IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG, PRETORIA

CASE NO: 60161/2017

Reportable

Of Interest to Other Judges-No

In the matter between:

DE BEER CONSOLIDATED MINES PROPRIATARY LIMITED Applicant

And

THE COMMISSIONER FOR SOUTH AFRICAN REVENUE SERVICE Respondent

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JUDGMENT

HUGHES J

Introduction

[1] The applicant, De Beers Consolidated Mines Proprietary Limited, applied to the Commissioner for the South African Revenue Service, the respondent, for refunds in respect of diesel purchased for the period 11 September 2011 to March 2016. Currently, the applicant is actively in the business of mining diamonds at its Venetia Mine, Limpopo Province and Voorspoed Mine, Free State. Whilst, it has undertaken closure of its mining activities in Namaqualand and Kimberley, Northern Cape Province.

[2] On 31 August 2016 the respondent rejected the applicant's request for such diesel refunds valued at R8, 848,185.68. Such determination by the respondent was in terms of section 47(9)(a) of the Customs and Excise Act 91 of 1964 (the Customs Act). The applicant now appeals such determination in terms of section 47(9)(e) of the Customs Act.

[3] For easy reference I set out the relevant portions of section 47(9) below:

'(9) (a) (i) The Commissioner may in writing determine—

(aa) the tariff headings, tariff sub-headings or tariff items or other items of any Schedule under which any imported goods, goods manufactured in the Republic ... shall be classified; or

(bb) whether goods so classified under such tariff headings, tariff sub-headings, tariff items or other items of Schedule No. 3, 4, 5 or 6 may be used, ... or otherwise disposed of or have been used, ... or otherwise disposed of as provided in such tariff items or other items specified in any such Schedule.

…

(9)(e) An appeal against any such determination shall lie to the division of the High Court of South Africa having jurisdiction to hear appeals in the area wherein the determination was made, or the goods in question were entered for home consumption.'

[4] At the hearing of this appeal the order sought in the notice of motion by the applicant was amended. The applicant now only seeks prayers 1 and 2 with an order for costs consequent on the employment of senior counsel. The applicant does not persist with the other prayers. Prayers 1 and 2 reads as follows:

'[1] The Applicant's appeal against the determination by the Commissioner contained in Annexure "FA2" to the founding affidavit that the Applicant does not qualify for diesel refunds claimed by Applicant under rebate item 670.04 provided for in the Customs and Excise Act, 1964, is upheld.

[2] The said determination is substituted with a determination that the diesel refunds claimed by Applicant qualify under rebate item 670.04.'

[5] Initially, the applicant sought to pursue this appeal on three grounds. The first of these being the crushing of basalt stockpile and aggregate, the second on the issue of rehabilitation activities of the mines and the third, on the issue of the use of the Light Duty Vehicles (LDV) on the mines. The applicant has now abandoned the third ground. Thus, in this judgment I will only address the two mentioned above.

The determination of the respondent

[6] A fuel levy and Road Accident Fund levy is obliged to be paid by a diesel fuel purchaser. This payment is included in the purchase price to the supplier of the fuel. The applicant sought a reprieve in the form of a diesel refund. The respondent conducted investigations and enquiries, then concluded that the applicant was not entitled to the diesel refund for three specific activities. As stated above the third activity was abandoned as part of this claim.

[7] From September 2011 to March 2018 the applicant contracted the services of Sanyati Civil Engineering and Construction (Pty) Ltd, B & E International (Pty) Ltd and NM Restoration CC to assist with *inter alia,* the crushing of basalt and aggregate to be used for surfacing and maintenance of haul roads on their mining sites, and, to fill the blast holes on these mining sites. Here the services of the first two contractors above were utilised. Prior to the mining certificate being issued the applicant had to rehabilitate mining sites. This was where the services of NM Restoration CC came into play.

[8] In the respondent's determination for that period it concluded that 'the activities performed by Sanyati in respect of the crushing of basalt to produce materials and the activities performed by B&E in respect of aggregate crushing to provide sized aggregate to be used in the construction of roads, do not constitute own primary production activities in mining'. Essentially, these activities did not comply with the section 75(1A) read with rebate item 670.04 of schedule 6 of the Customs Act.

