REPUBLIC OF SOUTH AFFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: **2024-084746**

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

DATE SIGNATURE

In the matter between:

ALLIANCE FUEL (PTY) LTD First Applicant

INSPACIAL PROPERTIES (PTY) LTD Second Applicant

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES Respondent

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REASONS FOR THE ORDER

Summary: Non-compliance with section 96 of the Customs and Excise Act 91 of 1964 (the Act) - whether the Commissioner for the South African Revenue services is entitled, in terms of section 88 of the Act 91 , to restrict the first applicant's employees' access to the premises.

Modiba J

[1] On 30 August 2024, I granted the following order:

"1. The application is dismissed with reasons to follow.

2. A ruling on costs is reserved until reasons are furnished."

Introduction

[2] This judgment sets out reasons for the order. It also disposes of the question of costs.

[3] The first applicant operates a fuel plant at premises in Meyerton, Gauteng and Louis Trichardt, Limpopo (the premises). The Commissioner for the South African Revenue Services (the Commissioner, SARS) obtained a warrant from the Magistrate's Court to enter and search the premises in terms of section 88 of the Customs and Excise Act[1] (the Act). Unless otherwise specified, all references to statutory provisions are to this Act.

[4] After the Commissioner's officers and expert entered and searched the premises, the Commissioner detained both premises in terms of section 88. Essentially, the dispute between the parties is whether the Commissioner is entitled, in terms of section 88, to restrict the first applicant's employees' access to the premises.

[5] The Commissioner vigorously opposed the application by raising two points *in limine.* He also opposed it on the merits. I upheld one point *in limine* and dismissed the second. I also found for the Commissioner on the merits. In what follows, I describe the parties, address the points *in limine*, then determine the merits. Lastly, a deal with the question of costs.

The parties

[6] There are two applicants in this application. The first is Alliance Fuel (Pty) Ltd (Alliance Fuel). The second is Inspacial Properties (Pty) Ltd (Inspacial Properties). Both companies are duly incorporated in terms of the company

[1] Act 91 of 1964.

laws of South Africa, with their principal place of business located in Louis Trichardt, Limpopo.

[7] The applicants allege that Alliance Fuel is licensed as a wholesale fuel retailer. SARS does not dispute this assertion. Alliance Fuel further alleges that it trades from premises in Louis Trichardt, Limpopo and Meyerton, Gauteng. Inspacial Properties owns both premises.

[8] SARS disputes that Alliance Fuel is a trading company. It alleges that it is a dormant company. It is only registered for income tax. It is not registered for Value Added Tax (VAT), Pay as you earn (PAYE) or any customs activity. It has only rendered one income tax return declaring its income to be nil. Since, Alliance Fuel barely denies these allegations, I determined this dispute on SARS's version.

[9] There is a third corporate entity associated with the applicants, namely Agrifuels (Pty) Ltd (Agrifuels). Although not a party, it features prominently in this application. It is a registered legal entity with its head office at the Louis Trichardt property. Mr Gilfillan is its sole director and has been so since 2018. The applicants allege that Alliance Fuel trades as Agrifuels.

[10] The Commissioner's version is that it is Agrifuels and not Alliance Fuel that trades from both the Meyerton and Agrifuels premises. It is registered with the South African Revenues Service (SARS) for income tax, VAT and PAYE. It is also registered with SARS for customs and excise as an importer/exporter. Between 2019 and 2023, it rendered income tax returns declaring revenue in excess of R5,667 billion. During the same tax period, it also rendered VAT returns declaring VAT turnover in excess of R7,041 billion. It has rendered further VAT returns for 2024. During 2019 and 2023, it rendered PAYE returns having deducted and paid over R1,141 million to SARS. It operates bank accounts with inflows in excess of R8,667 billion during the same period. In reply, the applicants did not answer to these allegations at all.

