IN THE HIGH COURT OF SOUTH AFRICA /ES

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 26368/2007

DATE: 26/9/2008

NOT REPORTABLE

IN THE MATTER BETWEEN

FASCINATION WIGS (PTY) LTD APPLICANT

AND

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES RESPONDENT

JUDGMENT

PRINSLOO, J

[1] This is an appeal in terms of the provisions of the Customs and Excise Act 91 of 1964 ("the Act"). Before me, Mr Puckrin SC assisted by Ms Ellis, appeared for the applicant. Mr Meyer, assisted by Ms Khatri, appeared for the respondent.

Brief synopsis and background

[2] The appeal referred to is one in terms of section 47(9) of the Act against two tariff determinations made by the respondent in respect of various products as imported by the applicant.

[3] The applicant has been importing completed wigs and hair pieces since its incorporation in 1971 and has entered these products under tariff heading 67.04. The applicant does not dispute this classification and has paid and continues to pay the prescribed excise duties thereon.

[4] During or about 1985, the applicant began importing human hair wefts (also knows as "weaves"), to be sold as a product which may be used for wig-like integration into mainly ethnic African hair. From the onset of the importation of these products, the applicant has entered same under tariff heading 67.03.

[5] During 1988, the applicant began importing synthetic braiding fibre (also known as "braids") and synthetic wefts. Similarly, these products were also entered under tariff heading 67.03.

[6] However, on or about 11 April 2001 an official from the respondent issued the applicant with two stop notes for the following:

(1) a Voucher of Correction was passed on a Bill of Entry (252) reclassifying human hair wefts from tariff heading 67.03 to 6704.20; and

(2) a Voucher of Correction was passed on a Bill of Entry (253) reclassifying synthetic acrylic fibre (used for braiding) from tariff heading 67.03 to 6704.19.

[7] In response to this, on 23 April 2001, the applicant filed a written tariff determination application with the respondent. 0n 16 May 2001, the respondent determined that tariff heading 67.03 was indeed applicable to both Bills of Entry and that the Vouchers of Correction were no longer applicable.

[8] During March 2003, the applicant received a letter from Customs and Excise stating that the human hair wefts (Bill of Entry 252) had on reconsideration been determined under tariff heading 6704.20. Nothing was stated at the time regarding the determination on the products in Bill of Entry 253.

[9] In December 2005 the applicant received a letter from the respondent confirming that the latter had determined that subheading 6704.19 also applies to a Bill of Entry (no 7588) involving imported synthetic fibre for braiding.

[10] 0n 2 May 2006 the applicant was informed that the respondent had reconfirmed that subheading 6704.19 applied to the braids and wefts in a subsequent determination dated 26 April 2006.

[11] 0n 12 June 2006, as a result of the audit and the incorrect tariff used by the applicant for braids and wefts, the respondent served a notice of intention to raise a debt in respect of duty in the amount of R8 703 288,52.

It appears that the respondent has agreed to defer this payment pending the outcome of these proceedings.

[12] The applicant is currently paying 20% customs duty on all imported braiding fibre and synthetic weft products, and has since March 2003 been paying the same percentage (20%) of duty on imported human hair weft products, on account of the said products' classification under tariff heading 67.04.

These products constitute the majority of the applicant's imports, and the aforesaid payment of customs duty holds severe financial implications for the applicant's viability.

[13] The republic is a party to the General Agreement of Tariffs and Trade and a member of the World Customs 0rganisation.

[14] As a result, the tariff as set out in Part 1 of Schedule no 1 of the Act, comprising of tariff headings, Section and Chapter Notes and rules for the Interpretation of the Harmonised System ("the HS") is a direct transposition of the Nomenclature of the aforesaid international instrument.

[15] Therefore, section 47(1) of the Act, *inter alia*, provides that duties shall be paid in accordance with Part 1 of Schedule no 1 of the Act, which Schedule in turn provides for the classification of goods.

[16] In other words, the HS was developed and designed as a core classification system to be applied with uniformity by the countries that adopted it, with the proviso that such countries could make further national subdivisions according to their particular needs.

[17] It was submitted on behalf of the applicant that it follows that the HS Rules of Interpretation are designed to ensure that a given product is always classified in the same heading, to the exclusion of any others that might appear to merit consideration.

[18] To provide assistance to the above, the text of the HS incorporates a series of provisions codifying the principles on which the HS is based and in addition, lays down general rules to ensure uniform legal interpretation.

[19] The General Rules for the Interpretation of the HS ("the GIR's") provide for a step-by-step basis for the classification of goods within the HS.

[20] The section and chapter notes, including subheading notes, form an integral part of the HS and have the same legal force as the GIR's.

