



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case no: 445/2020

In the matter between:

**COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICE** **APPELLANT**
and
TONELERIA NACIONAL RSA (PTY) LTD **RESPONDENT**

Neutral citation: *Commissioner: SARS v Toneleria Nacional RSA (Pty) Ltd* (Case No 445/2020) [2021] ZASCA 65 (1 June 2021)

Coram: NAVSA, WALLIS and MBATHA JJA and ROGERS and POYO-DLWATI AJJA

Heard: 10 MAY 2021

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Summary: Customs Duty – classification – wooden items for use in wine-making to impart flavour to the wine – whether coopers' products.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town
(Binns-Ward J sitting as court of first instance):

1 The appeal is upheld with costs, such costs to include the costs of two counsel.

2 The order of the high court is amended to read:

'The application is dismissed with costs such costs to include the costs of two counsel.'

JUDGMENT

Wallis JA (Navsa and Mbatha JJA and Rogers and Poyo-Dlwati AJJA concurring)

[1] Wooden barrels have been used for over four thousand years to store and convey an enormous variety of goods.¹ In recent times other materials, such as cardboard, plastic and steel, have largely taken their place. They are now primarily confined to use in the liquor industry, where they both provide storage during the maturation process and in some, if not all, instances the wood from which they are manufactured is treated so as to impart flavour to the wine or other product. One finds them being used for the maturation and storage of wine, port, sherry, rum, brandy and whisky.²

¹ A general history may be found in Wikipedia at <https://en.wikipedia.org/wiki/Barrel>.

² Including whiskey emanating from places outside Scotland. Wooden barrels are also used in the maturation of tabasco sauce, balsamic vinegar and soy sauce, where they are known as kioke and made of cedar rather than oak. In maturing wine brandy, both oak and chestnut are used. See Canas et al 'Physicochemical and sensory evaluation of wine brandies aged using oak and chestnut wood simultaneously in wooden barrels and in stainless steel tanks with staves' (2016) 51 *International Journal of Food Science and Technology* 2537-2545.

[2] The respondent, Toneleria Nacional RSA (Pty) Ltd (Toneleria), is the South African subsidiary of a Chilean company, Toneleria Nacional LTDA (TN), that manufactures, traditional wooden barrels for use in the wine industry. In addition to conventional barrels, TN also manufactures what it calls InserStaves, ShortStaves and MiniStaves (the disputed items), which are planks or slats made of the same treated oak as barrels and cut to different sizes.³ Toneleria imports these into South Africa and sells them to wine producers as a cheaper alternative to traditional wooden barrels for imparting the qualities of wood to the wine. They are attached to a frame or rack inserted into a maturation tank, usually of stainless steel. According to Mr Potgieter, the deponent to the founding affidavit, while not used in making premium wines, they are used in relation to wine that 'can come relatively near, quality-wise, to the best barrel-matured wines'. The difference between a traditional barrel and the disputed items appears from the photographs reproduced below showing TN's products:



³ In addition, it manufactures smaller oak products under the name of Zigzags, Viniblocks, Chips, Rice and Powder, directed at the same purpose.



[3] The dispute between Toneleria and the appellant, the Commissioner of the South African Revenue Service (the Commissioner, or SARS, as appropriate) relates to the classification of the disputed items for customs purposes in terms of Part 1 of Schedule 1 to the Customs and Excise Act 91 of 1964 (the Act). Toneleria contended that the disputed items should, like wine barrels, be classified under tariff heading 44.16 as:

‘Casks, barrels, vats, tubs and other coopers’ products and parts thereof, of wood, including staves.’

This tariff heading attracts no duty. SARS disagreed. On 13 June 2016 it made a determination, under s 47 of the Act in respect of a single container load imported from Chile, that the disputed items should be classified under tariff heading 4409.29.90.⁴ Toneleria appealed to the Western Cape Division of the High Court in terms of s 47(9)(e) of the Act. Its appeal was upheld by Binns-Ward J and a declaratory order granted that the disputed items, both those in the original container load that precipitated the determination and those in four subsequent container loads, should be classified under tariff heading 44.16. The appeal is with his leave.

Classification

⁴ Other aspects of the determination related to different products and are not in dispute.

[4] The proper approach to questions of classification between different headings is well-established.⁵ It follows a three-stage process⁶:

‘Classification as between headings is a three-stage process: first, interpretation – the ascertainment of the meaning of the words used in the headings (and relative section and chapter notes) which may be relevant to the classification of the goods concerned; second, consideration of the nature and characteristics of those goods; and third, the selection of the heading most appropriate to such goods.’

In terms of s 47(8)(a)(i) of the Act the interpretation of any tariff heading or any tariff sub-heading in Part 1 of Schedule 1:

‘shall be subject to the International Convention on the Harmonized Commodity Description and Coding System done in Brussels on 14 June 1983 and to the Explanatory Notes to the Harmonized System issued by the Customs Co-operation Council, Brussels (now known as the World Customs Organisation) from time to time ...’

