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

**CASE NO: 47405/2020**

(1) REPORTABLE: ~~YES~~ NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ NO
(3) REVISED: YES

2 EBRUARY 2023

SIGNATURE DATE 3/2/2023

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

Case number: 47405/2020

In the matter between:

**THOLO ENERGY SERVICES CC** **APPLICANT**

**AND**

**COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE** **RESPONDENT**

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**JUDGEMENT**

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**MOLOTSI AJ**

[1] This is an appeal in terms of section 47(9)( e ) of the Customs and Excise Act , 91 of 1964 ( " the Act") against a determination made by the respondent on 20 July

2017, disallowing the Applicant's refund claims totalling an amount of R4, 254, 924.80.

[2]. The issues in this appeal are whether the appeal is an appeal in a narrow or wider sense and whether the Applicant was able to show by way of evidence that it complied with the provisions of section 64F of the Act and Rule 19A4.04 (iii) & (iv) read with schedule 6 part 3 Note 12 item 671.11 (b) of the Act. In essence, the question to be determined is whether the Applicant is entitled to claim a refund in terms of section 75 (1)(d) of the Act.

[3] The Applicant is a close corporation incorporated in terms of South African law. The sole member of the Applicant is Mr Moroahae. The Applicant was registered as a Licensed Distributor of Fuel ( "LDF") and Licensed Remover of Good in bond. The registration took place on 25 January 2015 and the license was renewed in 2016. The Applicant is a transporter of diesel and petroleum products in Southern Africa, importing, exporting and removing diesel.

[4] During April to June 2016, the Applicant allegedly purchased 25 consignments of diesel fuel from PetroSA at Mossel Bay. PetroSA is a licensee of a customs and excise manufacturing warehouse at Mossel Bay. A custom and excise manufacturing warehouse is commonly referred to as " VM".

[5] The fuel was removed to the Applicant's clients in Lesotho. Tholo Lesotho, is a private company incorporated in the Kingdom of Lesotho, by Mr Moroahae, who is also its shareholder and its sole director.

[6] PetroSA invoiced the Applicant and payment to PetroSA was made on behalf of the Applicant by Tholo Lesotho. Tholo Lesotho carries on a business in Lesotho and supplies fuel to its customers in Lesotho. Tholo Lesotho sources fuel that it supplies to its customers from South Africa.

[7] The storage tank in Bloemfontein is operated by PetroSA. The storage tanks in Bloemfontein are not licensed as customs and excise manufacturing warehouse ( VM).

[8] The Applicant submitted refund claims to the respondent on 17 March 2017. On 3 May 2017 the Applicant received a notice from the respondent of its intention to disallow the refund claims. The notice was however withdrawn by the respondent on 9 May 2017. Eventually on 20 July 2017 the respondent issued a final disallowance of refund.

[9] The reasons for the final disallowance of refund were as follows:

[9.1.] The respondent alleged that the Applicant contravened section 64F(1)(b) of the Act. The respondent contented that fuel had to be loaded at the premises of a licensed customs and excise manufacturing warehouse. The respondent was therefore of the view that there was no proof that the fuel that was exported to Lesotho was manufactured in South Africa in this instance, by PetroSA at its customs and excise manufacturing warehouse at Mossel bay.

[9.2] The respondent further alleged that the fuel that the Applicant exported to Lesotho was not obtained from a licensed manufacturing warehouse.

[9.3] The Applicant did not possess an ITAC permit for the fuel goods to be removed to Lesotho.

[10] The Applicant, aggrieved with the decision of the respondent lodged an internal administrative appeal on 31 July 2017. On 27 October 2017 the Applicant appeared and made representations to the respondent's appeal committee. The respondent appeal committee requested additional documents and further information from the Applicant on 5 December 2017. The Applicant provided the appeal committee with further information and documents on 1 February 2018.

[11] The appeal committee of the respondent requested to conduct an inspection *in loco* at the various premises where fuel is manufactured and stored. Inspection *in loco* was conducted at PetroSA depots and storage tanks in Bloemfontein and PetroSA's custom and excise manufacturing warehouse at Mossel Bay. On 10 December 2018, the respondent's appeal committee adjudicated the decision in

favour of the respondent confirming that the fuel was not obtained from a custom and exercise manufacturing warehouse.

