IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

1. REPORTABLE: ~~YES~~/NO 2. OF INTEREST TO OTHER JUDGES: ~~YES~~/NO 3. REVISED DATE: 7 November 2024 SIGNATURE: [redacted]	**CASE NUMBER:** 38144/22

In the matter between:

GLENCORE MERAFE VENTURE	**FIRST APPLICANT**
GLENCORE OPERATIONS SOUTH AFRICA (PTY) LTD	**SECOND APPLICANT**
MERAFE FERROCHROME AND MINING (PTY) LTD	**THIRD APPLICANT**

and

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

JUDGMENT

COERTZEN AJ:

THE APPLICATION:

[1] The application is a statutory appeal in terms of s 47(9)(e) of the Customs and Excise Act 91 of 1964 ('the Customs Act').

[2] The first applicant ('GMV') is a joint venture between the second applicant ('GOSA') and the third applicant ('Merafe').

[3] The applicants seek an order that the applicants' appeal against a letter of demand ('LOD'), issued by the respondent ('the Commissioner' or 'SARS', as appropriate) on 20 December 2019, and against the decision of the respondent's internal Appeal Committee ('the Appeal Committee') made on 5 October 2021, be upheld.

[4] The applicants seek an order in the alternative that the respondent's determination that the applicants have not complied with Note 6(f)(ii)(cc) of Part 3 of Schedule 6 to the Customs Act (dealing with the requisite mining authorisation), be set aside.

[5] The applicants also seek an order that it be declared that the applicants have complied with the requirements of Note (6)(f)(ii)(cc), alternatively, that the respondent's refusal to exercise the discretion that the applicants be authorised to have claimed the refunds as contemplated in Note 5 of Part 3 of Schedule 6, be set aside.

[6] The applicants further seek an order that it be declared that the respondent was not entitled to raise any duties for the period preceding 26 February 2013.

[7] Lastly, the applicants seek an order that the respondent be directed to provide the applicants with a detailed calculation reflecting the portion of the diesel alluded to in paragraph 3.1.3 of the LOD.

[8] The impugned decisions resulted from an audit performed by SARS after GMV claimed diesel refunds in terms of section 75(1A) of the Customs Act, pursuant to its mining operations.

[9] SARS disallowed the refunds and raised the LOD on the basis that GMV is not entitled to the diesel refunds because GMV did not comply with one or more requirements set out in Note 6 of Part 3 of Schedule 6 of the Customs Act ('Note 6'). SARS raised the LOD and claimed an amount of approximately R75 million (plus interest) from GMV.

[10] The decision taken by SARS constitutes a '*determination*' as contemplated in ss 47(9)(d) & 47(9)(e) of the Customs Act.

[11] SARS opposes the application.

[12] At the hearing of the matter, the applicants did not pursue certain relief claimed in the alternative in the notice of motion, to review and set aside the LOD and the Committee's decision; and to declare the LOD and outcome of the Appeal Committee's decision as unconstitutional and invalid; and relief claimed in terms of PAJA.[1] The relief sought for review, was based on an alleged undue delay on the part of SARS to finalise the audit and the adjudication of the internal appeal, in breach of its duties in terms of ss 33 & 237 of the Constitution.

[13] Relying on *Commissioner for the Commissioner for the South African Revenue Service and Another v Richards Bay Coal Terminal (Pty) Ltd (1299/2021) [2023] ZASCA 39; 86 SATC 145 (31 March 2023)*, the applicants contend that the provisions of PAJA have not been ousted by section 47(9) of the Customs Act. The judgment has been taken on appeal to the Constitutional Court and has not yet been determined. In view of what is stated

[1] Promotion of Administrative Justice Act 3 of 2000.

in the preceding paragraph, it is not necessary to make any finding in this regard.

CONDONATION:

[14] It is common cause that the applicants instituted the proceedings some 14 court days after the expiry of the one year period provided for in s 96(1)(b) of the Customs Act.