The Explanatory Notes do not have an overriding function, in that the primary task of the court is to ascertain the meaning of the relevant headings and section and chapter notes, but they are a helpful guide in explaining or perhaps supplementing the headings, without overriding or contradicting them.⁷

[5] In the present case, there are no relevant section or chapter notes, but the explanatory note to tariff heading 44.16 reads as follows:

‘**44.16** – Casks, barrels, vats, tubs and other coopers’ products and parts thereof, of wood, including staves.

This heading is restricted to containers which are products of the coopers’ trade, that is those of which the bodies are composed of staves with grooves into which the heads and bottoms are fitted the shape being maintained by hoops of wood or metal.

⁵ *Secretary for Customs and Excise v Thomas Barlow and Sons Ltd* 1970 (2) SA 660 (A) (*Thomas Barlow*).

⁶ *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise* 1985 (4) SA 852 (A) at 863G-H.

⁷ *Thomas Barlow* op cit, fn 5, at 676B-C.

Coopers' products, include casks of various kinds (tuns, barrels, hogsheads, etc) whether tight (for wet goods) or slack (for dry goods), as well as vats, tubs, etc.

These goods may be disassembled or partly assembled, and are sometimes lined or coated inside.

The heading also covers staves and all other wooden products, finished or not, recognisable as parts of coopers' products (eg. barrelheads, hoopwood cut to length and notched at the ends for assembly).

The heading also includes unfinished staves (stavewood), that is, the strips of wood used for forming the side, heads or bottoms of barrels and other coopers' products. Such stavewood may be in the form of:

(1) Strips cleft from sectors of tree trunks along the direction of the medullary rays. Such cleft staves may also be further flat sawn on one of the principal faces, the other face being merely trued by axe or knife.

(2) Sawn staves, **provided** that at least one of the two-principal faces is concave or convex, such curved surfaces being produced by sawing with a cylindrical saw.

The heading **excludes**:

(a) Wood which is sawn flat on both principal faces (**heading 44.07 or 44.08**).

(b) Containers made of staves affixed to the heads and bottoms by nailing (**heading 44.15**).

(c) Casks, etc, cut to shape for use as furniture (eg, tables and chairs) (**Chapter 94**).'

[6] Save for the one critically important aspect, there is no particular difficulty in construing tariff heading 44.16. It falls comfortably into two parts, namely:

(a) Casks, barrels, vats, tubs and other coopers' products; and

(b) Parts thereof, of wood, including staves.

Both the founding and replying affidavit advanced an argument that the disputed items were staves in accordance with the second part of the tariff heading. The argument was pursued, 'albeit faintly', in the High Court, but it was rightly rejected and not pursued on appeal. The disputed items were not produced in order to be incorporated into some other product, but were products in their own right and imported and marketed as such. They were

not parts of other products. A stave in its ordinary sense relevant to this tariff heading refers to:⁸

'Each of the thin narrow usu curved pieces of wood which, when placed together side by side and hooped, form the side of a barrel or cask.'

[7] That left the first half of the tariff heading. The disputed items were not casks, barrels, vats or tubs. Were they 'other coopers' products'? This was the central issue in the case. Toneleria accepted that, as a relatively new product, they were not traditional coopers' products, but contended that the trade of a cooper is no longer confined to the traditional role of manufacturing barrels, casks and other containers and has developed to include the manufacture of alternative products for use in the wine trade. These serve the same purpose as a barrel, but at lower cost. This is where the parties joined issue.

[8] In accordance with the established taxonomy of classification the first step was to ascertain the meaning of tariff heading 44.16 and in particular the meaning of the expression 'other coopers' products'. In this regard the judge said that it was 'the typical use of the goods in question that fell to be established by evidence on the facts' of 'the range of products that coopers currently make'. Accordingly, so he held, whether or not a particular product is characteristically made by coopers is a question of fact that is amenable to proof by evidence.

[9] In adopting this approach, the judge fell into the error of conflating the first and second enquiries in the process of classification. The first stage required a determination of the meaning of 'other coopers' products',

⁸ *Shorter Oxford English Dictionary* (6 ed, 2007), Vol 2, p 2994, sv 'staff', meaning 5. The *Collins English Dictionary* (6 ed, 2003) defines a stave as 'any one of a number of long strips of wood joined together to form a barrel, bucket, hull etc.'

without regard to whether the disputed items constituted 'other coopers' products'. In the process of classification determining the meaning of the tariff heading is the essential first stage. Only thereafter does one proceed to the second stage of considering the nature of the products in issue to determine in the third stage whether they fall within the class of products identified in the tariff heading. Failing to observe that vital distinction has the result that the nature of the products is used to colour the meaning of the tariff heading.