[12] The appeal committee decision was confirmed on 7 March 2019. On 8 October 2019, the Applicant served DA96 notice in terms of section 96(1) of the Act to the respondent. After requesting additional documents and information from the Applicant post the serving of DA96 notice, the respondent on 15 July 2020, responded to the Applicant's DA96 notice and relied upon additional grounds of refusing the Applicant's refund claims.

*Applicant's case*

[13] The Applicant contended that this is an appeal in terms of section 47(9)( e) of the Act and that the appeal is a narrow appeal instead of a wider appeal. The respondent is bound by its final determination made on 20 July 2017. The additional grounds were not indicated in the final determination. The additional grounds included that the fuel levy goods were not loaded at the premises of a licensed customs and excise manufacturing warehouse in contravention of section 64F(1)of the Act and that the Applicant was not in possession of export permits issued by ITAC ( International Trade Commission) in respect of the consignments of fuel.

[14] The respondent withdrew his previous findings that there were differences in quantities of fuel purchased and delivered and that there were differences in the description of the fuel levy goods contained on the SAD 500 and the invoice.

[15] The Applicant contended that the respondent's determination that the Applicant as an LDF ( license distributor of fuel) was obliged to physically load fuel from customs and excise manufacturing warehouse was incorrect. That there is no provision in the Act, or in the Rules which required an LDF to obtain and load fuel levy goods from the customs and excise manufacturing warehouse.

[16] The Applicant further contended that there is no provision in Note 12 or the relevant sections of the Act , or rules which required an LDF ( Applicant) to be in

possession of an ITAC export permit. Mr Swanepoel submitted on behalf of the Applicant, that prayer(s) 1 and 1.1. of the notice of motion are abandoned . Both parties were in agreement that the determination of 20 July 2017 by the respondent is still in existence.

[17] Mr Swanepoel further submitted what the respondent stated in the answering affidavit is different from the determination of 20 July 2017. The respondent cannot make new determination. In essence, this argument was that the respondent was bound by its determination dated 20 July 2017 and that the answering affidavit introduced new determination and that this was not permissible.

[18] One of the additional grounds, namely, Tholo SA ( Applicant) did not remove or export fuel to Lesotho, constituted additional ground and that this was not permissible. It was on the basis of the above, that Mr Swanepoel submitted that the appeal is a narrow appeal and not a wider appeal. The Court must focus its attention on the determination made on 20 July 2017 and not the additional grounds listed in the answering affidavit. It is not permissible for the additional grounds to be considered by the Court.

[19] The Applicant further submitted that once the respondent makes a determination as contemplated in s 96(1)(b) of the Act, it is of force and effect until such time as being set aside by an order of this Court as provided in s 47(9)(b)(ii)(bb). Such determination remains operative and is incapable of being varied or altered by the respondent. The Applicant in effect stated that the respondent was *functus officio*, once he made his determination of 20 July 2017.

*Respondent's case*

[20] The Respondent did not take issue with the fact that the appeal was prosecuted one year after the appeal committee made its determination. The appeal is a wider appeal. It is a wider appeal and therefore additional grounds disallowing a refund are permissible. In appeal proceedings a record is not necessary. A record is necessary in review proceedings. In a wider appeal, the

Applicant is permitted to come with new evidence. A wider appeal is in essence a hearing *de novo.*

[21] A wider appeal is a superior remedy available to the Applicant. The additional ground disallowing the refund claim are based on a wider appeal process. The Applicant has not complied with the provisions of section 64F read with the rules thereto. The Applicant did not export the goods as provided for in the tariff items. The word removal means that the goods must be physically removed from the manufacturing warehouse ( VM).