[9] As regards the applicant's claim under the auspices of rehabilitation of land, the respondent contends that, the period when the rehabilitation was undertaken, rehabilitation had not been listed eligible activity for which a claim could be submitted in terms of the Mining and Petroleum Resources and Development, Act 28 of 2002 (MPRDA). In any event, so contends the respondent, such rehabilitation formed part of the scope of work which NM Restorations CC was contracted to undertake for the applicant.

The wide appeal aspect

[10] The parties are *ad idem* that this appeal, in terms of section 47(9)(e) of the Customs Act, falls within the realm of a wide appeal. That being said, it is trite that these proceedings equate to a rehearing of the matter, *de novo*, with or without new or additional evidence. The *locus classicus* of *Levi Strauss* has dealt with what a wide appeal entails. In doing so, reference was had to all the relevant authorities of the Supreme Court of Appeal and the Constitutional Court. In paragraph 25 of the judgment, Murphy J succinctly states what the legal position of a wide appeal is:

'25. An appeal against a determination in terms of the relevant provisions is an appeal in the wide sense which may entail a re-hearing of the matter and fresh determination of the merits with additional evidence if available. In *Tikly and Others v Johannes NO and Others*[1] this court held that the word 'appeal' could have one of three meanings, namely: -

'(i) an appeal in the wide sense, that is, a complete rehearing of, and fresh determination on the merits of the matter with or without additional evidence or information ...;

(ii) an appeal in the ordinary strict sense, that is, a rehearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong ...;

(iii) a review, that is, a limited rehearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly.'[2]

[11] The aforesaid was further amplified by the *dicta* in *Pahad Shipping*[3] of the Supreme Court of Appeal, where the court stated that because there was no hearing

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[1] *Tikly and Others v Johannes NO and Others* 1963(2) SA 588 (T) at 590G-591A.
[2] *Levi Strauss SA (Pty) Ltd v The Commissioner for the South African Revenue Service* (Unreported case 20923/2015 GP).
[3] *Pahad Shipping v CSARS* 2010 (2) All SA 246 (SCA).

before a determination under the Customs Act is made, the appeal is thus a wide appeal, sanctioning a complete rehearing of the merits and a determination of same afresh.

[12] Further, the Constitutional Court's pronouncement on an appeal in the wide sense appears as follows:

'This construction is strengthened by considering what is encompassed by a power of review in this context. In ordinary language, it is a power to reconsider and, if necessary, replace the decision of the IEC. It is not a narrow appeal power, bound to a record, where the court decides merely whether on that record the decision was right or wrong. Nor is it the even narrower review power, where the process through which the decision was taken is scrutinised, but the merits of the decision are not considered. Instead it is the widest possible type of review where the decision in question is subjected to reconsideration, if necessary on new or additional facts, and the body exercising review power is free to substitute its own decision for the decision under review.'[4]

[13] Having set out the various court authorities of an appeal in the wide sense, I now turn to deal with the position adopted by the applicant, even though there is a concession that indeed these proceedings constitute a wide appeal. The applicant argues that a wide appeal 'does not give the parties *carte blanche* to adduce any fresh evidence which they may be minded to raise.' Further, that the 'parameters of the appeal are still to be found within the administrative decision appealed against'. In my view this argument must fail. The cases have reiterated that this is absolutely a new determination, new consideration of the merits, a *de novo* process. That being so the previous determination does not ring fence consideration of the merits *de novo*.

[14] As stated by *Tikly* above it is 'a complete rehearing of, and fresh determination on the merits of the matter'. This also puts paid to the argument of the applicant that the parties are limited to new evidence pertaining to the findings reached in the determination that is appealed against. This is so as it is clearly evident from the authorities that the fresh determination could be conducted with or without additional evidence or information.

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[4] *Kham & Others v Electoral Commission and Another* 2016 (2) SA 338 (CC) at para 41.

[15] The applicant was at pains to point out that this additional information can only be permitted with the authorisation of the court presiding over the matter. As such, that court has a discretion to allow the additional evidence or not. The applicant pointed out that the fact that the Constitutional Court's use of the phrase 'if necessary on new or additional facts' is evident that the reconsideration was subject to allowing new evidence or facts. The court making the determination had a discretion whether to allow new or additional evidence, 'if necessary', so the argument goes.