[11] To bolster its case that Agrifuels is a trading entity, the Commissioner alleges that in 2018, Agrifuels, in its capacity as developer, sought to increase the storage capacity of the Louis Trichardt premises. To do so, it sought an exemption for a full Phase 1 Heritage Impact Assessment (HIA), under the National Heritage Resources Act[2]. To that end, Mr Gilfillan as the representative of Agrifuels commissioned G & A Heritage Management Properties (Pty) Ltd to prepare a report to recommend such exemption, in order to pursue the development of the fuel depot on the Louis Trichardt premises, which at the time was known as "Alliance Fuel". To his answering affidavit, the Commissioner annexed, marked AA13 a copy of the HIA report, which contains a survey of the Louis Trichardt at the time. The Commissioner concludes that the HIA report unequivocally demonstrates that the fuel depot business is that of Agrifuels.

[12] Mr Gillfillan distanced himself from the contents of the HIA report. He alleges that he commissioned Tekplan Environmental (Tekplan) to assist him with an evaluation of the expansion of the operation in 2018. Tekplan appointed G&A Heritage to conduct the HIA. In the circumstances, he did not commission, provide any information to G&A Heritage or sign off on the HIA report. His details appear nowhere in the report. Therefore, he cannot be held liable for incorrect details placed in the report.

[13] Curiously, in the applicants' replying affidavit, Mr Gilfillan creates the impression that he commissioned Tekplan as an individual. Yet, in his supplementary replying affidavit, he gives an elaborate explanation of the corporate structure under which Agrifuels, Inspacial Properties, Alliance Fuel and other corporate entities in which he has an interest are housed. He only holds directorship in Agrifuels and Alliance Fuels and in his personal capacity, is a shareholder in Alliance Fuels. Since on his version, the latter is the trading entity, it begs the question why he would commission Tekplan in his personal capacity to conduct an evaluation for the expansion of what he loosely refers to as "the operation".

[2] Act 25 of 1999.

[14] In any event, Mr Gillfilan's explanation of the events that led to the HIA do not refute the Commissioner's version, supported by tax returns and bank balances that Alliance Fuel does not trade. The Commissioner's version that Agrifuels, a separate legal entity is the trading entity, supported by similar evidence, is also irrefutable. I therefore accept it.

[15] The Commissioner is cited in his representative capacity. SARS is an organ of state, established in terms of the South African Revenue Service Act.[3] Its affidavits in this application are deposed to by Lesego Tsele (Tsele). SARS employs Tsele as as an investigator at Illicit Economic Activities (Trade) Unit, Syndicated Tax and Customs Crime Division (IEAU). He is an officer as defined and referred to in section 1 of the Act. He performs his duties and functions under the control and direction of the Commissioner as contemplated in sections 3 and 4 of the Act and section 3 of the Tax Administration Act.[4]

The applicants' founding and replying affidavit

[16] The Commissioner complains that the applicants' founding and replying affidavits fail to comply with the regulations promulgated in terms of section 10 of the Justices of the Peace and Commissioners of Oaths Act[5] in that when attesting to the declaration, the Commissioner of oaths:

(a) did not certify below the deponent's signature that he (the deponent) has knowledge of and understands the contents of the declaration;

(b) stated two different places of taking of the declaration;

(c) did not sign the declaration and print his full name and business address below his signature; and

[3] Act 34 of 1997.
[4] Act 28 of 2011.
[5] Act 16 of 1963.

(d) did not state his designation and area for which he holds appointment as Commissioner of oaths or the office held by him if he holds his appointment *ex officio.*

(e) (the replying affidavit) fail(s) to identify the deponent. Therefore, there could be no way that the Commissioner of oaths could have satisfied himself or herself as to the identity of the deponent.

[17] The applicants complain that the Commissioner raised these issues pedantically. However, it goes without saying that these allegations are unassailable. After this court heard oral arguments, the applicants filed an explanatory affidavit by the Commissioner of oaths, essentially conceding these allegations and attributing the defective manner in which she commissioned the affidavits to the haste in which they were presented to her as a result of the urgency of the application. She gave the necessary confirmations and undertook to be more diligent in complying with the applicable regulations when commissioning sworn statements in the future. The applicants also recommissioned the relevant affidavits, correcting the defects complained of and filed them.

