



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Not Reportable

Case no: 565/2023

In the matter between:

THE COMMISSIONER FOR THE SOUTH

AFRICAN REVENUE SERVICE

APPELLANT

and

MINING PRESSURE SYSTEMS (PTY) LTD

RESPONDENT

Neutral Citation: *The Commissioner for the South African Revenue Service v Mining Pressure Systems (Pty) Ltd* (565/2023) [2026] ZASCA 21 (27 February 2026)

Coram: ZONDI DP, MATOJANE, GOOSEN and COPPIN JJA and DAWOOD AJA

Heard: 24 November 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for handing-down of the judgment is deemed to be 27 February 2026 at 11h00.

Summary: Customs and Excise Act 91 of 1964 – tariff determination – classification of goods for the purposes of customs duty – imported seamless carbon steel pipes – whether the tariff heading 7304.39.35 or the tariff heading 7304.19.90 is the most appropriate classification.

ORDER

On appeal from: The Gauteng Division of the High Court, Pretoria (Du Plessis AJ sitting as court of appeal in terms of s 47(9)(e) of the Customs and Excise Act 91 of 1964):

- 1 The appeal is upheld with costs, including the costs of two counsel where so employed.
- 2 The order of the high court is set aside and is replaced with the following order:
‘The appeal is dismissed with costs, including the costs of two counsel where so employed, and the qualifying expenses of Dr N D Burger are allowed.’

JUDGMENT

Coppin JA (Zondi DP, Goosen JA and Dawood AJA concurring):

[1] This appeal concerns a dispute about the correct classification of seamless carbon steel pipes (the pipes) for the purposes of customs duty payable in terms of the Customs and Excise Act 91 of 1964 (the Act).

[2] The classification of the pipes for that purpose by the Commissioner of the South African Revenue Service (the Commissioner) under tariff heading (TH) 7304.19.90 was taken on appeal by the respondent, Mining Pressure Systems (Pty) Ltd, by way of an application to the Gauteng Division of the High Court, Pretoria (the high court), in terms of s 47(9)(e) of the Act. On 15 March 2023 the high court upheld the respondent’s appeal and made an order to the effect that (i) the Commissioner’s determination is set aside and is replaced with a tariff determination in terms of which the pipes are classified under TH 7304.39.35 as contended for by the respondent; and (ii) the Commissioner is ordered to pay the costs of the application. The high

court granted the Commissioner leave to appeal to this Court against the whole of its order.

[3] The respondent imported the pipes from China, where they were manufactured. It supplies them to the mining industry where they are applied (according to the respondent) for various purposes, including chilled water columns, high-pressure pump columns, backfill columns and for the transmission of drinking water. Before the Commissioner's determination, the respondent cleared the pipes duty free under TH 7304.39.35, which applies to 'Tubes, pipes and hollow profiles, seamless, of iron (excluding cast iron) or steel: other, of circular cross-section, of iron or non-alloy steel: Other: of a wall thickness exceeding 25 mm or an outside cross-sectional dimension exceeding 170 mm'.

[4] In May 2018 a dispute arose between the parties concerning the classification after a shipment of the pipes cleared under the bill of entry was stopped for inspection by customs officials. The respondent thereupon applied for a tariff determination, and pending its outcome, caused a provisional payment to be made as well as a voucher correction to be processed in order to secure the release of the shipment. The respondent's initial application was rejected, and the respondent re-submitted the application on 18 December 2018. On 15 January 2019 the Commissioner issued a tariff determination to the effect that the pipes were to be classified under TH 7304.19.90 which applies to 'Tubes, pipes and hollow profiles, seamless of iron (excluding cast iron) or steel: line pipe of a kind used for oil or gas pipelines: Other.' In terms of that classification a 10 per cent customs duty was payable.

[5] In terms of s 47(9)(a)(i)(aa) of the Act the Commissioner may, inter alia, determine the tariff headings, tariff subheadings (TSH), or tariff items, or other items, or any Schedule under which any imported goods, goods manufactured in the Republic of South Africa, or goods exported, shall be classified. An appeal against such classification lies to the high court with jurisdiction, before a single judge. It is an appeal in the wide sense.

[6] It is trite that the classification of goods under appropriate tariff headings and subheadings consists of three stages. The first is the interpretation stage, when the meaning of the potential headings, the relevant section and chapter notes are ascertained. The second stage is about identifying the goods in question. The third stage is where the most appropriate heading for the goods is decided upon in light of the outcome of the previous two stages.¹

[7] The legal sources for determining an appropriate classification are found in Schedule 1 Parts 1 and 2 of the Act. The body of case law is another source. Part 1 of Schedule 1 of the Act contains, the tariff or item headings and subheadings and the notes. They describe the goods to which they apply and are based on the Harmonised System for the Classification of Goods. In *Distell v Commissioner of South African Revenue Service*² the statutory sources are described as follows:

'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.'

[8] In terms of Rule 1 of the General Rules for the Interpretation (GRI) of Schedule 1 of the Act, the titles of sections, chapters and sub-chapters are provided for ease of reference only. For legal purposes, classification is to be determined according to the terms of the headings and any relative section or chapter notes,

¹ *International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise* 1985 (4) SA 852 (A) at 863 G-H.

