

NOT REPORTABLE

IN THE NORTH GAUTENG HIGH COURT. PRETORIA /ES

(REPUBLIC OF SOUTH AFRICA)

CASE NO: A882/09

Court a quo Case No: 16254/08

DATE:18/05/2012

IN THE MATTER BETWEEN:

THE COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICE

APPELLANT

(Respondent in the court a quo)

AND

SMITH MINING EQUIPMENT (PTY) LTD

RESPONDENT

(Applicant in the court a quo)

JUDGMENT

PRINSLOO. J

[1] The application heard by the court a quo constituted an "appeal" in terms of section 47(9) (e) of the Customs and Excise Act, 91 of 1964 ("the Act") against the determination made by the appellant on 25 January 2007 in terms of section 47(9)(a)(i)(aa) of the Act in relation to the "general purpose" variant of the Kubota RTV 900 Utility Vehicle ("the vehicle").

[2] For illustrative purposes it is convenient to quote the relief sought in the notice of motion before the court a quo:

"1. The respondent's tariff determination of 25 January 2007 to the effect that the Kubota RTV

900 Utility Vehicle ('the vehicle') imported by the applicant must for duty purposes be classified under Tariff Heading (TH') 8704.21.80 of part 1 of schedule no 1 to the Customs and Excise Act no 91 of 1964 ('the Act') is set aside.

2. It is declared, alternatively the respondent is ordered to issue a new determination, that the vehicle must for duty purposes be classified under TH 8709.19 of part 1 of schedule no 1 to the Act."

[3] In his judgment of 3 July 2009, the learned judge a quo granted the relief sought with costs. As far as prayer 2 is concerned, the learned judge granted the declaratory relief and not the alternative prayer for an order directing the appellant to issue a new determination.

[4] On 1 December 2009, the learned judge a quo granted leave to appeal to this full court. The appeal came before us on 11 April 2012.

[5] The crux of the dispute concerns the correct classification of the vehicle for customs duty purposes. The competing tariff headings are TH 8704.21.80 and TH 8709.19.

[6] In terms of the appellant's determination, based on the first mentioned tariff heading, the respondent is liable to pay 29% customs duty on the vehicle.

In terms of the last mentioned tariff heading contended for by the respondent, the vehicle is rendered duty free.

The relevant Tariff Headings and Explanatory Notes

[7] The relevant Tariff Headings referred to ("the relevant Tariff Headings") fall within section

XVII of part 1 of schedule no 1 of the Act. Section XVII covers "vehicles, aircraft, vessels and associated transport equipment". There are no Section Notes which are applicable to the present dispute.

[8] The relevant Tariff Headings also fall under chapter 87 of section XVII which covers "vehicles (excluding railway or tramway rolling-stock), and parts and accessories thereof. There are no Chapter Notes which are applicable to this dispute.

[9] TH 87.04 covers "motor vehicles for the transport of goods" and includes, inter alia, Tariff Sub Sub Heading 8704.21.80 which covers "other, of a vehicle mass not exceeding 2000 kg or a G.V.M. not exceeding 3500 kg, or of a mass not exceeding 1 600 kg or a G.V.M. not exceeding 3500 kg per chassis fitted with a cab". This is the Sub Heading under which the vehicle is classifiable, according to the appellant.

[10] The Explanatory Notes to TH 87.04 state, inter alia, the following:

"The classification of certain motor vehicles in this heading is determined by certain features which indicate that the vehicles are designed for the transport of goods rather than the transport of persons (heading 87.03). These features are especially helpful in determining the classification of motor vehicles, generally vehicles having a gross vehicle weight rating of less than five tonnes, which have either a separate closed rear area or an open rear platform normally used for the transport of goods, but may have rear bench-type seats that are without safety seatbelts, anchor points or passenger amenities and that fold flat against the sides to permit full use of the rear platform for the transport of goods. Included in this category of motor vehicles are those commonly known as 'multipurpose' vehicles (eg, van-type vehicles, pick-up type vehicles and certain sports utility vehicles). The following features are indicative

of the design characteristics generally applicable to the vehicles which fall in this heading:

(a) presence of bench-type seats without safety equipment (eg safety seatbelts or anchor points and fittings for installing safety seatbelts)

or passenger amenities in the rear area behind the area for the driver and front passengers.

