**IN THE HIGH COURT OF SOUTH AFRICA**
**(NORTH GAUTENG, PRETORIA)**

DELETE WHICHEVER IS NOT APPLICABLE
) REPORTABLE: YES/NO.
) OF INTEREST TO OTHER JUDGES: YES/NO.
) REVISED.
9/6/2011
DATE SIGNATURE

Case No: 45921/2010
Date heard: 02/06/2011
Date of judgment: 10/6/2011.

10/6/2011

**In the matter between:**

Nutec Southern Africa (Pty) Ltd — APPLICANT

and

The Commissioner for the South African Revenue Service — RESPONDENT

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**JUDGMENT**

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**DU PLESSIS J:**

[1] This is an appeal[1] against a tariff determination that the respondent made under the provisions of section 47(9)(i)(a) of the **Customs and Excise Act, 61 of 1964** ("the Act").

[2] The applicant conducts business as an importer, manufacturer and distributor of a variety of products utilised by the animal feed industry. It

[1] The appeal is brought under section 47(9)(e) of the **Customs and Excise Act, 91 of 1964**.

imports a product called *Acid Buf.* In terms of section 47(1) of the Act, import duty is payable on imported goods in accordance with the provisions of Schedule 1 to the Act. Purportedly in accordance with the classification provided for in Table 1 of Schedule 1, the respondent, for import duty purposes, classified *Acid Buf* under tariff subheading 2309.90.92 as "*preparations of a kind used in animal feeding*". The applicant contends that it should be classified under subheading 1212.20.90 as "*seaweed and other algae*".

[3] The applicant imports *Acid Buf* from Marigot Ltd t/a Celtic Sea Minerals (CSM), a company based in Ireland. *Acid Buf* is made from the skeletal remains of red seaweed harvested from the ocean near Ireland. The raw material is rich in minerals, primarily calcium and magnesium. After it has been harvested, the raw material is dried at temperatures of 120 - 130°C. The raw material is then ground to a particle size of approximately .2mm. Because the raw material is soft magnesium is added when it is ground so as to prevent the material from sticking to the grinder. From the perspective of the mineral wealth of the raw material, the percentage of magnesium added in the grinding process is insignificant. Due to its natural mineral wealth *Acid Buf* is used to assist in the regulation of the acid balance in the rumens of dairy cows. If the product is administered to the cows in the recommended quantities, it does not act as a mineral supplement.

[4] I now turn to the classification of *Acid Buf* for import duty purposes

[5] In terms of section 47(8)(a) of the Act the interpretation of Table 1 of Schedule 1 is subject to the International Convention on the Harmonised

case. I turn to the interpretation of the respective headings that the parties contend for.

[10] I have pointed out that the respondent contends that *Acid Buf* should be classified under 2309.90.92.[3] Having regard to the relevant headings and subheadings, it is the respondent's contention that *Acid Buf* must be classified as "*preparations of a kind used in animal feeding*"[4], other than "*dog or cat food*"[5], not imported from Switzerland[6] and not falling under any of the other sub-subheadings of subheading 90. The real issue is whether *Acid Buf* is a preparation of a kind used in animal feeding.

[11] According to the **Shorter Oxford English Dictionary** the word preparation means, in the present context, "a specially prepared or made up substance, as a ... foodstuff". The General Note to Chapter 23 is rather wide in its scope. It reads that the "Chapter covers the various residues and wastes derived from vegetable materials used by food-preparing industries .... The main use of most of these products is as animal feeding stuffs, either alone or mixed with other materials ..." (My underlining.) As to heading 9, Chapter Note 1, however, limits the seemingly wide scope of the General Note: It reads that heading 2309 "includes products of a kind used in animal feeding, not elsewhere specified or included, obtained by processing vegetable ... materials to such an extent that they have lost the essential characteristics of the original material ..." (My underlining). I conclude that heading 2309 applies to

[3] The eight digits denote a classification under chapter 23, heading 9, subheading 90 and further subheading 92.
[4] 2309.
[5] 2309.90 read with 2309.10.
[6] 2309.90.92 read with 2309.90.09 read with 2309.90.91

preparations of a kind used in animal feeding, obtained by processing vegetable materials. The processing must be such that the material has lost its essential characteristics. I shall now consider whether *Acid Buf* falls within 2309.

[12] I have earlier given some detail of the nature of *Acid Buf*. Dr Taylor, an expert whose affidavit the applicant tendered in evidence, explains that *Acid Buf* is derived from red algae. When live, the algae absorb minerals from the seawater and deposit them as an exoskeleton. The surface layer remains alive. Over time the skeleton breaks away from the growth areas. This is then harvested. The skeleton is composed of minerals, primarily calcium and magnesium. It is a rich mineral mix that has been derived naturally.

[13] For the respondent Mr Puckrin submitted that, being an exoskeleton, the skeletal material harvested does not form part of the original seaweed but is derived[7] from it. I cannot agree that, because it is an exoskeleton, the material did not form an integral part of the seaweed. To hold otherwise would be contrary to the express evidence of Dr Taylor.

[14] Dr Taylor further explains that the skeletal remains of the seaweed do not either through natural processes or through the drying and grinding process lose its essential characteristics. It follows that, having regard to Chapter Note 1 to Chapter 23, heading 2309 does not apply to *Acid Buf*.

[15] Mr Puckrin, rightly in my view, did not argue, as was contended for in the answering affidavit, that *Acid Buf* constitutes a "premix" or, in the words of

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[7] See the General Note to Chapter 23 quoted earlier.

heading 2309.90 "prepared animal feedings stuffs consisting of a mixture of several nutrients ..".

[16] Mr Vorster for the applicant pointed out that Chapter Note 1 to Chapter 23 also specifies that, to be included under 2309, a product must not be "elsewhere specified or included". He argued that, as *Acid Buf* is included under heading 1212 as contended for by the applicant, it is for that reason too excluded from heading 2309. I shall now consider whether *Acid Buf* is included under heading 1212.

[17] It is the applicant's contention that the product falls to be classified under "*seaweeds and other algae ... fresh, chilled... or dried, whether or not ground*"[8]. Chapter Note 5 to Chapter 12 excludes from heading 1212 certain specified goods. Dr Taylor states in his affidavit, and the respondent does not dispute, that *Acid Buf* can by no stretch of the imagination fall under any of those exclusions. I leave it at that. No other Chapter Note is relevant. The essential question is whether *Acid Buf* falls under "seaweeds and other algae". The fact that it consists of ground material is in terms of the express wording of the heading irrelevant.

[18] In my view the fact that *Acid Buf* is not made of the entire seaweed but only of the skeletal remains does not disqualify it from being classified as seaweed for import duty purposes. It is an essentially unchanged part of the original seaweed.

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[8] 1212 , 1212.20 and 1212.20.90..

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| On behalf of the applicant: | Shepstone and Wylie Attorneys<br>Per Clarinda Kugel Attorneys<br>789 Park Street<br>Sunnyside<br>Pretoria<br><br>Adv. J.P. Vorster SC |
| On behalf of the Respondent: | LEHAE LA SARS<br>Bronkhorst Street<br>Nieuw Muckleneuk<br>Pretoria<br><br>Adv. C.E. Puckrin SC<br>Adv. MPD Chabedi |