² *Distell Ltd and Another v Commissioner of South African Revenue Service* [2010] ZASCA 103; [2011] 1 All SA 225 (SCA); 73 SATC 148 para 22.

provided they do not require otherwise. Thus, the headings and notes are paramount in determining the classification of goods for duty purposes. The explanatory notes merely explain or supplement those, but do not contradict them.³

[9] It is also important to bear in mind what this Court said in *Samsung (Pty) Ltd v The Commissioner for the South African Revenue Service*⁴ about the application of the General Rules and the process of classification, namely:

‘The General Rules for Interpretation that are referred to in s 47(8)(a) of the Act: (i) are applied in a hierarchical fashion – rule 1 takes precedence over rule 2, rule 2 over rule 3 etc.; (ii) establish classification principles which, unless the text of headings, sub-headings or section or chapter notes otherwise require, are applicable throughout the Harmonised System nomenclature; and (iii) provide a step-by-step basis for the classification of goods within the Harmonised System so that, in every case, a product must first be classified in its appropriate 4-digit heading, then to its appropriate 1-dash sub-division within that heading and only thereafter to its appropriate 2-dash sub-heading under the 1-dash sub-division. This principle applies without exception throughout the Harmonised System.’

[10] Returning to the facts of this case. It is apparent that the difference between the classification of the Commissioner and that contended for by the respondent, essentially relates to the nature and characteristics of the pipes and, ultimately, to the further subheading it falls under. They agree that the pipes fall under TH 73.04, namely, ‘Tubes, pipes and hollow profiles, seamless, of iron (excluding cast iron) or steel.’ The difference is in the fifth digit of the subheading. The Commissioner contends that it falls under the further subheading 7304.19. 90, which applies to items with the following description: ‘Line pipe of a kind used for oil and gas pipelines: Other: Other’.

[11] The respondent contends that the applicable subheading is 7304.3 which applies to articles with the following description: ‘Other, of circular cross-section, of iron or non-alloy steel’, and more specifically under the further subheading

³ Ibid and also see *Secretary for Customs and Excise v Thomas Barlow and Sons Ltd* 1970 (2) SA 660 (A) at 675H-676F.

⁴ *Samsung Electronics (Pty) Ltd v The Commissioner for the South African Revenue Service* [2022] ZASCA 126; 2022 JDR 2654 (SCA); 85 SATC 24 para 8.

7304.39.35 which applies to articles fitting the further description: 'Other, of a wall thickness exceeding 25 mm or an outside cross-sectional dimension exceeding 170 mm'.

The first stage - interpretation

[12] There is a dispute regarding the meaning of some aspects of the respective headings and subheadings relied on by the parties. The parties agree that Chapter 73, which covers a certain number of articles in headings 73.01 to 73.24, applies to articles made of iron or steel. The general note to this chapter deals essentially with the meanings assigned to the expression 'tubes and pipes' for the purposes of that chapter and, most importantly, regarding the respondent's contentions, that '[t]he General Explanatory Note to Chapter 72 applies' to Chapter 73. Chapter 72 applies to 'iron and steel'.

[13] Regarding the meaning of TSH 7304.1, in particular, the phrase 'Line pipe of a kind used for oil or gas pipelines', there is a difference of opinion concerning the meaning of the words 'of a kind used for oil or gas pipelines', and the word, 'pipelines'. In respect of the former the respondent contends that this refers to actual use in the South African context, but the Commissioner argues that it refers to actual or potential use in a global context. Regarding the latter, the respondents contend for the Cambridge English Dictionary's definition of 'pipelines', namely, 'a very long large tube, often underground, through which liquid or gas flows for long distances'. On the other hand, the Commissioner contends that 'pipelines' ought to be given the meaning assigned to the term in Webster's Third New International Dictionary, namely, 'a line of pipes connected to pumps, valves and control devices for conveying of liquids, gases, and finely divided solids'. With regard to the meaning of heading 7304.3, and in particular, the phrase 'non-alloy steel', in the description 'Other, of circular cross-section, of iron or non-alloy steel', the parties also had a difference.

[14] Although the high court purported to differentiate between the different stages of classification it somewhat conflated the first two. Even though it did not identify the nature of the use as being in dispute, it found, seemingly relying on the view of

the respondents' expert, Prof Mostert, that the use contemplated in the phrase 'of a kind used for oil or gas pipelines' was confined to local, South African use. The high court criticized the Commissioner for not providing 'any evidence on the kind of line pipe used for pipelines in South Africa'. The high court, seemingly, mistakenly, said that the parties were in agreement concerning the meanings to be given to the phrases 'of a kind' and 'pipelines', whereas that was not the case. When it was considering the third stage the high court referred to the matter of *HMT Projects (Pty) Ltd v The Commissioner of the South African Revenue Service (HMT Projects)*⁵ where the court interpreted the word 'pipeline' as follows:

' . . . in Tariff Heading 7304.19, a "pipeline" appears to be a continuous line of pipes, constructed to form a pipeline for the conveyance of gas or petroleum. This may be from a refinery to storage tanks, from either of those to "a market" or from oil fields to a refinery. As these various elements may be close to each other or some distance apart, on the same premises or connected to the same plant or not, the distance appears to be immaterial. Where it is notionally possible that a pipeline may be constructed anywhere within the petrochemical or mining industry (to use the Applicant's words) one would not know the length (or distance) of the actual pipeline prior to its construction when one examines sections of line pipe upon importation. Whether the pipeline would be of a short or long distance would be of no consequence. To import a "long" distance into the meaning of the word "pipeline" does therefore not appear to be justified.'