[21] The function of these notes is to define the precise scope and limits of each subheading, heading or group of headings, chapter or section.

[22] Counsel before me agreed that Section notes and Chapter notes do not come into play for purposes of deciding the present dispute. What is of importance, in the present case, is the interpretation of the Explanatory Notes to the HS. They do not form an integral part of the HS, but they constitute the official interpretation thereof at international level and compliment the HS. They follow the systematic order of the HS. They provide a commentary on the scope of each heading, giving a non-exhaustive list of the main products included and excluded, together with the technical descriptions of the goods concerned, in accordance with their appearance, properties, method of production and uses. It was submitted on behalf of the applicant that they also offer a practical guidance for the identification of goods and, where appropriate, clarify the scope of particular subheadings.

[23] It was submitted on behalf of the applicant that the classification process between tariff headings consists of three stages:

(1) the interpretation or ascertainment of the words used in the headings and relative Section and Chapter Notes are considered;

(2) the nature and characteristics of the goods in question are considered; and

(3) the selection of the heading which is most appropriate to the goods in question is considered – see *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise* 1985 4 SA 852 (A) 863G-H.

[24] The respondent contends that the goods imported by the applicant should be classified (as is presently the position) under tariff heading 67.04. The applicant, on the other hand, contends for a classification under tariff heading 67.03.

[25] It is convenient, at this point, to quote the tariff headings 67.04 and 67.03, as well as the Explanatory Notes to those headings.

[26] Tariff heading 67.04 provides for –

> "wigs, false beards, eyebrows and eyelashes, switches and the like, of human or animal hair or of textile materials; articles of human hair not elsewhere specified or included.
>
> 0f synthetic textile materials: …
>
> 6704.19 …other
>
> 6704.20 – of human hair …"

[27] The Explanatory Notes to the above heading provides as follows:

> "This heading covers:
>
> (1) made up of articles of postiche of all kinds manufactured of human or animal hair or of textile materials. These articles include wigs, beards, eyebrows and eyelashes, switches, curls, chignons, moustaches and the like. They are usually of high-class workmanship intended for use either as aids to personal toilet or for professional work (eg, theatrical wigs)."

According to the Explanatory Notes, the following are excluded:

> "(i) dolls' wigs (heading 95.02); and
>
> (ii) carnival articles, generally of inferior material and finish (heading 95.05)."

[28] Tariff heading 67.03, on the other hand, provides as follows:

> "67.03 Human hair, dressed, thinned, bleached or otherwise worked; wool or other animal hair or other textile materials, prepared for use in making wigs or the like."

[29] The Explanatory Notes to heading 67.03 provides as follows:

> "With the exception of human hair which has been simply washed, scoured or sorted to length (but not arranged so that the root ends and tips respectively are together) and waste of human hair (heading 05.01), this heading covers human hair which has been dressed or otherwise worked (for example, thinned, bleached, dyed, waved or curled) for use in postiche (eg, manufacture of wigs, curls or switches) or for other purposes.
>
> The expression 'dressed' includes hair, the separate filaments of which has been arranged so that the root ends and tip ends are respectively together.

This heading also includes wool, animal hair (eg the hair of the yak, angora or Tibetan goat) and other textile materials (eg, man-made fibres), prepared for use in making wigs and the like, or dolls' hair. Products prepared for the above purposes include, in particular:

(1) Articles consisting of a sliver, generally of wool or other animal hair, interlaced on two parallel strings and having the appearance of a plait. These articles (known as 'crape') are normally presented in long length and weigh about one kilogram.

(2) Waved (curled) slivers of textile fibres put up in small bundles each containing a length of 14 to 15m and weighing about 500g.

(3) 'Wefts' consisting of man-made fibres dyed in the mass, folded in two to form tufts which are bound together, at the folded ends, by a machine-made plait of textile yarns approximately 2mm wide. These 'wefts' have the appearance of a fringe in the length.

Wool, other animal hair or other textile fibres in the mass, in the form or tow or prepared for spinning fall in section XL."

[30] The main area of dispute between the parties can be said, in my view, to amount to the following: the applicant submits that the goods classified under tariff heading 67.03 were intended by the legislature to refer to incomplete products made from, *inter alia*, human hair or synthetic materials for use in making wigs or similar products. The applicant contends that the goods imported by itself, and

forming the subject of this dispute, are such "incomplete products" and, accordingly, ought to be classified under tariff heading 67.03.

The respondent, on the other hand, contends that the synthetic articles imported by the applicant and referred to by it as "wefts" are, in addition to being complete, ready-to-use articles at the time of importation, furthermore physically not the same articles as the wefts as contemplated by the Explanatory Notes to tariff heading 67.03.