[22 In terms of Rule 19A4.04(a)(iii) and (iv) the procedure relating to goods removed from customs and excise warehouse, provides that only a licensee of such manufacturing warehouse or the special customs and excise storage warehouse contemplated in rule19A4.01(b)(ii) or a licensed distributor as contemplated in section 64F may export fuel levy goods and only a licensee of such manufacturing warehouse or a licensed distributor as contemplated in section 64F may remove fuel levy goods to any BLNS country.

[23] Removal of fuel levy goods for any purpose specified in the rules which requires compliance with a customs and excise procedure, provides goods may only be so removed from storage tank owned by or under the control of a licensee of a manufacturing or storage warehouse. It is the warehouses or premises that are licensed not persons in terms of section 19(1) of the Act.

[24] The stock of the licensee is a warehouse stock. Licensee is a person conducting business at the manufacturing warehouse ( VM). A licensee cannot use its status as a licensee to remove goods from any other place other than a customs and excise manufacturing warehouse.

[25] The removal of fuel to Lesotho was undertaken by Tholo Lesotho.

[26] Tholo SA ( Applicant) did not pay PetroSA for the fuel, Tholo Lesotho as the true purchaser and exporter of the fuel to Lesotho paid PetroSA. Mr Peter, for the respondent, referred to schedule 6 item 12 (b) which deals with the requirements in

respect of refunds. He submitted that for a valid claim for refund to exist, one must go to a customs and excise manufacturing warehouse. The fuel must be removed from customs and excise manufacturing warehouse.

[27] Mr Peter further submitted that the Applicant is seeking a refund on something that they did not pay. Tholo SA did not use its own transport. Tholo Lesotho using its own transport transported fuel to Lesotho. There was no proof that the fuel was manufactured at a customs and excise manufacturing warehouse in that the fuel from Bloemfontein and Alrode consisted of fuel from Transnet and British Petroleum ( BP). The respondent under Rule 19A(1)(iii) is given specific powers to prescribe procedures for export and rebate duty.

[28] There was not enough evidence that the Applicant complied with notes 12 item 671.11(b) of schedule 6/ Part 3.

*Statutory Regime and the Rules*

[29] Section 2 of the Act provides that:

" *The Commissioner shall, subject to the control of the Minister, be charged with the administration of this Act, including the interpretation of the schedules thereto."*
[30] The Act gives powers to the respondent to administer and interpret the schedules of the Act. The interpretation provided by the respondent in respect of the schedules of the Act , must be preferred unless the interpretation is patently incorrect or contrary to the purpose and objects of the Act and results in unbussiness like outcomes . This means that the onus is on the Applicant to show that the interpretation provided by the respondent is wrong. The burden of prove is discharged when the Applicant tenders evidence which shows that it complied with the requirements to claim a refund. If no such evidence is provided, it follows that the Court must accept the interpretation provided by the respondent and that the appeal must be dismissed.

[31] Section 3 (2)(b) of the Act provides that:

" *The Commissioner may make rules regarding any matter which the Commissioner considers necessary and useful for the purposes of administering the provisions of this section."*

[32] Section 19 (1) of the Act states that: "*The Commissioner may license at any place appointed for that purpose under the provisions of this Act, warehouses ( to be known as customs and excise warehouses) approved by him for the storage of such dutiable imported or such dutiable locally produced goods or for the manufacture of such dutiable goods from such imported or such locally- produced materials or such imported and such locally- produced materials as he may approve in respect of each such warehouses."*

[33] Section 19(1) gives the power to the respondent to appoint customs and excise warehouse ( "VM"). Only a place/premises licensed by the respondent can operate as a customs and excise manufacturing warehouse . If a place/premises is not licensed by the respondent as a customs and excise manufacturing warehouse , such a place/premises cannot function as such for the purposes of the Act.

[34] Section 19A of the Act deals with special provision in respect of customs and excise warehouses in which excisable or fuel levy goods are manufactured or stored. This allows for payment of duty when manufactured excisable or fuel levy goods are removed for home consumption from customs and excise manufacturing warehouses. This section further restricts the respondent in granting the licensing of customs and excise storage warehouses. This section further provides for the respondent to make rules in respect of entry of fuel levy goods .