[15] The court may in terms of s 96(1)(c)(ii) of the Customs Act, on application, extend the period, where the interest of justice so requires, and where the Commissioner has refused to extend the period. The applicants have in a separate notice of motion, supported by affidavit, applied for such extension.

[16] After the institution of the proceedings, the applicants, through their attorneys, in writing requested SARS for an extension from 5 October 2022 (i.e. the date of the outcome of the internal appeal), to the date of the institution of the proceedings (i.e. 25 October 2022).

[17] On 2 November 2022, SARS stated that it will abide by the decision of the court but referred the applicants to ss 75 & 76B of the Customs Act. When the applicants sought further clarity, SARS contended that the request should have been made before the expiry of the one year period in terms of the Customs Act.

[18] The applicants submit that SARS has effectively refused their request for an extension.

[19] The applicants' explanation for the late institution of the proceedings boils down to an unforeseen delay in the finalisation of the applicant's papers.

[20] The applicants submit that there is no prejudice to SARS if condonation is granted.

[21] At the hearing of the matter, SARS again confirmed that it will abide by the decision of the court.

[22] Upon a consideration of the affidavits and the circumstances, I am of the view that it is in the interests of justice to extend the relevant period.

[23] SARS in turn applies for the late filing of its answering affidavit in the condonation application. The applicants do not oppose SARS' application for condonation. I am similarly inclined to condone the late filing of SARS' affidavit.

THE ISSUES FOR DETERMINATION:

[24] It was common cause at the hearing that the (remaining) issues for determination are:[2]

(a) Whether the Appeal Committee had the power to make a new determination (or finding) on the adequacy of the logbooks/record keeping – ('the first issue').

(b) Whether the first applicant, GMV, was the holder or cessionary of the necessary mining authorisation granted or ceded in terms of the MPRDA,[3] as contemplated in Note 6(f)(ii)(cc) of Part 3 of Schedule No. 6 of the Customs Act - ('the second issue').

(c) In the alternative, whether the Commissioner properly exercised his discretion (to allow the refunds for GMV in terms of Note 5 of Part 3 of Schedule No. 6 to the Customs Act) - ('the third issue').

[2] As recorded in a joint practice note.

[3] Mineral and Petroleum Resources Development Act 28 of 2002.

A WIDE APPEAL:

[25] The parties are *ad idem* that the appeal before the Appeal Committee and before this court is a 'wide appeal'.

[26] The matter is heard *de novo* - *Cell C (Pty) Ltd v Commissioner, South African Revenue Service* 2022 (4) SA 183 (GP), 8 – 10.

[27] It is a complete re-hearing of the case and a fresh determination of the merits - *Pahad Shipping CC v Commissioner for the South African Revenue Services* [2010] 2 All SA 246 (SCA), 14.[4]

[28] A defect at the first level of decision making can be cured on appeal - *Slagment (Pty) Ltd v Building, Construction and Allied Workers' Union and Others 1995 (1) SA 742 (A)*, 756B – 757A; *Minister of Environmental Affairs and Tourism and Another v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA), 33 – 35.

[29] In *Tholo Energy Services CC v Commissioner for the South African Revenue Service* [2024] 4 All SA 89 (SCA), it was held – [emphasis added & footnotes omitted]:

> *'[37] Accordingly, an appeal in terms of section 47(9)(e) is an appeal in the wide sense, but it remains an appeal against the determination. As Wallis JA explained in Levi Strauss: "An appeal under section 49(7)(b) of the Act is an appeal against the determination. While it is an appeal in the wide sense, involving a complete re-hearing 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 it is not an opportunity for it to make a wholly different determination, albeit one with similar effect."*

[4] *Pahad* was concerned with an appeal in terms of s 65(6)(a) of the Customs Act, which section is identically worded to s 47(9)(e). Both sections provide:
'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.'

[38] The appellant concedes - as it must - that the appeal in this case is an appeal in the wide sense, which involves a complete rehearing and redetermination of the merits of the matter, with or without additional evidence or information. Indeed, this is specifically authorised by the empowering provision.