Interlocutory issues resolved and part of the original relief claimed abandoned

[31] During the course of the hearing before me, and after some debate with counsel, they produced a draft order which I marked "XYZ" and granted. It is convenient to quote the five paragraphs of the order:

> "1. That the respondent be granted condonation for the late filing of its answering affidavit;
>
> 2. That the applicant be granted condonation for the late filing of its replying affidavit;
>
> 3. That the applicant's application to strike out the WCO's opinion and the relevant paragraphs in the respondent's answering affidavit be granted;
>
> 4. That the respondent abandons its application to strike out;
>
> 5. That the costs in respect of the above, will be costs in the cause."

[32] The opinion of the World Customs 0rganisation referred to, was obtained by the respondent prior to the hearing. It was agreed between the parties that the opinion was not binding, either on the parties or the court, and, as such, fell to be considered irrelevant and struck out. This is what happened.

[33] In addition, Mr Puckrin, during the course of the hearing, recorded that the applicant was no longer proceeding with an application for condonation for the delay in filing the appeal in respect of the determination of the products as listed in annexure "A" to the notice of motion. Annexure "A" relates to the classification of the human hair wefts imported by the applicant. They are products of Bill of Entry 252, referred to earlier.

[34] The resolution of the interlocutory disputes and the abandonment of part of the relief originally claimed, led to a considerable shortening of the proceedings.

[35] I add that the applicant's counsel also handed up, for demonstration purposes, examples of the wefts and braids imported by the applicant. These articles were not received as formal exhibits. They received very little attention during the hearing before me. I am of the view that supplementary affidavits and photographic material forming part of the papers and submitted by both sides, present a much clearer picture than that which could be gleaned from the examples handed up. Declared intentions to present video demonstrations and

also to hand up more examples of the applicant's imports in the course of the respondent's argument, did not materialise.

The relief ultimately claimed

[36] I find it convenient to quote prayers 2 and 3 of the notice of motion (adjusted by me to prayers 1 and 2) as grammatically refined by me after the abandonment of part of the relief to which I have referred:

> "1. That the products listed in annexure B to the notice of motion as imported by the applicant are declared to fall under tariff heading 67.03 of Part 1 of Schedule 1 to the Customs and Excise Act no 91 of 1964.
>
> 2. That the determinations of the respondent that the products listed in annexure B to the notice of motion are classifiable within tariff heading 67.04 under subheading 6704.19 of Part 1 of Schedule 1 to the said Act be amended in accordance with paragraph 1 above."

[37] Annexure "B" to the notice of motion lists four of the applicant's imported products from determination 82/2005. Under columns headed "product name", "category" and "description" they are the following:

> "1. Cork screw syn, weft, a weft made from man-made synthetic fibres.
>
> 2. Rasta Dread, braid, heavily crimped braid made from a synthetic man-made fibre.

3. Pony Weft Short, weft, a weft made from man-made synthetic fibres.

4. Yaki Bulk (FRIKA), braid, straight braiding fibre made from a synthetic man-made material."

Remainder of tariff headings and Explanatory Notes left for consideration after the abandonment of part of the relief originally claimed

[38] Returning to the tariff headings and Explanatory Notes quoted in respect of 67.03 and 67.04 I have taken the liberty to adjust the tariff headings and Explanatory Notes by eliminating the reference to the articles of human hair in view of the abandonment.

[39] The result is that the tariff headings and Explanatory Notes should now read as follows for purposes of considering this dispute:

"Tariff heading 67.04: wigs, false beards, eyebrows and eyelashes, switches and the like, of animal hair or of textile materials;

of synthetic textile materials: …

6704.19 … other."

[40] The Explanatory Notes to heading 67.04 will now read as follows for present purposes:

"This heading covers:

(1) made up articles of postiche of all kinds manufactured of animal hair or of textile materials. These articles include wigs, beards, eyebrows and eyelashes, switches, curls, chignons, moustaches and the like. They are usually of high-class workmanship intended for use either as aids to personal toilet or for professional work (eg, theatrical wigs)."

These Explanatory Notes specifically excludes the following:

"This category does not include:

(i) dolls' wigs (heading 95.02);

(ii) carnival articles, generally of inferior material and finish (heading 95.05)."

[41] The adjusted tariff heading 67.03 will now read as follows for present purposes:

"67.03 … wool or other animal hair or other textile materials, prepared for use in making wigs or the like."

[42] The adjusted Explanatory Notes to heading 67.03 will read as follows for present purposes:

"… this heading also includes wool, other animal hair (eg, the hair of the yak, angora or Tibetan goat) and other textile materials (eg, man-made fibres), prepared for use in making wigs and the like, or dolls' hair. Products prepared for the above purposes include, in particular:

(1) articles consisting of a sliver, generally of wool or other animal hair, interlaced on two parallel strings and having the appearance of a plait. These articles (known as 'crape') are normally presented in long length and weigh about one kilogram.

