THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 416/09

In the matter between:

DISTELL LIMITED **First Appellant**

STELLENBOSCH FARMERS'

WINERY LIMITED **Second Appellant**

and

THE COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICE
Respondent

Neutral citation: *Distell v CSARS* (416/09) [2010] ZASCA 103 (13 September 2010)

Coram: HARMS DP, HEHER, MHLANTLA JJA, EBRAHIM AND K PILLAY AJJA

Heard: 18 August 2010

Delivered: 13 September 2010

Updated:

Summary: Customs and Excise – Act no 91 of 1964 – tariff classification – 'wine coolers' – whether 'other fermented beverages' or 'mixtures of fermented beverages and non-alcoholic beverages' – whether water is a 'non-alcoholic beverage'.

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ORDER

On appeal from: North Gauteng High Court (Pretoria) (Ebersohn AJ, Webster and Molopa JJ sitting as court of appeal):

1. The appeal succeeds with costs including the costs of two counsel.

2. The order of the court a quo is set aside and replaced by the following:

'1. The appeal succeeds with costs including the costs of two counsel.

2. Save for the costs order granted in favour of the second appellant the order of the High Court is set aside and in its place the following order is made:

"(a) The determination made by the Commissioner for the South African Revenue Service ("the Commissioner") on 13 October 2004 that the products listed in Annexure "A" (the "final wine cooler products") fall to be classified in tariff item 104.15.50 before the amendment of Part 2A of Schedule 1 to the Customs and Excise Act, 91 of 1964 ("the Act"), dated 18 February 2004, is hereby corrected by substituting therefor a determination that prior to the said amendment only the wine portion used in the manufacture of the final wine cooler products is liable to excise duty under item 104.15.10 of Part 2A of Schedule 1 to the Act.

(b) The determination made by the Commissioner on 13 October 2004 that the final wine cooler products fall to be classified in tariff item 104.17.15 after the amendment of Part 2A of Schedule 1 to the Act (dated 18 February 2004) is hereby corrected by substituting therefor a determination that after the said amendment the whole of the final wine cooler products is classifiable in tariff item 104.17.22 of Part 2A of Schedule 1 to the Act.

(c) The determinations made by the Commissioner on 13 October 2004 that Bernini Sparkling Grape Beverage and Crown Premium fall to be classified in tariff item 104.17.15 after the amendment of Part 2A of Schedule 1 to the Act (dated 18 February 2004) are hereby corrected by substituting therefor a determination that the whole of the said products is classifiable in tariff item 104.17.22 of Part 2A of Schedule 1 to the Act."

JUDGMENT

HEHER JA (HARMS DP, MHLANTLA JJA, EBRAHIM and K PILLAY AJJA concurring):

[1] This case concerns the correct classification of ten wine coolers[1] for the purposes of excise duty payable in terms of the Customs and Excise Act 91 of 1964 ('the Act') and the consequential relief to which the appellants are entitled if they succeed on the classification issue.

[2] The first appellant ('Distell') has manufactured alcoholic beverages for many years. It acquired the business of the second appellant ('SFW')[2] with effect from 1 January 2001. SFW also manufactured such beverages.

[3] Prior to 1 January 2001 SFW manufactured Crown. Distell continued to do so after the acquisition. Before and after, it manufactured the other nine wine coolers.

[4] The classification of the wine coolers was, for the most part, the subject of determinations made by the respondent ('the Commissioner') on various dates in terms of s 47(9)(a) of the Act. The appellants contest the latest determination in respect of each cooler. The relief claimed by the appellants in the courts below took the form of appeals in terms of s 47(9)(e), or, as an alternative, applications to compel the Commissioner to correct determinations 'made in error', as contemplated in s 47(9)(d)(i), and, in respect of Crown (during a limited period when it was not the subject of any determination), declaratory relief.

1 According to the evidence the wine coolers consist of variations of an unfortified wine base to which flavouring and water are added and the mixture is carbonated to produce the end product. The ten wine coolers are Bernini Sparkling Grape Beverage ('*Bernini*'); Crown Premium ('*Crown*');Bernini Dry Grape Liquor; Tiffany's Bucks Fizz Cooler; Tiffany's Blackcurrant Cooler; River Dew Peach Chenin Blanc Cooler; River Dew Raspberry Pinotage Cooler; River Dew Tropical Sauvignon Blanc Cooler; River Dew Blackcurrant Cabernet Cooler; and Castell Ginger Fizz Cooler.

2 The *locus standi* of SFW, a subject of dispute in the court a quo, is now moot.

[5] In terms of s 47(1) of the Act duty is payable on, inter alia, all 'excisable goods' in accordance with the provisions of Schedule 1 to the Act. The term 'excisable goods' is defined as meaning goods specified in Part 2 of Schedule 1. Part 1 of Schedule 1 contains descriptive headings and sub-headings[3] for the purposes of classifying goods in relation to duties payable under Part 1 (customs duty) and other parts of Schedule 1. Section A of Part 2 to the Schedule uses these tariff headings for the purpose of identifying, by way of item numbers, the goods which constitute 'excisable goods' and the excise duty payable on them. The excise headings in Part 2A mirror the tariff headings in Part 1 (sometimes with minor differences which may limit the goods within the excise headings but can never broaden the class). Part 2A of Schedule 1 was amended with effect from 18 February 2004. The classification issue will require a consideration of the position both before and after the amendment.

The facts and history of the dispute

[6] As will appear, each product is a composite and the descriptive tariff headings which must be considered are by no means sharply defined, and it is, therefore, hardly surprising that neither the appellants nor the Commissioner has been consistent in its views concerning the correct classification of the coolers. Each side treats the vacillations of the other as opportunism. It is in my view unnecessary to attach epithets to the conduct of either.

[7] On 17 July 1995 the Commissioner issued a written tariff determination to SFW in terms whereof Crown was determined to be (i) classified under tariff heading 22.06.00.90 of Part 1 of Schedule 1[4], and hence (ii) liable to excise duty in terms of item 104.15.80 of Part 2A of Schedule 1.

[8] On 1 December 1995 the Part 2A determination was amended by the

3 Based on the international Harmonized System for the Classification of Goods.
4 The precise terms of this and other headings are set out below. In this judgment the abbreviation 'TH' will be used to designate a heading in Part 1.

Commissioner from item 104.15.80 to item 104.15.50.