[15] The high court does not state whether the court's interpretation in *HMT Projects* was right or wrong, but, instead, conflated the determination of that issue with the second and third stages. It also seems to imply that the meaning of the word 'pipelines' would be different because the pipes in that case were made of 'alloy steel' whereas the pipes in this case are of 'non-alloy steel'. In my view, the interpretation of 'pipelines' by the court in *HMT Projects* was correct. Length is immaterial. This is underscored by the definition of the term 'pipeline' in the Oxford English Dictionary (Oxford University Press), namely as 'a continuous line of pipes; a conduct of iron pipes for conveying petroleum from the oil-wells to the market or refinery or for supplying water to a town or district' (emphasis added). The line does

⁵ *HMT Projects (Pty) Ltd v Commissioner South African Revenue Service* [2020] ZAGPPHC 143; 2020 JDR 0811 (GP) para 4.9.

not have to be long to make it a 'pipeline'. Confining the use to local South African use was also not justified. In light of the global Harmonised system, and in the absence of express wording in support of it, such confinement is inappropriate. The use contemplated is global use in oil or gas pipelines.

[16] The term 'non-alloy steel' in heading 7304.3 is not defined anywhere in the Act. In order to come to its meaning the high court considered Chapter Note 72(f) which defines 'other alloy steel' as follows:

'steel not complying with the definition of stainless steel and containing by mass one or more of the following elements in the proportion shown:

- 0.3 per cent or more of aluminium
- 0.0008 per cent or more of boron
- 0.3 per cent or more of chromium
- 0.3 per cent or more of cobalt
- 0.4 per cent or more of copper
- 0.4 per cent or more of lead
- 1.65 per cent or more of manganese
- 0.08 per cent or more of molybdenum
- 0.3 per cent or more of nickel
- 0.06 per cent or more of niobium
- 0.6 per cent or more of silicon
- 0.05 per cent or more of titanium
- 0.3 per cent or more of tungsten (wolfram)
- 0.1 per cent or more of vanadium
- 0.05 per cent or more of zirconium
- per cent or more of other elements (except sulphur, phosphorus, carbon and nitrogen), taken separately.'

[17] The high court effectively reasoned that a steel that did not fall within the definition of 'stainless steel' and which contained by mass one or more of the elements listed, but in lesser proportions than those shown for 'other alloy steel', was a 'non-alloy steel'. The difficulty with the high court's approach is that it not only performed that exercise when (a) purportedly it was considering the third stage, and not at the first stage, where it was obliged to interpret the meaning of the headings and description; but (b) seemed to be legislating a meaning for the phrase 'non-alloy

steel'. The high court should have interpreted the phrase with reference to its actual words. The meaning it assigned to the phrase is more appropriately assigned to the phrase 'alloy steel'. It makes more sense that an 'alloy steel' would not be a stainless steel and would have one or more of the elements listed in lesser proportions than those shown. A 'non-alloy steel' means a steel that is not an alloy. An 'alloy steel' or 'other alloy steel' is an alloy, it seems, precisely because it contains one or more of the elements listed. The proportion of those elements in the alloy steel determines whether it is merely an 'alloy steel' or a 'other alloy steel'.

[18] In Chapter Note 72(e) 'stainless steel' is defined. In terms of the definition, it is an 'alloy steel' and it differs from 'other alloy steel'. The word 'steel' is defined in Chapter Note 72(d) as 'ferrous materials (excluding those of heading 72.03) which (with the exception of certain types produced in the form of castings) are usefully malleable and which contain by mass 2 per cent or less of carbon. However, chromium steels may contain higher proportions of carbon.' Therefore, a 'non-alloy steel' is not a 'stainless steel', nor a 'other alloy - steel' as defined. Ultimately though, this exercise is academic in light of the conclusion reached in this judgment in considering the third stage of classification.

Stage Two – the nature and characteristics of the pipes

[19] As was pointed out in *Autoware (Pty) Ltd v Secretary for Customs & Excise (Autoware)*⁶: There is nothing in the Act or its Schedules that indicates that 'any matter that is at issue is to be governed by the intentions of the designer, manufacturer, importer, assembler or user' of the articles to be classified, and that the court 'shall not be influenced by evidence of such intentions, except, perhaps, to the extent that such evidence may help to explain technical matters' in respect of which technical assistance is required by the court. The court is to apply a test which ignores intention and rests upon the nature, form, character and functions of the article in question, objectively determined⁷.

