31/96

CG CASE NUMBER: 512/94

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE MONDI PAPER COMPANY LIMITED Appellant

and

COMMISSIONER FOR INLAND REVENUE Respondent

CORAM: **BOTHA, HEFER, NESTADT, HARMS JJA et PLEWMAN AJA**

HEARD ON: **23 FEBRUARY 1996**

DELIVERED ON: **27 MARCH 1996**

J U D G M E N T

PLEWMAN AJA

The issues in this appeal fall within a narrow compass. The appellant Mondi Paper Company Limited is a company which carries on business as a manufacturer of paper. It has a paper mill at Merebank in Durban. In its manufacturing operations it uses paper making machines to manufacture various grades of paper. These are very large machines. The process involves feeding a slurry of pulp into the process and submitting the pulp to a series of operations on a continuous basis at the conclusion of which paper is produced. The parts and materials which are the subject of this appeal are employed in the process. The question is whether or not sales tax was payable on the purchase of these items in terms of the (now repealed) Sales Tax Act 103 of 1978 ("the Act"). The respondent, the Commissioner of Inland Revenue, levied tax on the items which fall to be considered in this appeal. After objections by the appellant the matter went to the Income Tax Special Court where the appellant succeeded in part. The respondent appealed to the full bench of the Natal Provincial Division against that decision and was in

its turn successful in part. Leave to appeal to this Court was granted and the appellant now seeks the restoration of the order made by the Special Court. There is no cross appeal by the respondent. The items in issue at this stage are what are referred to as "wires" and "pressing felts" - all articles having functions in the paper making process.

A broad understanding of the process of paper making is necessary. It will suffice to quote the description of the process from the judgment of Hurt J in the court below:-

> "The basis of the paper-making process has not changed fundamentally for the past 2000 years. A pulp is made by breaking down materials such as wood or waste paper to the elemental fibres of which they are constituted in their ordinary form. These fibres are suspended in a water-based slurry which is passed over a sieve-like web, or mesh. In its original state, this slurry comprises about 99,5% water and only about 0,5% fibre particles. The mesh allows the liquid and some of the smaller fibre particles to pass through it and those which remain settle themselves on it in a wet 'mat'. The size and number of the orifices in the mesh define the size of the fibres which will be retained on it and this, in turn, governs the texture of the paper which

will eventually be manufactured. The mat, at the completion of this first 'sieving' operation, still has a substantial water content (approximately 80% water and 20 % fibre) and the fibres which comprise it are loosely packed so that the mat is soft and has very little intrinsic strength. The water content is reduced to the ultimately desired level in two subsequent processes, the first being one in which porous felt is pressed briefly against the wet mat and the second being a drying process in which heat is applied to the paper surface by heated rollers. The felt material used in the first of these processes has special sponge-like qualities which enable it to remove large quantities of water from the paper mat in a very short space of time. The operation is said, in the evidence in the court *a quo*, to be equivalent to dabbing a dry sponge briefly onto the wet mat surface, squeezing the absorbed water out of the sponge and repeating the dabbing process. The object of this pressing process is to reduce the water content of the mat to somewhere between 40% and 50%, depending on the specific requirements of the manufacturer. In the second of the dehydration operations, a type of felt material is also employed, but its function is merely to press the paper against the hot roller surfaces and it does not, itself, draw much, if any, water from the paper.

The original paper-making process was a 'batch process', in which individual sheets of paper were made, being subjected

to the three consecutive operations of precipitating on the mesh, pressing and 'sponging' off the initial excess water and drying. To create a continuous manufacturing process, the wires and felts are made in the form of endless belts and supported on sets of rollers so that they can rotate continuously. The pulp slurry is distributed evenly across the moving wire and the water is drawn off until the required wet mat of fibres is formed. The speed with which the wire moves is regulated so that the required amount of water can drain through it by the time that the wet mat is ready for the pressing process. At this point the mat is fed onto another set of rollers which support an endless belt of pressing felt. The pressing felts are pressed against the surfaces of the paper for very short spaces of time over very short distances in order to simulate the type of 'dabbing' action to which I have referred above. During this brief contact time the specially designed felt material from which they are made draws off substantial amounts of water by capillary action and it is a crucial feature of this operation that the felt is only in contact with the paper mat for long enough to draw the water in, because if the contact time is prolonged, the pressure exerted on the felt will expel some of the absorbed water from it and 're-wet' the paper. Finally the moving sheet of wet paper is passed onto a third set of rollers where the drying felt presses it against heated roller surfaces, after which the continuous sheet of paper emerging from the drying section is wound into large rolls. The