[9] On 21 June 1996 the Commissioner issued a determination that classified Bernini under TH 22.06.00.90 and item 104.15.80. In September of that year it amended the latter classification to item 104.15.50.

[10] For reasons not germane to the appeal Distell paid duty on Bernini at the rate specified in item 104.15.10 (a lower rate than 104.15.50) until August 2002. The appellants' view in the current litigation is that no duty at all was payable on Bernini as a cooler, but only on the wine used in making it. On that basis, any overpayment was mainly attributable to duty having been paid on the full volume of Bernini and not just on the wine content.

[11] On 14 August 2002 the Commissioner issued a determination to Distell in respect of the other eight coolers. This was the first determination in respect of these. The determination was in line with those made for Crown and Bernini, ie TH 22.06.00.90 and item 104.15.50. Shortly before issuing this determination, at a meeting on 22 July 2002 the SARS officials had explained their view as being that the coolers were a mixture of wine and a non-alcoholic beverage in the form of water.[5] Thus, at that stage, SARS's approach on the classification question was what the appellants contend in this appeal.

[12] Distell, whose opinion had until then been that excise duty was payable on the coolers, but at the rate contained in item 104.15.10, investigated the matter further. Its conclusion was that the mixtures falling under the second part of TH 22.06 were not excisable as such and that Distell should be paying excise duty only on the wine component and at the 104.15.10 rate. This was explained and motivated in a letter from its consultant, KPMG, to SARS of 7 October 2002.

[13] In regard to the eight coolers that had been the subject of the August 2002 determination, SARS conceded the position in a letter of 12 March 2003: the

5 'By virtue of the General Notes to Chapter 22 and the terms of headings 22.01 and 22.02'.

determination was amended in accordance with Distell's representations. At the same time SARS confirmed that duty (at the 104.15.10 rate) was payable only on the wine content of the coolers. However, in another letter of the same date the Commissioner refused to amend the 1995/1996 determinations for Crown and Bernini, holding that any appeal in that regard was time-barred in terms of s 47(9)(f), this despite its implicit acknowledgement that those determinations were wrong in law.

[14] Distell remonstrated without effect against what it regarded as inconsistent and unjust treatment. On 15 December 2003 it gave notice in terms of s 96 of the Act of its intention to institute legal proceedings against the Commissioner and launched the application which gave rise to this appeal on 6 May 2004. At that stage SARS's attitude was still that the coolers were mixtures falling under the second part of TH 22.06.

[15] In the meantime, with effect from 18 February 2004, Part 2A of Schedule 1 had been amended. The effect of the amendment was to make clear that all beverages classifiable under TH 22.06 would be liable for the same excise duty.

[16] Appellants' counsel submitted before us that, when the application was launched, SARS began to look for arguments to support the very large amounts of duty which Distell and SFW had overpaid. Be that as it may, in three letters to Distell and SFW dated 13 October 2004 SARS certainly adopted a new position, namely that the coolers were not mixtures falling under the second part of TH22.06, but, instead, fermented beverages, falling within the first part of that heading.

[17] In consequence of those letters, the Commissioner:

(i) determined the Part 1 classification of Crown to be amended from TH22.06.00.90 to TH22.06.00.80 from that date (ie 13 October 2004) and subject to excise duty in terms of item 104.17.15;

(ii) confirmed the Part 2A classification of Crown (made in 1995) in terms of item 104.15.50 prior to the statutory amendment of 18 February 2004;

(iii) determined Bernini to be classified under TH22.06.00.80 with effect from the date of determination and subject to excise duty in terms of item 104.17.15;

(iv) withdrew the determination of 12 March 2003 relating to the eight wine coolers (ie other than Crown and Bernini);

(v) determined those coolers to be classified under TH22.06.00.80 of Schedule 1 with effect from 14 August 2002 and subject to excise duty under item 104.15.50 before the statutory amendment of 18 February 2004 and under item 104.17.15 after that amendment.

[18] On or about 12 October 2005 Distell applied successfully to join SFW as a second applicant.

[19] The classification application was argued before Seriti J in September 2006. On 1 November 2006 the learned judge dismissed the application with costs but subsequently granted the appellants leave to appeal to the Full Court.

[20] The appeal was argued on 13 August 2008. The appellants refined the relief claimed by them without objection from the respondent. The relief that they then sought (and the order which they now seek on appeal) was as follows:

'1. The appeal is upheld with costs, including those attendant on the employment of two counsel.

2. Save for the costs order granted in favour of the second appellant, the order of the Court *a quo* is set aside and replaced with the following orders:

2.1 The determination made by the Commissioner for the South African Revenue Service ("the Commissioner") on 13 October 2004 that the products listed in Annexure "A" (the "final wine cooler products") fall to be classified in tariff item 104.15.50 before the amendment of Part 2A of Schedule No 1 to the Customs and Excise Act, No 91 of 1964 ("the Act"), dated 18 February 2004, is hereby corrected by substituting therefor a determination that prior to the said amendment only the wine portion used in the manufacture of the final wine cooler products is liable to excise duty under item 104.15.10 of Part 2A of Schedule No 1 to the Act.

2.2 The determination made by the Commissioner on 13 October 2004 that the final wine cooler products fall to be classified in tariff item 104.17.15 after the amendment of Part 2A of Schedule No 1 to the Act (dated 18 February 2004) is hereby corrected by substituting therefor a determination that after the said amendment the whole of the final wine cooler products is classifiable in tariff item 104.17.22 of Part 2A of Schedule No 1 to the Act.

2.3 In respect of the period prior to 18 February 2004, the determination made by the Commissioner on 10 September 1996 in respect of Bernini Sparkling Grape Beverage (such determination having been confirmed on 13 October 2004) is set aside and substituted with the following determination:

"Only the wine portion used in the manufacture of Bernini Sparkling Grape Beverage is subject to excise duty under tariff item 104.15.10 of Part 2.4 of Schedule No 1, as it read prior to 18 February 2004."

2.4 In respect of the period prior to 1 January 2001, the determination made by the Commission on 30 November 1995 in respect of Crown Premium (such determination having been confirmed on 13 October 2004) is set aside and substituted with the following determination:

"Only the wine portion used in the manufacture of Crown Premium is subject to excise duty under tariff item 104.15.10 of Part 2.4 of Schedule No 1, as it read prior to 18 February 2004."

