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

Case No. 2021/49805

(1)	REPORTABLE: ~~YES~~ / **NO**	
(2)	OF INTEREST TO OTHER JUDGES: ~~YES~~ / **NO**	
(3)	REVISED: YES	
1 March 2024 DATE		..... SIGNATURE

In the matter between:

BP SOUTHERN AFRICA (PTY) LTD Applicant

and

THE COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICE Respondent

JUDGMENT

WILSON J:

1 The applicant, BP, seeks leave to appeal against my judgment of 12 January 2024. In that judgment, I dismissed BP's appeal under section 47 (9) (e) of the

Customs and Excise Act 91 of 1964 ("the Customs Act") against determinations made under the Act by the respondent, the Commissioner. Those determinations were that BP did not qualify for refunds of duty paid on fuel BP says was exported to Zimbabwe. I also referred to trial BP's review of the Commissioner's further decision, taken in terms of 88 (2) (a) (i) of the Customs Act, to levy payment *in lieu* of forfeiture on the allegedly exported fuel.

2 BP takes no issue with the reference to trial, and has in fact issued its declaration in the trial proceedings that I have ordered. BP says, however, that I ought to have referred the appeal to trial as well. It argues that there is a reasonable prospect that a court of appeal will find that I should have done so, and will reverse my order.

3 I cannot agree. The trigger for a referral to trial is a dispute of fact that is material to the relief sought. In relation to the review, there plainly was such a dispute. That dispute was about whether BP claimed refunds on fuel it claimed had been exported to Zimbabwe with the intent to defraud the Commissioner. For the reasons I gave in my 12 January judgment, that dispute was irresolvable on the papers.

4 The question of BP's entitlement to the refunds themselves – the subject matter of the appeal – was different. In order to demonstrate that it was entitled to the refunds, BP had to show that the fuel at issue had been exported as provided for in rebate Items 623.23 and 671.07 of Schedule 6 to the Customs Act. That meant that BP had to show that the fuel had actually left the country, and that BP had otherwise complied with the requirements applicable to the relevant Items.

5 For there to have been a dispute of fact on this issue, BP had to make out a positive factual case by way of admissible evidence that (a) the fuel had left the country and (b) that the export had taken place in the manner provided for in the relevant Items. This BP failed to do. Not only that, but it was clear from the papers that BP did not (and still does not) really know whether the fuel left

the country or whether the requirements set out in the relevant Items were complied with. In particular, BP cannot say whether the consignees in Zimbabwe to whom it says it exported the fuel actually received the fuel. Nor can BP say whether the fuel was conveyed there by a licenced remover of goods. This is notwithstanding the fact that BP does not qualify for a refund under the relevant Items unless it keeps a record that the fuel has been received by the consignee and ensures that the fuel is conveyed by a licenced remover of goods.

6 BP did neither of these things. BP instead relied on what were referred to before me as "CN2" documents. These are documents normally generated by the Commissioner which confirm that a particular consignment has reached and crossed a border post. But there was no serious dispute that the relevant CN2 documents placed before me, and on which BP relied to prove export, did not in fact relate to the fuel BP says it exported, or even to the border post at which BP says the fuel crossed into Zimbabwe.

7 The Commissioner said the CN2s were not legitimate CN2s at all, but forgeries produced by someone else. BP did not authenticate the CN2s it relied on. It also did nothing to gainsay the Commissioner's allegation that the CN2s were forged, save to assert that it was not the source of any fraud. But even if the CN2s were genuine, and even if, on their face, they related to one of BP's fuel exports, that still would not have demonstrated, even *prima facie*, that the fuel was exported as required by the relevant Items. BP would still have had to have demonstrated that the fuel was conveyed by a licenced remover of goods, and that BP had proof that the consignee received it. BP does not so much allege that these requirements were met.