[18] This court would be entitled to reject the evidence contained in these affidavits on the authority in *4 Aces New and Used Spares CC v PA Cargo.*[6] However, I consider the explanatory affidavit and the recommissioned affidavits redemptive of the defects in the affidavits subject to this complaint. The respondent has not suffered any prejudice from the defects complained of and answered to the applicants' case. The application is ready for hearing. Disregarding the evidence contained in the relevant affidavits, which would result in the application being dismissed as there would not be a proper application before court, would not serve the interest of justice. This is so, because the applicants have already taken the necessary corrective measures.

[6] [2015] ZAGPPHC 998.

Getting them to do so in a fresh application would only serve to unduly escalate legal costs.

[19] For these reasons, this point *in limine* stands to be dismissed.

Non-compliance with section 96

[20] The Commissioner contends that the applicants have failed to comply with section 96. This provision prescribes the following requirements:

(a) process by which any legal proceedings are instituted may not be served before the expiry of one month after delivery of a notice in writing setting forth clearly and explicitly the cause of action and other prescribed information (section 96(1)(a)(i);

(b) the State, Minister or Commissioner (collectively referred to as the Commissioner) on good cause shown may reduce the one-month notice period by agreement with the litigant. Only in the event of a refusal to reduce the period, is the High Court empowered to reduce the prescribed notice period where the interests of justice so require (section 96(1)(c)).

(c) The notice shall be in such form and shall be delivered in such manner and at such place as may be prescribed by rule (section 96(1)(a)(ii)). The relevant rules are rules 96.01 and 96.02. These rules require that:

(i) The notice be delivered to the Manager: Litigation (Customs) to the prescribed address physically or by registered post, telefax or electronically. If transmitted by telefax or electronically; within ten days of it being so telefaxed or transmitted by electronic means, the original signed notice must be physically handed to the same SARS official.

(ii) The notice must be:

a. given in a duly completed form DA 96;[7] and

b. signed by the person instituting legal proceedings.

[21] The Commissioner places reliance on *Commissioner for the South African Revenue Service and Others v Dragon Freight (Pty) Ltd and Others* (*Dragon Freight)*,[8] where the Supreme Court of Appeal held that:

(a) plainly read, section 96 (1)(a)(i) proscribes the institution of any proceedings unless one-month written notice is given.

(b) in terms of section 96(1)(a)(iii), a section 96 notice which fails to comply with the prescribed requirements is invalid.

(c) the purpose of section 96(1) is to allow SARS, to investigate and review the merits of the intended legal proceedings and decide what position to adopt in relation thereto, before the institution of legal proceedings, to avoid unnecessary and costly litigation at the public expense.

(d) the section 96(1) notice also enables SARS to ensure that litigious matters are timeously brought to the attention of the appropriate official for investigation and review and promotes the economic use of resources in accordance the basic values and principles set out in section 195 of the Constitution.

(e) the giving of such notice and the period of one month, or a reduction of such period by either the Commissioner or the court are jurisdictional conditions precedent for the giving of relief.

[7] Notice in terms of section 96 (1) (a) of the Customs and Excise Act, 1964.
[8] [2022] ZASCA 84; [2022] 3 All SA 311 (SCA).

(f) there is no power in the Act to condone non-compliance with the provision requiring the giving of notice. The court may only reduce the prescribed notice period in the interest of justice.

[22] The Commissioner's case is that:

(a) a document purporting to be a section 96 notice was sent by email on 25 July 2024.

(b) the document identifies Alliance Fuel (Pty) Ltd and Agrifuel (Pty) Ltd as intending litigating parties. It fails to identify Inspacial Properties as an intending litigant. Consequently, no notice of any nature was given on behalf of Inspacial Properties.

(c) The cause of action expressed in the notice is as follows:

1.c.1 "Following a search conducted on 10 July 2024, SARS now bars applicants from accessing their premises in Louis Trichardt and Meyerton; and

1.c.2 SARS refuses to provide the outcome of test results on basis of which it justifies his actions."