[39] Not only is a court permitted to admit new evidence or information in a section 47(9)(e) appeal, but it also relies on the parties' assistance in considering new evidence and information in those proceedings to assist it to arrive at the correct decision…

[40] It follows that the appellant's argument that the Commissioner was not entitled to raise additional grounds for the determination in the section 47(9)(e) appeal, and that this was administratively unjust and procedurally unfair, has no merit. The Commissioner was entitled to raise additional, legitimate grounds for the rejection of the refund claims, as was done in the answering affidavit. The High Court was permitted to decide the correctness of the determination on the additional grounds. And it must be stressed that these grounds did not change the determination at all - whether the fuel had been exported in compliance with the relevant provisions of the Act, the Rules and the rebate items in Schedule 6.'

THE FACTS:

The relevant facts are largely common cause and may be summarised as follows:

[30] The original joint venture was established on 25 February 2004 in terms of a Pooling and Sharing Agreement ('the agreement').

[31] GMV mines chrome ore and recovers chrome ore by receiving tailings from platinum concentrators and processing the tailings to extract the chrome. GMV operated nine mines in two mining areas, referred to as the Western Mines and the Eastern Mines. Out of the nine mines, only six mines are currently still operative.

[32] GMV is registered as a VAT Vendor in terms of s 23 of the Value-Added Tax Act 89 of 1991 ('the VAT Act').[5]

[5] GMV is an unincorporated body who carries on an 'enterprise' separate from its members, as contemplated in

[33] GMV was also registered as a 'user'[6] for diesel refund purposes in terms of s 75 of the Customs Act.[7]

[34] GMV was at all relevant times a 'user' as defined in Note 6(a)(vi) of Part 3 in Schedule No 6 to Customs Act.[8]

[35] GMV, as the joint venture, although not a legal persona, is recognised by SARS, for purposes of VAT and diesel refunds, as an entity or enterprise entitled to be so registered and to claim diesel rebates.

[36] The agreement provides that the pooling transaction will enable the parties to thereto, to give effect to the provisions of the MPRDA, and Charter.

[37] Any assets acquired and/or mined and/or produced out of the pooled operations would be jointly owned by the parties to the agreement, in undivided shares in proportion to their participation interest, subject to any of the provisions of the agreement which expressly provide otherwise.

[38] The commencement date is determined in the agreement as 1 July 2004.

[39] GMV is managed by a joint board and management structure.

[40] The joint venture is consistent with sections 2(d) and (f) of the MPRDA, by expanding the opportunities for historically disadvantaged persons to enter into and actively participate in the mineral and petroleum industry and by promoting and advancing the social and economic welfare of all South Africans.

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s 51 of the VAT Act.

[6] "user" shall mean, according to the context and subject to any note in Schedule 6, the person registered for a diesel refund as contemplated in subsection (1A) – [s 75(1C)].

[7] Which refund shall be granted in accordance with the provisions of s 75 and of item 670.04 of Schedule No. 6 to the extent stated in that item - subsection (1A) – [s 75(1A)(a)]

[8] "user", as defined in section 75 (1C)(b)(i) means, according to the context and subject to any notes to item 670.04, a person registered for value-added tax purposes under the provisions of the Value-Added Tax Act, 1991 (Act No. 89 of 1991), and for diesel refund purposes as contemplated in section 75 (1A) and (4A).

[41] On 25 February 2015, SARS issued GMV with a Letter of Engagement ("LOE") in terms of which SARS informed GMV that it intends on conducting a diesel refund audit/inspection, covering the periods December 2012 – November 2014. In the LOE, SARS stated – [emphasis added]:

'The planned inspection will be performed on site from a date to be agreed upon. The purpose of this inspection will be to audit the information submitted and the VAT 201 returns with regards to your diesel usage and to establish if the requirements of the Customs & Excise Act No. 91 of 1964 ("Customs Act") have been complied with regarding diesel refund claimed for the abovementioned periods.

…

In order to ensure that the inspection is conducted in an efficient and effective manner with minimal disruption to your operations and time, you are requested to ensure that your documents and recordkeeping are at the proper standard required by fiscal legislation.