Such seats are normally fold-away or collapsible to allow full use of the rear floor (van-type vehicles) or a separate platform (pick-up vehicles) for the transport of goods;

(b) presence of a separate cabin for the driver and passengers and a separate open platform with side panels and a drop-down tailgate (pick-up vehicles);

(c) absence of rear windows along the two side panels; presence of sliding, swing-out or lift-up door or doors, without windows, on the side panels or in the rear for loading and unloading goods (van-type vehicles);

(d) presence of a permanent panel or barrier between the area for the driver and front passengers and the rear area;

(e) absence of comfort features and interior finish and fittings in the cargo bed area which are associated with the passenger areas of vehicles (eg floor carpeting, ventilation, interior lighting, ashtrays)."

[11] The Explanatory Notes of sub-heading 8704.21 provide as follows:

"The g.v.w. (gross vehicle weight) is the road weight specified by the manufacturer as being the maximum design weight capacity of the vehicle. This weight is the combined weight of the vehicle, the maximum specified load, the driver and a tank full of fuel."

[12] TH 87.09 covers "works trucks, self-propelled, not fitted with lifting or handling equipment, of the type used in factories, warehouses, dock areas or airports for short distance transport of goods; tractors of the type used on railway station

platforms; parts of the foregoing vehicles".

The Tariff Sub-Headings are:

8709.1 Vehicles:

8709.11 Electrical 8709.19 Other 8709.90 Parts

Tariff Sub-Heading 8709.19, contended for by the respondent, is relevant only insofar as it provides for "other", ie vehicles not powered electrically. In the case of the vehicle it is diesel powered. For present purposes, however, the emphasis remains on the group of vehicles covered by TH 87.09 (to which reference will be made throughout) and the Explanatory Notes quoted hereunder.

The Explanatory Notes to TH 87.09 state, inter alia, the following:

"This Heading covers a group of self-propelled vehicles of the types used in factories, warehouses, dock areas or airports for the short distance transport of various loads (goods or containers) or, on railway station platforms, to haul small trailers.

Such vehicles are of many types and sizes. They may be driven either by an electric motor with current supplied by accumulators or by an internal combustion piston engine or other engine.

The main features common to the vehicles of this Heading which generally distinguish them from the vehicles of Heading 87.01, 87.03 or 87.04 may be summarised as follows:

- (1) their construction and, as a rule, their special design features, make them unsuitable for the transport of passengers or for the transport of goods by road or other public ways;
- (2) their top speed when laden is generally not more than 30 to 35 km/h; and
- (3) their turning radius is approximately equal to the length of the vehicle itself.

Vehicles of this Heading do not usually have a closed driving cab, the accommodation for the

driver often being no more than a platform on which he stands to steer the vehicle. Certain types may be equipped with a protective frame, metal screen, etc, over the driver's seat.

The vehicles of this Heading may be pedestrian controlled.

Works trucks are self-propelled trucks for the transport of goods which are fitted with, for example, a platform or container on which goods are loaded."

The harmonised system and relevant provisions of the Act

[13] A detailed resume of the harmonised system, which often comes up for consideration in matters of this kind, and relevant provisions of the Act is offered by the appellant (as respondent) in paragraphs 4 and 5 of the answering affidavit. It is not necessary to embark upon unnecessary repetition of those details.

[14] In terms of section 47(8)(a) of the Act, the interpretation of any Tariff Heading or Sub Heading, the General Rules of Interpretation and the Section and Chapter Notes are subject to the Explanatory Notes to the Harmonised System issued by the Customs Co-operation Council.

