



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case no: **74019/2016**

In the matter between:

SILVERBACK TECHNOLOGIES CC

APPLICANT

And

**THE COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICES**

RESPONDENT

Case no: **13891/2017**

In the matter between:

OMNICO (PTY) LTD

APPLICANT

And

**THE COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICES**

RESPONDENT

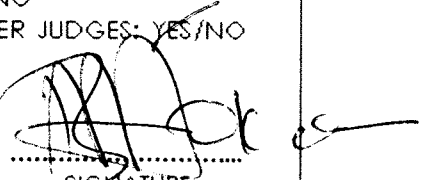
Case no: **15052/2017**

In the matter between:

CYTEK CYCLE DISTRIBUTION CC**Applicant**

And

**THE COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICES****Respondent**

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
17/3/22	
DATE	SIGNATURE

JUDGMENT

MOKOENA AJ**INTRODUCTION**

- [1] The Applicants in this appeal are asking for leave to appeal to the Supreme Court of Appeal, as contemplated in Section 17(6)(a)(ii) of the Superior Courts Act, against the whole of my Judgment.
- [2] Several grounds upon which this appeal is premised are set out in the Applicants' Notice for leave to appeal. I deal firstly with the competence of this Court to have issued Order 3 of the Judgment.
- [3] It is common cause that the use of the words "*Excise duty*" was an error taking into account what is said at paragraph 30 of my Judgment. Order 3 was accordingly corrected in terms of Rule 42 of the rules of this Court. The words "*Excise duty*" was substituted with the words "*Custom duty*".

- [4] Nevertheless, the Applicants' took issue with the Order as amended. They argued that this Court was not called upon to make such an Order. Counsel for the Applicants argued that there was no application before Court by the Respondent asking for such an Order and in the absence of such an application, the Applicants were denied an opportunity to challenge the Order granted by the Court. I was referred to **Transvaal Canoe Union v Beitgereit** as authority for this submission. In that matter the Court said¹:-

'The inherent powers of a Court,, are powers which may be exercised before the delivery of a final Judgment, i.e while the issue or lis is pendens. The Supreme Court's jurisdiction referred to in S19(1)(a)(iii) is to consider and grant declaratory orders, but it will only do so when 'at the instance of any interested person' such issue is brought before Court in the normal manner, ie by action or motion claiming the necessary relief in the usual manner'.

- [5] I disagree with the submission made by the Applicants as a valid ground for appeal in this matter. The reasons are to follow.
- [6] The Applicants' in their main applications sought an Order that certain bicycle components be classified under a specific Tariff Heading as opposed to the determination made by the Respondent under a different Tariff Heading. In opposing the applications, the Respondent asked for the dismissal of the Applicants' application.
- [7] Ordinarily when the Applicants' applications are dismissed what remains are the determinations already made by the Respondent which the Applicants are bound to comply with, unless there is a pending appeal and or a review regarding the dismissal of the applications.
- [8] In addition, the facts upon which the Applicants relied for the relief sought in their main applications and the facts relied upon by the Respondent in opposing the applications will be no different even if there was a counter application filed by the Respondent for the Court to declare its determinations as factually correct.

¹ 1990(3) SA 398 at 403E-F.

[9] It is for these reasons that Order 3 was issued. I am therefore of the view that there is no merits in the Applicants' argument that the Court was not competent to issue such an Order.

[10] With regard to the second ground of appeal upon which the Applicants rely for their application, I set out hereunder the submissions made by the Applicants in their Notice for leave to appeal. They are framed as follows:-

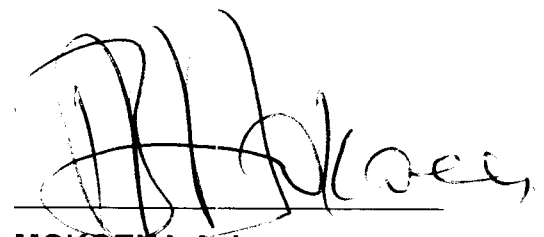
- '1 *The court incorrectly found in paragraphs [39], [40] and [49], that the judgments in **Autoware v Secretary For Customs and Excise 1975 (4) SA 318(W)** and **Commissioner, South African Revenue Service v LG Electronics SA (Pty)Ltd 2012 (5) SA 439 (SCA)** are distinguishable from the present matter.*
- 2 *The approach followed in Autoware to ascertain the essential character of the article in question, which was endorsed in LG, ought to have been applied by the court in the present matter. The ordinary meaning of the words, dictionary definitions and the content of the explanatory notes will always be relevant in determining what the essential character is. This is the basis on which Komatsu was distinguished from Autoware in paragraph 13 on page 7 of the Komatsu judgment.*
- 3 *The court, in paragraph [46] of the judgment, incorrectly accepted the evidence of Mr Du Toit as admissible. The court misdirected itself in paragraph [44] in finding that expert evidence is required to determine what the essential character of a bicycle is, where it ought to have followed the approach laid down in Autoware.*
- 4 *The court furthermore held in Autoware at 323 A that definitions by technical witnesses of phrases which are clearly a part of ordinary English usage, are inadmissible and the court failed to appreciate that the terms commented on by Mr du Toit fall into that category which does not require assistance from an expert witness'.*

[11] What seems to be the Applicants' position is that the Court erred for not finding that an '*essential feature*' of a bicycle must be determine by reference to the dictionary meaning of a bicycle which is a '*tubular metal frame mounted on two spoked wheels one behind the other*'. That is, an '*essential feature*' of an incomplete bicycle components is not a technical term requiring expert evidence.

[12] I am of the view that the Supreme Court of Appeal in considering the appeal will provide some guidance and certainty as to whether the approach in **Komatsu** is consistent with **Autoware** and **LG** or not. An answer to this question will be relevant to the issue of admissibility or inadmissibility of the expert evidence of both Mr. Du Toit and Mr. Stickells.

[13] From the foregoing, the following Order is made:

1. Leave to appeal is granted to the Supreme Court of Appeal against the Order of this Court dated 31 January 2022; and
2. That costs be costs in the appeal.



MOKOENA A.J

**ACTING JUDGE OF THE
HIGH COURT**

Date of Hearing : 14 March 2022

Judgment Delivered : 17 March 2022

APPEARANCES

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