…

You are required to make the following information/documentation available at the commencement of the inspection on the planned date.

…

9. Records reflecting the storage and use of the diesel for the audit period, reflecting the following (distribution and use logbook):

- *The date or period of use;*
- *The quantity and purpose of use;*
- *Full particulars of any diesel supplied on a dry basis to any contractor or other person who renders qualifying services to you;*
- *The capacity of each tank in which diesel is stored and the receipt and removal from such tanks;*
- *The quantity of diesel supplied to each vehicle and what the vehicle was used for;*

10. Proof of purchase of the asset or a copy of an agreement/contract if the equipment/vehicle is contracted.

11. Diesel refund calculations that reconciles to the VAT201 returns.

Please note that the listed information above is not an exhaustive list, but that additional documents/information may be requested if necessary.

…

Your attention is specifically drawn to the fact that these books, accounts and documents must be kept for a period of five years in terms of section 101 of the Customs Act read with the Rule 101 thereto.'

[42] Information was provided to SARS during March 2015 as well as during a field audit conducted by SARS from 13 to 17 July 2015. SARS also inspected logbooks and financial records.

[43] On 22 August 2016, SARS raised a query, stating – [emphasis added]:

'As per the attached example, only the usages as per the vehicles were provided in relation to the Eastern Mines.

Kindly provide description of the vehicles, cost centre allocated to and the contract responsible for all sites for periods under review.'

[44] On 23 January 2018, SARS issued GMV with a Notice of Intention to Assess ('LOI') informing GMV of the outcome of its audit, and a summary of its intended liability, as a result of its diesel refunds related to its mining operations. SARS stated in the LOI – [emphasis added]:

'5. EXTENSION OF SCOPE

Also, the diesel refund claims in respect of the subsequent periods, i.e, December 2014 to September 2017 will also be added back where the above findings are applicable. In light of the above you are requested to provide a quantification of the diesel litres used respect thereof.

…

8. PROVISION OF TIME FOR RESPONSE

You are hereby afforded the opportunity to, by not later than close of business on 22 February 2018 to respond to the content of this letter and, in particular, to furnish the Commissioner such evidence and/or submissions as you may deem necessary in order to prove that the diesel was not dealt with contrary to but in full compliance with the provisions of the Customs Act. The evidence and/or submissions must include and explain, where necessary, the evidence, or lack of evidence in the Commissioner's possession and set out the evidence you rely upon and must fully address each and every aspect raised in this letter. Your attention is also referred to the fact that by virtue of the provisions of sections 101 and 102 of the Customs Act, the onus to prove compliance with the Customs Act is on Glencore. Upon receipt of your evidence and/or submissions, the Commissioner will take a decision as to whether the relevant provisions of the Customs Act had been complied with or not and will advise you of his decision. Should you fail to timeously respond to this letter, a decision will be taken on the available evidence.'

[45] SARS afforded GMV an opportunity to make representations and to provide further relevant submissions in response to the *prima facie* findings in the LOI. In the LOI, SARS submitted that GMV is not the holder or cessionary of the necessary mining authorisation granted or ceded in terms of the MPRDA.

[46] GMV claimed VAT refunds from SARS in respect of these mining operations. GMV also recovered refunds from SARS by way of preliminary payments or recoveries. These claims included refunds in respect of diesel that was used by, and diesel costs recovered from its contractors.

[47] GMV has its own bank account and paid for the diesel in respect of which the refunds were granted or were sought to be recovered. GMV submitted VAT 201 returns and claimed diesel refunds.

[48] SARS contends that GMV's claims also related to non-eligible activities, namely, activities that were not for its own primary production activities in mining. These claims relate to light delivery vehicles, trucks, personnel carriers, security services and activities unrelated to mining and or primary production activities in mining.

[49] SARS contends that prior to May 2016, GMV claimed for rehabilitation activities, which at the time was a non-eligible activity.

[50] On 5 February 2018, SARS granted GMV an extension to respond by 16 March 2018. On 15 March 2018, GOSA (on behalf of GMV) responded to the letter of LOI, and disputed the preliminary findings of SARS.