[15] The meaning of "subject to" as referred to in section 47(8)(a) of the Act, has been considered judicially in this country and it has been held that the primary task in classifying goods is to ascertain the meaning of the relevant Headings and Section and Chapter Notes and while the Explanatory Notes should be used in difficult cases and cases of doubt, they are merely intended to explain or supplement the Headings and Notes, not to override or contradict them - see *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd* 1970 2 SA 660 (A) at 676A-F and *International Business Machines SA (Pty) Ltd v Commissioner for*

Customs & Excise 1985 4 SA 852 (AD) at 864A-C.

Brief references to relevant South African authorities

[16] In their comprehensive and useful heads of argument, counsel for the appellant, Mr Puckrin SC and Ms Kilmartin, dealt with the relevant principles of interpretation and related subjects as they have been crystallised and developed by our courts. I take the liberty to deal briefly with some of the references.

[17] In *International Business Machines*, supra, the learned judge of appeal says the following at 863G-I:

"Classification as between headings is a three-stage 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."

[18] As to the first (interpretation) step, namely the ascertainment of the meaning of the words used in the Tariff Headings (and relevant Section and Chapter Notes, which are absent for present purposes) it has been held that the interpretation should be done in accordance with the ordinary recognised principles of statutory interpretation, namely the grammatical and ordinary sense of the words, unless the context or the subject clearly shows that they were used in a different sense - see for example *Kommissaris van Doeane en Aksyns v Mincer Motors Bpk* 1959 1 SA 114(A) at 120D-E.

[19] When it comes to the second and third stages of classification, namely the consideration

of the nature of the goods and the selection of the most appropriate heading, the test is an objective one and requires a consideration of the nature, form, character and functions of the article in question, objectively determined -see *Autoware (Pty) Ltd v Secretary for Customs and Excise* 1975 4 SA 318 (W) at 321H-322A.

[20] 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."

- *Commissioner, South African Revenue Service v Komatsu Southern Africa (Pty) Ltd* 2007 2 SA 157 (SCA) at 160F-161A.

[21] The purpose for which the thing in question was constructed and designed may be of fundamental importance in determining the classification of an item - see *Thomas Barlow & Sons*, supra, at 677B-E.

[22] In *Commissioner, South African Revenue Service v The Baking Tin (Pty) Ltd* 2007 6 SA 545 (SCA) it was held, at 548G-549D. that the intention of the manufacturer or importer of goods is not a determinant of the appropriate classification for the purpose of the Act. With reference to *Komatsu*, supra, it was held that in that decision the court was suggesting "no more than that light may be thrown on the characteristics of the article by subjective factors".

It was submitted by counsel for the appellant that, having regard to the particular Tariff Headings in question, the purpose for which the vehicle was manufactured is relevant.

The striking out application

[23] Before turning to the characteristics of the vehicle, it is necessary to consider the fact that the learned judge a quo, on application by the respondent, struck out certain portions of the record, mainly annexures to the answering affidavit in the form of reproductions from websites dealing with the vehicle and its various attributes and uses, as offloaded and prepared by representatives of the appellant.

[24] Details of the portions struck out appear from the judgment of the learned judge a quo, and more particularly paragraphs 29-31 thereof.

[25] Before us, counsel for the appellant indicated that they would not be contesting the decision to strike out the material referred to, for purposes of the appeal. In the circumstances, I shall refrain from dealing with those passages.

[26] What was not struck out, however, is the Operators Manual ("the manual") in respect of the vehicle. This was presented to the appellant's tax lawyers. Ms Odendaal and Ms Myburg, when they visited the respondent's business premises on 5 February 2008 to inspect the vehicle and to take photographs. The photographs, also not struck out, are attached to the answering affidavit as "LM12" and the manual is attached as "LM13".

[27] The fact that the manual was supplied to these two officials by the respondent and, obviously, the correctness of the manual, are admitted in the replying affidavit.

[28] Mr Joubert SC who, with Mr McAslin, appeared for the respondent, argued that we should ignore the manual for purposes of this dispute.