> endless wires and felts used in large-scale manufacturing enterprises such as those carried on by the respondent are very large, and costly, items of equipment. The wires and pressing felts are subjected to the most rapid wear and/or deterioration in use. The wires have to be replaced at intervals of between 36 and 70 days, depending upon the machine in which they are used and to the grade of paper being made. The pressing felts tend to become compacted and thus loose their capacity for rapid absorption of water, and they have to be replaced at about 52-day intervals. The drying felts, however, last substantially longer and are replaced about once a year."

Heard on the same day as this appeal was an appeal in the case of Sappi Cape Kraft (Pty) Ltd vs Commissioner for Inland Revenue in which the interpretation of the Act and the role of the similar items of equipment (with one additional item) was in issue. In the present appeal however argument was restricted to one aspect of the interpretation of the Act. The present appeal concerns the terms of the Act as it read after certain amendments effected by section 21(1)(a) of the Taxation Laws Amendment Act 86 of 1987. Even without reference to that amendment

however the Act and particularly the schedule thereto, had been amended on a number of occasions. The schedule (to which reference will presently be made) had at the relevant date for the purposes of this appeal been amended on at least eleven occasions between 1978 and 1986.

Section 5 of the Act was the section which imposes the liability to pay tax on goods sold or imported into the Republic on or after 3 July 1978. Section 5 was however subject to the provisions of section 6 which, when read with the schedules incorporated therein, provided for exemptions from liability to pay tax. The mechanism was a curious one. Paragraph 3(b) of Division 1 of Schedule 2 (which is the section in the schedule relevant to the present appeal) gave exemption to parts and materials purchased for incorporation in or attachment to machinery for the purpose of the repair or maintenance thereof but, by way of a proviso, excluded goods described in a list of non-qualifying goods. To qualify for exemption the goods must enter through the front door but

not leave by the back door.

The question relates to the Act and schedule after amendment by section 21(1)(a) of Act 86 of 1987.

Section 6 provided:

> "6(1) The tax will not be payable in respect of any taxable value which, but for the provisions of this section, would be determinable in respect of the following, namely-
>
> (a) .....
>
> (b) .....
>
> (c)(i) subject to compliance with the provisions of section 14, sales of goods or taxable services rendered to a vendor who is registered under section 12 in respect of an enterprise falling within a category of enterprises mentioned in Schedule 2, if such goods or services are goods or services described in that Schedule in relation to such category and are intended for use or utilization in such enterprise;
>
> (ii) .....
>
> (d) ....."

Schedule 2 to the Act provided:

"SCHEDULE 2

(SECTION 6 OF THIS ACT)

Exemptions: Certain sales of goods and taxable services

The categories of enterprises and the goods and taxable services in respect of which the exemptions applicable under the provisions of section 6(1)(c), (t) and (v) shall apply, shall be as hereinafter set forth.

DIVISION 1

Manufacturing Enterprises

In the case of any enterprise in the ordinary course of which goods (other than goods in respect of which an exemption under section 6(1)(d) applies) are manufactured or assembled for sale or any process of manufacture is undertaken for reward, the goods and taxable services set forth in this Division .....:

1. .....
2. .....
3.(a) Any repair or maintenance service-
   (i) in respect of machinery or plant used directly in the manufacture, assembly or processing of goods for reward or for sale; or
   (ii) .....

and parts and materials purchased by the vendor carrying on the enterprise concerned for incorporation in or attachment to such machinery or plant in order to have such service effected.

(b) Parts and materials purchased for incorporation in or attachment to such machinery or plant for the purpose of the repair or maintenance thereof by the vendor carrying on the enterprise concerned.

(c) .....