[35] Section 20 (4) of the Act provides that:

" *Subject to section 19A, no goods which have been stored or manufactured in a customs and excise warehouse shall be taken or delivered from such warehouse except in accordance with the rules and upon due entry for any of the following purposes:*
*[a] home consumption and payment of any duty due thereon.*
*[b]…."*

[36] Section 20(4) of the Act provides that no goods which have been stored or manufactured in a customs and excise manufacturing warehouse shall be taken or delivered from the customs and excise manufacturing warehouse except in accordance with the rules especially Rule 19A4.04 (iii) and (iv) respectively. Customs duty and excise duty are payable if the goods are intended for home consumption. The goods can only be removed from a customs and excise manufacturing warehouse in accordance with the procedure laid down by Rule 19A4.04 (iii) & (iv) respectively and if the goods are for home consumption.

[37] A proper interpretation of section 20(4) of the Act read with Rule 19A.04 ( iii) & (iv) , lends itself to a conclusion that if goods are delivered from customs and manufacturing warehouse contrary to the rules and not for home consumption, then the provisions of the rule are contravened. Furthermore, it appears that the respondent has no discretion when goods are removed from customs and excise manufacturing warehouse in contravention of the rules and are not for home consumption. Under those circumstances, any claim for refund must be refused.

[38] Rule 19A4.04 provides that:

*" [a] [i] Any fuel goods removed for any purpose by the licensee of a customs and excise warehouse must be removed from stocks which have been entered or are deemed to have been entered for home consumption in accordance with the provisions of these rules, hereafter referred to as "duty paid stock".*

*[ii] Where fuel levy goods are removed for any purpose specified in these rules requiring compliance with a customs and excise procedure either in respect of the removal, movement or receipt thereof, such goods may only be so removed from a storage tank owned by or under control of a licensee of a customs and excise manufacturing or special customs and excise storage warehouse.*

*[iii] Only a licensee of such manufacturing warehouse or the special customs and excise storage warehouse contemplated in rule 19A4.01(b)(ii) or a licensed distributor as contemplated in section 64F may export fuel levy goods.*

*[iv] Only a licensee of such manufacturing warehouse or a licensed distributor as contemplated in section 64F may remove fuel levy goods to any BLNS country.'*

[39] Rule 19A4.04 deals with the procedure relating to goods removed from a customs and excise warehouse. These are the rules and procedure referred to in section(s) 19A(1)(iii) (dd) and 20(4) of the Act respectively . The rules therefore prescribe the procedure that the Applicant must follow in removing goods from customs and excise warehouse to Lesotho. The rules clearly states that only the licensed distributor in this instance the Applicant may export fuel levy goods.

[40] Furthermore, the rule provides that the Applicant as a licensed distributor may remove goods to any BLNS country. Lesotho is one of the BLNS countries. BLNS countries referred to in section 64F means Botswana, Lesotho, Namibia and Swaziland.

[41] Furthermore schedule 6/part 3 dealing with rebates and refunds of fuel levy and Road Accident Fund Levy. Notes 12 item 671.11 (b) provides that:

*"Requirements in respect of refunds:*
*[i] The refund provided for in this item is subject to the provisions of section 75(11A)*
*[ii] Any application for a refund of fuel levy and Road Accident Fund levy in terms of this item shall be subject to compliance with-*
*[aa] section 64F and its rules;*
*[bb] rule 19A4.04 mutatis mutandis and any other rule regulating movement of goods to which this item relates.*
*[iii]*
*[aa] Any load of fuel obtained from the licensee of a customs and excise manufacturing warehouse must be wholly and directly removed for delivery in any other country in the common customs area by the licensed distributor in order to be considered for a refund of duty.*
*[bb] A refund shall only be payable on quantities actually delivered to a purchaser in any other country of the common customs area."*

[42] Schedule 6 part 3 note 12 item 671.11 (b) provides requirements for a refund. Any refund which does not comply with this requirement must be refused by the respondent. It appears that the respondent has no discretion to approve a refund which does not comply with these requirements.