In support of this argument, Mr Joubert relied on a passage from *Autoware (Pty) Ltd v Secretary for Customs and Excise* 1975 4 SA 318 (WLD) where the learned judge said the following at 321C-D:

"Another category of evidence which I consider to be irrelevant is that which related to the manner in which the vehicles were described in advertisements, manuals and elsewhere by their Japanese progenitors and by the local assemblers and distributors of Toyota products ..."

In reply, Mr Puckrin strongly argued that the contents of the manual are relevant and important and should be taken into account for purposes of this judgment. He referred us again to the passage from *Thomas Barlow*, *supra*, at 677D-E where the following is stated:

"Hence the purpose for which the thing in question was constructed and designed is of fundamental importance in determining whether it is a vehicle, and, if it isT whether it must be classified under heading 87.01, 87.02 or 87.03 ..." At 677A it was also stated:

"Hence, to determine whether or not heading 87.01 applies, one must have regard to the main purpose for which the vehicle was constructed and designed ..."

[29] I add that the manual, annexure "LM13", was also not targeted to be struck out in the respondent's application to strike out which came before the learned judge *a quo*.

[30] In my view, the contents of the manual are indeed of prime importance and relevance for purposes of determining "the objective characteristics and properties of the goods" as described in *Komatsu* at 160E-G and, for that matter, in *The Baking Tin* at 548H-549B.

The characteristics and properties of the vehicle

[31] The basic question for decision is whether the vehicle is classifiable under TH 8704,21.80 or whether it is classifiable under TH 87.09 (or, for that matter, TH 8709.19).

Put differently, is it a "motor vehicle for the transport of goods ... of a vehicle mass not exceeding 2000 kg or a G.V.M. not exceeding 3500 kg or is it comfortably classifiable as part of "a group of self propelled vehicles of the types used in factories, warehouses, dock areas or airports for the short distance transport of various loads (goods or containers) or, on railway station platforms, to haul small trailers"?

[32] As far as the latter classification, namely under TH 87.09 contended for by the respondent, is concerned, it was confirmed by counsel for both parties before us, that this classification is restricted to that group of vehicles of the type used in the locations mentioned in the Tariff Heading.

[33] It is common cause between the parties, and it also appears from the manual, that the vehicle comes in three models, namely "general purpose", "work site" and "recreational".

It is also common cause that the vehicle in question, for present purposes, is the "general purpose" model. The vehicle is also described in the manual, and in the papers, as a "utility vehicle".

[34] On 4 March 2008, Ms Odendaal on behalf of the appellant, requested the respondent's attorneys to furnish copies of invoices relating to the sale of the vehicle. These were furnished

and constitute annexure "LM17" to the answering affidavit. The deponent to the answering affidavit, Mr Millar, who is the Manager of the Tariff Policy section of the appellant, describes these invoices as follows:

"It appears from the invoices that the applicant has sold a number of the vehicles in this country to different entities (which obviously use them for various purposes). The purchasers include entities such as Sishen Golf Club, Watersport & Marine, Clifford Mining and Tractor World. The names of these businesses indicate the nature of their businesses and illustrate that the vehicle is bought by different people to be used for different purposes."

[35] "LM17", which was not struck out, contains some eighty or ninety entries of sales by the respondent to various customers of the vehicle, over the period August 2006 to March 2008. In reply, the respondent states that it sold the vast majority of the vehicles to dealerships, and has no control over the persons or entities to which the dealers sold the vehicles.

The only evidence offered by the respondent about the use of the vehicle at the locations mentioned in TH 87.09, consists of a few photographs attached to the founding affidavit, as annexure "J", allegedly demonstrating the use of the vehicle at a fruit processing factory in the Western Cape, at Galway Airport in Ireland and at Cape Town International Airport. Of course, the fact that some of the vehicles are used at a factory and airports, does not mean that it cannot be used elsewhere, or, for that matter, that the use of the vehicle at the restricted locations mentioned in TH 87.09, represents "the main purpose for which the vehicle was constructed and designed" as postulated by the learned judge of appeal in *Thomas Barlow & Sons, supra*.