[23] The Commission contends that neither of the statements set out a cause of action. In relation to the access to the premises, the "cause of action" does not disclose, either clearly or concisely, or at all, any right that either of the applicants have to access to the premises. Similarly, the notice does not disclose, either, clearly or concisely, or at all, the basis upon which either applicant has a right to test results.

[24] The Commissioner further contends that Inspacial Properties' failure to give the notice at all is fatal to any relief being granted to it. Similarly, Alliance Fuel's

failure to disclose a cause of action, either clearly or concisely, or at all, cannot be condoned and is fatal to the application on the part of the first applicant.

[25] The Commissioner also contends that to the extent that the section 96 notice holds any validity, the notice was sent by email at 15h42 on the afternoon of Thursday, 25 July 2024. The covering letter sent a few minutes earlier, sought shortened notice period from the Commissioner to 17h00 that day, effectively requesting the Commissioner to truncate a one-month period to a period of one hour and eighteen minutes. Given the purpose of the statutory notice, the period was so short as to effectively be no notice at all. Most importantly, the applicants have failed to set out any facts or circumstances why it would be in the interest of justice for this court to shorten the period so drastically, as sought in prayer 2 of the notice of motion. Therefore, the condonation sought in prayer 2 ought to be refused.

[26] Prayer 3 of the notice of motion seeks the vacation of SARS from the premises, (effectively) providing unlimited access to the “owners and lawful occupiers” of the premises. To be successful with a claim for such relief, the Commissioner further contends, the applicants need to show a right of access to or occupation of the premises. The applicants must also establish that this right is stronger than the right of the Commissioner exercising his powers under the Act. The Commissioner concludes that the applicants fail on both scores.

[27] Inspacial Properties initially claimed to be the owner of the premises and on that basis sought to establish a right to access or occupation. The Commissioner had contended that Inspacial Properties provided no evidence of its alleged ownership of the immovable properties. Furthermore, in respect of the property in Louis Trichardt, the Commissioner has produced evidence (in respect of which he contends that he bears no onus) that the property in Louis Trichardt is in fact registered in the name of Agrifuels (Pty) Ltd. In response to these allegation, the applicants filed an affidavit to explain that at the time its affidavits were deposed to, Mr Gillfilan was not aware that the Louis Trichardt property had been transferred to a third party. I deal with this issue no further

because ownership of the premises has no bearing on the issues that arise for determination.

[28] The Commission also contends that Alliance Fuel's difficulties are even greater than those of Inspacial Properties in that the only allegation that could be attributed to it, is that it traded from the premises (which, as stated in paragraphs 7 to 10 of this judgment, is in dispute between the parties). According to the Commissioner, trading from the premises does not establish any lawful right to possession or occupation of the premises. Alliance Fuel makes no allegation of a lease, or any form of permission or consent from either the lawful owner or lawful occupier of the premises.

[29] Below I deal with the applicants' failure to comply with the prescribed formalities.

One-month notice period

[30] As contended on behalf of SARS, the one hour and eighteen minutes notice period Alliance Fuel gave to SARS is extremely short. However, I do not agree with SARS that an extremely short notice constitutes no notice all at. A valid section 96 notice may, even if it is issued at short notice, satisfy the jurisdictional requirement in section 96(1)(c) (ii) for an order reducing the prescribed notice period. However, two difficulties confront the applicants. I deal with them below.