[51] On 5 April 2019, SARS informed GMV of the extension of the scope of the audit to include the period October 2017 to February 2019. On 7 May 2019, GOSA (on behalf of GMV) responded to SARS. GMV attached a spreadsheet with the updated litres and amounts proposed to be disallowed.

[52] On 20 December 2019, SARS issued the LOD to GMV. The LOD extended the scope of the audit to include the period March 2019 to September 2019. SARS states that GMV did not comply with the requirements of the diesel refund provisions as a result of which they were not entitled to the refunds paid to them. SARS demanded repayment of the refunds paid to GMV in respect of diesel bought and used by it during the audit period (plus interest), in terms of s 75(7A), read with Note 6(f)(ii) of Part 3 of Schedule 6, and s 76A, read with ss 75(1C)(d)(i) & (ii), of the Customs Act, the repayment of the diesel refunds which were not duly payable.

[53] SARS states in respect of the mining rights:

> *'1.1.1 In our letter of intention to assess dated 23 January 2018 (LOI), we indicated that GMV is duly registered for diesel refund purposes and defined as a user in terms of Note 6(a)(vii), however, GMV is not the holder or cessionary of the necessary authorisation granted or ceded in terms of the* [MPRDA]*. To this effect, SARS had the intention to disallow the diesel refund claims for the periods under review.*
>
> *1.1.2 In its reply to our letter of intention to assess dated 15 March 2018, GMV submitted that ".....on a proper interpretation of note 6(f)(ii)(cc), the note does not disentitle GMV from claiming the refunds and that SARS' finding that GMV incorrectly claimed diesel refunds where it is not the holder of the mining right Is therefore incorrect". The position was further on reiterated as per the letter dated 07 May 2019 from GMV.*
>
> *1.1.3 GMV also submitted that "Should SARS not agree with the above, we submit that the Act affords the Commissioner the discretion in terms of note 5 to part 3 of Schedule 6 to the Act to "authorise on good cause shown" the payment of the refunds to GOSA and Merafe Ferrochrome either jointly or in accordance with their respective participation interests in the GMV joint venture. Should SARS disagree with our view that GMV is entitled to be registered for the diesel refunds, we request that SARS exercises the discretion afforded to it in terms of the said note to allow GOSA and Merafe Ferrochrome to retrospectively claim the diesel refunds according to their respective participation interests in GMV."*

[54] On 8 January 2020, GMV applied to SARS for the suspension of payment for the debt and on 27 January 2020, GMV, through its attorneys, requested reasons for the determination from SARS.

[55] On or about 20 February 2020, SARS set off an amount of R100,648 702.79 against the refunds claimed in GMV's VAT return for December 2019. On 27 February 2020, GMV, through its attorneys, requested a reversal of the set-off.

[56] On 6 May 2020, SARS declined GMV's request for the suspension of payment.

[57] On 24 June 2020, SARS responded to GMV's request for reasons. In the response, SARS submitted that sufficient reasons for the basis of issuing a demand are contained in the LOD. SARS further submitted that the Mining Rights issue, was not the only reason for disallowing the quantity of diesel litres claimed. The findings were also raised regarding the non-primary production activities in mining. As the investigations revealed that GMV was not the holder of the Mining Rights, the entire diesel litres claimed were denied.

[58] On or about 15 April 2020, GMV instituted an internal administrative appeal against the following findings:

(a) That the refunds are disallowed on the basis that GMV is not the holder or cessionary of the necessary authorisation granted in terms of the MPRDA.
(b) That (an unspecified) portion of the diesel in question was not used for own primary production activities in mining.
(c) That the Commissioner was unable to condone the claiming of diesel refunds by GMV in terms of note 5 to Part 3 of Schedule No 6 to the Act to authorise, on good cause, payment of the refunds to GOSA and Merafe Ferrochrome according to their respective participation interests in GMV.
(d) The denial by the Commissioner that he has a discretion to condone the payment of refunds outside the periods prescribed in s 75 read with s 76 and s 76B of the Customs Act.
(e) That GMV will not be able to claim the refunds as requested as such application is required to be made by GOSA and Merafe.
(f) That rehabilitation did not qualify as a primary production activity in mining

prior to the introduction of note 6(f)(iii)(vv) with effect from 27 May 2016.