2.5 In respect of the period 1 January 2001 to 18 February 2004 it is declared that only the wine portion used in the manufacture of Crown Premium was subject to excise duty under tariff item 104.15.10 of Part 2A of Schedule No 1, as it read prior to 18 February 2004.

2.6 The determinations made by the Commissioner on 13 October 2004 that Bernini Sparkling Grape Beverage and Crown Premium fall to be classified in tariff item 104.17.15 after the amendment of Part 2A of Schedule No 1 to the Act (dated 18 February 2004) are hereby corrected by substituting therefor a determination that the whole of the said products are classifiable in tariff item 104.17.22 of Part 2A of Schedule No 1 to the Act.

2.7 The first respondent shall pay the applicants' costs including those attendant on the employment of two counsel.'

[21] On 3 April 2009 the Full Court (per Ebersohn AJ, Webster and Molopa JJ concurring) dismissed the appeal with costs. This Court thereafter granted special leave to appeal.

Sources of law

[22] The legal sources applicable to tariff classification are-

(a) Schedule 1 to the Act, Part 1 of which deals with customs duties, and Part 2 with excise duties. Part 1 contains the wording of the tariff headings, section notes and chapter notes. The tariff headings in Part 1 are used in Part 2 for purposes of imposing excise duty. Schedule 1 also contains, in section A of the General Notes, the General

Rules for the Interpretation of the Harmonized System. In the present matter Interpretative Rules 1, 3 and 6 may have relevance.

(b) The Explanatory Notes to the Harmonized System (sometimes called 'Brussels Notes') issued from time to time by the World Customs Organization. In terms of s 47(8)(a) of the Act, the interpretation of any tariff heading or sub-heading in Part 1 of Schedule 1, the general rules for the interpretation of Schedule 1, and every section note and chapter note in that Part, is 'subject to' the Explanatory Notes.

(c) The Case Law

In *Secretary for Customs and Excise v Thomas Barlow and Sons Ltd*[6] Trollip JA referred to Rule 1 of the Interpretative Rules which states that the titles of sections, chapters and sub-chapters are provided for ease of reference only and that, for legal purposes, 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. In *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise*[7] Nicholas AJA identified three stages in the tariff 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.'

There is no reason to regard the order of the first two stages as immutable.

[23] As to the Interpretative Rules, reference has been made above to the content of

6 1970 (2) SA 660(A) at 675H-676F.
7 1985 (4) SA 852 (A) at 863G-H.

Rule 1. Rule 3 provides that when goods are prima facie classifiable under two or more headings, the heading which provides the most specific description shall be preferred to headings providing a more general description. Rule 6 applies the same principle *mutatis mutandis* as between sub-headings.

The nature and characteristics of the wine coolers

[24] In applying the three stages of tariff classification in this case it is convenient to consider first the nature and characteristics of the wine coolers, as without such an understanding the importance of the words used in the headings may be lost or undervalued.

[25] The manufacturing process of the coolers was described in an affidavit by a Distell employee, Duncan Green. He stated that the coolers consist of 'a wine base to which water, sweetening agents and flavouring agents are added'. He annexed to his affidavit detailed recipes for each product. The differences in the processes are only material in relation to an alternative argument raised by counsel for the Commissioner. For present purposes the Bernini recipe may be cited as an example of the similarities.

[26] The first part of the Bernini recipe describes the manufacturing of the 'concentrate', a blending of sweetening agents, fining agents and a small amount of water with base wine, an ordinary wine with an alcohol content of between 12% and 13%. The next part of the recipe requires the blending of the concentrate with additional water (described as 'de-aerated, carbonated process water') to achieve a 50:50 blend with the concentrate. The wine in the 'concentrate' is ordinary wine without the removal of volume ie the concentrate is not reduced to a syrup. The intermediate phase of the product is a 'concentrate' because it has a higher alcohol content than the intended end-product, the cooler.

[27] The recipes for Crown and the eight other coolers are essentially the same as that of Bernini, save that in the case of some of the coolers there is no intermediate concentrate: instead the full amount of water (not yet carbonated) is added to the wine together with the flavourants and fining agents and the full-volume product then goes to

the bottling plant where it is carbonated and bottled.

Words used in the Headings, Chapter Notes and Tariff Items

[28] It is common cause that the relevant chapter of Part 1 is chapter 22, headed 'BEVERAGES, SPIRITS AND VINEGAR'.

[29] Tariff Headings 22.01 and 22.02 deal with (in summary) unsweetened and sweetened water respectively. (Neither such is excisable under Part 2A.) TH 22.03 deals with beer made from malt, and is not relevant.

[30] THs 22.04, 22.05 and 22.06 read as follows:

'22.04 - WINE OF FRESH GRAPES, INCLUDING FORTIFIED WINES; GRAPE MUST OTHER THAN THAT OF HEADING 20.09

22.05 - VERMOUTH AND OTHER WINE OF FRESH GRAPES FLAVOURED WITH PLANTS OR AROMATIC SUBSTANCES

22.06 - OTHER FERMENTED BEVERAGES (FOR EXAMPLE, CIDER, PERRY, MEAD); MIXTURES OF FERMENTED BEVERAGES AND MIXTURES OF FERMENTED BEVERAGES AND NON-ALCOHOLIC BEVERAGES, NOT ELSEWHERE SPECIFIED OR INCLUDED.'

(The later headings in chapter 22 are of no significance.)

[31] TH22.06 thus falls into two parts, namely

(a) the part before the semi-colon (ie other fermented beverages such as cider, perry and mead) and

(b) the part thereafter (which covers two types of mixtures, namely

(i) mixtures of fermented beverages, and

(ii) mixtures of fermented beverages and non-alcoholic beverages).

[32] As regards excise duty, the relevant item prior to 18 February 2004 was item

104.15.[8] The relevant items from 18 February 2004 are items 104.15 and 104.17.15 and 104.17.22.[9] The relevant excise items in Part 2A use the THs 22.04, 22.05 and 22.06. The dispute between the parties concerns the interpretation of these headings and their application to the wine coolers.