[31] Firstly, the applicants have not advanced reasons as to why the notice period should be truncated in the interests of justice. The circumstances that led to SARS seizing the premises, and the legal basis on which it has done so renders the truncation of the notice period, especially to such an extremely short notice period, not to be in the interests of justice. The applicants' have no right to conduct an illicit fuel traded on the seized premises as alleged by SARS. The alleged illicit fuel trade seems to be intricate. Shortening the notice period by

the period contended for by the applicants will defeat the purpose of section 96 (1) as set out in *Dragon Freight.*

[32] The fact that the parties have exchanged various correspondence prior to the applicants serving the section 96(1) notice also does not justify the extremely truncated notice period. It is unclear from the judgment in *Dragon Freight,* whether Dragon Freight took this point. What is however, clear from the judgment is that Dragon Freight's engagement with SARS was much longer. Dragon Freight had given SARS a section 96(1)(a)(i) notice dated 17 February 2020 (February 2020 notice) in relation to one cause of action. When it ultimately instituted the application in relation to another cause of action several months later, it sought to rely on the February 2020 notice. The SCA found that the February 2020 notice does not constitute a notice as contemplated in section 96(1)(a)(i) because it did not relate to the relief sought. The fact that the parties have been engaged in correspondence and that legal action ought to therefore have been reasonably anticipated does not render the notice requirement in section 96(1)(a)(i) nugatory.

[33] Secondly, the section 96(1)(a)(i) notice suffers from other defects that render it invalid in terms of section 96(1)(a)(iii). I set out my reasons for this conclusion below:

(a) The notice was sent to an operation officer and not to the Manager, Litigation at SARS as prescribed by rule 96.01.

(b) Inspacial Properties' failure to give notice at all is fatal to the relief this party seeks. The fact that the notice fails to identify this party defeats the objective of section 96(1). SARS could not have investigated the affairs of this entity and taken an informed decision whether to oppose or concede the relief sought as against this party. Section 96(1) does not permit any party to ride behind a notice given by another party.

(c) No notice was given on behalf of Afrifuels (Pty) Ltd, the party trading from the premises. Alliance Fuel on behalf of whom the purported

section 96 notice was given has established no right to access the premises because on the Commissioner's version, it is a non-trading entity.

(d) The applicants seek spoliation relief. They contend that this cause of action is articulated in paragraph 1.c.1 of their section 96(1) notice. The applicants' selectively place reliance on the principle in *Yeko v Qana*,[9] that their legal right to possession is an irrelevant consideration in spoliation proceedings. This paragraph states only that, "Following a search conducted on 10 July 2024, SARS now bars applicants from accessing their premises in Louis Trichardt and Meyerton". It fails to set out a clear cause of action. No allegation that SARS's conduct in barring the applicants access to the premises is unlawful. Unlawfulness in this context means to dispossess without due legal process. Yet, the applicants make that allegation in these proceedings. This court lack the power to condone this shortcoming in the applicants' section 96 (1) notice. Even if it had such powers, the applicants have not made that request.

(e) For reasons I fully deal with in the merits section of the judgment, SARS is legally entitled to bar the applicants from the premises.

[34] For all these reasons, the applicants have failed to give a valid section 96 notice. They have also not made out a proper case for the prescribed notice period to be reduced in terms of section 96(1)(c)(ii). The applicants' failure to comply with the section 96 (1) requirements dealt with above is fatal to the application. I nonetheless proceed to deal with the merits of the application as they are fully ventilated in the papers. They were also ventilated during oral argument.

[9] 1973 (4) SA 735 (A).

The merits

[35] As already stated, the applicants have framed their cause of action as spoliation. They allege that they were in undisturbed possession of the Meyerton and Louis Trichardt properties on 10 July 2024 when the Commissioner disposed them by placing guards at the entrances and excluded the applicants from accessing the properties. Initially, the applicants alleged that Inspacial Properties as owner, exercised possession by allowing Alliance Fuel to trade from the premises. But, I have already found that Alliance Fuel is not a trading entity. It follows that it is not trading from the premises, therefore, this application is a devoid of merit.

[36] The applicants seek a court order restoring their possession.

[37] SARS alleges that petroleum oil fuels are highly regulated under the Act. Kerosene (also known as paraffin) and diesel (referred to in the Act as "distillate fuel") are relevant to this application. Kerosene is like diesel and can be mixed in with diesel to power diesel engines. There are two types of kerosene: aviation kerosene and illuminating kerosene. Aviation is used as fuel for aircraft. Illuminating kerosene as wide uses, including fuel in domestic settings. The chemical properties of these two fuels are substantially identical.