[16] I am of the view that, a reading of the *dicta* in *Kham* does not confer a discretion on the court. What it in fact does is that it allows the parties in the *de novo* proceedings, if necessitated to do so, to advance new and additional evidence. Thus, the proceedings are characterised as a wide appeal, and not ordinary and strict. I also accept the respondent's argument that within the grand scheme of exchange of pleadings, in a *de novo* matter, one could never dictate to the parties what to plead in advancing their case. Importantly, it is an advantage for both parties in *de novo* proceedings to be able to advance new and additional evidence.

[17] In *Pahad,* the Supreme Court of Appeal demonstrated that a determination by the respondent ceases once a final judgment is made by this court. Thus, this court makes a determination on appeal with a final judgment. These proceedings are not and cannot be classified as a review proceedings.[5]

[18] The problem, the way I see it, is that the applicant is adamant that the entire wide appeal has to be fashioned around that which was before the respondent when it made its determination. The applicant's submission that a discretion is necessary to allow for additional evidence, must fail. This is so as reliance on the initial determination fashions the proceedings like a review and does not cater for the court dealing with the matter *de novo.*

[19] Notably the same propositions were submitted in the *Levi* matter. Ironically, that decision stands as it has not been overturned. In line with the doctrine of *stare decisis*

[5] *Pahad* at para 26.

I am bound by the decision in *Levi,* a decision of this court. Hence, I find no reason to depart from the decision in *Levi*.

[20] The respondent proffers that the determination merely amounts to a preliminary assessment. The applicant disagrees. This aspect was explained in *Pahad* and restated in *Levi.* The courts pronounced that the determination is considered to be preliminary as it is not preceded by a hearing, as the forensic assessment is done by the respondent itself and not by an independent impartial tribunal.

[21] Purely for record purposes, it must be noted that the applicant at the hearing of these proceedings abandoned the constitutional challenge as regards the approach adopted in *Levi* as regards the determination being a preliminary assessment.

[22] Lastly, the applicant takes issue that allowance is made for the respondent to adduce secondary evidence or facts in its answering affidavit, instead of primary evidence on the determination. As pointed out by the respondent the applicant bears the onus and has the duty to set out the case it wishes to present. The respondent answers thereto. It is not a case of the respondent initiating the proceedings and setting out facts to defend its determination. In fact, in my view, it is a case of the respondent defending its determination, based on the case presented by the applicant. Consequently, the facts in the answering affidavit of the respondent do not amount to secondary facts or evidence.

[23] On the secondary evidence issue, the statements in *Die Dros* are apposite in this case. This is so, as the onus rest upon the applicant to set out its case and the relief it seeks. Thus, the answers to the applicant's case by the respondent are not secondary but rather primary to the case advanced. See *Die Dros and Others v Telefon Beverages CC* 2003 (4) SA 207 (C) at paragraph 28:

'It is trite law that the affidavits in motion proceedings serve to define not only the issues between the parties, but also to place the essential evidence before the Court (see *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (W) at 323G) for the benefit of not only the Court but also the parties. The affidavits in motion proceedings must contain factual averments that are

sufficient to support the cause of action on which the relief that is being sought is based. Facts may be either primary or secondary. Primary facts are those capable of being used for the drawing of inferences as to the existence or non-existence of other facts. Such further facts, in relation to primary facts, are called secondary facts. (See *Willcox and Others v Commissioner for Inland Revenue* 1960 (4) SA 599 (A) at 602A; *Reynolds NO v Mecklenberg (Pty) Ltd* 1996 (I) SA 75 (W) at 781.) Secondary facts, in the absence of the primary facts on which they are based, are nothing more than a deponent's own conclusions (see *Radebe and Others v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at 793C - E) and accordingly do not constitute evidential material capable of supporting a cause of action.'

The Statuary Provisions

[24] It is common cause that the distillate fuel refund is regularised by section 75(1A) of the Customs Act read with rebate item 670.04 Schedule 6 Part 3 Note 6. For easy reference I set out section 75(1A):

'75(1A)

Notwithstanding anything to the contrary contained in this Act or any other law-

(a) (i) a refund of the fuel levy leviable on distillate fuel in terms of Part 5A of Schedule 1; and ... shall be granted in accordance with the provisions of this section and of item 870.04 of Schedule 8 to the extent stated ln that item;

(b) such refunds shall be granted to any person who-

(i) has purchased and used such fuel in accordance with the provisions of this section and the said item of Schedule 8; and

(ii) is registered, in addition to any other registration required under this Act, for value-added tax purposes under the provisions of the Value-Added Tax Act, 1991 (Act 89 of 1991), and for diesel refund purposes on compliance with the requirements determined by the Commissioner for the purposes of this Act and the Value-Added Tax Act…'

[25] In terms of section 75 a refund is granted to those who purchase and use distillate fuel diesel. The prescripts of section 75 dictates that the said purchase and use of such fuel ought to be in line with schedule 6 note 6 read with item 670.04. In terms of note 6(b)(i)[6], which is relevant to this matter, the activity of mining on land, entitles a purchaser to benefit from such rebate.