[33] The debate focuses mainly on TH22.06. The Commissioner's case is that the coolers are 'other fermented beverages' under the first part of 22.06. His argument in

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8
Tariff Item | Tariff Heading | Description
104.15 | | Wine of fresh grapes, including fortified wines: grape must other than that of heading 20.09
.05 | | Vermouths and other wine of fresh grapes flavoured with plants or aromatic substances
.10 | | Other fermented beverages (for example, cider, perry and mead):
.40 | | Sorghum beer (excluding beer made from preparations based on sorghum flour)
.50 | | Unfortified still wine
.60 | | Fortified still wine
.70 | | Other still fermented beverages, unfortified
.80 | | Other still fermented beverages, fortified
22.04 | | Sparkling wine
22.05 | | Other fermented beverages (excluding sorghum beer)'
22.06

9
Tariff Item | Tariff heading | Description
104.15 | | Wine of fresh grapes, including fortified wines; grape must, other than that of heading no 20.09
22.04 | | Vermouths and other wine of fresh grapes flavoured with plants or aromatic substances.
22.05 | | Sparkling wine
.02 | | Unfortified wine
.04 | | Fortified wine
.06 | |
104.17 | |

support of that classification is the following:

(a) The coolers are not like, for example, wine and lemonade, the result of a fermented beverage and a proper non-alcoholic beverage simply mixed together; they are designer products made in a single process that, for purely practical reasons, is subdivided into two stages. The outcome of the process is, in each case, a fermented beverage.

(b) Shorn of adornment, the processes are no different from that employed to make a cup of coffee (using coffee, milk and sugar): although a mixture of two or more ingredients may result in an end product that may be consumed as such (eg sweetened milk or sugar water), and although some people may have a preference as to the order in which the ingredients are to be added, nothing turns on these matters. Irrespective of how one goes about it, the final product will not be a mixture of the ingredients, but a new designer product: coffee.

[34] By contrast the appellants' case is that the coolers fall under the second part of TH22.06 ('mixtures'), being a mixture of a fermented beverage (wine) and a non-alcoholic beverage (water).

An explanation of the relief claimed by the appellants and why they regard it as important

[35] To explain the significance of the two competing positions for purposes of excise duty in Part 2A, one must distinguish between the period before and after 18 February 2004.

22.06
Other fermented beverages, (for example, cider, perry and mead); mixtures of fermented beverages and mixtures of fermented beverages and non-alcoholic beverages, not elsewhere specified or included:
.05

Traditional African beer as defined in Additional Note 1 to Chapter 22
.15

Other fermented beverages, unfortified
.17

Other fermented beverages, fortified
.22

Mixtures of fermented beverages and mixtures of fermented beverages and non-alcoholic beverages
.90

Other'

[36] Before 18 February 2004-

(a) Item 104.15 in Part 2A included only the first part of TH22.06. Accordingly, it is common cause that if, as the appellants contend, the wine coolers are mixtures that fall under the second part of TH22.06, no excise duty was payable on the coolers up to that date.

(b) Excise duty was, however, payable on the manufacture of the wine used in creating the wine coolers. This duty was payable in terms of item 104.15.10 ('unfortified still wine') read with TH22.04 ('wine of fresh grapes . . .').

(c) However, the Commissioner's case is that the coolers are 'other fermented beverages' and that the first part of TH22.06 was certainly covered by excise item 104.15. In that case the coolers would fall under excise sub-item 104.15.50 ('Other still fermented beverages, unfortified').

(d) The result would be, on the Commissioner's case, that the appellants had to pay duty not only on the wine alone, but also on the coolers containing the same wine (which, because of the addition of water, would have a larger volume). Moreover, the rate imposed by item 104.15.50 was higher than the rate imposed by item 104.15.10.

(e) The different contentions of the parties are also relevant to the question of rebates on the excise duty payable in respect of the wine used in making the coolers. This will be dealt with below.

[37] From 18 February 2004:

(a) Item 104 in part 2A was amended by removing TH22.06 from item 104.15 and creating a new excise item, 104.17, to deal with TH22.06 which it now covers in its entirety (and not merely the first part as previously).

(b) It is common cause that excise duty is, in terms of item 104.17, payable on the coolers. However, the appellants contend that, because the coolers fall under the second part of TH22.06, they should be classified under excise sub-item 104.17.22, whereas the Commissioner (consistent with his contention that they fall under the first part of TH22.06) argues that the coolers are to be classified under excise sub-item 104.17.15.

(c) The difference is not relevant to the rate of excise duty payable on the coolers,

since the rates in items 104.17.15 and 104.17.22 have been the same. However, the classification is of importance when it comes to *rebates* on the excise duty payable on the wine used in making the coolers.

[38] In the debate between the parties rebates are relevant in respect of the period before and after 18 February 2004 for the reasons which follow:

(a) As noted, excise duty is payable on the *wine* manufactured for use in making the coolers. Up to 18 February 2004 this duty was payable in terms of item 104.15.10 read with TH22.04. As from that date the duty on the wine has been payable in terms of item 104.15.04 read with TH22.04. (The change in the numbering of the sub-items is not material – both deal with 'unfortified wine'.)

(b) If excise duty is also payable on the *coolers* such duty (whether under the old item 104.15.50 or the new item 104.17.15 or 104.17.22) would be payable at a higher rate and on a larger volume. The larger volume would include the wine on which duty (albeit at a lower rate) had already been paid.

(c) To prevent this double taxation, s 75(1)(d) read with Schedule 6 allows a manufacturer of excisable goods in certain circumstances to claim a rebate in respect of duty paid on excisable goods used in the manufacture of other excisable goods.

(d) Prior to 1 April 2006 the relevant rebate item in Schedule 6 was item 606.22.10. This item did not deal specifically with wine used in the manufacture of mixtures falling under TH22.06, but provided for a full rebate of duty for excisable goods in a customs and excise warehouse 'entered for use in the manufacture, by reprocessing, of excisable goods of the same or another class or kind'. This was the rebate item Distell initially applied for the wine used in making the coolers.

(e) But Schedule 6 was amended with effect from 1 April 2006. An item 620 was introduced dealing specifically with wine and fermented beverages. Item 620.05.03 allows a full rebate of duty for unfortified wine 'entered for use in the manufacture of . . . mixtures of fermented beverages and mixtures of fermented beverages and non-alcoholic beverages of item 104.17.22' (i.e.) mixtures as contemplated in the second part of TH 22.06). There is, however, no rebate item for wine entered for use in the manufacture of 'other fermented beverages' (ie beverages contemplated in the first part of TH 22.06).