Provided that for the purposes of this paragraph, parts and materials purchased shall not include any goods described in this Division under the heading of non-qualifying goods.

4. .....

5. .....

6. .....

7. .....

Non-qualifying goods

(1) .....

(2) .....

(3) Tools, accessories, equipment or component parts attached to machinery or plant and which come into direct contact with goods which are being processed and which by their specific function alter such goods or are used for the purposes of brushing, crushing, cutting, forming, honing, machining, mixing, moulding, painting, polishing or

screening.

(4) Tools, accessories, equipment or component parts attached to machinery or plant used for the purpose of handling goods which are being processed.

(5) Greases and lubricants

(6) Cutting oils

(7) Filtering and screening materials

(8) Cleaners and disinfectants

(9) ....."

(This list contained at the time 19 items and it is unnecessary to quote further. Items 5 to 8 sufficiently indicate the manner in which particular materials or parts have been added or changed from time to time as also the manner in which specific goods and classes of goods have from time to time been included in the list.)

It was common cause in the court below that the wires and pressing felts were goods falling within the category of goods referred to in paragraph 3(b) of the Schedule. The contention there advanced was that they were to be categorised as "goods purchased for incorporation in" the machines as opposed to being goods purchased for "attachment

to" the machines. This distinction, so it was argued, had the effect that they were not goods listed as non-qualifying goods in either items (3) or (4) in which reference is made (only) to parts or equipment "attached to machinery". The conclusion therefore was, so it was argued, that the goods were exempt from sales tax.

The critical step in this argument is that the words "for incorporation in" and "for attachment to" in paragraph 3(b) connote separate and distinct categories of goods. In other words that the two concepts were mutually exclusive.

In examining the latter proposition Hurt J said as follows:

> "Although the approach to the interpretation of the statutory provisions was apparently common cause in the court *a quo*, I find myself respectfully unable to agree with it. In the first place the approach depends upon the major premise that the concepts of 'incorporation in' and 'attachment to' are treated by the legislator as mutually exclusive. These two expressions are, indeed, separated by the word 'or' where they first appear in section 3(b) of Division I, while in item (3) of the list of non-qualifying goods only the expression 'attached to' appears. But I am by no means persuaded that

this must lead to the inference that the legislator intended that the expressions should be treated as defining mutually exclusive concepts. If one is going to adopt a purely semantic approach, it is true that the word 'attachment' is sometimes employed in the sense of an 'adjunct' and that the Oxford English Dictionary defines an adjunct, insofar as material to this matter, as 'something joined to another, but subordinate, as auxiliary, or dependent upon it'. But that restricted use is as a substantive noun. I do not think it can be applied comfortably to an expression such as 'for incorporation in or attachment to', where 'attachment' is used as a type of gerund. Moreover, item (3) of the list of non-qualifying goods does not use the word 'attachment', but the word 'attached', and it uses that word in immediate conjunction with the words 'equipment or component parts'. A component part, according to the dictionary definition and in keeping with the everyday usage of the expression, is 'a constituent part or element'. There can clearly be situations in which a 'component part' of a machine is not 'attached' to that machine. The balls or rods in a grinding or crushing mill (cf item (2) of the list of non-qualifying goods) are a good example. But I have great difficulty in imagining a component part of a machine which could be regarded as not being incorporated into it. If a 'component part' must needs be 'incorporated', then the premise that the expressions 'attachment to' and 'incorporation in' must be treated as mutually exclusive cannot be sound for to speak of a

'component part attached to machinery' would be a contradiction in terms."

In this Court Mr Shaw argued that when interpreting the Act effect had to be given to the difference between the description in paragraph 3(b) of parts as goods purchased "for incorporation in or attachment to such machinery or plant" and the description of goods in item (3) as "component parts attached to machinery or plant". The emphasis was placed on the phrase "attached to" in item (3) and the omission of any reference therein to "incorporation in". This he suggested reflected a deliberate change of wording brought about by the amendments introduced by Section 16(1)(a) of Act 99 of 1984. From this he argued, as I understood him, that the words "incorporation in" and "attachment to" in paragraph 3(b) had to be read as connoting different categories of goods.