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[6] Note 6 (b) The extent of refund for eligible purchases-

ON LAND

(i)Farming, forestry or mining on land is, 120 cents per litre fuel levy on 80 per cent of eligible purchases, **plus** 163 cents per litre Road Accident Fund levy on 80 per cent of eligible purchases equalling 283 cents per litre on 80 per cent of the **total eligible** purchases.

[26] Note 6(f) sets out those 'eligible purchases' entitled to the grant of the refund. These are, distillate fuel purchased by the user for use and used as fuel for own primary production activities mining as provided in items (ii) and (iii).[7] Relevant to this matter is those activities in item (iii).

[27] A list of various activities is set out in note 6(f)(iii) which constitutes own primary production. I proceed to set out that which is relevant to this case and relied upon by the applicant in advancing its case against the respondent:

'(f) (iii) Own primary production activities in mining including the follows:

…

(*bb*) The removal of overburden and other activities undertaken in the preparation of the site to enable the commencement of mining for minerals.

(*cc)* Operations for the recovery of minerals being mining for those minerals including the recovery of salts but not including any post-recovery or post-mining processing of those minerals [the emboldened words having been inserted with effect from 13 December 2013]

…

(gg) The construction or maintenance of private access roads at the place where the mining operation is carried on.

…

(*oo*) The removal of waste products of a mining operation and the disposal thereof, from the place where the mining operation is carried on.

(*pp*) The transporting by vehicle, locomotive or other equipment on the mining site of ores or other substance containing minerals for the processing in operations for recovery of minerals.

(*qq*) The service, maintenance or repair of vehicles, plant or equipment by the person who carries on the mining operation solely for use in a mining operation, at the place where the mining operation is carried on.

(*rr*) The service, maintenance or repair of transport networks for use in a mining operation, to the extent that the service, maintenance or repair is performed at the place where a mining operation is carried on.

(*ss*) Quarrying activities necessary solely for obtaining, extracting and removing minerals from quarry, but excluding any secondary activities to work or process such minerals (including crushing, sorting and washing) whether in the quarry or at the place where the mining operation is carried on.

[7] As set out in note 6(f)(ii).

(*tt*) The transport of ores or other substances containing minerals from the mining site to the nearest railway siding.
The insertion of (*vv*) occurred on 27 May 2016:
'(*vv)* Rehabilitation required by an environmental management programme or plan approved in terms of the MPRDA, but excluding such activities performed beyond the place where mining operations are carried on or after a closure certificate has been issued in terms of the MPRDA.'
[Emphasis on those pertinent to this case]

The issue of interpretation

[28] The parties are not in agreement with the interpretation of the opening line of note 6(f)(iii), being *'Own primary production activities in mining including the follows'*. On the one hand, the respondent states that the word 'including' means that the list of activities listed denotes a closed list, *numerous clausus*. Whilst, the applicant's view is that, that which is listed as activities, are not the only activities, and by use of the word 'including', the activities are non-exhaustive.

[29] This entire matter is a matter of interpretation and hence in dealing with interpretation I would be remiss if I did not quote the *locus classicus* of *Endumeni* as set out below:
'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which itis directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.
….

The 'inevitable point of departure is the language of the provisions itself', read in context and having document.'[8]

[30] I deal with the interpretation of the word 'including' and that of the opening line in the note later in the judgment.

Stare decisis

[31] This very note 6(f)(iii) has regard to the purpose of the provision and the background to the preparation and production and has been interpreted by this court. Initially, in *Glencore*[9] then in *Graspan.*[10] Notably, *Graspan* did not adopt the interpretation of the note recommended by *Glencore*. According to *Glencore* the listed activities were not exhaustive, whilst in *Graspan* the reasoning was that it was limited to that listed in the note. Collis J in *Graspan* was of the view that, according to the facts in *Glencore*, *Graspan* was distinguishable. Hence, the *dicta* need not be followed and *Glaspan* was not bound by that decision.