[38] The local manufacture of diesel must take place in a specially licensed manufacturing warehouse. It attracts fuel levy and Road Accident Fund levy ("levies"). When imported, it also attracts ordinary customs and excise duties. Liability for these taxes arises at the time of importation, or if locally manufactured, at the time diesel leaves the licensed manufacturing warehouse.

[39] When illuminating kerosene is imported or locally manufactured, it is required to be moved to a licensed special storage warehouse. Illuminating kerosene is marked with a special chemical marker before being allowed to enter home consumption. When marked, the illuminating kerosene does not attract levies and VAT.

[40] Aviation kerosene does not have a chemical marker applied to it. It is highly regulated. For a party to be able to acquire aviation kerosene, it should be a licensee of a customs and excise warehouse. To be able to supply it, it should be registered as a supplier in terms of the Customs and Excise Act and the rules promulgated under the Act. Aviation kerosene does not attract levies but does attract VAT. Since aviation kerosene is highly regulated, it is not easily available, other than to owners of aircraft fuelling their aeroplanes from registered suppliers. Illuminating paraffin on the other hand is widely and readily available but comes with a chemical marker.

[41] Since illuminating kerosene is duty-free, there is an opportunity to defraud the fiscus of the taxes on diesel by adulterating diesel by mixing it with kerosene. The presence of the chemical marker in illuminating kerosene is a tool to combat such unlawful practice. The presence of the chemical marker enables on site tests, with portable field analysers that the fuel in a particular vehicle or tank may be inspected. The test that is conducted is a test for the presence of the marker. The presence of the marker should show up in diesel which has been mixed with illuminating paraffin, unless the illuminating paraffin has been treated to remove the marker or prevent its detection.

[42] SARS received information that the mixing of kerosene with diesel and the removal of its marker was taking place at the applicants' premises in Meyerton and the adulterated fuel was being transported to the premises in Louis Trichardt. On 3 July 2024, SARS obtained a search warrant from the Meyerton Magistrates Court permitting entry and search of the Alliance Fuel Depot at the Meyerton premises. On 4 July 2024, SARS obtained another search warrant from the Louis Trichardt Magistrates Court permitting entry and search of the Alliance Fuel Depot at the Louis Trichardt premises. Both warrants did not name the applicants as a subject. The warrants authorised entry to specified premises. They did not name any person as a subject or target.

[43] A SARS official named in its papers filed in this application attended the Meyerton premises. SARS describes the premises as containing some buildings with offices, a warehouse and a very extensive open air tank farm.

The SARS official observed an open area on the premises were 69 vertical steel storage tanks each with a capacity of approximately 120,000 litres and 23 horizontal steel tanks each with a capacity of approximately 80,000 litres were located. In the warehouse section there was a large strong room type door that was locked and controlled by fingerprint access.

[44] The SARS official requested the person in charge, Mr Reinhard van Niekerk, to open the door. He initially refused saying that this had been sublet to someone else. After he had spoken to Alliance Fuel's attorney who had arrived on site, Mr van Niekerk used his fingerprint to open the door which operated on fingerprint recognition. The door led to a room which was a laboratory with testing machines and Lateral Flow Device test kits which are used to detect the first layer of the chemical marker introduced into illuminating paraffin. The test kits indicated that no chemical marker was present. There were also written notes alongside the equipment setting out the specifications for what the diesel should be, with its density, flashpoint and sulphur content. This gave rise to a reasonable inference that the chemical marker in illuminating paraffin was being washed out and that there was blending taking place with diesel and the final product was being tested to conform to the density, flashpoint and sulphur content of diesel.