[10] Maintaining a clear distinction between the first and second stages of the determination process was vitally important in this case, because 'other coopers' products' constitutes a category of material items of a specific type, in the same way that other items in the tariff heading, such as casks, barrels, vats and tubs, are material items capable of definition and description as a class of objects. The point can be illustrated by the homely example, of whether a domestic kettle is a boiler. As the tariff heading refers to boilers, one must in the first instance determine what is meant by a boiler. Having done this, in the second stage the court considers the nature of the domestic kettle. Finally, in the third stage the domestic kettle's properties are measured against those of a boiler in the light of the meaning ascribed to the word 'boiler' in the first stage. If one conflates the first two by focussing on the fact that both the boiler and the domestic kettle use a source of heating in order to boil water and produce steam, one is likely to fall into error.⁹

[11] A failure to undertake the analysis in the proper stages leads, as it did in this case, to the court analysing the nature, purpose and function of

⁹ The example is a simplification to illustrate the point.

the goods in issue, without having first established what kind of goods were referred to in the tariff heading. The judgment commenced its consideration of the question whether the goods were 'other coopers' products' by citing a submission by counsel that the disputed items bore the hallmarks of cooperage. It proceeded to describe the process of sourcing oak to make the products and highlighted that it was the same process as used for sourcing oak to make barrels. It went on to explain that the wood used for the disputed items underwent a similar process to the wood used for making barrels and emphasised the functional equivalence of the disputed items and traditional barrels. After reference to a dictionary definition of a cooper, that he recognised did not support Toneleria's case, the judge asked rhetorically (and went on to answer affirmatively) the question:

'But is a barrel substitute or alternative that is now commonly produced by coopers, using many of their traditional skills and methods,¹⁰ not also a modern day 'coopers' product?'

[12] Interpreting the tariff heading and understanding to what it refers may require that some facts about the object or goods described in the tariff heading be established by evidence. That was the point made by this court in *Smith Mining*.¹¹ The tariff heading under consideration referred to 'works trucks ... of the type used in factories, warehouses, dock areas or airports for short distance transport of goods'. Of its own knowledge, the court could not know what vehicles were used for that purpose in factories, warehouses, dock areas or airports. Accordingly, evidence needed to be led to show what vehicles were used for those purposes in those work

¹⁰ As will become apparent later in this judgment, there was no evidence that the production of the disputed items involved coopers or the use of any of their traditional skills and methods.

¹¹ *Smith Mining Equipment (Pty) Ltd v The Commissioner: South African Revenue Service* [2013] ZASCA 145 para 8.

environments. In this case the relevant material is available from dictionaries, encyclopaedias, reference books and other publications, together with the limited evidence led by the parties on this issue.

The meaning of 'cooper' and 'other coopers' products'.

[13] A good starting point is to ascertain the meaning of a 'cooper'. In the oldest dictionary available to me¹² a cooper is defined as:

‘One who makes or repairs barrels, hogsheads, casks etc.’

Jumping forward 80 years the Shorter Oxford English Dictionary¹³ defines a cooper as:

‘A skilled worker who makes and repairs wooden vessels formed of staves and hoops, as casks, tubs, etc.’

The Cambridge English Dictionary provides the following definition:

'a person who makes and repairs barrels (= large wooden containers with a flat top and curved sides, used for holding beer, wine etc.)

I have consulted a number of other dictionaries both printed and online. All of them are to the same effect, so citation of further definitions would be otiose and add nothing to our understanding of what a cooper is.¹⁴ Each definition refers to a person who manufactures various forms of container and the word 'etc' refers to other unspecified containers. The tariff heading uses similar language in its reference to 'casks, barrels, vats, tubs and *other coopers' products*'. That recognises that casks, barrel, vats and tubs are by their very nature coopers' products, and the word 'other', like 'etc' in the dictionaries, points to these being further products of a similar nature made by coopers.

¹² *Websters New International Dictionary of the English Language* (1927).

¹³ Vol 1 p 517, sv 'cooper'.

¹⁴ The word 'cooper' appears to have its origin in corresponding Dutch or German words and means a barrel-maker. The common surname traces its origin to people who were barrel-makers.

[14] The cooper's craft is as ancient as the use of wooden containers such as barrels, casks, vats, pails, troughs, churns and similar items.¹⁵ Manufacture of these items required special tools and skills in which every cooper would be trained. All were made using staves fitted and bound together with hoops and flat ends.¹⁶ The ubiquitous use of wooden containers has now diminished and some more modern tools have been adapted for use in the craft, but the evidence was that the essential process remains the same. A brochure from Maison Louis Latour, annexed to an affidavit on behalf of SARS, dealt with the operation of its cooperage, which is given over to the production of wine barrels. It said that the process had changed very little since the Middle Ages.

[15] The description in the brochure was as follows. Most of the steps in preparing the staves used in manufacturing a barrel, such as shaving, shortening, shaping and gouging, are now done by machine, but the essential task of assembling the barrel is done by hand and requires a skilled cooper. At Maison Louis Latour – a famous wine producer – only one cooper works on each barrel, although some cooperages use production-line processes. The production of a barrel involves the cutting and shaping of the staves so that they fit together. They have to be bent to form the curved external shape of a barrel, with a bulge in the middle. The base and head have to be cut to fit the barrel. This is done by cutting grooves (crozes)¹⁷ in the staves into which the head is fastened. The whole is fastened together and held with hoops, usually of metal. The joins

¹⁵ Its antiquity is preserved in the United Kingdom by the Worshipful Company of Coopers which is one of the oldest Livery Companies of the City of London and received its Royal Charter in 1501. See <https://www.coopers-hall.co.uk/history/the-companys-history> accessed 9 May 2021.