[32] The principle of *stare decisis* is well established in our law and I restate same below:

'The basic principle is stare decisis, that is, the Court stands by its previous decisions, subject to an exception where the earlier decision is held to be clearly wrong. A decision will be held to have been clearly wrong where it has been arrived at on some fundamental departure from principle, or a manifest oversight or misunderstanding, that is, there has been something in the nature of a palpable mistake.'[11]

[33] Thus, there are two differing judgments on the interpretation of the meaning of the word 'including' in note 6(f)(iii) and as such both decisions stand unless over-turned on appeal. In the above two cases the *ratio* in *Graspan* for deviating from the interpretation given to 'including' in *Glencore*, was that the latter interpretation, was accorded when considering post mining processing of minerals, which is note 6(f)(iii)(*cc*).

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[8] *Natal Joint Municipal Pension Fund v Endumeni* 2012 (4) SA 953 (SCA) at para 18.
[9] *Glencore Operations SA (Pty) Ltd v CSARS* (Unreported) 11698/19 dated 24 October 2019.
[10] *Graspan Collery SA (Pty) Ltd v CSARS* (Unreported) 8420/2018 dated 11 September 2020.
[11] *Patmar Explorations (Pty) Ltd v Limpopo Development Tribunal* (1250/2016) [2018] ZASCA 19 (16 March 2018).

[34] Whilst, in *Graspan* the interpretation of 'including' was in the context of rehabilitation, thus, the courts *ratio* that the cases are distinguishable. Rehabilitation is to be found at note 6(f)(iii) (*vv*).

[35] In the Constitutional Court, Brand AJ, in *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* had the following endorsement for the doctrine of precedent:

'… The doctrine of precedent not only binds lower courts but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. Stare decisis is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos[12]

…

Of course, it is trite that the binding authority of precedent is limited to the *ratio decidendi* (rationale or basis of deciding) and that it does not extend to *obiter dicta* or what was said 'by the way'. [13]

[36] Thus, if the *ratio* of any one of the aforesaid judgments is clearly wrong I am bound by the decision were the *ratio* is correct or if both judgment's *ratio* is clearly wrong, I am enjoined to come up with different *ratio*.

[37] I now turn to deal with that disputed by the applicant.

Crushing of basalt stockpile and aggregate

[38] The applicant and Sanyati have a contract to crush the basalt stockpiles and produce aggregate to be used to build the applicant's mine haul roads. The applicant seeks to claim a refund for the diesel utilised by Sanyati in performing such services. The applicant 'claims' that the diesel refund it seeks emanates from Sanyati's crushing of the basalt stockpiles, so the respondent retorts.

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[12] *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* [2010] ZACC 19 (unreported, decided on 4 November 2010) at para 28.
[13] *Ibid* at para 30.

[39] I deem it relevant to set out the relevant portion of the scope of works for the crushing of basalt in the contract between the applicant and Sanyati:

'Section D – Scope of Works for Crushing Basalt at De Beers Voorspoed mines,

Clause 2 – Scope.

This document is applicable to Basalt stockpile to produce material sizes that will be used for building mine haul roads...

Clause 2.1. Introduction.

The intention of this project is to crush basalt stockpile to produce aggregate for road building.

Clause 2.2.

Requirements by Voorspoed Mine

Voorspoed mine requires the service of the contractor to crush basalt stockpile to the following 2 size fractions and capacities...

-The contractor to setup a mobile screening and crushing plant at Voorspoed mine."

-The contractor to manage all the operational aspects (maintenance, operation etc) of the plant and use own crew.

Clause 5.2— Contractor's deliverables —

Clause 5.2.2

The contractor is required to crush basalt rock into aggregate of the following specifications:

…

Clause 5.2.6

The contractor shall be responsible for all activities relating to the feeding, crushing and storage of aggregate …

Clause 5.3 – Company's Responsibilities

5.3.2 Make available fuel and lubrication inside mine security area for company's account.'

[40] In support of its diesel claim the applicant places reliance on note 6(f)(iii)(*cc*), (*gg*) and (*ss*) as set out above and I do not propose to repeat same. The entire dispute centres on the issue of the interpretation of note 6(f)(iii).

