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Case No: 265/93

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

SANACHEM (PTY) LTD	Appellant
v	
FARMERS AGRI-CARE (PTY) LTD	First Respondent
RHONE POULENC AGRICHEM SA (PTY) LTD	Second Respondent
MINISTER OF TRADE & INDUSTRY	Third Respondent
COMMISSIONER FOR CUSTOMS AND EXCISE	Fourth Respondent

CORAM: JOUBERT, HEFER, NESTADT, FH GROSSKOPF, et VAN DEN HEEVER JJA

Heard: 17 November 1994

Delivered: 23 Februarie 1995

J U D G M E N T

JOUBERT JA:

On 4 September 1992 the Appellant obtained in the Durban and Coast Local Division a rule nisi, returnable on 24 September 1992, calling on the First and Second Respondents to show cause why they should not be interdicted "from selling, distributing or otherwise disposing of the consignment of herbicides, anti-sprouting products and plant-growth regulators with diuron as active ingredient, imported under Bill of Entry no 74573 dated 12 August 1992". The rule nisi was to operate as an interim interdict pending the determination of the application. The Third and Fourth Respondents applied successfully to intervene in the proceedings. On 19 February 1993 LEVINSOHN J dismissed the Appellant's application and discharged the rule nisi. The Appellant was ordered to pay the costs of the First and Second Respondents. Leave to appeal was granted to the Appellant by the Court a quo. The Third and Fourth Respondents abide the judgment of this Court.

In terms of sec 2 (1) of the Import and Export Control Act No 45 of 1963 ("the Import Act") the Minister of Trade and Industry and Tourism "may whenever he deems it necessary or expedient in the public interest, by notice in the Gazette prescribe that no goods of a specified class or kind . . . (b) shall

be imported into the Republic, except under the authority of and in accordance with the conditions stated in a permit issued by him or by a person authorized by him". (My underlining). A person who imports any goods in contravention of the provisions of any notice issued under sec 2 (1) commits an offence (sec 4 (1) (a)). Upon conviction of the offence the goods in question may be declared forfeited to the State. (sec 4 (2)).

On 23 December 1988 the Deputy Minister of Economic Affairs and Technology, acting in terms of sec 2 of the Import Act, issued Government Notice No R2582 and prescribed that

> "(a) goods described in Schedule 1 shall not be imported into the Republic except by virtue of an import permit issued in terms of section 2 of the said Import and Export Control Act, 1963";
>
> . . . . . .
>
> "(iii) hereby determine that an import permit, except for the conditions specified in the permit, shall be subject to the following conditions:
>
> (a) That only goods of the class and kind specified in the permit may be imported".

Schedule 1 makes no reference to Herbicides, Anti-sprouting Products, or Plant-growth Regulators. Government Notice R2582 came into operation on 1 January 1989.

With effect from 4 August 1989 Government Notice R1635, issued by the Deputy Minister of Economic Affairs and Technology in terms of sec 2 of the Import Act, amended Government Notice No R2582 by the deletion of Schedule 1 and the substitution thereof by Schedule 1 A. The latter has three columns, the first and third of which are headed "Description of goods" (in English and Afrikaans respectively) and the second of which is headed "Tariff heading/tariefpos". Furthermore the following commodities are listed: "Herbicides, anti-sprouting products and plant-growth regulators" (tariff heading 3808.30) followed by "Disinfectants" (tariff heading 3808.40) and "Other" (tariff heading 3808.90).

On 29 November 1991 Maybaker Agrichem (Pty) Ltd, the name by which the Second Respondent was formerly known until it was changed to its present name as from 1 March 1992, applied to the Department of Trade and Industry for an import permit. The application form was signed by a certain Pillay. Paragraph 4 thereof required details of the goods for which the permit was required. The description furnished was "H T 3808.30.90" and the "actual price" was R1 189 000-00. Paragraph 8 which sought general remarks in

support of the application elicited the following information: "Goods are required for agrochemical business - not obtainable locally". Import permit No 92/05081 was issued by the Department of Trade and Industry authorising Maybaker Agrichem (Pty) Ltd to import Herbicides 3808.30.90 from any country to an amount of R1 189 000-00. Upon the change of its name to its present name permit No 92/05081 was on 3 March 1992 replaced by permit No 92/11919 which was issued in identical terms to the Second Respondent to import Herbicides 3808.30.90.