¹⁶ See the description of 'cooperage' in the 1911 Encyclopaedia Britannica at https://en.wikisource.org/wiki/1911_Encyclop%C3%A6dia_Britannica/Cooperage accessed 10 May 2021.

¹⁷ Technically called crozes, as are the tools used to cut the groove for holding the head and foot of the barrel.

between the individual staves, and between the staves and the head and base of the barrel, must be tight and permit of no leakage. All this requires considerable skill.¹⁸ There was no evidence that the manufacture of the disputed items required the same, or even similar skills.

[16] Against the background of the dictionary definitions and this description of the cooper's craft, the expression 'other coopers' products' in the tariff heading includes a variety of containers not specifically mentioned under the general reference to 'casks, barrels, vats, tubs'. Originally a barrel described a wooden container of a specific shape and capacity manufactured by a cooper. It was broadly cylindrical with a bulge around the centre section, making it easy to roll and manoeuvre, with a capacity of approximately 120 litres. There was a range of similarly constructed containers the largest of which was a 'tun' and then, in descending order, a pipe or butt (half a tun), a puncheon or tertian (one third); a hogshead (one quarter), a tierce (one sixth), a barrel (one eighth) and a rundiet (one fourteenth). With the decline in use of wooden barrels the expression 'barrel' has become more generic, referring generally to containers of this broad description, but made in the traditional way. For

¹⁸ The following description of the manufacture of barrels for the Bordeaux region of France is to be found at <https://Bordeaux.com>.

'COOPERS (OR BARREL MAKERS)

Wooden barrels or casks play an important role in making and aging wine, providing the wine with aromatic notes of coconut, vanilla, buttered bread and caramel. Coopers are craftsmen who make and repair barrels. The craft dates back centuries and has changed very little over time. Making barrels still requires the hands of an expert. ... Coopers are craftsmen who make and repair barrels. The craft dates back centuries and has changed very little over time. Making barrels still requires the hands of an expert. Because the wood is the key factor in the quality of the barrel, coopers hand-select the best oak, often from European forests. Once the wood is selected, logs are split and the wood is aged naturally through exposure to air and water. After aging, lengths of wood (called staves) are carefully shaped then assembled. At this point, the cooper seals the joints by running a wet cloth over the staves and placing the barrel over a fire. This stage is called *chauffe*, meaning "warm-up". The "toast" of the wood can be light, medium or heavy – a decision made by the winemaker based on the style of wine to be aged and the aromas sought. Once the warming-up is over, the wood is pliable and can gradually be arched and tightened to obtain the shape of the barrel. The standard capacity of a Bordeaux barrel is 225 liters. From beginning to end, the barrel making process requires approximately eight hours of work, almost all exclusively by hand.'

example, the wine barrels that one encounters on South African wine farms typically contain between two and three hundred litres.

[17] Apart from the different types of barrels described in para 16, other containers made in the traditional manner by coopers included butter churns, firkins and kegs. Some would be closed containers and others open. The products manufactured by coopers can be described as follows:¹⁹

'There were four divisions in the cooper's craft. The "dry" or "slack" cooper made containers that would be used to ship dry goods such as cereals, nails, tobacco, fruits, and vegetables. The "dry-tight" cooper made casks designed to keep dry goods in and moisture out. Gunpowder and flour casks are examples of a dry-tight cooper's work. The "white" cooper made straight-staved containers like washtubs, buckets, and butter churns, which would hold water and other liquids but did not allow shipping of the liquids. Usually there was no bending of wood involved in white cooperage. The "wet" or "tight" cooper made casks for long-term storage and transportation of liquids that could even be under pressure, as with beer. The "general" cooper worked on ships, on the docks, in breweries, wineries and distilleries, and in warehouses, and was responsible for cargo while in storage or transit.'

[18] I have found only two general references to coopers making products other than containers. The article cited in the previous paragraph said that journeymen coopers also traditionally made wooden implements such as rakes and wooden shovels. The other said that white coopers crafted utensils, bowls, pails, butter churns, spoons, ladles and other kitchen implements.²⁰ The latter related to the colonial period in the United States. Bar these two exceptions, the available material about the trade of a cooper demonstrated that their function and area of expertise lay in the

¹⁹ The description is taken from [https://en.wikipedia.org/wiki/Cooper_\(profession\)](https://en.wikipedia.org/wiki/Cooper_(profession)). See also <https://www.britannica.com/technology/barrel-container> and <https://winehistoryproject.org/croze-howel-or-chiv/>, both accessed on 11 May 2021.