[43] Then lastly section 64F states that:
"[1] *For the purposes of this Act , unless the context otherwise indicates-*

*Licensed distributor means any person who-*
*[a] is licensed in accordance with the provisions of section 60 and this section;*
*[b] obtains at any place in the Republic for delivery to a purchaser in any other country of the common customs area for consumption in such country or for export ( including supply as "ships" or aircraft stores), fuel , which has been or is deemed to have been entered for payment of excise duty and fuel levy, from stocks of a licensee of a customs and excise manufacturing warehouse; and*
*[c] is entitled to a refund of duty in terms of any provision of schedule 6 in respect of such fuel which has been duly delivered or exported as contemplated in paragraph b."*

[44] In a nutshell, to comply with the provisions of section 64F, the Applicant must deliver fuel to the purchaser in any country and the fuel must come from stocks of a licensee of a customs and excise manufacturing warehouse.

[45] Section 64F does not contemplate a third party delivering to a purchaser to any other country. Furthermore section 64F does not contemplate any other person other than a licensed distributor to obtain and deliver fuel. It further does not provide that fuel must be obtained from any other place except the customs and excise manufacturing warehouse.

*Evaluation*

[46] The first issue to be determined is whether this is a wider or a narrow appeal. Mr Swanepoel, could not provide this Court with any authority which supported his argument that the appeal is a narrow appeal. The authorities relied upon by Mr

Peter, shows that the appeal in terms of section 47(9)( e) of the Act is a wider appeal. It is a wider appeal in the sense that the Applicant can produce new evidence and that the respondent is not precluded from providing additional grounds for disallowing a refund.

[47] A wider appeal is beneficial to both the Applicant and the respondent. It is a wider remedy and not limiting the parties to their initial positions as long as the new evidence or additional grounds for disallowance of the refund, are relevant and necessarily connected to the initial position. There must accordingly, be a *nexus,* between the initial determination by the respondent and the additional grounds. A wider appeal does not postulate a different or new determination by the respondent.

[48] The argument by Mr Swanepoel, that the respondent is functus officio and cannot rely on additional grounds for disallowing a refund is with respect incorrect and flawed. It is precisely because of the nature of a wider appeal, that the respondent can rely on additional grounds for disallowing a refund.

[49] In *Commissioner , South African Revenue Service v Levi Strauss South Africa ( Pty) Ltd*[1] the Court held that:

" *I do not think this argument is open to SARS on these papers. An appeal under s 47(7)(b) of the Act is an appeal against the determination. While it is an appeal in the wide sense, involving a complete rehearing and determination of the merits, it remains an appeal against what was determined in the determination , and nothing more. It is open to Sars to defend its determination on any legitimate ground, but is not an opportunity for it to make a wholly different determination, albeit one with similar effect."* This Court is bound by the abovementioned SCA judgement.

[50 ] The above judgement was referred in argument by Mr Swanepoel, in his submission as to why the appeal must be a narrow appeal. This SCA judgement is not helpful to Mr Swanepoel. In fact, the judgement puts to an end his argument that this appeal is an appeal in a narrow sense. The caution that Mr Swanepoel

[1] 2021 (4) SA 76 ( SCA) at para 26

attempted to explain the SCA judgement was referring to , in respect of the additional grounds, does not apply in the present case. This Court is of the view that there is a nexus between the determination of 20 July 2017 and the additional grounds.

[51] Taking into consideration the entire process including the appeal committee numerous requests for additional information and documents from the Applicant and since this appeal is a rehearing of the matter on the merits, the respondent was permitted and entitled to rely on additional grounds disallowing the refund of the Applicant. The additional grounds were legitimate and formed a nexus with the initial determination. The respondent did not provide a wholly different determination. The determination never changed. The determination was that the Applicant's claim for a refund was refused.

[52] This was the final determination of 20 July 2017. The additional grounds relied upon by the respondent in his answering affidavit, did not mean that the respondent changed his determination of 20 July 2017. The character of an appeal being a hearing *de novo* , provided the respondent with an opportunity to provide additional grounds for refusing to grant a claim for refund. It was therefore permissible in law for the respondent in his answering affidavit to provide additional grounds of refusing the claim for refund. There is certainly nothing wrong with such an approach. The respondent, for the purposes of appeal, is not bound to solely rely on the reasons provided on his determination of 20 July 2017. There was therefore nothing unfair by the respondent in relying on the additional grounds.