[41] The applicant contends that the fact that the word 'including' is used in the note, this court is bound to interpret same as the Constitutional Court did in *De Reuck,* where it was stated:

'The correct sense of 'includes' in a statute must be ascertained from the context in which it is used. [*R v Debele* 1956 (4) SA 570 (A) at 575 H- 576 C] provides useful guidelines for this determination. If the primary meaning of the term is well – known and not in need of definition

and the items in the list introduced by 'includes' go beyond that primary meaning, the purpose of that list is then usually taken to be to add to the primary meaning so that 'includes' is non-exhaustive. If, as in this case, the primary meaning already encompassed all the items in the list, then the purpose of the list is to make the definition more precise. In such a case 'includes' is used exhaustively. Between these two situations there is a third, where the drafters have for convenience grouped together several things in the definition of one term, whose primary meaning — if it is a word in ordinary, non-legal usage — fits some of them better than others. Such a list may also be intended as exhaustive.'[14]

[42] The applicant argues that on application of the guidelines set out in *de Reuck* the word 'includes' is non-exhaustive as the phrase 'primary production activities in mining' is well-known and not in need of definition. The applicant contends that if one looks at the note, that which is listed clearly goes beyond the primary meaning. To demonstrate this the applicant, as an example, referred to the activity set out in (*tt*) of the note.[15] Thus, the primary meaning of 'primary production activities in mining' could not be such as to encompass all the items in the list, so the argument goes. Lastly, the applicant contends that on an examination of the activities listed in the note, the primary meaning of the phrase does not fit some of the activities better than others. Hence, the applicant states that the phrase is not exhaustive.

[43] The applicant submits that as the production of material for roadbuilding is not listed in the note as 'primary production activities in mining', this highlights the respondent's deficiency in the interpretation of the note. In doing so, what the respondent does is interpret the note as not having the word 'including', so the argument goes. Lastly, it submits that the crushing of the basalt and utilization thereof for the construction of roads is in fact part and parcel of that intimately associated with mining activities.

[44] In dealing with the respondent's interpretation of note 6(f)(iii), it is noteworthy to recognise that it takes cognisance of 'own' in the phrase, 'own primary production of activities in mining'. Consequently, their reasoning that the activity of Sanyati as a

[14] *De Reuck v Director of Public Prosecutions* 2004 (1) SA 406 (CC) at para 16.
[15] *(tt)* is set out in para [27] of the judgment.

contractor for the applicant does not constitute ‘own primary production in mining’ as listed in the *numerous clausus* of note 6(f)(iii). The respondent contends that the sole purpose of the contract with Sanyati was for the crushing of basalt and nothing more. This is so for the B&E contract as well.

[45] Besides the aforesaid contractor’s activities not constituting ‘own primary production in mining’, the respondent argues that they do not even qualify as activities under ‘construction and maintenance’ of a road. Hence, the respondent’s conclusion was that such services do not qualify as ‘own primary production activities in mining’ or ‘construction or maintenance’ of roads, as is envisaged in note 6(f)(iii).

[46] In addressing the interpretation of the relevant note 6(f)(iii), it is important in my view, to note that one would qualify for the refund if the mining activities are carried out for ones ‘own primary production’, be it by the user or a contractor. Further, in terms of note 6(f)(ii) this must take place at the place where the mining operation is carried out, unless otherwise specified.

[47] My understanding is that the note goes further to explain what constitutes ‘own primary production activities in mining’ in note 6(f)(ii) by the use of the word ‘including’. Hence, the legislator goes on to numerate the activities by the use of ‘including’. In applying the *dicta* of *De Reuck* and a reading of note 6 as a whole, it is clear to me, that the legislature sought to emphasis what these ‘own primary production activities in mining’ were, if one is still not sure. Thus, the use of the word ‘including’; one could not be mistaken to decipher what in fact constituted ‘own primary production activities in mining’. Therefore, the listing in note 6(f)(iii), which covers a wide spectrum of activities relevant to mining.

[48] The literal meaning of the relevant portions of the phrase relied upon as per the legal dictionary is as follows:

‘Own- to have legal title or right to something

Primary – first, principle, chief, leading

Production - to bring forward; to show or exhibit; to bring into view or notice'[16]

[49] Taking the aforesaid meanings into account, 'own primary production' as appears in introducing note 6(f)(ii), in my view, is qualified by the listing illustrated in 6(f)(iii). It is therefore, clear to me that the primary meaning of 'own primary production' encompasses the list. Thus, the purpose of the list was to make the definition more precise.