²⁰ The reference is to a culinary education site <https://www.ice.edu/blog/what-is-a-cooper> accessed 11 May 2021.

manufacture of wooden containers, both closed and open. The technique characterising a cooper's work in relation to all these items was to manufacture staves that were fitted (not nailed) together and bound, almost invariably with hoops of wood or iron.²¹ In the case of barrels and casks and other closed containers, they would ordinarily be bent into the barrel shape with a bulge in the centre and closed at top and bottom.

[19] SARS provided us with the extract on cooperage from *The Oxford Companion to Wine*.²² The history it gave was consistent with what is set out above. Under the heading of 'Cooperage today' it said:

'Cooperages are found wherever there is a wine or spirits business that needs barrels, notably in America, Scotland, and France, but also in Italy, Spain, Portugal, Ireland, eastern Europe, Germany, Australia and South Africa. They make new vats and barrels ... and/or repair or maintain older barrels and vats ...'

The entry continues and deals with cooperage in the United States, France, Italy, Spain and Portugal. Although published in 2006, when the European Union permitted wood products to be inserted in wine for flavouring purposes where the vintner was not maturing the wine in oak barrels, it does not refer to such products as being manufactured by coopers.

[20] Against that background, the reference to 'other coopers' products' in tariff heading 44.16 most obviously refers to containers similar in the manner of their construction to the casks, barrels, vats and tubs referred to in the opening words of the heading. These containers are manufactured using the skill and techniques of a trained cooper. The disputed items do not fall into this category. This is not an application of the *eiusdum generis* rule of interpretation, but flows from an examination, derived from

²¹ Copper in the case of barrels containing gunpowder.

²² Jancis Robinson (ed) *The Oxford Companion to Wine* (2006, 3 ed) pp196-197, sv 'cooperage'. The 4th edition published in 2016 is not available to me.

dictionaries and similar published sources, of the work undertaken by coopers and the nature of the products manufactured by them, using the skills and techniques in which they have been trained.

[21] The reference to 'other coopers' products' goes further than merely requiring that the products in question be produced by coopers or in cooperages. The tariff heading indicates that these are products of a distinctive nature, recognisable as coopers' products and capable of being distinguished from other manufactured wooden products. In my view that means that they must recognisably be products of a type and quality that would be produced in a cooperage and require the application of the skills, training, techniques and expertise of a trained cooper. That serves to distinguish such items from other wooden products and, where the products are manufactured in a cooperage, determine whether they are in truth coopers' products and not simply a by-product of the operations of the cooperage.

[22] This understanding of the expression 'other coopers' products' is consistent with the explanatory note's statement that the tariff heading is restricted to 'containers which are products of the coopers' trade, that is, those of which the bodies are composed of staves with grooves into which the heads and bottoms are fitted, the shape being maintained by hoops of wood or metal'. The further provisions of the note demonstrate a familiarity with the trade of a cooper, distinguishing as it does between tight and slack barrels and vats and tubs. SARS contended that this was the correct interpretation of 'other coopers' products'.

[23] In summary, it is strongly arguable that the reference in tariff heading 44.16 to 'other coopers' products' is confined to wooden containers

and parts thereof. If that is correct it would dispose of the appeal, but it is unnecessary to decide that finally, as more complete evidence than we received might show that this interpretation is unduly narrow. It is therefore preferable to adopt a more limited construction of 'other coopers' products'. In my view it applies to wooden products, manufactured by coopers and requiring the use of the traditional skills, techniques and expertise of a qualified cooper.

[24] I do not think that Toneleria's invocation of the 'always speaking' approach to the interpretation of statutes is permissible. That approach is apt when the court is considering whether a statute extends to a situation not foreseen at the time it was drafted. But the principle has its limits. They were expressed as follows in *Malcolm*:²³

'There is obvious sense in this approach when a court is confronted with a novel situation that could not have been in the contemplation of the legislature at the time the legislation was enacted. Courts can then, in the light of the broad purpose of the legislation, current social conditions and technological development, determine whether the new situation can properly, as a matter of interpretation, be encompassed by the language. But, as Lord Bingham pointed out in *Quintavalle*,²⁴ by way of example, they cannot use the principle to extend legislation relating to dogs to cats, however desirable such an extension may seem. In other words the principle has limits ...'

[25] Applying the principle in the context of the Harmonised System is particularly inappropriate, because that system is constructed on the basis that from the outset it includes all products in the course of trade, whether in existence or still to be invented and manufactured. In other words, there

²³ *Malcolm v Premier, Western Cape Government* [2014] ZASCA 9; 2014 (3) SA 177 (SCA) paras 10 and 11.

²⁴ *R (on the application of Quintavalle) v Secretary of State for Health* [2003] UKHL 13; [2003] 2 All ER 113 (HL) paras 8-10.

are no gaps that need filling or updating. Every product is capable of being classified using the process of classification described above. If a product is thought to sit uncomfortably within the applicable tariff heading or sub-heading, that may justify an approach to the Harmonised System Committee of the World Customs Organisation for a revision of the relevant tariff heading or sub-heading, but that is not a matter for a national court.²⁵ The Harmonized System is the product of international agreements between states, and like any international agreement it should as far as possible be interpreted uniformly by national courts.²⁶ It should not be subjected to an approach to interpretation the proper purview of which is purely domestic legislation.