*Did the Applicant comply with the provisions of section 64F of the Act and Rule 19A4.04(iii) & (iv) read with schedule 6 part 3 note 12 item 671.11 (b) of the Act – Did the Applicant comply with the requirements to claim a refund.*

[53] Having considered all the evidence before this Court , the following facts are apparent:

[53.1.] The Applicant did not obtain the fuel from customs and excise warehouse of PetroSA at Mossel Bay.

[53.2.] PetroSA arranged that the Applicant would collect fuel from stocks held by Total at its storage tanks and depot. These stocks are not based at the customs and excise manufacturing warehouse of PetroSA at Mossel bay.

[53.3.] The fuel was collected from the relevant storage tanks and depots and delivered to Lesotho by Tholo Lesotho using trucks belonging to Tholo Lesotho driven by Lesotho citizens.

[53.4.] It was Tholo Lesotho that paid PetroSA and not the Applicant.

[53.5] Tholo Lesotho obtained fuel from places/premises which are not licensed as customs and excise warehouse ( "VM") . Tholo Lesotho collected fuel from Bloemfontein, Alrode and Tzaneen. Alrode is a Total depot. Total is a licensee of customs and excise manufacturing warehouse. However, neither the Applicant nor Tholo Lesotho purchased, the fuel consignment in question from Total.

[53.6.] Tholo Lesotho did not obtain the fuel from PetroSA customs and excise manufacturing warehouse at Mossel bay.

[53.7]. As per the provisions of Rule 19A4.04 ( iii) , the Applicant did not export the fuel levy goods.

[53.8 ] The Applicant did not remove fuel levy goods to Lesotho.

[53.9] As per the provisions of note 12 item 671.11.(b), the Applicant did not wholly and directly remove for delivery the fuel levy goods.

[53.10] The Applicant did not comply with the provisions of section 64F of the Act.

[53.11] Tholo SA and Tholo Lesotho are two independent bodies operating in different countries.

[53.12] There is no proof that the fuel which was transported to Lesotho was manufactured by PetroSA or such fuel was locally manufactured.

[54] The respondent in terms of section 19 of the Act license a warehouse situated in a particular place/premises and does not license the owner of the warehouse. The Act does not permit the licensee of the customs and excise manufacturing warehouse to acquire fuel from any source or store it anywhere. Note 12(b)(iii) provides that fuel obtained from the licensee must be wholly and directly removed for delivery by the licensed distributor. On the facts before this Court, there is no evidence which shows that the Applicant, as a licensed distributor of fuel, obtained fuel from PetroSA warehouse at Mossel Bay.

[55] The contention by the Applicant that the interpretation provided by the respondent to section 64F is incorrect is rejected. Section 64F provisions are quite clear. The Applicant must obtain fuel and deliver it to the purchaser in any country. In the present case, the Applicant did not obtain fuel from customs and excise warehouse and did not deliver fuel to Lesotho. Tholo Lesotho, was the purchaser, collected the fuel and delivered the fuel to Lesotho.

[56] Furthermore the provisions of Rule 64F.06 dealing with procedures to the movement of fuel to a BLNS country or exported were not followed. Rule 64F.06 provides that:

" *[a] The procedures and other requirements prescribed in rule 19A4.04 which regulate the removal of fuel levy goods to a BLNS country or when exported shall apply mutatis mutandis in respect of fuel so removed to any other country in the common customs area or so exported as contemplated in section 64F and these rules.*
*[b] Unless the licensed distributor uses own transport, such fuel, if wholly or partly transported by road, must be carried by a licensed remover of goods in bond contemplated in section 64D."*

[57] The Applicant did not use its own transport to remove the fuel and deliver it to Lesotho. Mr Peter, correctly submitted that stock of licensee means the warehouse stock. In the present case, the fuel delivered to Lesotho was not obtained from the stock of the customs and excise manufacturing warehouse.