[45] There was a further locked door. When Mr Van Niekerk was asked to open that door, he informed the SARS official that there was no key and he was waiting for Mr Gilfillan to obtain access. One of the SARS officials who attended the premises found a bunch of keys and started testing the keys. One of the keys opened the door. It led to an area (a washroom) in which there was a complex set of mini filtration tanks with large pipes leading in and out the room. The mini tank farm had pressure metres and flowmeters to check how many litres of fuel passed through. There were multiple containers containing different coloured filtration sand mixed with activated charcoal on site. Sand and activated charcoal are commonly used to attempt to remove certain layers of the chemical marker. The applicants deny this allegation on the basis that SARS is raising it for the first time in this application, having failed to state it in its 15 July 2024 affidavit. They contend that SARS is raising these allegations to create a

version of events to sustain its version. The applicants reserved their right to respond to the rest of the allegations at a later stage.

[46] SARS could clearly not have detailed the test results in its 15 July 2024 affidavit as it was still conducting further tests. I therefore accept SARS's version.

[47] In the washroom there were pairs of green pumps, followed by pairs of black pumps. These discharged into large pipes which fed into the outside tank farm. A representative from FAS Authentication, an expert firm contracted to SARS for the supply and testing of the chemical marker, who accompanied SARS officials to the premises had two different field test analysers: an LSX3000 analyser that tested for the presence of the chemical marker and an LQX1000 analyser that tested for the presence of kerosene in diesel. Samples were taken from some of the tanks in the tank farm and three tanker vehicles that were present on the premises. All the samples tested on 10 July 2024 tested positive for the presence of kerosene but none tested positive for the presence of the chemical marker on the field tests.

[48] On that day, the Commissioner detained various goods which include boxes of documents, about 102 distillate fuel tanks, 93 and 95 petrol drums, three (3) tankers, the plant and equipment, laptops and cell phones as detailed in the detention notices issued in terms of section 88(1)(a) of the Act. The laptops and cell phones were imaged and downloaded at the premises by SARS forensic and digital investigators in the presence of the owners. The detention in respect of these laptops and cell phone was uplifted and these items were handed back to the owners.

[49] SARS contends that the only reasonably practicable method of effecting the detention was to secure the premises as a whole and place security guards to control access thereto.

[50] On 15 July 2024, further samples were taken of the remaining tanks on the premises. All but 18 samples tested positive for the adulteration of diesel with

kerosene. However, none of the field tests detected the presence of the chemical marker.

[51] In the washroom, when tested with the field analysers, the green pumps tested positive for different levels of the chemical marker, but the black pumps, at the end of the filtration process, tested negative for the presence of the chemical marker. However, the samples from the supply feeds and pumps in the washroom were subjected to further laboratory tests of a higher accuracy than the field analysers. The laboratory analysis of the supply feeds and pumps revealed the following:

(a) the supply feeds all tested positive for the presence of all three levels of the chemical marker;

(b) all samples from the green pumps tested negative for the presence of the first level of the chemical marker and tested positive but with reduced percentages of the presence of the second and third level markers;

(c) all the samples from the black pumps tested negative for the presence of the first and second level chemical markers and tested positive for the presence of the third level marker but in greatly reduced percentages, the lowest being 1.6% in respect of the fourth black pump.

[53] The premises at Louis Trichardt were visited by a team of SARS officials and a representative from FAS Authentication. According to SARS, the premises contained offices and a tank farm. There were two kerosene storage tanks and nine diesel storage tanks. Field analyser tests showed that:

(a) both kerosene tanks indicated the presence of the chemical marker;

(b) six of the diesel tanks tested negative for the presence of the chemical marker, although all such tanks tested positive for the presence of kerosene indicating adulterated diesel; and

(c) eight of the nine diesel tanks tested positive for the presence of kerosene and the one that tested negative for kerosene, was one of those that tested positive for the presence of the chemical marker.

[54] The Commissioner has detained the diesel and storage tanks as well as two cell phones which were imaged and then returned in terms of section 88(1)(a) of the Act and further attached documents in the form of books and records. The applicants are not contesting that the Commissioner has statutory powers to detain goods in terms of section 88(1)(a). In fact, they concede that the Commissioner is entitled to seize and detain items and documents in terms of the Act. However, they contend that the conduct of its officials is contrary to the Act and in violation of the applicants' rights. They contend that the Commissioner may assert temporary control of the goods detained and not over goods that have not been detained.