(2) Waved (curled) slivers of textile fibres put up in small bundles each containing a length of 14 to 15m and weighing about 500g.

(3) 'Wefts' consisting of man-made fibres dyed in the mass, folded in two to form tufts which are bound together, at the folded ends, by a machine-made plait of textile yarns approximately 2mm wide. These 'wefts' have the appearance of a fringe in the length.

Wool, other animal hair or other textile fibres in the mass, in the form of tow or prepared for spinning fall in section XL."

Submissions made and conclusions arrived at

[43] I find it convenient to quote (sometimes in abbreviated form) some of the closing submissions contained in the applicant's founding affidavit as to the nature and characteristics of the braids and wefts imported by the applicant and forming the subject of the dispute:

1. braiding fibres are components of wefts, which in turn are components of wigs;

2. as a result of innovation, wefts (or weaves) and braids (or braiding fibre) are currently attached onto a person's own hair by means of various

methods, as opposed to affixing the wefts or braiding fibre onto a wig-cap in order to create a wig like impression;

3. the various manufacturing processes of braids and wefts do not purport to create products which are 'usually of high-class workmanship', as referred to in the Explanatory Notes to tariff heading 67.04;

4. the essential difference between products classifiable in tariff headings 67.03 and 67.04, is the use of the product in its completed state;

5. the braids (or braiding fibres) and wefts imported by the applicant are 'incomplete' products in terms of being classifiable under tariff heading 67.04. However, the braids and wefts imported by the applicant are 'completed' products for purposes of classifying in terms of tariff heading 67.03;

6. the reference to braids and wefts as being incomplete products, is made with the purpose of indicating their disqualification from classification in tariff heading 67.04, due to the fact that these products require an assembling process to be followed in order to make a wig or the like, as contemplated in tariff heading 67.03 (emphasis added);

7. the character and purpose of the braids and wefts in issue are that they are used as hair extensions, which can be equated with a wig or wig-like appearance once the products have been affixed (my emphasis)."

[44] I now turn to a brief consideration of some of the submissions made by the applicant's witnesses who filed supporting affidavits.

[45] Michael Dashwood ("Dashwood") has been in the business of wig-making for the past forty years. He was asked by the applicant to give an opinion on whether the products as imported by the applicant are products prepared for use in the making of wigs or the like, or whether the products are made up articles of postiche (which include wigs, beards, eyebrows and eyelashes, switches, curls, chignons, moustaches and the like) of all kinds manufactured of human or animal hair or of textile materials.

[46] The witness, correctly in my view, considered it appropriate and necessary to distinguish between made up articles or postiche, and articles prepared for use in making wigs or the like. He points out that the term "made up" is defined as "artificial or fictitious" and "completed or finished" in Funk and Wagnalls *Practical Standard Dictionary of the English Language* (1945).

In the *Shorter 0xford English Dictionary* (vol II, 3rd ed) the term "postiche" is defined as, *inter alia*, "counterfeit, feigned", "counterfeit, artificial" and "an imitation substituted for the real thing". The *Freedictionary.com* defines "postiche" as "a covering or bunch of human or artificial hair used for disguise or adornment".

This witness, correctly in my view, concluded that the articles referred to under 67.04, namely wigs, beards, eyebrows, etc clearly refer to artificial completed

articles, as compared to incomplete articles. In other words the products are ready to use in the form in which they are described.

[47] The witness Dashwood then goes on to describe how articles of postiche are made. In the case of a wig the hair or fibre is folded in two to form tufts which are bound together at the folded ends by a machine-made plait of textile yarns approximately 2mm wide, in order to produce a weft. The weft is then sewn onto a cap. The final product, or assembled wig, is then created and ready to wear.

Switches and hair pieces are synthetic fibre or human hair that is wefted. The wefts are sewn together in a circular pattern. These products are ready to wear and the user pins the switch and/or hair piece onto the existing hair to use as a pony-tail.

[48] Braiding fibre is not a complete made-up article of postiche, due to the fact that it requires a process (usually done by a braiding expert) to braid the fibre into the user's hair. This braiding process can take from 2 to 18 hours depending on the desired style. The end-result, in the opinion of witness Dashwood, is an appearance similar to that of a wig. In the *Shorter 0xford English Dictionary* (vol I, 3rd ed) a braid is defined as "anything plaited or interwoven; especially a plait of human hair" or "a string or band confining or intwined in the hair".

[49] The witness comes to the conclusion that the products forming the subject of the dispute are products prepared for the use in making wigs or the like.