(f) In regard to the rebate regime up to 1 April 2006, the Commissioner responded to the application brought by the appellants in this matter by notifying Distell, in para 22.7 of an opposing affidavit filed on 6 May 2005, of his decision that as from the date of delivery of that affidavit Distell would no longer be allowed to enter the wine under rebate item 606.22.10. In other words, the Commissioner specifically sought to exact double tax from Distell.

(g) In regard to the rebate regime from 1 April 2006, the Commissioner's excise determination in respect of the coolers has become directly relevant because the new rebate item 620.05.03 permits a full rebate for unfortified wine used in making 'mixtures' (ie beverages falling under the second part of TH22.06) but contains no rebate for wine used in making 'other fermented beverages' (ie beverages falling under the first part of TH22.06).

(h) Accordingly, if the appellants are right that the coolers are 'mixtures' falling under the second part of TH22.06, the position as from 1 April 2006 is that, because Distell has been paying excise duty (at a higher rate) on the wine coolers (inclusive of the wine forming part thereof), Distell would be entitled to a rebate on the excise duty paid on the earlier manufacture of the wine. Effectively, Distell would pay excise duty once on the finished product, a result that, so the appellants submit, would be both just and intended by the legislature.

(i) However, the Commissioner's excise determination is that the coolers are not mixtures but fall under the first part of TH22.06. Rebate item 620 does not accommodate this situation and the appellants thus have to pay duty on the original wine and, again (at a higher rate and on a larger volume) on the coolers.

(j) The appellants therefore submit that the Commissioner's excise determination gives rise to an oppressive and unjust result. Moreover, they contend, the very formulation of rebate item 620.05 (read with note 3 thereto) shows that the Commissioner's excise classification of the coolers is wrong. Rebate item 620.05 allows a full rebate on wine entered for use in making sparkling wine, fortified wine, mixtures and spirits of item 104.20. The thinking of the legislature is, according to appellants' counsel, quite clear: if wine is used in making another excisable beverage it should enjoy a full rebate; the reason why rebate item 620.05 does not mention wine used in making 'other fermented beverages' (ie beverages falling under the first part of

TH22.06) is that the legislature knew that the first part of TH22.06 did not apply to wine-based beverages (for reasons which will be considered below). The Commissioner's contested excise determinations in the present case fly in the face of this statutory scheme.

[39] Clearly, the financial consequences of the classification issue are substantial and ongoing. If Distell's submissions are valid the payment of double duty is understandably regarded by it as a serious injustice.

[40] As noted earlier, the Commissioner contends that the coolers are classifiable under the first part of TH22.06 as 'other fermented beverages', whereas the appellants submit that they are classifiable under the second part as mixtures. By the time of the hearing in the court a quo the Commissioner disputed that water was a 'non-alcoholic beverage' for tariff purposes. On the Commissioner's argument, this rendered irrelevant the fact that, prior to 18 February 2004, item 104.15 did not include the second portion of TH22.06 dealing with mixtures. According to the Commissioner, the relevant tariff item in Part 2A was item 104.15.50, 'Other still fermented beverages, unfortified'.

[41] Although Chapter 22 is titled 'BEVERAGES, SPIRITS AND VINEGAR, Interpretative Rule 1 states that such titles are for ease of reference only and that, for legal purposes, classification must be determined according to the terms of the headings and relevant section and chapter notes. Accordingly, the appellants' counsel rightly placed no reliance on such force as the title might lend to their argument.

[42] The wine component of the coolers ie the wine before it is mixed with the water, is ordinary wine falling under TH 22.04, 'wine of fresh grapes'. The explanatory notes to TH 22.04 state that this tariff heading includes ordinary wine.

[43] The water component of the coolers, ie the water which is, prior to mixing, added to the wine, is unsweetened water falling under TH 22.01. That item itself states that 'waters' for the purpose of the heading include natural waters. The Explanatory Notes on TH22.01 provide that the item includes natural waters of all kinds. (Chapter Notes

1(b) and (c) and the corresponding Explanatory Note A state that seawater and distilled or conductivity water – do not fall under chapter 22.)

[44] As regards the end product (the wine coolers manufactured through a process of mixing), the parties were *ad idem* that TH22.06 applied, the dispute being confined to whether it fell into the first or second part of the item.

Can the wine coolers be accommodated in the first part of TH 22.06 under the rubric 'Other fermented beverages', as the Commissioner has classified them?

[45] The rationale for so placing the coolers, according to counsel, was that they are 'designer products' in which the wine component, the product of a fermentation process, imbues the mixture of wine, water, sweeteners and flavourant with the element of fermentation and renders the finished product a fermented beverage. When the court put to counsel that, properly interpreted, a 'fermented beverage' was one where the beverage was the end product of a fermentation process, he maintained his initial stance but conceded that if such should be the correct interpretation, 'the Commissioner has no argument'.

[46] A moment's reflection will demonstrate that the proposition put to counsel must be correct. The wine component is, of course, separately manufactured, anterior to use for any other purpose such as its adoption as a base for a wine cooler. The wine is, of itself, classifiable under TH22.04. By reason of a note to TH22.06 it is excluded from the scope of TH22.06 and is, therefore, not a 'fermented beverage' for the purpose of the heading. The recipe for each cooler shows that fermentation does not occur in the process and plays no role in bringing about the product. Thus, production of the coolers is devoid of any fermentation process and they are not 'fermented beverages' in the normal sense of the term. That this is so is borne out by reference to the extensive examples in the notes to TH22.06 of the fermented beverages which are among those included.[10] In every case the beverage named is one which is the final product of a

10 '(1) **Cider**, an alcoholic beverage obtained by fermenting the juice of apples.
2) **Perry**, a fermented beverage somewhat similar to cider made with the juice of pears.
3) **Mead,** a beverage prepared by fermenting a solution of honey in water. (The heading includes *hydromel vineux* – mead containing added white wine, aromatics and other substances.)

fermentation process, albeit enhanced by additives, as in the case of *hydromel vineux*. As appellants' counsel submitted (see para 38(j) above) the absence of wine used in making 'other fermented beverages' from rebate item 620.05 is consistent with its exclusion from TH22.06.

[47] On this ground alone the determinations made by the Commissioner in respect of each of the coolers was wrong in substance and must be set aside.

[48] Counsel for the appellants was not satisfied with the extent of such a victory. He pointed out that the relief which his clients had sought in the court below also provided for the substitution of the Commissioner's determinations by orders as to the correct headings which should be applied.