Toneleria's case and the facts

[26] The broad description of the cooper's trade set out above was not challenged. Toneleria's contention was that, with the march of progress, coopers were no longer confined to the traditional role of manufacturing barrels, casks and other containers, but had developed and now manufacture alternative products for use in the wine trade, serving the same purpose as a barrel, but at lower cost. Even if the tariff heading had been formulated with the traditional concept of what constituted 'coopers' products' in mind, the Harmonised System was intended to accommodate both existing and novel products with the aim of accommodating all products under an appropriate heading, notwithstanding that a particular

²⁵ The following description of the process is taken from the World Customs Organisation (WCO) website at <https://wcoomd.org>.

'The maintenance of the HS is a WCO priority. This activity includes measures to secure uniform interpretation of the HS and its periodic updating in light of developments in technology and changes in trade patterns. The WCO manages this process through the Harmonized System Committee (representing the Contracting Parties to the HS Convention), which examines policy matters, takes decisions on classification questions, settles disputes and prepares amendments to the Explanatory Notes. The HS Committee also prepares amendments updating the HS every 5 – 6 years.'

²⁶ *Commissioner: SARS v Levi Strauss SA (Pty) Ltd* [2021] ZASCA 32 para 36.

item was not known to, or in the minds of, those who formulated the Harmonised System. The disputed items would be accommodated most appropriately under tariff heading 44.16, together with traditional barrels, as 'other coopers' products', in accordance with the third step of tariff determination.

[27] Toneleria rested its case almost entirely on the fact that the disputed items were made of the same oak as conventional barrels and underwent a similar process of curing and toasting, before the oak was cut on a conventional circular saw into the particular items. It suggested that the only difference between the disputed items and barrels was that instead of putting the wine into wood, the wood was being put into the wine. But in contrast to cutting planks or slats with a conventional saw, the staves intended for producing barrels must be fitted together on the bases; the crozes must be cut; the barrel heads installed; and the whole bound together with hoops.

[28] Toneleria's affidavits concentrated on the now abandoned argument that the disputed items were staves in terms of the definition, and on trying to show that the process of production was largely similar to that of producing barrels. There was no attempt to trace the history of the development of these alternative products. We do not know when they started to be made and used in viniculture. An academic article on wine maturation said that the use of wood shavings in wine production has been documented in France since the nineteenth century. However, it suggested that experiments in using pieces of oak instead of barrels commenced in the early 1960s in new winemaking countries and was regulated in the United States of America in 1993. Until 2006 their use was barred in the

European Union (EU).²⁷ The International Organisation of Vine and Wine, an intergovernmental organisation of which South Africa and most, if not all, major wine-producing nations are members, regulated the use of pieces of oak wood as an alternative to traditional barrel-aging by resolutions in 2001 and 2005.²⁸ It appears therefore that the use of these alternative products is a relatively recent phenomenon, although it has become more widespread since 2006 when the EU sanctioned the use of such material.²⁹ That is not in itself decisive, but it demanded some evidence to show that this is now part of a cooper's trade so that the products are to be regarded as coopers' products.

[29] Regrettably, other than the brochure from Maison Louis Latour and the description of the manufacturing process used by TN, neither party tendered evidence concerning general practice among coopers or the range of products that coopers now produce. The judge's researches on the internet discovered cooperages in France that have added items similar to the disputed items to their range of barrels.³⁰ That appears also to be the position with Toneleria's parent company. However, there are cooperages that exclude this type of product from their cooperage products, and describe them separately as oak additives.³¹ There are also manufacturers

²⁷ Maurizio Petrozziello et al *Chemistry and Technology of Wine Aging with Oak Chips* Section 1 (Introduction) available at <https://www.intechopen.com/books/chemistry-and-biochemistry-of-winemaking-wine-stabilization-and-aging/chemistry-and-technology-of-wine-aging-with-oak-chips>, accessed 10 May 2021.

²⁸ Pilar Rubio-Bretón, Teresa Garde-Cerdán and Juana Martinez 'Use of Oak Fragments during the Aging of Red Wines' *Beverages* 2018, 4, 102 available at <https://mdpi.com> (accessed 16 May 2021). See Resolutions OENO 9/2001 and OENO 3/2005 of the International Organisation of Vine and Wine.

²⁹ Canas et al, 'Wine Aging Technology: Fundamental Role of Wooden Barrels' (2020) 9 *Foods* 1160 available at www.mdpi.com/journal/foods. The original Regulation EC 1507/2006 has been replaced by Regulation 2019/934. Petrozziello et al, op cit, fn 28. See also Perez-Coello and Diaz-Maroto 'Volatile Compounds and Wine Aging' in M V Morneo-Arribas, M C Polo (eds) *Wine Chemistry and Biochemistry* Chapter 8C, pp 295-311 at 296.

