconcilable conflict between the two should arise, which in my view is not the case here, then possibly the meaning of the headings and notes should prevail, because, although sec 47)(8)*(a)* of the Act says that the interpretation of the Schedule shall be subject to' the Brussels Notes, the latter themselves say in effect that the headings and notes are paramount, that is, they must prevail'.

[9] Miller AJA, whilst noting that the situation did not arise in that case remarked that 'the Brussels Notes appear to serve as guides and aids to classification properly to be made in accordance with the terms of the headings read with the relevant sections and chapter notes'.

[10] See also *Commissioner of Customs and Excise v Capital Meats CC (In Liquidation) and Another* 1999(1) SA 570 (SCA) [1998] ZASCA 80.

[26] The Commissioner's further complaint that TH22.06 does not contemplate alcohol produced only by fermentation of sugar must also fail. To recap, an example was made that a cider is expressly included in TH22.06 because it is 'an alcoholic beverage obtained by fermenting the juice of apples', and not by fermenting sugar extracted from apples or apple juice. The argument was that on a correct interpretation of TH22.06, only a cider produced by fermenting apple juice resorts under TH22.06. On SAB's argument, both sugar-based and juice-based fermented beverages would be classifiable under TH22.06. Such interpretation cannot be countenanced, so it was submitted. Further, so the argument went, the FABs contemplated in the second part to TH22.06 are those with unique organoleptic characteristics deriving from both components (ie from the fruit or vegetable and from the fermentation of the plant's sugar), whereas the FABs in question, or some of them, only result in fake ciders (with no unique organoleptic sense).

[27] However, it seems to me that what is of relevance in heading TH22.06 are the properties of the end-product which would derive their qualities from the fermentation process. It matters not whether the organoleptic properties of the beverage are referable only to the fermentation of sugar or to such fermentation as well as to the flavours of the base fruit or vegetable. TH22.06 does not justify SARS' contention that the beverage must retain flavours which are distinctive of the plant. It is common cause that the fermentation of dextrose syrup can and does result in distinct organoleptic qualities of fermentation which are desirable characteristics of the end-product.

[28] Tariff heading 22.08 for which the Commissioner contends, provides for *spirits, liqueurs and other spirituous beverages.* Spirits are by their nature, a concentrate and are made by a process of distillation. The FABs in question bear neither of these qualities. They do not have the qualities of or essence of distilled FABs.[11] And they are clearly not liqueurs. Neither the ascertainment of the meaning of the words used in TH22.08, nor the characteristics of the FABs, result in classification under that tariff heading.

[11] See the meaning of spirituous in the Oxford Dictionary.

[29] The Commissioner's reliance on *Distell 2* for its submission that beverages produced from fermented alcohol can be included in TH22.08 is misplaced. The nature of the FABs that were under consideration in *Distell 2* are distinguishable from those which form the subject in this appeal. Their production involved use of wine which had been stripped to neutralise its taste and then fortified with (distilled) cane spirits. The Court in that case held that:

'It is clear, when one has regard to the TH, that the beverages do not resort under tariff sub-heading 2208.20, in that they are not spirits obtained from distilling grape wine or grape marc. It is common cause that they do not fall under any of the other tariff sub-headings between 2208.30 and 2208.70. It is equally clear that they cannot be classified under tariff notes (A) or (B). As set out above the cane spirits was added to the stripped wine to boost alcohol content significantly. According to Taylor, he had tested all 15 beverages organoleptically and concluded that they all have a distinct spirituous character. Considering our line of reasoning set out above, in relation to the beverages in question, and in particular paragraph 47, the compelling conclusion is that the ultimate distinctive nature of the beverages is spirituous, that they rightly resort under TH22.08, and are covered by tariff note (C)'.

In our case, by contrast, and on a proper application of the approach to interpretation developed by this Court, and as I have set it out above, the goods can only be classified under TH22.06.

[30] That then leaves the question as to where, in TH22.06, do the FABs stand to be classified. The parties are agreed that if TH22.06 is the correct heading, the correct sub-heading as from 27 February 2013 is TH2206.00.90. The question is whether, prior to that date, the FABs qualified as mixtures contemplated in TH2206.00.85 as then worded, namely '[o]ther, mixtures of fermented beverages and mixtures of fermented beverages and non-alcoholic beverages, with an alcoholic strength not exceeding 9 per cent by volume'.

[31] SAB's response in this regard is that when the FABs were first developed in 2002 the non-alcoholic beverage component (soft drink) was based on existing commercial products at the time, such as Appletiser and flavours of Just Juice. The non-alcoholic elements were brought together in a so-called 'lemonade tank' where they existed as a beverage before being added, as such, to the alcohol base. In

actual production, however, and, to promote efficiency and for economical reasons, the lemonade tank method was replaced with the on-line blending process previously described earlier.

[32] Dr Dehrman's evidence is instructive in this regard. She explains that, after the alcoholic product has been filtered and transferred to a final product tank, the brand specific flavours, fruit juices, acidity regulators and stabilizers are added. Carbon dioxide is also added. This evidence does not seem to bear out the existence of a complete non-alcoholic beverage at any stage of production. The described method of production does not result in the coming into existence, at any stage, of a non-alcoholic beverage which is then mixed with the alcoholic base. What TH22.06 and TH2206.00.85 require is the mixing of two beverages. The plain and ordinary meaning of the words require the beverages to exist prior to mixing. SAB's counsel was constrained to argue that the non-alcoholic component was a beverage even though it is not produced as a separate beverage and had never been introduced into the market as a separate beverage. Whilst the efficacy of the in-line process may render it a superior method of production for the purposes of the beverage which is sold by SAB on the market, it has not been shown that the ultimate FABs which are the subject of this appeal are mixtures of two distinct beverages within the meaning of TH 2206.00.85. Even if the alcohol base qualifies as a 'fermented beverage' (a hotly contested question which we need not resolve), such a beverage is at no stage mixed with a non-alcoholic beverage. Instead, the fermented base is simply modified sequentially by addition of various ingredients. For this reason the FABs can only be correctly classified under 'other' (2206.00.90) in both Part 1 and Part 2A of the Schedule.

Costs

[33] Accordingly, although the court a quo was correct to set aside the Commissioner's determination, its substituted determination requires modification. This modification does not justify granting the Commissioner the costs of the appeal. The Commissioner's primary stance has throughout been that the FABs should be classified under TH22.08, a position correctly rejected by the court a quo and again rejected by us on appeal. All indications are that, from a financial perspective, the distinction between classification under TH2206.00.85 and TH2206.00.90 is likely to

be insignificant, having regard to the alcoholic content of the FABs. SAB, it may be added, accepted that as from 27 February 2013 the FABs fell under TH2206.00.90.

[34] Consequently, the following order is made:

1 Save as set out in para 2, the appeal is dismissed with costs such costs to include the costs of two counsel.

2 Paragraph 3 of the order of the high court is set aside and substituted by the following:

‘The said tariff determinations are replaced with tariff determinations in terms of Tariff Heading 2206.00.90 in Part 1 Schedule 1 to the Act and the Tariff Item 104.17.90 in Part 2A of Schedule 1 to the Act, from the date of the respondent’s determination.’

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N Dambuza
Judge of Appeal

For the Appellant:	J A Meyer SC (with him K Kollapen)
Instructed by:	RW Attorneys, Pretoria
	Phatshoane Henney Attorneys, Bloemfontein
For the Respondent:	C E Puckrin SC (with him A P Joubert SC and C Louw SC)
	Instructed by: Bowman Gilfillan Inc, Johannesburg
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