[50] In the premise, I am fortified to conclude that the decision taken by the respondent was aimed at clarifying the activities which the legislature sought to include in note 6 (f)(iii), at that very specific period applicable in this case.

[51] Under these circumstances, the respondent has successfully demonstrated that the applicant does not qualify with regards to the crushing of basalt for a diesel refund.

[52] For the reasons set out above I differ with van der Westhuizen J's application of *De Reuck* and his interpretation of 'including' in *Glencore*. The manner of interpretation adopted in *Glencore*, in my view, fails to align itself with the *dicta* of *Endumeni* and is a fundamental departure from the principles of interpretation or misunderstanding thereof.

[53] I align myself with the *dicta* and the *ratio* in *Graspan* where the court reasoned as follows:

'[45] In employing the reasoning of the cases law listed above, I am persuaded that the use of the word 'include' in the phrase own primary production activity in the note is to give the phrase a more precise meaning by listing what will encompass own primary production activities in mining. The word 'include' is therefore, aimed at illustrating that the list is exhaustive of the meaning of primary production activities in mining.'" To hold otherwise, would render the usage of the word 'include' nugatory and it will bring about a superfluous usage of the word in the phrase which could not have been what was intended by the legislator.'

[16] Concise Oxford English Dictionary, Eleventh Edition, Revised, Edited by Catherine Soanes & Angus Stevenson

Rehabilitation

[54] The applicant contracted with NM Restoration CC for the restoration of the disturbed land at its Namaqualand Mine at Koingnaas, Northern Cape. It is common cause that the rehabilitation process is undertaken at the applicant's mine. The scope of work includes restoration of disturbed land, rehabilitation activities of mined out areas inclusive of grassing, seeding, maintenance of the rehabilitation netting, such being the rehabilitation services.

[55] Interestingly, during April 2010 mining was suspend on the aforesaid mine. This culminated in certain mining rights being sold in 2011. The applicant contends that the rehabilitation is ongoing on the remaining undisturbed licenced areas. Hence, the applicant as the holder of such rights, ensures that the rehabilitation and remediation of the adverse environmental impacts are conducted.

[56] On 27 May 2016 item (*vv*) in note 6(f)(iii) was introduced which permitted, from said date, that all diesel used in rehabilitation activities undertaken by the applicant or its agent qualified for a diesel refund. The applicant confirms that (*vv*) was introduced after the September 2011 and March 2016 audit period. However, it places emphasis on the fact that such insertion was done 'to clarify the position with regard to certain provisions under the diesel refund item.'

[57] The applicant contends that as such 'it was introduced to clarify that it has always been the legislature's intention that rehabilitation be included as a primary mining activity under note 6(f)(iii).' The applicant submits that rehabilitation is a normal concomitant of mining and as such falls within the meaning of 'own primary production activities in mining'. In addition, it is a precondition to mining rights in terms of MPRAD and National Environmental Management Act of 1998 (NEMA).

[58] The respondent contends that NM Restorations CC undertook, as the scope of works states, 'restoration of the land'. It contends covers rehabilitation which was not catered for until the insertion of clause (*vv*). Thus, it did not qualify as activity under the note at the time prior to the amendment.

[59] The aspect has already been dealt with by this court in *Graspan* and as such I am bound by that decision unless it is clearly wrong, which has not been determined. The *ratio* is set out from the judgment below:

'[46] The most logical and most reasoned conclusion to draw, is that rehabilitation only qualified as an own primary production activity as from 27 May 2016 and that prior thereto, that no refund could have been qualified for and payable under the Customs Act.'

Order

[60] Consequently, the following order is made:

[a] The application of De Beer Consolidated Mines (Pty) Ltd is dismissed with costs, inclusive of two counsel where so employed.

W Hughes
Judge of the Gauteng High Court, Pretoria

Virtually Heard: 16 February 2021
Electronically Delivered: 17 March 2021

Appearance:
For the Applicant: Adv J.P Vorster SC
Instructed by: Edward Nathan Sonnenbergs Inc

For the Respondent: Adv C.E Puckrin SC
Adv L.G Kilmartin
Instructed by: The State Attorney