IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 11696/2018

DATE: 2020-02-12

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
DATE
SIGNATURE

In the matter between

SARS Applicant

and

GLENCORE OPERATIONS (PTY) LTD Respondent

J U D G M E N T (LEAVE TO APPEAL)

VAN DER WESTHUIZEN J: In matter 11696/2018 an ex tempore judgment follows. The Respondent in the main application, namely, The Commissioner for the South African Revenue Service seeks leave to appeal against the whole of my judgment and order that was delivered and granted on 24 October 2019 on a number of grounds set out in the Notice of Application for Leave to Appeal. In

particular, five grounds have been stipulated in terms of which it is submitted another Court would come to a different conclusion than I had come in my judgment.

The first ground upon which the Commissioner relies is in respect of the manner in which I dealt with the matter, and had erred accordingly in doing so. It is submitted to be in conflict with the unreported judgment under the name *Canyon Resources (Pty) Ltd and the Commissioner for the South African Revenue Service,* Case Number 68281/2016.

The submission is that the principles enunciated in that judgment is different and contrary to that which I found and applied in my judgment. A copy of that judgment was handed up at the hearing of this matter, and I had a quick glance through it.

I could not find, and it was conceded by Mr Ellis on behalf of the Commissioner, that it did not deal with the interpretation of the word “include”, which is the primary issue that had to be decided in my judgment and which formed the primary reasoning for the order that I granted.

It further is gleaned from that matter, that the issue was whether the particular Contractor, on behalf of whom a rebate was claimed, conducted a so-called wet or dry contract. On the facts in that matter it was held by Davis J, that the particular Contractor did not perform a so-

called dry contract, as defined in that judgment, but a wet contract. The issue was whether the processing and the processes that were undertaken by that particular Contractor fell within the particular section and note on which reliance was placed in that matter.

It is further gleaned, that it merely dealt with the washing and crushing of coal, or the particular mineral that was the subject of the claim. It was common cause between the parties at the hearing of the matter before me, that the Applicant in the main application, Glencore Operations (Pty) Ltd, did in fact do crushing and washing. However, it was not done by using diesel fuel but electricity. Hence it was not an issue whether a diesel rebate should have been allowed.

The judgment by Davis J, in Canyon Resources (Pty) Ltd, clearly does not deal with the interpretation of the word “include”. It dealt with specific wording, whether on the facts of that matter, that wording covered the particular issue, or action.

That judgment related to an application of the wording of the particular note, or subsection, on whether the facts fell within that particular wording. Primarily, as recorded earlier in my judgment under consideration, it dealt with the interpretation of the word “include”, whether it is to be interpreted in a narrow sense, or in a broader

sense.

Further in that regard, the third ground upon which the Commissioner relies in the Application for Leave to Appeal, whether it has a bearing upon the principles enunciated by the Constitutional Court in the matter of *De Reuck v Director of Public Prosecutions*, Witwatersrand Local Division 2004 [1] SA 406 CC at paragraph 80, where that Court considered the interpretation of the word "include". It held that there are three possibilities of interpretation, and dealt with those various modes of interpretation, or rather meaning of the word "include". In my judgment under consideration, I dealt with that particular argument. I held that the present case did not fall within the third possibility of meaning that was contended for by the Commissioner in this matter.

It was submitted in argument on behalf of the Commissioner that I had erred in not applying the third possibility that is set out in the De Reuck matter to the issues that were before me for consideration.

In that regard, it was submitted on behalf of the Commissioner, that I had to reconsider my findings on whether the circumstances were not leaning more towards an application of the third possible meaning as set out in the De Reuck matter.

The submission is further that another Court

reconsidering that issue, would find in favour of the Commissioner rather than in the favour of Glencore Operations (Pty) Ltd.

The second ground on which the Application for Leave to Appeal is premised, is that I had misconstrued the purpose of the note concerned. I dealt with that issue in my judgment. In particular, I dealt with the Budget Speech by the Minister of Finance during 2001 that was relied upon in the matter before me.

When considering the levies on fuel and payable by Consumers of distributed diesel fuel, that are raised in respect of the Road Accident Fund, some leniency is called for, and ought to be introduced to encourage competitiveness with International Competitors of Mining and Land as a primary production sector. When dealing with that issue in my judgment I made a finding contrary to the stated purpose of the act to collect revenue and not to hand revenue out. I dealt comprehensively in my judgment with that issue, and intend to not deal with it further.

The fourth ground that is raised, is that I dealt with the arguments raised before me on behalf of the Commissioner, in a circular manner. In doing so, I commenced on the wrong premise to arrive back at the same wrong premise. That ground was not debated further in oral argument, and it has not been shown where I had

departed from such a wrong reasoning premise and how it was circular to arrive back there at.

The fifth ground raised was on whether or not I had considered the words:

'But not including post recovery, or post mining processing of those minerals in Note 6 [iii] [cc].'

It was submitted that it rather supports the Commissioner's interpretation than the one I had given to the word "include". I dealt with the various issues in my judgment and need not deal with that again.

It is clear that the Commissioner primarily relies on the three main grounds that were raised in oral argument on behalf of the Commissioner. The fact that there are two judgments by this Court which are divergent and thus requires the attention of a Court of Appeal to settle as it were for "once and for all" the proper interpretation to be given to the word "include".

Mr Voster, on behalf of Glencore Operations SA (Pty) Ltd submitted that, apart from the fact that the Canyon Resources (Pty) Ltd matter is clearly distinguishable on the facts, there is no difference in approach, and as already recorded, that Court did not deal with the interpretation of the word "include".

It is not to be found in that judgment that it considered that issue, and it does not appear from that

judgment that it gave any consideration of the De Reuck judgment, or which of the three possible interpretations are to be applied to the word “include”.

In my view there is no disharmony in the two judgments that would require the attention of a Court of Appeal.

I have already dealt with the second ground relating to the alleged misconstruing of the purposes of the enactment which in fact runs hand-in-hand with the third ground.

It is highlighted by Mr Voster, on behalf of Glencore Operations SA (Pty) Ltd, that I dealt with the concession by the Commissioner in his Answering Affidavit, that any contention that an activity cannot qualify as an own primary production activity in mining because it is not one of the activities listed in note 6 [F] [iii] of the Schedule. It is further submitted that that argument is flawed.

On the basis of that concession it is difficult to understand how another Court would come to a different conclusion than on the one that I had arrived at.

It follows that I am not persuaded nor convinced that another Court would come to a different conclusion to that which I have come to in my judgment. In particular, where there are no contradicting judgments on the very issue that I had decided.

It follows that the Application for Leave to Appeal cannot succeed.

There is no reason why the usual norm in respect of costs should not be applied.

I grant the following Order:

The Application for Leave to Appeal is dismissed. The Commissioner for the South African Revenue Service is to pay the costs, such costs include the cost consequent on the employ of senior Counsel.

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