³⁰ They refer to their products as staves. See <https://www.boutes.com/en/produits/gamme/staves/> and <https://www.boutes.com/en/produits/gamme/staves/>. A domestic cooperage's website refers to 'oak barrels and other cooperage products' which includes 'oak alternatives'. See <https://capecooperage.com>.

³¹ See <http://www.apjohn.com.au/product-categories/oak-additives/>.

who confine their business to such products and neither produce barrels nor claim to be cooperages.³² One local cooperage apparently manufactures both wine barrels and wine barrel furniture and novelty items.³³ This inconclusive, and necessarily limited, judicial review goes no further than indicating that products similar to the disputed items are being manufactured by some cooperages internationally, but we do not know the extent to which this is the case.

[30] I turn then to the evidence on behalf of Toneleria. It came from Mr Potgieter, its general manager. He has a degree in Viticulture and Oenology, spent seven years as a winemaker and in short order became first commercial, and then general, manager of Toneleria. His connection with manufacturing barrels and the disputed items arises from his having visited the parent company's factory and studied some unidentified academic material. He is not a cooper nor does he claim any expertise in regard to the training, techniques and skills of a cooper and his evidence was not supported by an affidavit from a cooper.

[31] Mr Potgieter explained that the disputed items and the other ancillary products manufactured by TN are all intended as alternatives or substitutes for the wooden barrels traditionally used to mature wine. He highlighted the function of the wood in the barrels to impart taste, aroma, flavour profile and structure to the wine and the increasing cost of traditional barrels. This led TN and, he said, its competitors worldwide, although he did not identify them, to devise products of the same general nature as the disputed items intended as a relatively cheaper alternative to barrels.

³² See <https://oaksolutionsgroup.com/configurations/#tankstaves>.

³³ See <https://sawinebarrels.com>. The website describes only the wine barrels as coopered products.

[32] According to Mr Potgieter the use of these alternative products enables winemakers having 'the necessary knowledge and skill' to make wines that 'can come relatively near, quality-wise, the best barrel-matured wines'.³⁴ He explained that the selection of the wood and its drying, seasoning and toasting were very similar to the treatment undergone by wood to be used in making barrels. However, the differences between the two were not explained, so we do not know how and why they diverge. Can wood that would be unsuitable for the making of barrels be used to make the disputed items, or are they made out of the offcuts after cutting the staves and tops for barrels? How similar is the toasting process as between barrels and the disputed items? The statement that:

'[o]verall, the toasting process undergone by the staves is *very similar* to the toasting processes undergone by barrels.' (emphasis added)

is unhelpful, without stating the differences between the different processes. It left too much unexplained.

[33] Mr Potgieter described TN's business as being 'a manufacturer of wooden products related to the production and ageing of wine'. He said this included 'staves, blocks, chips, rice and powder and 'apart from these' it also manufactures traditional wine barrels. As its name suggests,³⁵ he said that TN's business 'qualifies as that of cooperage, *even if* one were to restrict this term to its traditional sense'. Apparently, almost half its business is based on barrel sales. There is no reason to doubt that TN's business is in part the business of a cooperage, but that is not the part with which this case is concerned. The mere fact that one half of the business is

³⁴ Pilar Rubio-Bretón et al, op cit, fn 28 analysed the differences between different forms of aging of wine and showed that there were different effects as to the release of chemicals and in regard to the timing of aging. Canas et al, op cit, fn 29 refer to wine of similar quality being produced by the different forms of aging. There does not appear to be a clear picture as to the differences between the two different methods of maturation.

³⁵ Tonelaria translates from Spanish into English as 'cooperage'.

a cooperage has little bearing on whether the other half fits the same description.

[34] It emerged from Mr Potgieter's description that at the production stage there is a divergence between the process of making barrels and the manufacture of the disputed items. He described the cutting of the disputed items using a circular saw according to the dimensions required by customers. This is determined by the amount of wood that the winemaker wants to have contact with the wine. He did not deal with the process of preparing the staves that go into the manufacture of barrels. The size of these is presumably not determined by the customer, but by the size of the barrels produced by TN. The staves have to be cut and shaped in order to enable the barrel to be constructed. We were not told how the curved shape is achieved or whether the barrels are crafted individually or by a production line system. The manufacture of the hoops, the assembling of the barrels and the barrel heads, the cutting of the crozes and the process of fitting the whole together, were not explained. Accordingly, it is impossible for the court to know how significant these divergences are in the greater scheme of things. All one can say is that, given the nature of a barrel and the complexity of its construction, it is likely that it involves far more complex work to produce a barrel than to produce the disputed items. That is reflected in the cheaper price of the latter.

[35] The final processes in regard to the disputed items are the drilling of the 'staves' so that they can be attached to and suspended from an appropriate frame inside a stainless steel vat and packing in specialised packaging to prevent them from being damaged, or absorbing unwanted odours, being contaminated or undergoing environmental changes. By contrast, the finishing of barrels involves the installation of barrel heads;

the cutting of holes for taps or bungs; sanding and hoop installation; and pressure testing. We were not told anything about the packaging of barrels, but it will not be the same as the disputed items.