After the said import permit was granted the Second Respondent, who carried on the business of formulating and selling chemicals to the agricultural distribution trade, proceeded to import a consignment of herbicides into the Republic. On 12 August 1992 when the Second Respondent entered the imported consignment of herbicides into the Republic it delivered in terms of sec 39 (1) (a) of the Customs and Excise Act No 91 of 1964 ("the Customs Act") bill of entry No 74573 in the prescribed form to the Controller of Customs and Excise. The bill of entry set forth the full particulars as indicated on the form and as required by the Controller of Customs and Excise. The

imported goods were described therein as "Herbicides, anti-sprouting products and plant-growth regulators with diuron as active ingredient" and the tariff code was given as 3808.30.15. Reference was also made to permit No 92/11919. It is not disputed that the appropriate amount of duty was levied and paid in respect of the imported goods.

It is obvious that there is a great disparity between the import permit and the bill of entry as regards the goods to which they are respectively applicable. The import permit relates to "Herbicides 3808.30.90" whereas the bill of entry refers to Tariff Code 3808.30.15 and "Herbicides, anti-sprouting products and plant-growth regulators with Diuron as active ingredient". In order to decipher the code tariffs 3808.30.90 and 3808.30.15 it is necessary to consult the Harmonized Customs and Excise Tariff Book ("the Tariff Book"), which is based upon the "International Convention on the Harmonized Commodity Description and Coding System". The latter according to the provisions of sec 43 of the Customs and Excise Amendment Act No 84 of 1987 became part of Schedule 1 to the Customs Act on 1 January 1988. According to an applicable excerpt from the bulky Tariff Book tariff code 3808.30.90

relates to "Herbicides, anti-sprouting products and plant-growth regulators: Other "i.e. herbicides without diuron as an active ingredient, while tariff code 3808.30.15 refers to "Herbicides, anti-sprouting products and plant-growth regulators: with diuron as an active ingredient". It is therefore clear that the import permit refers to herbicides without diuron as an active ingredient while the bill of entry relates to herbicides which contain diuron as an active ingredient.

Second Respondent sold and delivered the imported consignment of herbicides to the First Respondent which carries on business as a retailer of, inter alia, herbicides used in the agricultural industry. The First Respondent was a bona fide purchaser believing at all relevant times that the Second Respondent could lawfully dispose of the imported herbicides. During August 1992 Mr. Holden, the Appellant's national marketing manager visited the First Respondent's depot at Stanger where he noticed that First Respondent was in possession of two containers of Diuron Wettable Powder 80% which formed part of the consignment of herbicides imported by the Second Respondent. The First Respondent admits that it is still in possession of the bulk of the imported

consignment of herbicides which contain diuron as an active ingredient.

In its Founding Affidavit the Appellant alleged that it was the sole South African manufacturer of diuron which was extensively used in the production of Diuron Flowable and Diuron Wettable Powder for use in the farming industry. The Appellant claimed in its Founding Affidavit that the Second Respondent had wilfully and unlawfully imported herbicides of tariff code 3808.30.15 without having the correct and proper import permit therefor. The Appellant's case was that the importation was unlawful since it was contrary to the provisions of the Import Act and the Customs Act.

The First and Second Respondents in their Answering Affidavits maintained that the import permit was valid and consequently the importation was lawful.

Validity of the importation

The first question that falls for decision is the validity of the importation.

In terms of sec 2 (1) (b) of the Import Act the Minister is empowered to prescribe by notice in the Gazette that no goods "of a specified class or

kind" shall be imported into the Republic except under the authority of a permit and in accordance with the conditions therein stated. The First and Second Respondents in their Answering Affidavits maintained that the import permit was valid and consequently the importation was valid. According to them the only description which was relevant for the purposes of the import permit was the reference to the "description of goods" in the 1st column of Schedule 1 A in Government Notice R1635 of 4 August 1989. The reference in the 2nd column to "tariff heading" or code, namely 38.30.90, was irrelevant for purposes of the import permit and was relevant only to ascertain the duty payable in the circumstances. The Court a quo upheld their contentions by deciding that the "description of goods" and not the tariff headings was decisive in deciding what category of goods required import permits.

I cannot agree with this conclusion. The Minister's function is to prescribe and specify by notice in the Gazette a "class or kind" of goods in respect of which his prescription and specification is to operate. There is no provision in the Import Act which restricts the Ministerial specification to "description of goods" in words. The Minister's intention was to include "tariff

headings" in digits to form part of each "class or kind". In my judgment the "tariff headings" constitute part of the specification of the "class or kind" of goods to which they relate. As such the "tariff headings" are relevant in deciding what category of goods require import permits.