[58] The Applicant's reliance Rule 19A.07(b) without reference to Rule19A4.04 (iii) & (iv) respectively is misplaced. The rules must be read together. Furthermore, Rule 19A.07(b) does not explain the procedure of removing goods from customs and excise warehouse. The procedure for removing goods from customs and excise warehouse is contained in Rule 19A4.04.

[59] .The fuel that Tholo Lesotho delivered to Lesotho did not originate from stocks of licensee of a customs and excise manufacturing warehouse ( "VM"). The fuel comes from Bloemfontein, Alrode and Tzaneen, which are not customs and excise manufacturing warehouses. The Applicant did not dispute the fact that it is possible that the fuel which Tholo Lesotho delivered to Lesotho was mixed with other fuel and therefore no evidence existed that the fuel comes from stocks of customs and excise manufacturing warehouse and that it was locally produced.

[60] In fact, in the replying affidavit, the Applicant stated that PetroSA confirmed that the diesel reflected as "imported" was locally acquired from another supplier.[2] This without a doubt, explains that the fuel does not come from customs and excise manufacturing warehouse of PetroSA situated at Mossel bay.

[61] On the proper interpretation of section 64F, the LDF is required to obtain and load fuel levy goods from a customs and excise manufacturing warehouse (" VM" ) . To provide any other interpretation to section 64F would result in unbusiness like outcome. The interpretation that the respondent gave to section 64F was correct and proper. Any interpretation to the contrary, would go against the provisions of section 64F of the Act. This interpretation accords with the principles laid down in *Natal Joint Municipal Pension Fund v Edumeni Municipality*[3].

[62] The contention by the Applicant that there was no export of fuel is of no moment as the Applicant failed to comply with the provisions section 64F of the Act , Rule 19A4.04 (a)(iii) & ( iv) and schedule 6 part 3 note 12 item 671.11(b). Whether one uses the word "export or removal" it to boils down to non- compliance of the requirements by the Applicant.

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[2] Paragraph 30.2. of the replying affidavit. Case lines pagination 011-17.
[3] 2012 ( 4) SA 593 ( SCA) at para 18.

[63] As Mr Peter , correctly, pointed out , the Applicant is seeking a refund on something that it did not pay. This is untenable on the part Applicant . Section 75(1)(d) provides that any refund under this paragraph may be paid to the person who paid the duty or any person indicated in the notes to the said Schedule No 6. Furthermore, section 75(1A)(b) provides that such refunds shall be granted to any person who has purchased and used such fuel in accordance with the provisions of this section and the said item Schedule No 6. As previously stated, the Applicant did not pay for the fuel in question.

[64] Section 64F(2) of the Act provides that:

" *No person, except a licensee of a customs and excise warehouse, who removes to any other country in the common customs area or exports any fuel, which has been entered or is deemed to have been shall be entitled to any refund of duty unless such person is a licensed distributor as contemplated in this section.*" Tholo Lesotho is not a licensed distributor. Tholo Lesotho is not entitled to any refund of duty.

[65] It is therefore odd, for the Applicant to claim for a refund under the circumstances wherein the provisions of section 75(1)(d) indicate the person who may be entitled to a refund. Since the Applicant was not a purchaser, it is not entitled to a refund. The requirements for a refund are as follows:

- The fuel must have been manufactured in South Africa;
- The fuel must be obtained from the stocks of a licensee of customs and excise manufacturing warehouse;
- The fuel must have been entered or deemed to have been entered for home consumption with payment of duty by a licensee of a manufacturing warehouse.
- Only a licensee of such manufacturing warehouse or a licensed distributor as contemplated in section 64F may remove fuel levy goods to any BLNS country.;
- When any fuel levy goods are transported by road for export or removal to BLNS such removal shall only be by a licensed remover of goods in bond as contemplated in section 64D unless the goods are carried by the licensee or licensed distributor using own transport.

- Any load of fuel obtained from the licensee of a customs and excise manufacturing warehouse must be wholly and directly removed for delivery in any other country in common customs area by a licensed distributor.