[55] On the Commissioner's version, its officials did not deny the applicants' employees access to the premises. They denied them unrestricted access. They have allowed them access for legitimate purposes. The Commissioner contends that the applicants want unrestricted access to the premises to temper with, destroy evidence and remove the detained goods. The applicants contend that the Commissioner has no right to dictate to the applicants what they may or may not do on their premises.

[56] Ultimately, the dispute between the parties is whether the Commissioner is entitled, in terms of this provision to restrict the applicants' employees' access to the Meyerton and Louis Trichardt premises.

[57] The applicants contend that the warrants did not authorise to take possession of the two premises. The warrants only authorised them to "search for, detain, remove, take samples, image and deal with all the identified goods/products and/ or records, documentation and information in relation thereto in accordance with the provisions of the Act". If goods are detained, the Commissioner is entitled to remove them from the premises. Since, the

premises are not detained, the Commissioner is not entitled to deny the applicants' employees access to the premises.

[58] The applicants further contend that section 88(1)(a) is aimed at movable property. It does not contemplate that immovable property can be detained by excluding the possessor thereof. Detention means interfering with the ability of a person or a thing to move in space. Immovable property cannot be detained. Further, the applicants contend that section 88(1)(a) only lists items that can be moved i.e. "ship, vehicle, plant, material or goods. Section 88(1)(b) also contemplates that such detained goods may be moved to and stored at a place of security. Section 86(bA) also contemplates movable items because it provides that no one may remove detained goods.

[59] The applicants also contend that whereas, it is clear from the section 88(1)(a) notices that not all tanks were found to be contaminated, the Commissioner has detained the total premises at Meyerton and Louis Trichardt premises. The Commissioner has therefore acted beyond the scope of his authority in terms of section 88.

[60] On the Commissioner's version, an unlawful kerosene and diesel mixing plant is operated at both premises. The premises are principally interconnected tank farms for mixing these two types of fuel and storing them. When regard is had to the context, purpose and text of section 88. I cannot imagine a more practical method of securing the detention of the tank farms without detaining the two premises. As contended by the Commissioner, the farms consist of *inter alia* storage tanks which are connected to each other with pipes. As a result, it is impossible to secure or seal a single tank. To establish whether the storage tanks interconnected as they are for the purpose of adulterating fuel as alleged and thus liable to forfeiture it is necessary and practical to secure the whole premises. Given the alleged operations and their scale, the Commissioner would not be able to properly achieve the objectives of section 88 if he detained only the tanks that were found to be adulterated because what is being investigated is not so much the storage of fuel but the allegation that the applicants are operating an unlawful mixing plant. He is only exercising

temporary control of the premises at this stage. Only once he has established that the fuel tanks are liable for forfeiture may the Commissioner seize the goods.

[61] The applicants' allegation that jet fuel is stored on the premises does not absolve them from the Commissioner's allegations. The applicants are not licenced to warehouse and/ or supply aviation kerosene as required in terms of section 37A(9)(a)(i) read with Rule 37A(13)(a).

[62] For all the above reasons. The application falls to be dismissed. Attorney and client scale on scale C as sought by the Commissioner is justified by the first applicant's failure to give a valid section 96 notice and the second applicant's failure to give it at all; as well as the applicants' failure to join the Agriefuels as the entity trading from the detained premises, and the alleged illicit fuel trade from the premises who has not sought any relief in terms of section 96.

MODIBA J

JUDGE OF THE HIGH COURT,

JOHANNESBURG

Appearances

For the Applicants:	P F Louw SC
	R Mastenbroek
Instructed by:	Mayet Attorneys
For the Respondent:	John Peter SC
Instructed by:	Ramushu Mashile Twala Attorneys
Date of hearing:	6 August 2024
Date of judgment:	15 October 2024

MODE OF DELIVERY: This judgment is handed down virtually on the MS Teams platform and transmitted to the parties' legal representatives by email, uploading on CaseLines and release to SAFLII. The date and time for delivery is deemed to be 10 am**.**