⁶ *Autoware (Pty) Ltd v Secretary for Customs & Excise* 1975 (4) SA 318 (W) (*Autoware*) at 321E-F; see also *African Oxygen Ltd v Secretary for Customs and Excise* 1969 (3) SA 391 (T) at 397B-H.

⁷ *Autoware* at 322.

[20] In *Commissioner, South African Revenue Service v Komatsu Southern Africa (Pty) Ltd (Komatsu)*⁸ this Court summed up the position as follows:

'It is clear from the authorities that the decisive criterion for the customs classification of goods is the objective characteristics and properties of the goods as determined at the time of their presentation for customs clearance. This is an internationally recognised principle of tariff classification. The subjective intention of the designer or what the importer does with the goods after importation are, generally, irrelevant considerations. But they need not be because they may, in a given situation be relevant in determining the nature, characteristics and properties of the goods.' (Footnotes omitted).

[21] At customs clearance the invoice and Mill Test Certificate, amongst other documents, were available that described the nature and characteristics of the pipes. In the invoice they are described as '130 Bundles (199 PCS) Carbon Steel Seamless Pipes'. They are further described in accordance with the American Iron and Steel Institute's specifications as 'API 5L X42 PSLI SMLS'. In the Mill Test Certificate issued by the manufacturer of the pipes, Hebei Aster Steel Pipe Co., the material and chemical composition of the pipes are described. The certificate further confirms that they are 'carbon steel seamless pipes' with a 'API 5L' specification. The Customs Declaration Form states, amongst other things, that the wall of the pipes exceeds 25 mm in thickness, or that they have an outside cross-sectional dimension exceeding 170 mm.

[22] The parties respectively appointed experts to assist with the technical matters that require explanation. The Commissioner engaged Doctor Nicolaas Daniel Burger (Dr Burger), a professional mechanical engineer and extraordinary university professor of engineering, who prepared a report and deposed to affidavits in which he expressed his views. The respondent engaged Professor Roelof Johannes Mostert (Prof Mostert) an expert metallurgical engineer and university professor who did likewise. They do agree on certain aspects but mostly disagree. They were not cross-examined, and their evidence was not referred for an oral hearing. Dr Burger explained that the purpose of the American Institute's 'API 5L' specification is to

⁸ *Commissioner, South African Revenue Service v Komatsu Southern Africa (Pty) Ltd* [2006] ZASCA 156; 2007 (2) SA 157 (SCA); [2007] 4 All SA 1094 (SCA); 69 SATC 9 para 8.

provide standards for pipe that is suitable for use in conveying gas, water and oil in the oil and natural gas industries. The standards include seamless and welded steel line pipe of different grades and strengths, indicated as X42, X80 and so on. He further explains that the API 5L standard is not prescriptive regarding the qualities or sizes to be used for particular materials. Prof Mostert differs sharply with Dr Burger concerning the use of the pipes in this matter (an aspect that will be dealt with later), but they agree that the pipes are as described in the documents referred to above. They further agree on the dimensions of the pipes, their composition, their yield and tensile strengths.

Stage 3 – the appropriate tariff heading (s) for the pipes

[23] The answer to the question, whether the pipes are of a kind used in oil or gas pipelines, is decisive. If they are, then the Commissioner's impugned determination is appropriate. If not, then they would fit under the heading(s) proffered by the respondent, and the appeal must fail. What matters in deciding this question is the objective position and not the subjective intention of the importer or designer. The views of the experts are relevant in understanding the scientific or technical aspects of the pipes.⁹

[24] The main disagreement between Prof Mostert and Dr Burger concerns this very issue. Dr Burger's view is that the fact of the pipes having an API 5L standard makes them suitable for use in water, oil or gas pipelines in the oil and gas industries. The use of any particular strength or dimension of pipe is not prescribed by the standards authority but would be a matter for the buyer or importer and designer of the pipeline to decide. Prof Mostert essentially opines that compliance with the API 5L standard does not by implication mean that the specific pipe is suitable for use in an oil or gas pipeline. According to him, '[t]o be suitable for use in an oil or gas pipeline, the material used and the dimensions are of particular importance...' Prof Mostert's understanding of a 'pipeline' is informed by his experience with pipelines in the South African context, in particular the Sasol gas pipeline and the Transnet pipelines. In the Sasol pipeline, high-pressure natural gas is conveyed from

⁹ *Autoware* at 321E-F.

Mozambique to South Africa over a distance of about 865 kilometres. He prefers the definition given for 'pipeline' in the Cambridge English Dictionary, namely, 'a very long, large tube, often underground, through which liquid or gas can flow for long distances'.

[25] According to Prof Mostert, the line pipe in the Sasol and Transnet pipelines generally has an outer diameter of 610 to 660 mm and is made of high-strength steel, with an API 5L strength standard of X70. In addition, according to him, those pipelines are made up of welded, and not seamless, pipes because of their greater diameters. Prof Mostert opines that the pipes in this matter, which have a much smaller diameter, and are made with an API 5 L steel strength of X42, 'are probably intended for transporting water in piping systems, probably over relatively short distances.' He gives two reasons for this view, namely (a) the full length of the pipes if laid out (2 388m or 2.4 kilometres) – which, according to him, is relatively short if compared to the length of the Sasol pipeline; and (b) the lower strength level of the pipes and their small diameters, ie compared to those of the Sasol and Transnet line pipes.