[36] The appellant offered, before the court a quo, an affidavit by Roelof Erasmus le Roux Viljoen, the industry liaison officer employed by the contractor for the Department of Transport

maintaining the National Traffic Information System (also known as "eNaTIS"). According to this witness, the respondent has introduced (as an importer) hundred and forty one of the vehicles bearing the model number 538168 (petrol) between September 2006 and January 2009 and sixty one of the vehicles bearing the model number 539125 (diesel) between July 2006 and July 2007. It is common cause that these are the "general purpose" models forming the subject of this dispute. The gross vehicle mass ("G.V.M.") of the petrol model is 1545 kg and of the diesel model 1590 kg. This is well inside the 2000 kg limit as intended by Tariff Sub Heading 8704.21.80 contended for by the appellant.

The properties of these models, according to the eNaTIS system are: make ... "Kubota Off Road" series ... "RTV 900 Off Road" category... "special vehicle" description ... "utility vehicle"

[37] In my view, these properties of the vehicle do not readily strike one as belonging to a vehicle "constructed and designed" only for use at the restrictive locations mentioned in TH 87.09.

[38] In a further effort to establish the "main purpose for which the vehicle was constructed and designed", in the celebrated words of the learned judge of appeal in *Thomas Barlow & Sons*, and in further consideration of the "nature and characteristics" of the vehicle, as contemplated in *Komatsu*, *supra*, and other decisions like *The Baking Tin*, *supra*, I turn to briefly consider the manual, the Tariff Headings and the Explanatory Notes.

(I) The manual

[39] There is a sketch showing the driver and his passenger, both secured with seatbelts. The "cab area" is fitted with Roll-Over Protective Structures and the reader of the manual is

cautioned to "always use the seatbelt". The vehicle imported by the respondent and photographed by the appellant's officials during their inspection, contains a plate with the inscription "warning, to avoid personal injury: always fasten your seatbelt". I could not see on the photos taken on behalf of the appellant whether those particular vehicles were fitted with seatbelts.

[40] The vehicle photographed, contains the signage "4x4 diesel Kubota". The Roll-Over Protective Structures ("ROPS") are clearly visible on these photographs.

[41] There is also the warning "to avoid roll-overs, slow down when turning, on uneven ground, and before stopping". There is also the warning "do not operate near ditches, holes, embankments or other ground surface features which may collapse under the vehicle's weight. The risk of vehicle upset is even higher when the ground is loose or wet."

[42] Under "operating on slopes" the driver is advised how to negotiate these areas. It is stated that "Slopes are a major factor related to loss-of-control and tip-over accidents, which can result in severe injury or death. All slopes require extra caution." The load should be reduced when operating on hilly or over rough terrain. When riding on soft terrain, the front wheels must be turned slightly uphill to keep the vehicle on a straight line across the hill.

[43] The driver is cautioned never to "Drive exceeding the limit of visibility. Slow down near crest of hill until getting a clear view of the other side ... Stay alert for holes, rocks and other hidden hazards in the terrain."

[44] It is clear from the specifications that the vehicle has four wheel drive ("4wd") capacity

and power steering. This is common cause.

[45] Under "operating the vehicle" the driver is cautioned to check for hidden obstacles or hazards before driving in a new area, to keep the speed down until "you know the area well" and to "use existing trails and stay away from hazardous areas such as steep, rocky slopes or swamps". The driver must be cautious when visibility is limited, "as you may not be able to see obstacles in your path".

[46] There are a number of sketches depicting the vehicle being operated on difficult terrain. The driver is instructed to "always go straight uphill or downhill" and "if the engine stalls on a steep slope, roll slowly straight down, using the brake" and to "reduce vehicle's speed to prevent tipping or loss of control" and "do not traverse hillsides that are slippery or covered with rocks or obstacles which may cause you to tip over". The driver is also advised to "use 4wd and maintain low speeds on areas covered with clay, mud, ice or snow to prevent uncontrolled skidding".