[49] Although counsel for the Commissioner resisted such relief on the ground that the further determinations should be left to his client, the parties have long been ad idem that if the coolers are to find a home in the tariff schedule, the only suitable heading is TH22.06. The matter has been fully argued and it is desirable that we resolve the dispute which remains over the second half of that heading. In this regard the decisive issue is the meaning and scope of the expression 'non-alcoholic beverage'.

Is water a 'non-alcoholic beverage' within the context of TH22.06?

[50] Although there are dissenting voices, the balance of dictionary definitions

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4) **Raisin wine**
5) **Wines obtained by the fermentation of fruit juices**, other than juice of fresh grapes (fig, date or berry wines), or of vegetable juices, with an alcoholic strength by volume exceeding 0.5% vol.
6) **"Malton"**, a fermented beverage prepared from malt extract and wine lees.
7) **Spruce**, a beverage made from leaves or small branches of the spruce fir or from spruce essence.
8) **Saké or rice wine**.
9) **Palm wine**, prepared from the sap of certain palm trees.
10) **Ginger beer and herb beer**, prepared from sugar and water and ginger or herbs, fermented with yeast.

All these beverages may be either naturally sparkling or artificially charged with carbon dioxide. They remain classified in the heading when fortified with added alcohol or when the alcohol content has been increased by further fermentation, provided that they retain the character of products falling in the heading.'

favours the view that the meaning of 'beverage' is wide enough to include ordinary water. That feasible breadth of interpretation has been recognized in reported cases.[11] Whether it bears the wider or a narrower meaning (which excludes water) depends upon the context in which the word is used, in the present case TH22, and, particularly, in sub-heading 06 .

[51] There are strong linguistic indications of an intention that water was regarded by the legislator as a non-alcoholic beverage. The Explanatory Notes to TH22 state, under 'General', that the products covered in the chapter fall into four main groups, the first of which is 'Water and other non-alcoholic beverages and ice', thereby conveying that water is part of the *genus* of non-alcoholic beverages. To like effect is the formulation of TH22.02 which states that the heading covers sweetened waters 'and other non-alcoholic beverages' (excluding fruit and vegetable juices falling under TH20.09). The Explanatory Notes to the same heading state that it covers 'non-alcoholic beverages . . . not classified under other headings, particularly heading 20.09 *or 22.01*' (my emphasis). As TH22.01 relates only to unsweetened water, the express exclusion is, in context, consistent only with the understanding that such water is regarded a 'non-alcoholic beverage'.

[52] 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). The wine coolers are designer products in that sense which have a drawing power over and above that of the wine constituent alone (which, as earlier noted has already been brought within the excise regime, upon its creation, within TH22.04). The water component is not simply incidental but plays an important role in providing the character of the finished product. The parties are agreed that if the coolers cannot be brought within TH22.06 there is no apparent place for them in the existing tariff headings. Since, for the reasons set out above, the first part of the heading is inapposite, only the second can accommodate the coolers. In the

11 See for example Re *Bristol-Myers Company (Pty) Ltd v Commissioner of Taxation* [1990] FCA 200; *Perrier Group of Canada Inc v Canada* [1996] 1 FC 586.

circumstances, given the 'added value' contributed by the water element, the recognition of water as a non-alcoholic beverage for the purposes of TH22.06 seems entirely consistent with the commercial rationale of the tariff. Moreover, it is clear, that were the cooler to utilize lemonade instead of water, the second part of the heading would apply: the explanatory note says so explicitly. I can find no reason in principle to distinguish between two non-alcoholic liquids, both potable, that perform the same function as a mixing component, such that one should be excluded from the operation of the heading and the other be included.

[53] Counsel for the Commissioner have referred to contra-indications in the structure of TH22. These are, however, at best, equivocal. They are not strong enough to outweigh the persuasive considerations to which I have drawn attention. I conclude, therefore, that the appellants' contention that water is to be understood as a non-alcoholic beverage within the framework of TH22.06 must be upheld.

[54] In their heads of argument counsel for the Commissioner submitted that by reason of the formulation of the recipes, certain of the coolers were a textbook example of an "alcoholic preparation" as contemplated by TH21.06.90:[12] According to Explanatory Note (7) to TH21.06.90 the heading includes the following (if not covered by any other heading):

'*(7)* Non-alcoholic or alcoholic preparations (not based on odoriferous substances) of a kind used in the manufacture of various non-alcoholic or alcoholic beverages. These preparations can be obtained by compounding vegetable extracts of heading 13.02 with lactic acid, tartaric acid, citric acid, phosphoric acid, preserving agents, foaming agents, fruit juices, etc. The preparations contain (in whole or in part) the flavouring ingredients which characterize a particular beverage. As a result, the beverage in question can usually be obtained simply by diluting the preparation with water, wine or alcohol, with or without the addition, for example, of sugar or carbon dioxide gas. Some of these products are specially prepared for domestic use: they are also widely used in industry in order to avoid the unnecessary transport of large quantities of water, alcohol, etc. As presented, these preparations are not intended for consumption as beverages and thus can be distinguished from the beverages of Chapter 22.'

12 'Food preparations not elsewhere specified or included: Other'.

[55] Counsel further submitted that, even if water were, on a proper interpretation, to be regarded as a 'non-alcoholic beverage', the coolers were, in their perfected state, a mixture of an 'alcoholic preparation' and a 'non-alcoholic beverage' and not a mixture of a 'fermented beverage' and a 'non-alcoholic beverage'. Whether the coolers were 'alcoholic preparations' within the ambit of TH21.06.90 was, however, in the first instance, a question of fact. The appellants were not confronted with either the facts or the legal conclusions to be drawn from them until they received counsel's heads of argument in this appeal. Quite apart from the composition of the alcoholic compound, the note requires that 'as presented' the alcoholic preparations concerned are not intended for consumption as beverages. No evidence was adduced as to when, if at all, and in what state, presentation occurred. In these circumstances no case was made out by the Commissioner for the relevance of TH21.06.90 in the classification of the coolers. It is in the circumstances not an answer that counsel can rely on.

[56] In the result the appeal must succeed in relation to all the coolers concerned.