Discussion

[36] The net effect of Mr Potgieter's evidence was that the processes undertaken in the production of the disputed items and those used in relation to barrels were directed at achieving similar results insofar as imparting flavour, sensory profile and the like to wine. The manufacturing processes were in some respects similar and might at points overlap, especially in the preliminary stage of selecting and curing the wood, but it is clear that in many respects they diverge. The disputed items may perform a similar role to barrels insofar as the maturation of the wine and imparting flavours to the wine is concerned, but they are fundamentally different in not fulfilling the storage function that is, at the least, a primary purpose of a barrel.

[37] Mr Potgieter's conclusion was that there was a 'virtually complete functional equivalence of oak barrels' and the disputed items. He stressed the fact that the disputed items and the wood used to make barrels underwent very similar treatments. This distinguished them from wood used in carpentry. He said:

‘The staves at the centre of the present dispute are, effectively, barrels in everything except name. They are made from exactly the same sort of raw material; have undergone exactly the same sort of production process; and serve precisely the same function, only at slightly lower cost – indeed the goal behind their use is to simulate as far as possible, only more cheaply, traditional barrel fermentation. The staves can be described, in effect, as de-constructed barrels. They allow other vessels (steel tanks) to achieve barrel-like effects without any need for the vessels to be replaced by actual barrels, or indeed, for the vessel used to be modified in any way.’

[38] There are two problems with these contentions. The first is that the disputed products are not performing the same functions as barrels produced by a cooper. They are performing some of the same functions, but not all of them. That is a significant difference. The storage function of the barrel cannot be ignored. The second problem is that the fact that products may serve a similar purpose or function does not mean that they should for customs purposes fall in the same classification. Electric light bulbs and candles serve the same purpose, but are plainly different products and fall to be classified differently.

[39] Tellingly, Mr Potgieter did not say that the manufacture of the disputed items is undertaken by a cooper. He did not say that the production of the disputed items is a result of the exercise of the skill, techniques and expertise of a cooper. Instead, he spoke of an 'employee' manually grabbing the 'staves' and placing them in a machine for brushing. That does not seem to require particular skill or expertise. It might well be the work of a labourer or machine hand. He said that an 'experienced employee' used a circular saw to cut the 'staves' according to the requirements of the customer. The only skill that seems to require is the ability to operate the circular saw safely and cut the pieces to the correct dimensions. There appears to be a world of difference between cutting planks or slats using a circular saw and the complex process of manufacturing a barrel. On the face of it, the cutting and drilling undertaken in respect of the disputed items does not display any features that would distinguish it from the type of work done in a conventional workshop manufacturing wooden products or preparing wood for use in the manufacture of wooden products. There is no suggestion that the people who do this work in TN's factory are trained coopers or need to be trained coopers. (The position in regard to the barrel-making section is presumably different.)

[40] I accept that there are probably a number of companies around the world that operate cooperages and, in addition to making barrels, manufacture other wooden products, including some the same as, or fairly similar to, the disputed items. This does not mean that the additional products are coopers' products. It is significant that products of this type can be produced without the manufacturer engaging in the concurrent manufacture of barrels or requiring the services of a qualified cooper.

[41] To sum up, the manufacture of the disputed items is not part of the traditional tasks of a cooper nor does their production require an application of the skills, training, techniques and expertise of a cooper. They are directed at serving a similar function in wine-making to a conventional oak wine barrel, other than the storage of the wine itself. There is no resemblance between them and barrels used in the storage and maturation of other liquor products, such as whisky, port, sherry, brandy or rum, or non-liquor products, such as tabasco, balsamic vinegar or soy sauce. Those barrels and other containers produced for those purposes are coopers' products.

[42] At the end of the day Toneleria's argument rested on nothing more than the functional similarities between the disputed items and traditional oak barrels arising from the selection of wood, the seasoning and toasting, and the role they play in the maturation of wine. In my view that was insufficient to bring the disputed items within the category of 'other coopers' products' as described in tariff heading 44.16. They are not products of the same or similar type to those expressly described as coopers' products, because they are not containers. Nor does their production require the application of the skills, techniques and expertise of a trained cooper. The functional similarities on which Toneleria relied

accordingly did not serve to bring the disputed items within the category of 'other coopers' products'.

[43] In the result the appeal must succeed. That renders it unnecessary to enter into the debate whether the high court's order could encompass the additional containers. The following order will issue:

1 The appeal is upheld with costs, such costs to include the costs of two counsel.

2 The order of the high court is amended to read:

'The application is dismissed with costs such costs to include the costs of two counsel.'

M J D WALLIS
JUDGE OF APPEAL

Appearances

For appellant: J A Meyer SC (with him L G Kilmartin)

Instructed by: The State Attorney, Cape Town and Bloemfontein.

For respondent: RF van Rooyen SC (with him CR Cilliers)

Instructed by: Smith, Tabata Buchanan and Boyes, Cape Town
Honey Inc, Bloemfontein.