(g) That the contractors providing services at Boshoek and Rietvly did so on a wet basis, as opposed to a dry basis.

(h) That GMV is liable for the full extended audit period of March 2013 to June 2019.

[59] During the period 26 October 2020 to 4 October 2021, the Appeal Committee convened ten times.

[60] During this period, on 13 May 2021, SARS issued GMV with its *prima facie* views on the internal appeal. The Appeal Committee informed GMV that it agreed with the findings set out in the letter of demand dated 20 December 2019 and requested GMV to provide further submissions. On 10 June 2021, GMV, through its attorneys, sought clarification from SARS. On 24 June 2021, SARS informed GMV in writing, that the appeal is an appeal *"in the wide sense"* and that the Appeal Committee required submissions of record keeping for both the Eastern and Western mines, and for both dispensing and usage records, supported by substantiating evidence, as follows – [emphasis added & footnotes omitted]:

'4. A tariff appeal is accordingly an appeal "in the wide sense", i.e. "a complete re- hearing and fresh determination of the merits with or without additional evidence".

5. The purpose of the Committee's letter dated 13 May 2021 was therefore to obtain clarity from the Appellant on the issues raised. With respect to the response by the Appellant in its letter dated 15 March 2018, the Committee found that the response was very limited; and that the Appellant used an "estimation" to explain its records, which did not support the requirements of the Act.

6. The Committee, as part of the hearing de novo, requested that the Appellant provide information on the eastern mines, i.e. as to why the Committee should not regard the facts related thereto, to be additional grounds for disallowance of the refunds claimed.

7. As part of the submissions, the Appellant is also required to provide supporting evidence in relation to the Appellant's record keeping, as the Committee is of the prima

facie view, that these are not compliant with the provisions of the Act, more specifically Section 75 and Note 6, to Part 3 of Schedule 6 to the Act.

8. The Committee in this respect requires submissions of record keeping for both the eastern and the western mines, and for both dispensing and usage records, supported by substantiating evidence.

9. The Appellant is accordingly again invited to provide the Committee with such further submissions that the Appellant could assist in confirming why the refunds claimed should be approved.

10. The Appellant must provide the required information within 10 days of this letter.'

[61] It appears that as a result of incorrect email addresses reflected in the letter of 24 June 2021, the letter only came to the attention of the applicants on 1 August 2021.

[62] On 9 September 2021, GMV, through its attorneys responded to the Appeal Committee, stating that the Appeal Committee is acting *ultra vires* and abusing their powers to request further information. GMV demanded that the Appeal Committee deliver the outcome of the internal appeal on or before 9 October 2021.

[63] On 5 October 2021, SARS communicated the outcome of the internal administrative appeal to GMV. The Appeal Committee disallowed the appeal in full.

[64] The Appeal Committee made the following findings:

(a) GMV was registered as both the user and as a VAT registrant, it had its own bank account, was paying for diesel and recovered the refunds as claimed.

(b) GMV could therefore submit claims for refunds in terms of rebate item 670.0, read with the provisions of ss 75(1A) & (4A).

(c) GMV did not prove that it was entitled to any refunds in terms of Schedule No. 6 to the Act.
(d) GMV was not the holder of the required mining rights, as prescribed in Note 6(f)(ii)(cc).
(e) GMV had limited, insufficient and incomplete records which were not compliant with Note 6 of Part 3 to Schedule No 6.
(f) GMV claimed for non-eligible activities relating to rehabilitation and wet contracts, contrary to the provisions of Note 6 of Schedule No. 6 to the Act.

[65] GMV's registration as a user and a VAT registrant was not cancelled.

[66] The Appeal Committee resolved to confirm the letter of demand and to disallow the appeal in full.