[66] The Applicant failed to comply with the refund requirements in the following respect:

[66.1.] There is no evidence that the fuel delivered to Lesotho was locally manufactured. The evidence shows that the fuel was also obtained from other suppliers except PetroSA. The fuel was obtained from stocks of BP ( British Petroleum) and Total.

[66.2.]. The Applicant did not physically obtain or remove fuel from the stocks of customs and excise manufacturing warehouse of PetroSA at Mossel Bay.

[66.3] There is no evidence that the fuel was removed for home consumption.

[66.4] The Applicant as the licensed distributor did not deliver fuel to Lesotho and Applicant did not use its own transport.

[66.5] The fuel was not wholly or directly removed for delivery in any other country by the Applicant as a licensed distributor.

[67] The rules applies when fuel is removed from the customs and excise manufacturing warehouse. The respondent had the power to promulgate the rules in terms of section 19A(1)(iii)(dd). The rules in terms of Rule 19A4.04 are very clear and unambiguous. The Applicant was obliged to follow the rules in order to claim a refund. A refund cannot be claimed if the Rules, section 64F and Note 12 item 671.11(b) are not followed.

[68] The provisions of section 64F , note 12 of schedule 6 part 3, and does not make provision for the LDF to be in possession of ITAC permit for exporting fuel. However, there are other provisions of law, which required an exporter of fuel to have a permit.

[69] The respondent was therefore bound to consider other provisions outside of the Act, the rules and schedule 6, in dealing with the Applicant's claim for refund. Not to have done so would have been irresponsible and reckless on the part of the respondent. Accordingly, it does not mean that when the Act , the rules and notes, do not refer to ITAC permit, the respondent was precluded from referring to it.

[70] Section 17 of International Trade Administration Act 71 of 2002, provides that:
" *The Commission may investigate, evaluate and determine applications and issue or recommend the issuing of permits or certificates , in terms of –*
*[a] the rebate and drawback provisions of the Customs and Excise Act.*
*[b]…"*

[71] Section 2 of the International Trade Administration Act 71 of 2002 states that:
" *The object of the Act is to foster economic growth and development in order to raise incomes and promote investment and employment in the Republic and within the common customs by establishing an efficient and effective system for the administration of international trade subject to this Act and the SACU agreement."*

[72] Section 26 (1) of the International Trade Administration states that:

" *A person may, in the prescribed manner and form, apply to the Commission for-*
*[a] an import and export control permit or an amendment of such a permit in terms of Part B of this Chapter and the regulations."*

[73] The International Trade Administration Act in terms of section 3(1) applies to all economic activity within , or having effect within the Republic. The provisions of section 27(2) of the international Trade Administration, gives power to the Commissioner to prescribe how the goods in question can be exported.

[74] Given the importance of the International Trade Administration Act particularly in respect of its objects purpose and application, the respondent was bound to consider its provision. There was accordingly nothing wrong when the respondent considered the provisions of such an Act. The Applicant ought to have known that

it was required to have an export permit. It is no defence that the Customs and Excise Act, its Rules, do not refer to the ITAC issued permit.

[75] Based on the above, there is no evidence that the Applicant complied with the provisions of section 64F of the Act, Rule 19A4.04 (a)(iii) & (iv) respectively. There is further no evidence that the Applicant complied with schedule 6 part 3 of note 12 item 671.11(b) of the Act. This Court accept the interpretation provided by the respondent in respect of section 64F, Rule 19A4.04(a)(iii) & (iv) respectively and Note 12 item 671.11(b) of schedule 6 part 3.

[76] It therefore stands to reason that the appeal must be dismissed. . There is no reason why costs should not follow the result.

[77] Accordingly the following order is made-

[77.1.] The Applicant's appeal in terms section 47(9)( e) of the Act is dismissed with costs.

**H MOLOTSI**

**ACTING JUDGE OF THE HIGH COURT, PRETORIA**

**DATE OF HEARING : 1 NOVEMBER 2022**

**DATE OF JUDGEMENT : 2 FEBRUARY 2023**

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