[50] Attached to the Dashwood affidavit are a number of photographs which I find useful and clearly illustrative. MD2 is a photograph of a completed wig, the cap onto which the wefts are sewn. MD3 is a completed moustache which can be glued on by the wearer. MD4 is a completed false beard. MD5 is a sample of a completed set of false eyebrows. MD6 is a sample of a completed three stem switch. The product consists of wefts which are wound around a wire or a shoe string like rope with a loop at the end. The product is ready to wear. MD7 is also a completed hair piece. The wefts are sewn together in a circular pattern. MD8 is also a photograph of a completed hair piece. The wefts are sewn together in a circular pattern. MD9 is a photograph of a braid, the strands of which are collected in bunches that are folded in two and held together in the middle by a form of fastening agent. This product is not ready to wear and needs to be braided into the hair by a braiding expert. MD10 is a photograph of a weft and shows the hair and/or synthetic fibre that is folded in two to form tufts, which are bound together at the folded ends by a machine-made plait of textile yarns approximately 2mm wide. <u>This product is a component of a wig. It is not a completed product and needs to be weaved into the hair by a weaving expert</u>.

[51] Chan Kwok Keung ("Chan") is a citizen of Hong Kong. He is the executive director of Evergreen Products Factory Ltd which manufactures the wefts and braids under debate.

[52] Video clips referred to in the Chan affidavit were not exhibited during the hearing.

[53] In the Chan affidavit the manufacturing process of the wefts and the braids is explained.

[54] Chan concludes that the braid products as manufactured by its company are simple strands of fibre, tied together in the middle and not a complete wig or hair piece. He also testifies that the weft products, as referred to in the affidavit, are not completed wig or hair pieces, unless sewn onto a cap as demonstrated.

[55] Matshidiso Theresia Mphaki ("Mphaki") is a female braider and weaving extension artist. She has been in this business of braiding and weaving for the past twenty years. In her affidavit she testifies about the steps needed to complete a braided hairstyle and the steps needed to complete a hairstyle using wig weaves (also known as wefts).

[56] As the braiding expert, she will determine how many packets of fibre are required to complete the style and the type of style usually dictates the amount of material

that is required. The customer's hair is then sectioned as dictated by the desired style and the synthetic fibre is then attached or fastened onto the sectioned hair by braiding it directly to the hair or by looping the synthetic fibre around the sectioned hair to fasten it. The process can take up to 18 hours to complete.

[57] As to the steps needed to complete a hair styling using wefts the witness also gives a detailed description. The process can take up to six hours. The quantity of wefts needed must first be determined and the witness then decides the method of attaching the wefts. The wefts are attached to the hair of the customer.

[58] 0n reading the evidence of these supporting witnesses, and studying the Dashwood photographs, I was left with a clear impression that the wefts and braids are not final, independent, ready-to-wear products, but components to be meticulously crafted onto the wig or human head of hair in order to achieve the final wig-like article of postiche.

[59] The respondent's opposing affidavit was deposed to by Ms Cremore, employed by the respondent as a tariff specialist. She made the determination in respect of the applicant's goods, no 85/2000, as referred to in annexure "B" to the notice of motion.

[60] The main thrust of the respondent's case, as I understand it, is contained in paragraph 4.2 of the opposing affidavit:

> "The commissioner, on the other hand, has determined all the goods in issue in this application to be classifiable under TH 67.04 on the basis that the goods, as presented upon importation, are retail packed for individual sale, together with instructions for care thereof and require no additional work or process of manufacture to the goods themselves prior to attachment or incorporation to the end-user's hair. In other words, the imported goods are complete, final products at the time of importation."

[61] The respondent contends that all the goods in issue in this application fall under the first part of tariff heading 67.04, namely made up or complete articles of postiche and that they are specifically covered by the reference to "and the like" as found in both the heading and the Explanatory Notes thereto. It is submitted that the imported articles are "like" switches, as expressly included in the heading, or hair pieces (curls or chignons).

[62] In her comprehensive opposing affidavit, Ms Cremore identifies the difference in the goods covered by the two headings, 67.03 and 67.04, read with the Explanatory Notes thereto:

(1) 67.03 covers components of articles such as wigs, hair pieces, switches and false eyebrows, etc while 67.04 covers complete articles of the same sort.

(2) The components (human hair or other fibre) have in some way been processed, worked or prepared to a stage where they can be used in the

making or the manufacture of various articles of postiche. These goods are not complete articles and will, of necessity, undergo further processes after importation to become "made up" articles of postiche.

(3) 0n the other hand, 67.04 deals with goods that are finished articles of postiche which require no further work and are ready for use.

[63] In my view, this description of the distinction between the two classifications is correct.