[67] It is common cause that the mining rights in question were not registered in the name of the first applicant, GMV. They were either held by, or leased to, the second and third applicants, GOSA or Merafe.

[68] The mining activities in respect of which the diesel refunds were claimed were carried out on mining areas subject to mining rights, which were not registered in the name of GMV.

[69] Clause 17 of the mining rights provides that the holder of the mining right is bound by the provisions of the relevant [joint venture] agreement entered into and between the holder (or its predecessor) — i.e. the "empowering partner" and the relevant "empowerment partner" (or its successor in title). The relevant agreement forms part of the mining right. The holders of each of the mining rights and the relevant empowerment partners are identified in clause 17.

THE LOGBOOKS & RECORD KEEPING:

[70] Note 6(q) to Schedule 6 of Part 3 to the Customs Act requires that GMV must ensure that it keeps proper records to demonstrate its entitlement to the diesel refund claimed - *Graspan Colliery SA (Pty) Ltd v the Commissioner for the South African Revenue Service* (8420/2018) [2020] ZAGPPHC 560 (11 September 2020), 29.

[71] The applicants contend that the Appeal Committee had no power to make a new determination (or finding) on the adequacy of the logbooks/record keeping. In support of the argument, the applicants relied on *Commissioner SARS v Levi Strauss SA (Pty) Ltd* [2021] 2 All SA 645 (SCA); 2021 (4) SA 76 (SCA), 26. The relevant paragraph relied on by the applicants are quoted in the judgment of the SCA in *Tholo Energy*, above.

[72] According to the applicants, the Appeal Committee made a wholly different determination from the determination which was made in the LOD.

[73] SARS contends that the applicants' reliance on *Levi Strauss* is misconceived. SARS argues that GMV was aware as early as February 2015 that SARS intended to conduct a diesel refund audit relating to the applicants' mining operations. It was therefore incumbent upon GMV to keep all the relevant records, including logbook, until the entire audit process and any internal appeal was finalised.

[74] The applicants argue that when SARS raised a query in relation to the logbooks at Eastern Mines on 22 August 2016, it did not do so in relation to the Western Mines. This appears to be incorrect. I have already referred to the query raised on 22 August 2016, in terms of which SARS requested information on *'all sites'*.

[75] SARS did not in the LOD rely solely on the mining authorisation issue.

[76] The purpose of the audit and inspection was stated in the LOE to be '*to audit the information submitted and the VAT 201 returns with regards to* [GMV's] *diesel usage and to establish if the requirements of the* [Customs Act] *have been complied with regarding diesel refund claimed for the abovementioned periods.*

[77] SARS argues that the core question before the Appeal Committee was whether GMV was entitled to any refunds in terms of the Customs Act. The question of the logbooks was relevant to determine whether GMV discharged the onus resting upon it. In this regard, SARS refers to the following findings of the Appeal Committee, in disallowing the internal appeal – [emphasis added]:

'11. After duly considering the matter, the Committee therefore found the following:

11.1 The Appellant did not acquit its burden of proof in terms of Section 75, read with Section 102 to prove that it was entitled to any refunds in terms of Schedule 6 of the Act.

11.2 The Appellant was not the holder of the required mining rights as prescribed in Note 6(f)(ii)(cc), to Part 3 to Schedule 6 of the Act.

*11.3 The Appellant had limited, insufficient and incomplete records which were not compliant with Note 6, of Part 3 to Schedule 6 of the Act, as it did not provide a proper audit trail as required by these provisions, and the appellant had therefore failed to discharge the onus of proving eligible usage as required. More specifically, compliant records were not kept in the form of **both** dispensing and usage records; which records must provide a full audit trail, supported by substantiating evidence as prescribed in Notes 6(a)(xi) and 6(q) to Schedule 6 of the Act.*

11.4 The Appellant claimed for non-eligible activities relating to rehabilitation and wet contracts, contrary to the provisions of Note 6 to Schedule 6 of the Act.

12. As such, the refund claims submitted by the Appellant that failed to conform to the requirements of the Act, did not qualify for diesel refund entitlements.