The terms of the relief to which the appellants are entitled

[57] Counsel for the Commissioner, relying on *3 M South Africa (Pty) Ltd v The Commissioner for the South African Revenue Service and Another*[13], submitted that any claim for refunds will be limited to the two years immediately before the amendment of the tariffs in question. Because the same rate of excise duty has, since 18 February 2004, been payable on all products classifiable under TH22.06, the appellants would not, in their submission, be entitled to any refund irrespective of by whom the amendment is made or its effective date. Appellants' counsel dispute the interpretation that their opponents have placed on the judgment. They submit that the judgment is irrelevant to the present case and that the practical effects of the amendment must be adduced from the terms of the statute. For the reasons which follow I think their submission is correct.

[58] In the *3 M* case an incorrect and adverse determination made by the Commissioner on 9 April 1991 was eventually corrected by him in the taxpayer's favour

13 (272/09) [2010] ZASCA 20 (23 March 2010) at paras 21 to 27.

on 21 November 2006. In terms of s 47(9)(d)(i)(bb) of the Act the amended determination was made effective from 9 April 1991. The question arose as to the extent of the refunds to which the taxpayer was entitled in consequence of the amended determination. This involved an interpretation of s 76B(1)(a)(i), which limits refunds to goods entered for home consumption 'during a period of two years immediately preceding the date of such determination, new determination or amendment, whichever date occurs last . . .'. The taxpayer argued that the date of the amendment was its effective date (9 April 1991) so that it could claim refunds on goods entered on or after 9 April 1989. The Commissioner argued that the date of amendment was when it was issued (21 November 2006) so that the taxpayer could only claim refunds on goods entered on or after 21 November 2004. The Court upheld the Commissioner's contention.

[59] In *3 M* the adverse determination of 1991 had not been the subject of an appeal under s 47(9)(e). The determination was simply amended by an exercise of the Commissioner's power of amendment under s 47(9)(d)(i). When there is an appeal under

s 47(9)(e), the two year period is reckoned backwards from the date of the appeal, even though the court's order amending the determination might only be made some time later (see the proviso to s 76B(1)(a)(i) and the *3 M* judgment at paras 22 and 24).

[60] In the present matter, unlike *3 M*, the Commissioner has not as yet corrected the determinations which the appellants say are (and which I have found to be) wrong. The relief which the appellants seek in respect of the disputed determinations is based on appeals under s 47(9)(e), alternatively, are orders compelling the Commissioner to correct the determinations under s 47(9)(d)(i). In respect of *Crown*, where no determination existed for the period 1 January 2001 to 18 February 2004, Distell seeks declaratory relief.

The period prior to 18 February 2004

[61] In respect of this period one must distinguish between the eight wine coolers, *Bernini* and *Crown*.

[62] As regards the eight coolers, in his adverse determination of 13 October 2004 the Commissioner amended his earlier favourable determination of 12 March 2003 retrospectively to 14 August 2002, purporting to act in terms of s 47(9)(d)(i). Distell appealed timeously against the determination in its amended notice of motion dated 15 December 2004. Because of the success of its appeal, Distell would, in terms of the proviso to s 76B(1)(a)(i) be entitled to refunds in respect of Bernini entered for home consumption on or after 15 December 2002. The effect of the *3 M* judgment is that the two-year period would not take Distell back to the effective date of the amended determination made on 13 October 2004 namely to 14 August 2002.

[63] The practical importance of the appeal in respect of the eight wine coolers prior to 18 February 2004 is also to prevent the Commissioner from asserting an entitlement to underpaid duty. An order in terms of para 2.1 is therefore justified. [14]

[64] As regards Bernini (prior to 18 February 2004), the adverse determination was

14 See para 20 above. All subsequent references to the relief claimed refer to the terms of the proposed order set out there.

made in September 1996. Distell brought a belated appeal against this determination, relying on s 47(9)(e), and, alternatively, on enforcing the Commissioner's duty to correct his erroneous determination, relying on s 47(9)(d)(i).

[65] The s 47(9)(e) appeal is dependent on condonation. As regards the period prior to 18 February 2004, the appellants accept that the Commissioner's letter of 13 October 2004 was not a fresh determination in respect of the classification of Bernini under Part 2A but merely confirmation that the Commissioner was adhering to the determination of 10 September 1996. Unless there was a timeous appeal against the determination (s 49(7)(f)) or a discretionary extension of time (in terms of s 96(1)(c)), the determination of 10 September 1996 could not be challenged by way of appeal nor could a declaratory order be obtained inconsistent with the terms of such determination: *Samcor Manufacturing (Pty) Ltd v Commissioner SARS.*[15]

[66] The period of delay was about 8 years. The courts below refused condonation. Distell's case was that the 1996 determination did not come to the attention of its officials who had been querying the Bernini classification. The evidence to establish this alleged failure was, however, hearsay in nature. It also lacked credibility to the extent that, when an opportunity arose in August 2002 to draw the attention of SARS to the non-receipt of the determination, and in circumstances which called for such a response, no protest was forthcoming. I do not therefore find reason to override the decisions of the lower courts.

[67] The appellants argued in the alternative for a duty on the Commissioner under s 47(9)(i) to amend determinations made in error even in cases where an appeal was no longer available. However, as counsel concede, should there be an enforced correction under s 47(9)(d)(i), the two-year period would be reckoned backwards from the date on which the enforced amendment were to be made. Since that date lies in the future, the effect of the *3 M* judgment is that there would be no right to a refund in respect of any part

15 2002 (4) SA 823 (SCA) at paras 22 to 31.

of the period up to 18 February 2004. The relief claimed in para 2.3 is, for these reasons, refused.

[68] The position in respect of *Crown* prior to 18 February 2004 (where the adverse determination was made in December 1995) would be the same as for *Bernini*, but for the fact that, in the case of *Crown*, there was no determination at all in respect of the period from 1 January 2001 (when Distell took over the manufacture of *Crown* from SFW) until 18 February 2004 (when the 1995 determination was rendered redundant because of the statutory amendment). The belated s 47(9)(e) appeal could obviously have no bearing on the position between 1 January 2001 and 18 February 2004. Because the purported s 47(9)(e) appeal was only filed in May 2004 (without furnishing grounds for the exercise of condonation) neither a s 47(9)(e) appeal nor an enforced correction under s 47(9)(d)(i) would enable the appellants to claim refunds in respect of the period prior to 1 January 2001. The relief in para 2.4 is therefore refused.

[69] There was no determination for *Crown* in force during the period 1 January 2001 to 18 February 2004. In terms of s 76B(1)(e), in respect of this period, Distell would have had to apply for refunds within two years from the date of entry of the goods for home consumption. As counsel readily conceded, there was no proof that it had done so. The relief claimed in para 2.5 therefore serves no apparent purpose.