[64] Deponent Cremore then goes on to identify the differences between the contentions of the parties regarding the scope of the two headings:

(1) It is common cause that the applicant's goods do not require any additional work or manufacturing process to be carried out on the goods themselves after importation, as they are already capable of being directly integrated, incorporated or attached to the end-user's hair or head.

(2) The applicant contends that, due to the complexity and length of time required for incorporating the weaves and braiding fibre into the customer's hair and the fact that such incorporation is often carried out by a person other than the customer, mostly a hair stylist, the imported goods constitute components of or incomplete "wigs and the like" thus rendering them classifiable under TH 67.03.

[65] To these two contentions the applicant replies as follows:

"38.1 The applicant admits the contents hereof, but specifically contends that the direct integration, incorporation or attachment to the end-user's hair or head can be equated to the process of attaching the wefts onto a cap to form a wig.

38.2 The applicant reiterates that TH 67.03 describes goods prepared for the use in making wigs or the like, which presupposes an additional process to be followed, not on the goods itself, but to make a wig or the like (including a postiche or for other purposes).

38.3 Accordingly, the act of weaving or braiding the man-made fibres or the wefts create a 'wig-like' finished article."

[66] In my view, this exchange between the parties embodies the crux of the dispute which falls to be decided.

[67] Deponent Cremore goes on to make further submissions in support of the case advanced by the respondent. At the time of importation, all the applicant's products subject to the debate are complete articles of postiche "and the like", the latter expression as it is expressly used in the first part of TH 67.04 and the Explanatory Notes thereto, as no further work/manufacturing process needs to be carried out on the imported products after importation.

The process of temporarily attaching the imported goods to a human head can, by no stretch of the imagination, be regarded as a process of manufacture.

[68] The effect of the applicant's argument would be that a human being becomes an object, capable of being used as a component in a process of manufacture to create a whole new article capable of being classified in the Nomenclature.

[69] These submissions were developed further by Mr Meyer during his address. He puts it as follows in his heads of argument:

> "22.1 The manufacturing process described by the applicant and its various experts can by no stretch of the imagination be described as constituting the 'manufacturing' of a new product;
>
> 22.2 The braiding or weaving of the hair into the customer's hair does not, and cannot, create a new product merely because the process is somewhat complicated and tedious;
>
> 22.3 The imported product ie the braids and wefts is a final product that is simply temporarily attached to a person's head by means of (mostly) weaving or braiding it into a person's hair; and thus classifiable under TH 67.04;
>
> 22.4 It is thus, similar to false beards and eyelashes, classifiable under TH 67.04;
>
> 23.1 What is the new 'weft-like' product (ie the human fastened to hair) to be called and as what would it be classifiable in terms of the Harmonised System?

23.2 If the applicant's argument is correct, the implanting of eg a cardiac pacemaker or a hip prosthesis would also result in a new product being manufactured."

[70] Further submissions were made by deponent Cremore on behalf of the respondent. She disputes the applicant's reliance on the end-product, after the integration of the imported goods into the hair, as being the creation of a "wig-like impression". She argues that the imported goods are more properly classifiable under TH 67.04 as "switches and the like" which also perform the same function, namely supplementing, augmenting or extending natural hair and in stark contrast to covering the head. She also argued that the applicant's "wefts" are, after integration or attachment to the user, of a permanent or semi-permanent nature in that they remain attached at all times until they are permanently removed. The end-product can thus not be likened to a wig as contended for by the applicant, as the wig can be removed on a daily basis and re-used over and over again. She argued that while wigs may be used by a bald person, the applicant's products may only be used by a person who has his or her own hair.

[71] There was also a rather technical argument on behalf of the respondent to the effect that the wefts and braids imported by the applicant differ from the classic weft used to create wigs and the like. *Inter alia*, the distinction was drawn by reference to the "double" plait and the width of the plait. It was argued on behalf of the respondent that the double plait is thicker than the plaits of simple wefts.

[72] The respondent also offered the expert testimony of Mr Colin Clive Muir ("Muir") in the form of a supporting affidavit. Muir is also an experienced wig-maker.

[73] According to his affidavit, Muir was asked whether the articles imported by the applicant were what are known in the trade as "wefts" – used to make wigs. He says they are indeed made from such wefts and have the general appearance thereof but on close examination certain technical differences are revealed. This has to do with the stitching or "plait" at the top of the article which had been folded or doubled over, creating something like a "double weft". According to Muir, the articles were not "simple" wefts but were more durable than simple wefts and had been further worked from the form of a simple weft normally used to make wigs. For this reason the witness felt that the articles "can be likened to switches and other hair pieces" which are also made from simple wefts.

[74] I did not understand the witness to say that the articles imported by the applicant can be used as "finished" or "completed" products such as wigs, moustaches and the like.