8 In these circumstances, it cannot be said that BP has made a positive factual case by way of admissible evidence either that (a) the fuel ever crossed the border or that (b) if and when it did so, the fuel was exported in compliance with the requirements applicable to the relevant Items.

9 The question that naturally arises in this context is whether BP put up a *prima facie* factual version that was capable of creating a dispute – in other words, whether there was any positive factual case that BP qualified for the refunds it claimed. The answer, in my view, is clear. There was no such case. If there was no such case, there could have been no real and material dispute of fact. If there was no real and material dispute of fact, then there was nothing to refer to trial.

10 Mr. Joubert, who appeared together with Mr. Louw and Mr. du Bruyn for BP, could not really challenge these conclusions. He was accordingly unable to convince me that there is a reasonable prospect that another court might find that I ought to have referred BP's section 47 (9) (e) appeal to trial.

11 It is principally for that reason that the application for leave to appeal must fail. There are, however, three further issues which I should address. The first is BP's submission that I lacked jurisdiction to entertain the merits of the dispute, because all BP had asked me to do was consider the application for a referral to trial. I found in my 12 January judgment that Rule 6 (5) (g) of the Rules of this Court, which governs the exercise of a court's discretion to refer an application to trial, entails a court first forming a view on whether an application can properly be decided on the papers. That, I found, entailed the proposition that a court dealing with an application for a referral to trial has jurisdiction to consider and decide the merits of an application if a referral to trial is inappropriate. This was exactly what the Commissioner asked me to do. There can, accordingly, be no merit in BP's further argument that I decided an issue that the parties did not raise.

12 Mr. Joubert nonetheless argued that my consideration of the section 47 (9) (e) appeal on its merits cannot be reconciled with the decision of the Constitutional Court in *Mamadi v Premier of Limpopo Province* 2024 (1) SA 1 (CC). However, I fail to see the connection. *Mamadi* was about whether it is permissible to dismiss a case statutorily required to have been brought on motion simply because foreseeable disputes of fact have developed. The Constitutional Court found that it was not. This case is different. I dismissed

BP's application for referral to trial and its section 47 (9) (e) appeal because BP had failed to make out a positive factual case from which a factual dispute could genuinely arise. There is nothing in *Mamadi* that prevents me from dismissing the application in those circumstances.

13 Second, Mr. Joubert suggested that my decision would have been different if I had admitted a chunk of new evidence BP sought leave to introduce in the main application. But none of that evidence went to the critical factual issue: viz. whether the fuel BP says it exported actually crossed the border in a manner that complied with the requirements applicable to the relevant Items. The evidence was instead aimed at demonstrating that the Commissioner's systems through which it monitors the export of fuel are not fit for purpose. But any defects in the Commissioner's systems that might have been proved plainly do not translate into a positive factual case that the fuel actually crossed the border. It was for BP to make out a case that the fuel was exported, not for the Commissioner to prove that it was not.

14 Finally, it was argued that the fact that BP's appeal in this matter is part of a trio of cases – the other two of which are or will be instituted as trial actions that BP hopes to consolidate with this case – constitutes a compelling reason to grant leave to appeal against my refusal to refer the appeal to trial. I cannot agree. I know very little about the other two matters, the stage that they have reached, or the issues that arise in them. There is accordingly nothing to compel me to grant leave to appeal merely on the possibility that BP's appeal, if successful, might one day allow it to consolidate this matter with the other two.

15 There are, for all of these reasons, no prospects of success in the appeal BP wishes to mount, and no other compelling reason to detain an appellate court with it.

16 The application for leave to appeal is dismissed with costs, including the costs of two counsel, where employed.

S D J WILSON

Judge of the High Court

This judgment was prepared by Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 1 March 2024.

HEARD ON:	29 February 2024
DECIDED ON:	1 March 2024
For the Applicant:	AP Joubert SC C Louw SC LF du Bruyn Instructed by Edward Nathan Sonnenbergs
For the Respondent:	J Peter SC Instructed by MacRobert Inc