[26] In response, Dr Burger opines that even if Prof Mostert may be correct regarding the Sasol and Transnet line pipes and pipelines, 'he has created an incorrect view that pipes with dimensions lesser than 610 mm can never be used for the [conveyance] of oil and gas.' According to Dr Burger, API 5L line pipe is carbon steel pipe used for oil and gas transmissions, and it includes both, welded and seamless pipes of various grades. The line pipe could also be used for the transmission of steam, water, slurry and such fluids. He points out that the API 5L specification does not in any way prescribe the use of the pipe, and that the Sasol and Transnet line pipes are not compliant with a South African regulatory standard or requirement, but were the choices of those institutions. He explains that API 5L pipes come in various grades, from X42 to X80; PSL 1 and PSL 2 pipes are available in diameters from 2 to 80 degrees (seamless) and up to 80 degrees for welded pipe. He is adamant that line pipe of the standard, strength and with the dimensions of the pipes in this matter can be used for the conveyance of gas or oil.

[27] Dr Burger states that: 'The designation X42 – X80 is an indication of the mechanical properties of the pipe, as per the API 5L standard. The pipeline will then be designed, stressed and calculated to ensure that the pipeline is safe for the operating pressure. A pipeline manufactured from X42 material and [of a] specific schedule will obviously not handle the same pressure as a X70 with [the] same schedule. The design criteria are very clearly specified in [the] API 5L standard. Again, the material properties for the various grades including SPL 1 and 2 is as per [the] API 5L standard... You might find that certain companies or certain projects will limit the material grade that can be used for example. Pipeline projects in Russia limit the material to X70 and the specific requirements of Transnet and SASOL. These are all company policy and NOT the general design and/or usage guidelines. Furthermore, nowhere in the API 5L standard is the standard prescriptive regarding use or SPL requirements.'

[28] Despite their disparate views and the fact that their views were not subject to testing in an oral hearing, the high court was seemingly persuaded by Prof Mostert's argument that the pipes were not used in oil or gas pipelines in South Africa. As pointed out in the first stage, there is no reason, in the wording of the relevant heading or elsewhere, for confining the use to the South African context. The South African use is a matter of intention or election by the pipeline's owner or designer and does not preclude other uses elsewhere on the globe. Prof Mostert's views were ultimately the product of his experience of pipelines in South, or Southern Africa. This is underscored by his choice of dictionary definition of the term, 'pipeline', namely, 'a very long large tube, often underground, through which liquid and gas can flow for long distances'. This resonates with his knowledge of the Sasol Gas pipeline which stretches over 865 kilometres, as well as the Transnet pipelines. For Prof Mostert a pipe length of 2,4 kilometres was not 'very long'. He seemingly, overlooked the fact that the definitions in other dictionaries do not emphasise length or distance or the dimensions of the line pipes. As pointed out earlier, in the Webster's Third New International Dictionary, a pipeline is defined as a 'line of pipes. . .', and in the Oxford English Dictionary (Oxford University Press) it is defined as 'a continuous line of pipes. . .'

[29] It is clear that for the purposes of this exercise, the intended use of the pipes is irrelevant. What matters is whether they are of the kind or type of line pipe used in pipelines for oil or gas. It is a matter of objective fact that the pipes comply with the API 5L standard which applies to pipes used for the conveyance of oil and gas. The relative strength of the pipe does not disqualify its use for that purpose. Ultimately, it depends on the intended use, the requirements of the user and the design of the pipeline, including its length and diameter. While the use of a higher strength pipe (or a wider pipe) may be called for in a particular design, a lesser strength pipe of smaller dimension might do in another.

[30] The Commissioner's determination has not been shown to be inappropriate. The classification of the pipes under TH 7304.19.90, which applies to 'Tubes, pipes and hollow profiles, seamless of iron (excluding cast iron) or steel: line pipe of a kind used for oil or gas pipelines: other', fits appropriately. The pipes are indeed seamless, of steel, of a kind used in oil or gas pipelines, and they are 'other', because their wall thickness exceeds 25 mm and cross-sectional dimension exceeds 170 mm. This conclusion is decisive. It follows that the appeal must succeed. The costs follow the result. The Commissioner has asked for the qualifying expenses of Dr Burger to be allowed. There is no reason for refusing the request.

Response to the second judgment

[31] I have read the second judgment, and I do not agree with its conclusions, on the basis of what is stated above, and additionally, for the following reasons. Even though the second judgment proclaims to accept that the 'use' contemplated in TH 7304.1 should not be confined to use in South Africa only, it unreservedly accepts Prof Mostert's thesis, which is indeed only about pipelines in the South African context, and in particular, the Sasol and Transnet pipelines. The second judgment also accepts Prof Mostert's concept of a 'pipeline', which is flawed as pointed out above. The second judgment is also ensconced on what it refers to as '[t]he Explanatory Notes (EN's) to the HS for TH 73.04'. It contends that those notes indicate that the line pipe contemplated in TSH 7304.1 'is intended for the oil and natural gas industries, implying high-volume, high-pressure, or long-distance

transmission networks'. It does not identify the (alleged) note it is referring to with any precision.