I have dealt supra with the great disparity between the import permit and the bill of entry. The effect of the import permit is that only herbicides without diuron as an active ingredient, may be imported, whereas the bill of entry relates to herbicides with diuron as an active ingredient. In view of this great disparity regarding the description and particulars of the goods in the import permit and the bill of entry, it follows that the entry of the goods is invalid in terms of sec 40 (1) (a) of the Customs Act which provides as follows:

> "No entry shall be valid unless -
> (a) in the case of imported . . . goods, the description and particulars of the goods . . . declared in that entry correspond with the description and particulars of the goods . . . in any certificate, permit . . . by which the importation . . . of those goods is authorized". (My underlining).

The answer to the first question is therefore that the importation of the

consignment in question is invalid. The judgment of the Court a quo to the contrary cannot stand.

Permanent Interdict

The second question is whether the Appellant has on a balance of probabilities succeeded in making out a case for a permanent interdict against the First and Second Respondents. At the outset I must point out that because it is common cause that the Second Respondent has sold and delivered the imported consignment of herbicides to the First Respondent, there is no factual basis on which a permanent interdict could be granted against the Second Respondent. The enquiry must accordingly be restricted to the First Respondent who is at present in possession of the bulk of the imported consignment of herbicides.

The requisites for a permanent interdict (mandament poenaal) were stated by INNES JA in Setlogelo v Setlogelo 1914 A D 221 at p 227 as follows: "The requisites for the right to claim an interdict are well known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy". These requisites

are based on a passage by Van der Linden (1756-1835) in his Koopmans Handboek 3.1.4.7 which was translated into Afrikaans by HIEMSTRA J in Meyer v Administrator, Tvl. 1961 (4) S A 55 (T) at p 57A-E.

The question which arises is whether the Appellant has a clear right which can be protected. The Appellant as the sole local manufacturer of herbicides containing diuron as an ingredient relies on a clear right at common law to carry on its lawful trade or business without unlawful interference from others (Patz v Greene & Co 1907 T.S. 427 at p 436). In modern legal terminology the Appellant has a subjective right to exercise its trade or business freely in the absence of special legal restrictions and agreements to the contrary. Such right is, however, not an absolute right but is ex pari materia subject to the right of others also to trade and to subject the Appellant to lawful competition. Per DE VILLIERS JA in Matthews and Others v Young 1922 A D 492 at p 507: "In the absence of special legal restrictions a person is without doubt entitled to the free exercise of his trade, profession or calling, unless he has bound himself to the contrary. But he cannot claim an absolute right to do so without interference from another. Competition often brings about

interference in one way or another about which rivals cannot legitimately complain. But the competition and indeed all activity must itself remain within lawful bounds. All a person can, therefore, claim is the right to exercise his calling without unlawful interference from others."

Can it be said that the First Respondent is an unlawful rival of the Appellant? Has it unlawfully interfered with the trade or business of the Appellant as a manufacturer of herbicides containing diuron as an ingredient? Or is there a reasonably apprehended unlawful interference by the First Respondent with the trade or business of the Appellant? The First Respondent as a retail trader in herbicides containing diuron as an ingredient also has at common law a subjective right to exercise its right to trade in lawful competition with the Appellant as manufacturer of the same type of herbicides. The Appellant has not established that it has monopolistic rights which oust lawful competition from rivals. There is no legislative provision which deprives lawful rivals of their rights to lawful competition with the Appellant. Moreover, the mere fact that the importation of the consignment in question is invalid, as indicated supra, does not per se taint the consignment itself with

illegality in the absence of any steps in terms of the Import Act and the Customs Act to have the consignment declared forfeited to the State. The result is that the imported herbicides with diuron as an ingredient are not tainted with illegality. They are res in commercio and not res extra commercium. They are capable of being freely and lawfully traded in the Republic. Since the First Respondent acquired them bona fide for value and is in possession of them, it has a common law right to trade with them in lawful competition with the Appellant. It follows that the Appellant is, in my judgment, not entitled to a permanent interdict against the First Respondent.

The appeal is dismissed with costs. Such costs in regard to the Second Respondent are to include the costs of two counsel.

C.P. JOUBERT JA

CONCUR

HEFER JA
NESTADT JA
F H GROSSKOPF JA
~~VAN DEN HEEVER JA~~