[75] Muir also drew the distinction between the use of a wig and so-called "hair extensions" by pointing out that with hair extensions the user wears the hair style

at all times, including when sleeping, bathing, swimming, running or performing any other activity.

[76] The respondent also offered a supporting affidavit by one Palesa Lydia Makhura ("Makhura") who is a female hair stylist. Her skills include braiding, relaxing, plaiting, re-attaching and hair extensions. She drew a comparison between different brands of "bonding" which she uses in her salon and a sample of bonding sold under the name of Frika as imported by the applicant. The type of hair extension, as well as the method of attaching it to the customer, is commonly known as "bonding". All the brands of bonding that she uses and the sample of Frika have the same sort of stitching at the one end.

[77] She also described the process of bonding.

[78] I must confess that I could not glean from her affidavit a conclusion, one way or the other, which may be directly relevant to the adjudication of this particular dispute.

[79] I now turn to a brief summary of evidence presented by the applicant in reply to the submissions made by the respondent.

[80] The applicant reiterates that all the products imported by the applicant which are under consideration in this appeal are not made up articles of postiche but are

goods prepared for use in making wigs or the like. It is strongly denied that the applicant at any stage contended or admitted that the products under consideration are "like" switches or hair pieces.

[81] I have already quoted paragraph 38 of the replying affidavit dealing with what I consider to be the crux of the dispute.

[82] It is submitted by the applicant that it is important to note that all the products listed in TH 67.04 require no further work before they are attached, which is not the case for the applicant's products at issue. It is submitted that stylists, braiders and weaving experts spend long hours using the components of TH 67.03 to make a finished product that is similar to a wig. The only difference between the finished product as described and that of a wig is that the components of a wig is attached to a wig cap, net or wire whilst the components of the mentioned product are directly attached to the user's head. In both instances, the end-product is made from the same components to be found in TH 67.03, using only different methods in order to present a final product of postiche or the like. The imported goods are not only covered by "the like" in TH 67.03 but they are also covered by the fact that they are used in the making of wigs or articles of postiche. They are not complete articles of postiche at the time of importation.

[83] It is contended on behalf of the applicant that the respondent's use of the word "manufacture" is not appropriate when TH 67.03 specifically refers to goods

prepared for use in making wigs or the like. It is pointed out that the imported goods are not only attached to human heads, but also to wig caps, netting, etc in order to prepare wigs (articles of postiche) or the like. It is argued that the applicant's imported goods most definitely create a wig-like impression in that they do "cover" the end-user's head instead of a wig cap.

[84] It is submitted, in reply, that the permanent or semi-permanent nature of the applicant's imported products can never be a factor to be considered in the classification process. Many bald men prefer to glue their wigs directly onto their scalps for weeks at a time and the wigs are only removed for shaving of the head in order to ensure a tight fit. It is also submitted, correctly in my view, that neither TH 67.03 nor TH 67.04 requires the end-product's ability to be removed on a daily basis and re-used over and over again.

[85] The applicant, with reference to supporting replying affidavits of Dashwood and Chan, makes compelling submissions with regard to the alleged technical differences between the applicant's imported products and the so-called "simple" wefts. The double plaited weft as depicted in annexure "F" to the answering affidavit is merely a single machine plaited weft, folded in double and attached by a simple machine stitch. If detached, the "double" plaited weft is simply one single weft, with a 2mm machine-made plait. The Explanatory Notes pertaining to wefts in TH 67.03 does not specify measurements of the plait, but merely provide for a measurement of "approximately 2mm wide". There is no difference

between the wefts that are components used to prepare wigs or the like, and the goods that the applicant imports.

[86] In his comprehensive replying affidavit, Dashwood reiterates that switches and hair pieces are complete items of postiche whereas braids and wefts are yet to be assembled into a final product resembling such an article of postiche or the like thereof. I consider this to be a compelling rebuttal of the argument to the contrary offered by the respondent. In my view, the photographic material forming part of the papers offers a clear illustration of the distinction between switches and hair pieces on the one hand and braids and wefts as imported by the applicant on the other hand.

[87] In similar vein, Dashwood confirms that braids and wefts are unable to be worn as imported. They must further be worked by a braider, weaving expert or a postiche manufacturer in order to create a made-up article of postiche (eg a wig) or the like (a wig-like appearance, eg hair extensions).

[88] Dashwood has been importing double wefts for many years to make wigs, on account of the fact that it is usually manufactured and exported in that form by the manufacturers of wefts. In other words, the single weft is simply folded in double and stitched together with an easily detachable machine stitch. Dashwood therefore disagrees with the respondent's witnesses when they say that the plait on

a double weft is thicker and broader than the plait on a single weft. Instead, it is exactly the same.