[32] The main difficulty is that Chapter 73 of Schedule 1 Part only has two notes and they do not deal at all with TH 73.04 or TSH 7304.1. Where the implication referred to arises from, is otherwise unknown. The Chapter 72 notes also do not deal at all with the topic, and the article descriptions under TH 73.04 and TSH 7304.1 do not imply anything of the sort asserted by the second judgment. One can only assume that the second judgment was relying on Prof Mostert's opinion. In his affidavit dated 1 February 2021, in response to Prof Mostert's further affidavit where he makes the very assertions, which the second judgment ascribes to (a non-existent 'explanatory note'), Dr Burger, amongst other things, correctly points out that there is no heading or note to that effect.

[33] The thesis and the second judgment's conclusion that the line pipe contemplated in TSH 7304.1 can only be of a greater strength and diameter than the pipes in this matter, is not consistent with the wording of that heading and further sub-headings. The article descriptions under those headings in fact negate the validity of that theory and conclusion. Under the TSH 7304.1, the following line pipes, other than those made of stainless steel, are listed: (a) line pipe with 'a wall thickness exceeding 4.3 mm but not exceeding 12.7 mm and an outside cross-sectional dimension exceeding 200 mm but not exceeding 600 mm' (73.19.05); (b) line pipe described as follows: 'Other, of a wall thickness not exceeding 25 mm and an outside cross-sectional dimension not exceeding 170 mm' (7304.19.10); and (c) line pipe described as 'Other' (7304.19.90). All those strengths and dimensions of pipe are covered under TSH 7304.1 ('line pipe of a kind used for oil or gas pipelines').

[34] The pipes under consideration have a wall thickness and an outside cross-sectional dimension greater than those of the line pipes referred to in (a) and (b), therefore they would be 'Other', ie (c). Why would the line pipes, with the wall thicknesses and dimensions referred to in (a) and (b), be considered as being of the kind envisaged in TSH 7404.1, while the pipes under consideration are to be excluded, despite their greater wall thickness and cross-sectional dimension? It is further noteworthy that the line pipes envisaged in (a) and (b) are pipes with a lesser

outside cross-sectional diameter than 600 mm, which further undermines Prof Mostert's view that line pipe for use in oil or gas pipelines exceeds 600 mm in diameter.

Order

[35] In the result:

- 1 The appeal is upheld with costs, including the costs of two counsel where so employed.
- 2 The order of the high court is set aside and is replaced with the following order: 'The appeal is dismissed with costs, including the costs of two counsel where so employed, and the qualifying expenses of Dr N D Burger are allowed.'

PCOPPIN
JUDGE OF APPEAL

MATOJANE JA (dissenting):

[36] I have read the judgment of my colleague (the first judgment), and I agree with the framework he sets out for classifying goods under the Act. We part company, however, at the point of application. In my view, the Commissioner erred in classifying these seamless carbon steel pipes under TH 7304.19.90 as 'line pipe of a kind used for oil or gas pipelines'. The high court was right to set that determination aside.

[37] The issue is deceptively simple to state. Both parties accept that the pipes fall under heading 73.04, which covers seamless tubes and pipes of iron or steel. The dispute concerns the correct five-digit subheading. The Commissioner contends for TH 7304.1 'line pipe of a kind used for oil or gas pipelines' which attracts a 10 per cent duty. The respondent contends for TH 7304.3 'other, of circular cross-section, of iron or non-alloy steel' and specifically TH 7304.39.35, which is duty free. Everything turns on whether these pipes are 'of a kind used for' oil or gas pipelines.

The interpretive framework

[38] The General Rules for Interpretation (GRI) apply in strict hierarchical order. GRI 1 directs that classification is to be determined according to the terms of the headings and any relative section or chapter notes. It follows that the starting point is the language of the headings themselves, with the Explanatory Notes serving a supporting role in doubtful cases — they may explain or supplement the headings but cannot override them: *Secretary for Customs and Excise v Thomas Barlow & Sons (Pty) Ltd*¹⁰.

[39] It is equally well established that classification rests on the objective characteristics and properties of the goods as they present at the time of customs clearance. The subjective intentions of the importer are ordinarily irrelevant: *Komatsu*.¹¹ I accept, as the first judgment holds, that the "use" contemplated by the phrase "of a kind used for oil or gas pipelines" is global use and not merely use in South Africa. The Harmonised System operates uniformly across jurisdictions.

[40] Where, however, the parties diverge is on the meaning of 'of a kind used for'. The Commissioner reads that phrase functionally: if a pipe was manufactured to a standard that permits oil and gas transmission, it is 'of a kind used for' that purpose. The respondent reads it more narrowly: the phrase identifies a genus of goods defined by their objective characteristics; that is actually employed in oil or gas pipelines. In my view, the respondent's reading is correct, and the Commissioner's approach taken to its logical conclusion, would render the qualifying language of the heading largely meaningless.