[47] I see no sketch or illustration depicting the vehicle being used on the relatively flat, and generally easily traversable surfaces found at factories, airports, docks and the like, not to mention railway platforms.

[48] There is an illustration of the "knobby" tyres which are a standard fit to this particular general purpose vehicle, forming the subject of this dispute. These are for "hard packed surfaces, wet turf, and general usage (standard on the general purpose model)" as stated in the appellant's tariff determination of 25 January 2007.

[49] I return to what was said in *Thomas Barlow & Sons, supra*, at 677A-E that

"The purpose for which the thing in question was constructed and designed is of fundamental importance in determining whether it is a vehicle, and, if it is, whether it must be classified under heading 87.01, 87.02, or 87.03."

On a general reading of the manual, and given the contents thereof, parts of which I attempted to illustrate, I cannot see that it can fairly be concluded that the purpose for which the vehicle was constructed and designed is for it to be used in

[76] Against this background, I am not persuaded that the Explanatory Notes to TH 87.09 militate in favour of a classification of a vehicle under that Sub Heading. On the contrary, and for the reasons illustrated, I am of the view that the vehicle is more appropriately and comfortably classified under TH 87.04, read with 8704.21.80.

Brief remarks about the onus of proof

[77] In *Abbott Laboratories South Africa (Pty) Ltd v The Commissioner for Customs and Excise, Transvaal Provincial Division* case no 10643/86, STAFFORD, J, as he then was, says the following on p4 of the typed judgment:

"As briefly stated above the onus of proving that the respondent's determination is incorrect and is to be substituted by the determination claimed by the applicant rests on the applicant. That is now trite law."

[78] Before me, counsel for the respondent strongly argued that "the importer does not bear an onus of proving the Commissioner's determination to have been wrong". In their heads of

argument, counsel for the respondent also submitted

"It follows then that an importer can never be required to adduce evidence of the factual basis on which the Commissioner's determination is premised and that an importer, like any other litigant, is only required to adduce evidence to prove its own case."

In this regard, respondent's counsel referred to *Autoware (Pty) Ltd v Secretary for Customs and Excise* 1970 4 SA 318 (W) at 321 (A) and *Commissioner for Customs and Excise v CI Caravans (Pty) Ltd* 1993 1 SA 138 (N) at 149A-C.

In *CI Caravans*, at 149C-D, it was held that in that particular appeal, "which is concerned in the main with questions of interpretation which cannot, in their very nature, be decided by reference to an onus of proof. However, it was also pointed out that "the only factual issue where the question of onus could arise relates to the nature of the goods to be classified ..."

[79] In the present instance, it was argued on behalf of the appellant that the respondent, not relying on any expert evidence, failed to discharge the onus to prove details relating to the characteristics of the vehicle such as the top speed, the turning radius, its suitability for the transport of goods over certain areas and related subjects.

To that extent, I am of the view that the question of onus does arise in this particular case, and, for the reasons mentioned, I have come to the conclusion that the respondent failed to discharge that onus.

The grounds of appeal

[80] The grounds are concisely stated by the appellant in his notice of appeal which is to be found in volume 6 of the record. I find myself in respectful agreement with the grounds of

appeal relied upon and, for the reasons I attempted to illustrate above, I have come to the respectful conclusion that the learned judge a quo erred in granting the respondent's application which came before him.

The order

[81] I make the following order:

1. The appeal is upheld with costs including the costs flowing from the employment of two counsel.
2. The order granted by the court a quo on 3 July 2009 is set aside and replaced with the following: "The application is dismissed with costs, which will include the costs of two counsel."

W R C PRINSLOO

JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree

R G TOLMAY

JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree

ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

A882-2009

HEARD ON: 11 APRIL 2012

FOR THE APPELLANT: C E PUCKRJN SC ASSISTED BY L G KILMARTIN

INSTRUCTED BY: STATE ATTORNEY

FOR THE RESPONDENT: A P JOUBERT SC ASSISTED BY C J McASLIN

INSTRUCTED BY: SMITH TABATA BUCHANAN BOYES