There appear to me to be a number of answers to this proposition. The phrase "for incorporation in or attachment to" first appeared in the

schedule in 1978. At that time there was no proviso to the paragraph and no list of non-qualifying goods. In those circumstances introduction of the list and of the words "attached to" in item (3) of the list cannot be invoked as an aid to the interpretation of the wording of paragraph 3(b).

In my view the word "or" in paragraph 3(b) is the key. "Or" is said in Webster's Third New International Dictionary *prima facie* to indicate an alternative between different or unlike things but also, often, to have the meaning of the synonymous, equivalent or substitutive character of two phrases. Stroud's Judicial Dictionary 5th edition says that "or" is not always disjunctive. It is sometimes interpretive or expository of the word which it follows and that it is often a connecting term of synonymous words. Fowler's Modern English Usage 2nd edition (as the third use of the word "or") lists it as "or in enumerations". Fowler goes on to describe this use as not desirable but the fact is that it obviously is a frequent usage. In my view reading the section and the Schedule as a whole "or" is used in paragraph 3(b) in this sense.

Recognition must also be given to the fact that the proviso (whether a true proviso or some more modified form of proviso is not material) was only introduced by section 20(1)(c) of Act 111 of 1979 with effect from 18 July 1979. It is inconceivable that the legislature intended to alter the meaning of the phrase "incorporation in or attachment to" in paragraph 3(b) by this means. Furthermore when the list of non-qualifying goods is considered as a whole, no pattern can be discerned which would have necessitated the use of the word "or" between the words "incorporation in" and "attachment to" in any sense other than as a connecting term for similar concepts.

The mechanism of the 1979 amendment was to renumber the existing paragraph as paragraph 3(a) and introduce a new paragraph 3(b) repeating therein in relation to parts these phrases and adding the proviso. (See section 20 (1)(b) of Act 111 of 1979). The machinery to which reference is made in paragraph 3(b) is the machinery or plant referred to in paragraph 3(a). The words "such machinery or plant" in paragraph

3(b) make this clear. This too suggests that it could not have been the intention of the legislature to use the phrase in paragraph 3(b) in a sense different from that in which it was used in what is now paragraph 3(a).

Mr Shaw's argument was that effect must be given to a deliberate change of wording in a statute. However there are limits to this principle. Even if full value be given to the change of language in item (3) of the list of non-qualifying goods the court is bound to recognize that a change in language may be due to oversight or legislative error. See R v Shole 1960 (4) SA 781 (A) at 787 B; Gulf Oil Trading Co and Others v The Fund Comprising the Proceeds of the Sale of the MV "Emerald Transporter" 1985 (4) SA 133 (N) at 141 F-G.

Many examples may be cited of situations where something may be said to have been incorporated in by being attached to something else. There are also situations where either description may be found to be appropriate. In the light of this an argument based on the contention that there has been a deliberate change of wording to which effect must be

given loses much of its force. Surplusage, repetition or unintended incongruity may be found in legislation where the language as a whole and the context point to a conclusion other than an intention to import a change of meaning.

In my view neither the wording of section 3(b) nor the proviso thereto indicates that "incorporation in" and "attachment to" are to be read as connoting wholly separate and different things. In the light of that I agree with the court *a quo*'s conclusion that the expressions are not mutually exclusive.

If an attempt is made to draw a conclusion from the history of the legislation one runs into a blind alley. All that the history of the eleven amendments indicates is that the fiscal authorities were engaged in an ongoing process of refinement of the original language in the hope of achieving greater clarity in their efforts to obtain revenue.

What is finally destructive of the appellant's argument is the fact that prior to the transactions in issue the terms of item (3) of the list had

been amended by section 21(1)(a) of the Taxation Laws Amendment Act 86 of 1987 by the deletion of the word "ancillary" before the word "equipment" and the addition of the words "or component parts" thereafter. That the articles in question here constituted "component parts" attached to the machinery is clear and the arguments addressed to this court to the contrary cannot be sustained.

Both these conclusions are destructive of the appellant's case.

The appeal is dismissed with costs.

C PLEWMAN AJA

CONCUR:

BOTHA JA)
HEFER JA)
NESTADT JA)
HARMS JA)