[70] It may further be recorded that the Commissioner has (through his counsel) tendered consent to an order that he amend the 1995 and 1996 determinations given to SFW and Distell in respect of Crown and Bernini respectively, should this Court find (as it has) that the coolers are mixtures of fermented beverages and non-alcoholic beverages. Such an order would have no practical effect.

The period from 18 February 2004

[71] The determinations made by the Commissioner in his letters of 13 October 2004 classified *Bernini*, *Crown* and the other eight wine coolers in a particular way as from 18 February 2004 (the date on which Schedule 1 to the Act was amended). In respect of those determinations there were timeous s 47(9)(e) appeals by way of the

appellants' amended notice of motion of 15 December 2004 or the further amended notice of motion dated 2 June 2005.

[72] Accordingly, and irrespective of the date of this judgment, the two-year period contemplated in the proviso to s 76B(1)(a)(i) would permit the appellants to claim refunds on all goods entered for home consumption on or after 18 February 2004: a period of two years reckoned backwards from the date of the s 47(9)(e) appeals would pre-date 18 February 2004. The orders sought in paras 2.2 and 2.6 accordingly serve a legitimate purpose and must be granted.

[73] In the result the following order is made:

1. The appeal succeeds with costs including the costs of two counsel.
2. The order of the court a quo is set aside and replaced by the following:

'1. The appeal succeeds with costs including the costs of two counsel.

2. Save for the costs order granted in favour of the second appellant the order of the High Court is set aside and in its place the following order is made:

"(a) The determination made by the Commissioner for the South African Revenue Service ("the Commissioner") on 13 October 2004 that the products listed in Annexure "A" (the "final wine cooler products") fall to be classified in tariff item 104.15.50 before the amendment of Part 2A of Schedule 1 to the Customs and Excise Act, 91 of 1964 ("the Act"), dated 18 February 2004, is hereby corrected by substituting therefor a determination that prior to the said amendment only the wine portion used in the manufacture of the final wine cooler products is liable to excise duty under item 104.15.10 of Part 2A of Schedule 1 to the Act.

(b) The determination made by the Commissioner on 13 October 2004 that the final wine cooler products fall to be classified in tariff item 104.17.15 after the amendment of Part 2A of Schedule 1 to the Act (dated 18 February 2004) is hereby corrected by substituting therefor a determination that after the said amendment the whole of the final wine cooler products is classifiable in tariff item 104.17.22 of Part 2A of Schedule 1 to the Act.

(c) The determinations made by the Commissioner on 13 October 2004 that Bernini Sparkling Grape Beverage and Crown Premium fall to be classified in tariff item 104.17.15 after the amendment of Part 2A of Schedule 1 to the Act (dated 18 February 2004) are hereby corrected by substituting therefor a determination that the whole of the said products is classifiable in tariff item 104.17.22 of Part 2A of Schedule 1 to the Act."

J A Heher
Judge of Appeal

HARMS DP (concurring)

[74] I have read the judgment of my colleague Heher JA and agree with the order proposed by him. His judgment deals comprehensively with the arguments raised before us based on the multifarious issues defined in the papers. They were the consequence of inconsistent approaches and frequent changes of mind by all the parties. The Full Court added a discussion of matter not raised by either party, namely, the application of the Promotion of Administrative Justice Act 3 of 2000 to the case. In the course of this the issue, which ought to be a straightforward interpretation issue, became blurred.

[75] The case is about excise duty. Duty is payable on all excisable goods in accordance with the provisions of schedule 1 at the time of entry for home consumption of such goods (s 47 (1) of the Customs and Excise Act 91 0f 1964). The goods on which the commissioner wished to levy a duty are, generically speaking, wine coolers. The entry of the ingredients of the wine coolers (such as the wine component) for home consumption and excise payable thereon is not for present purposes relevant.

[76] A wine cooler, as appears from the main judgment, is in general terms made by first preparing a concentrate consisting of wine and flavouring and sweetening agents. The concentrate is then mixed or blended with water to produce a 50:50 blend. This, once carbonated, is the wine cooler which, depending on its classification in schedule 1, may be subject to excise duty.

[77] The commissioner sought to impose a duty on wine coolers for the period preceding 18 February 2004 under a tariff heading ‘other still fermented beverages, unfortified’. It was common cause that there was no other applicable tariff heading which had to be considered. The commissioner was wrong. Wine coolers are not ‘still’

beverages – they are carbonated. In addition, wine coolers are not 'fermented' beverages – they may contain a fermented product, namely wine, but that does not mean that they are on entry for home consumption fermented products.

[78] The 2004 amendment created the source of the second dispute. The commissioner argued that wine coolers are fermented beverages falling under the heading 'other fermented beverages (for example, cider, perry and mead)'. Cider is obtained by fermenting the juice of apples, perry is similar but obtained from pears, and mead is prepared by fermenting honey in water. Apart from the fact that wine coolers are clearly not of the same genus as the examples, they are, as mentioned, not 'fermented' beverages. This puts an end to the commissioner's attempted classification.

[79] What is left for consideration is whether, as submitted by the appellants, wine coolers are 'mixtures of fermented beverages and non-alcoholic beverages'. Since wine is a fermented beverage the question depends on whether water is, in context, a 'beverage'. The irony of the case is that if we accept the commissioner's argument that water is not a beverage it means that wine coolers cannot be classified under this tariff heading and in the absence of an alternative argument for the one rejected in the previous paragraph it would mean that, as before, wine coolers *per se* were since the amendment not subject to excise duty.

[80] The main judgment deals at some length with the meaning of 'beverage' in the present context and comes to the conclusion that it includes water. This means that the appellants' submission about the correct tariff heading is accepted as correct. The matter is not without its difficulties but since the appellants insist that water is a beverage and the commissioner is not prejudiced if we find accordingly I accept the conclusion.

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L T C Harms

APPEARANCES

APPELLANTS: A P Joubert SC with him O L Rogers SC

Instructed by Cliffe Dekker Hofmeyr Inc, Johannesburg;

Webbers, Bloemfontein

RESPONDENT: C E Puckrin SC with him J A Meyer SC and I A Enslin

Instructed by State Attorney, Pretoria;

State Attorney, Bloemfontein