[41] The phrase 'of a kind used for' a stated purpose is not an invitation to ask whether a pipe is theoretically capable of performing a function. It directs attention to the class or genus of goods that are, in practice, deployed for that purpose. A pipe

¹⁰ *Secretary for Customs and Excise v Thomas Barlow & Sons (Pty) Ltd* 1970 (2) SA 660 (A) at 669E–F.

¹¹ *Commissioner, South African Revenue Service v Komatsu Southern Africa (Pty) Ltd* [2006] ZASCA 156; [2007] 4 All SA 1094 (SCA); 2007 (2) SA 157 (SCA); 69 SATC 9 at para 10.

belongs to that class when its objective physical attributes, its yield and tensile strength, its dimensions, and the specification to which it was manufactured, correspond to those of goods that pipelines of the relevant description actually employ.

what must first be determined is the kind of goods fitting the description, and only then whether the goods under consideration are of that kind. This is the approach taken in *Smith Mining Equipment (Pty) Ltd v Commissioner, South African Revenue Service*¹² in that case the court emphasised a sequential two-step inquiry for classification:

1. Step 1: Determine the kind of goods that fit the legal description provided in the tariff heading.
2. Step 2: Determine whether the specific goods under consideration actually belong to that kind.

[42] The word 'pipeline' is not controversial. The court in *HMT Projects*¹³ interpreted it as a continuous line of pipes constructed for the conveyance of gas or petroleum, and rightly observed that distance is immaterial to that concept. I respectfully agree. A pipeline may be short or long; what distinguishes it from general industrial piping is not length, but the nature of the medium conveyed and the operating conditions that conveyance entails.

The expert evidence

[43] The Commissioner engaged Dr Burger, a professional mechanical engineer, to support its case. The respondent engaged Prof Mostert, a metallurgical engineer and university professor. They were not cross-examined. Both agreed on the physical description of the pipes as recorded in the invoice and Mill Test Certificates. Their disagreement was about what the 'API 5L X42 PSL1' designation means for the purposes of tariff classification.

¹² *Smith Mining Equipment (Pty) Ltd v The Commissioner South African Revenue Service* [2013] ZASCA 145; 76 SATC 49 para 3.

¹³ *Ibid* fn 5 above.

[44] Dr Burger's evidence was that the API 5L standard provides specifications for pipes used to convey gas, water and oil in the oil and natural gas industries, and that compliance with that standard is sufficient to bring the pipes within TH 7304.1. He stressed that the standard prescribes no minimum size or strength grade for particular applications, those choices are left to the pipeline designer. His conclusion was that an X42 grade pipe at any dimension is capable of use in an oil or gas pipeline, depending on the design parameters.

[45] Prof Mostert took a different view. He explained that oil and gas transmission pipelines, whether assessed by reference to South African practice or international engineering norms, are designed to operate under high pressure and to handle large volumes of combustible fluid over continuous conduits. Those operating conditions demand high-strength steel. In the API 5L grading system itself a global standard of the American Petroleum Institute, this means grades of X60 or X70 and above. The pipes under consideration, manufactured to the X42 grade and at a comparatively small diameter, fall well short of what is objectively required. His view was that they are suited to the conveyance of water, slurry and similar fluids in industrial settings such as mining piping systems, and not to oil or gas pipeline service.

[46] The first judgment criticises Prof Mostert's evidence as being parochially confined to the South African context, pointing to his reliance on the Sasol pipeline from Mozambique and the Transnet pipeline network. With respect, I read his evidence differently. Those pipelines were examples, not the premise of his opinion. The underlying proposition that X60 or X70 grades are what oil and gas transmission pipelines require, is not a South African rule. It derives from the API 5L standard itself, which is why the grading system runs from X42 to X80 and why the design of any high-pressure gas or petroleum line, anywhere, will specify the higher grades. Prof Mostert was articulating a global engineering reality, not a local preference.

[47] The first judgment proceeds on the basis that Dr Burger's evidence is to be preferred because the API 5L standard does not prescribe minimum grades for oil or gas applications. The very structure of the API 5L grading system; a range from X42 to X80 with graduated mechanical properties reflects the reality that different

grades are designed for different operating conditions. An X42 grade is not merely a lesser version of an X70 in the same field of use; it is a specification directed at materially different conditions. Saying that the standard does not preclude X42 pipe from oil or gas service, is not the same as saying that X42 pipe is of the kind used in such service.

[48] Dr Burger himself acknowledged that higher-strength grades are used in high-pressure natural gas transmission lines, and that the choices made by Sasol and Transnet reflect the requirements of high-pressure pipeline engineering, even if those choices are expressed as company policy rather than regulatory prescription. That acknowledgement is important. It means that, even on the Commissioner's own evidence, the objective characteristics of oil and gas pipeline design point to grades above X42. The question under TH7304.1 is whether these pipes belong to the class of goods that possess those characteristics. They do not.