[89] Dashwood also takes issue with what Muir had to say about the different uses of wigs as opposed to hair extensions. Dashwood says that a wig may be worn by a user during the performance of any of the activities described by Muir. Wigs are also washed by hand.

[90] In his replying affidavit, Chan confirms that the single weft products imported by the applicant are manufactured in the same manner in which his company manufactures the wefts used for making wigs. His company manufactures both single and double plaited wefts to be used as components of wigs or other articles of postiche.

[91] There was also a replying affidavit by Mphaki. She drew more distinctions between the imported products under debate and wigs, switches and hair pieces. This was in rebuttal of deponent Cremore's argument that the imported goods may be likened to switches and hair pieces: the goods in issue cannot simply be attached by the wearer. They are not in a wearable form. They must still be processed by people such as Mphaki that are skilled in braiding and weaving. The goods in issue are components, meaning they are typically combined and further worked before they can become a complete product. They are not a complete hair extension product at the time of import.

[92] Mphaki works with both single wefts and double wefts. Both are equally feasible for use in the weaving process.

[93] Mphaki also joins issue with Makhura with regard to the actual bonding process to be applied.

[94] A consideration and analysis of all this evidence, arguments and counter-arguments has led me to the conclusion that the articles imported by the applicant are not "made-up articles of postiche" as intended by Explanatory Note 1 to tariff heading 67.04. They are not "usually of high class workmanship intended for use either as aids to personal toilet or for professional work (eg theatrical wigs)". I am mindful of the definition of "made-up" mentioned by witness Dashwood by referring to Funk and Wagnalls *Practical Standard Dictionary*. This definition includes "completed or finished".

[95] In my view, the evidence presented by the applicant, and more particularly the evidence of Dashwood and Chan, favours a conclusion that the imported goods under debate are "… other textile materials, prepared for use in making wigs or the like" as intended by TH 67.03.

[96] I am particularly mindful of the fact that the Explanatory Notes to 67.03 prescribe that included in this heading would be "wefts" consisting of man-made

fibres dyed in the mass, folded in two to form tufts which are bound together, at the folded ends, by a machine-made plait of textile yarns approximately 2mm wide. These "wefts" have the appearance of a fringe in the length. In my view, the testimony of the witnesses Dashwood and Chan, in particular, accommodates the imported goods comfortably within the ambit of this description.

[97] In view of these conclusions, I cannot accept the argument of the respondent that the goods are classifiable under TH 67.04 "on the basis that the goods, as presented upon importation, are retail packed for individual sale, together with instructions for care thereof and require no additional work or process of manufacture to the goods themselves prior to attachment or incorporation to the end-user's hair". The fact remains that the goods, neatly imported and packed as they may be, cannot be used as a final, ready to wear product. I never saw a submission to the contrary in the papers offered by the respondent. The goods are of no use in isolation. They have to be integrated into the hair of the end-user (or into a wig) to create the "made-up article of postiche". The goods are "prepared for use in making wigs or the like".

The "creation" which Mr Meyer argued to be absent, is the wig-like article of postiche emerging after the lengthy integration process described by the ladies working in the salon. The final creation is an imitation or artificial substitute for a head of hair. This definition of "an imitation; artificial substitute" is part of the definition of postiche offered by Funk and Wagnalls *Standard Dictionary*. The

Concise 0xford Dictionary, 7th edition defines postiche as "coil of false hair, worn as adornment". The *Bilingual Dictionary* of Bosman, Van der Merwe and Hiemstra, 8th edition describes postiche as "vals hare, namaaksel".

In my view, the final creation emerging after the braiding process in a salon involving the applicant's imported articles or, for that matter, the final wig produced by using the applicant's articles, would comfortably resort under these dictionary definitions.

[98] For all these reasons I have come to the conclusion that the relief claimed (in truncated form after the abandonment described) ought to be granted.

The order

[99] I make the following order:

1. The products listed in annexure "B" to the notice of motion, as imported by the applicant, are declared to fall under tariff heading 67.03 of Part 1 of Schedule 1 to the Customs and Excise Act no 91 of 1964.
2. The determinations of the respondent that the products listed in annexure "B" to the notice of motion, are classifiable within tariff heading 67.04 under subheading 6704.19 of Part 1 of Schedule 1 to the said Act are amended in accordance with paragraph 1 above.
3. The respondent is ordered to pay the costs of the application including the costs flowing from the employment of two counsel.

W R C PRINSLOO
JUDGE OF THE HIGH COURT

26368-2007

HEARD ON: 3 SEPTEMBER 2008

FOR THE APPLICANT: C E PUCKRIN SC ASSISTED BY I ELLIS

INSTRUCTED BY: KLAGSBRUN DE VRIES & VAN DEVENTER

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