Application to the tariff headings

[49] Applying GRI 1 and GRI 6, TH 7304.1 requires that the goods be 'line pipe of a kind used for oil or gas pipelines'. On the objective evidence, these pipes; X42 grade, at the dimensions described in the Mill Test Certificate are not of that kind. Their strength and dimensional profile are suitable for general industrial piping in lower-pressure applications. The fact that they are API 5L classified does not change this. The API 5L standard covers a spectrum of pipe grades for a range of purposes; classifying all pipes within that spectrum under TH 7304.1 would conflate the standard with the tariff heading, and would drain the words 'of a kind used for oil or gas pipelines' of operative content. Classification concerns what goods are, not what they might conceivably become in an unusual design scenario.

[50] The first judgment relies, at paragraphs 33 and 34, on the structure of the subheadings under TH 7304.1. The argument is that because those subheadings include descriptions for pipes of smaller dimensions and lesser wall thickness (notably TH 7304.19.10, covering pipes with a wall thickness not exceeding 25 mm and an outside cross-sectional dimension not exceeding 170 mm), the legislature must have intended to include pipes of the dimensions under consideration, which

are larger within TH 7304.1. I cannot accept this reasoning. The subheadings within TH 7304.1 operate to organise goods that have already qualified as 'line pipe of a kind used for oil or gas pipelines' at the five-digit level. Their purpose is descriptive, not definitional. A pipe of small dimensions may well qualify as line pipe of the relevant kind if its grade and specification place it in that genus; a pipe that does not qualify at the five-digit threshold cannot be swept in by the existence of a subheading that happens to accommodate its dimensions.

[51] It follows that the pipes under consideration fall under TH 7304.3. They are seamless, of circular cross-section, and as is apparent from the Mill Test Certificates when assessed against the definition of 'other alloy steel' in Chapter Note 72(f) are of non-alloy steel. Their wall thickness exceeds 25 mm, and their outside cross-sectional dimension exceeds 170 mm. They satisfy each element of TH 7304.39.35 without difficulty.

[52] Should it be necessary to go further, which I do not think it is, the General Rules provide alternative support for this conclusion. GRI 3(a) applies where goods are prima facie classifiable under two or more headings and directs that the heading providing the most specific description is to be preferred. TH 7304.39.35 identifies goods by their material composition, cross-sectional form, manufacturing process and precise dimensional criteria. TH 7304.1 identifies goods by their use. Description by reference to objective physical and dimensional characteristics is, as a general matter, more specific than description by reference to use, and TH 7304.39.35 must, on this basis, be preferred. If, notwithstanding the above, the matter were evenly balanced between the two headings, the dispute is resolved by GRI 3(c). That rule directs that where goods cannot be classified under GRI 3(a) or 3(b), they must be classified under the heading that appears last in numerical sequence. In this instance, TH 7304.3 comes after TH 7304.1.

[53] There is a further consideration, though in a case of this kind it should be the last resort. It is a settled principle of our fiscal law that genuine ambiguity in a taxing

provision is to be resolved against the revenue authority¹⁴. The state may not levy a tax unless the statute clearly imposes it. Here, the Commissioner seeks to attract a ten per cent duty on the strength of an expansive reading of the words 'of a kind used for oil or gas pipelines' — a reading that sweeps in all pipes manufactured to any grade within the API 5L standard. That is not, in my view, the natural meaning of the phrase. But even if some doubt remained, it would fall to be resolved in favour of the respondent.

Conclusion

[54] The high court was right. The Commissioner's tariff determination cannot stand. The appeal should be dismissed with costs. For these reasons, I would dismiss the appeal.

[55] I would make the following order:

The appeal is dismissed with costs, including the costs of two counsel where so employed.

KE MATOJANE
JUDGE OF APPEAL

¹⁴ *Commissioner for Inland Revenue v Simpson* 1949 (4) SA 678 (A) at 692; *CIR v Witwatersrand Association of Racing Clubs* 1960 (3) SA 291 (A). *Secretary for Inland Revenue v Gallagher* 1978 (2) SA 463 (A) at 470; *Commissioner, SARS v Executor, Estate Late J Heller* 2011 (5) SA 574 (SCA) para 22. *In Telkom SA SOC Limited v Commissioner for the South African Revenue Service* 2020 (4) SA 480 (SCA); 82 SATC 225; The court emphasized that while the in dubio contra fiscum rule exists, it only comes into play as a last resort when an "irresoluble ambiguity" remains after applying the modern, purposive approach to interpretation set out in *Endumeni*. It confirmed that the rule has not been abolished but has been subordinated to the modern context-based method of interpretation.

Appearances:

For the appellant: MPD Chabedi SC with Mr WN Mothibe
Instructed by: Maponya Incorporated, Pretoria
Phatshoane Henny Attorneys, Bloemfontein

For the respondent: HJ Snyman
Instructed by: Shepstone Wylie Attorneys, Johannesburg
c/o Clarinda Kugel Attorneys, Pretoria
c/o Webbers Attorneys, Bloemfontein.