13. The Committee therefore decided to confirm the letter of demand, dated 20 December 2019, and to disallow the appeal in full.'

[78] The Appeal Committee pointed out that GMV elected not to respond to the Appeal Committee's request for information in terms of its letter addressed to GMV on 24 June 2021, but instead provided the Committee with a deadline to finalise the appeal by 9 October 2021. It may be prudent to quote more fully from the outcome of the internal appeal:

'4. With regards to the Committee's letters to the Appellant, respectively dated 13 May 2021 and 24 June 2021, the Committee requested the Appellant to address further submissions to the Committee seeking clarity on the issues of contracts, record keeping and eligible activities.

5. In response to the request from the Committee, the Appellant responded that all the information required had already been supplied as part of the audit and the DA51 submission, and declined to provide any further or additional information to the Committee.

…

8. The Appellant however failed to respond favourably to the Committee's request and elected not to submit any additional records / information, which resulted in the Committee having to make a decision on the information before it.

9. The Committee during its deliberations on the matter was however satisfied of the following facts before it, namely:

9.1 The Appellant was registered as both the user and a VAT registrant, it had its own bank account, was paying for the diesel and recovered the refunds as so claimed. The Appellant could therefore submit claims for refunds in terms of rebate item 670.04, read with the provisions of Section 75(1A) and (4A).

9.2 The Appellant was however not the holder of the mining rights, as required in Note 6(f)(ii)(cc), to Part 3 of Schedule 6 to the Act. The mining rights that were presented by the Appellant was not in the name of the user ("Joint Venture"), but in the name of various other entities, one of them in the name of GOSA (Glencore South Africa).

9.3 On the limited information available relating to the contracts, the Appellant actually recovered diesel costs from the Contractor, and these contracts were found to be wet contracts. The Appellant claimed for refunds on these

contracts, which is contrary to the provisions of Note 6(f)(ii)(aa), to Part 3 of Schedule 6 to the Act that provide that only fuel supplied on a dry basis contract, could qualify for a refund of levies. The Appellant was therefore not entitled to the refunds of levies so claimed.

9.4 The Appellant claimed for non-eligible activities such as rehabilitation before 2016. With reference to the judgement of Graspan Colliery SA (Pty) Ltd v The Commissioner for the South African Revenue Service…, it was confirmed that rehabilitation activities were not part of eligible activities prior to 2016, and thus in this instance clarified the fact that the Appellant could not claim such, as it is regarded as a non-eligible activity.

9.5 In respect of record keeping, the Appellant did not have sufficient dispensing and/or usage records, supported by the required documentation. The Appellant therefore did not have, or kept records as prescribed in Notes 6(a)(xi), 6(q) and Section 75 of the Act.

9.6 With reference to the judgment of Umbhaba Estates (Pty) Ltd v The Commissioner for the South African Revenue Service…; it was ruled that "Even if it were found that the activities for which the refund claim has been submitted are all eligible activities, the claim still stands to be rejected on the basis that there was no compliance with the requirement to keep and maintain proper logbooks". Therefore the purported records that were presented by the Appellant were found to be non-compliant in light of the above.

9.7 The Appellant failed to clearly show the difference between fuel dispensed and used for eligible activities, and those dispensed and used for non-eligible activities. Specific reference is further made to the judgment of The Commissioner for the South African Revenue Service v Glencore Operations SA (Pty) Ltd 462/2020 SCA, from which it is clear that the Appellant has a burden to prove its qualifying primary / eligible activities.'

[79] SARS argues that the determination of the Appeal Committee was not a different finding to the one in the LOD. The Appeal Committee was not bound by the same facts as those underpinning the LOD. It considered the matter afresh. The same is true for the appeal before the court. SARS argues that the court is called upon to answer the same question, namely whether GMV is entitled to the refund its claimed. I am inclined to agree.

[80] It appears from the judgment in *Levi Strauss*, that SARS in that matter relied on completely new contentions on appeal, namely that the certificates of origin

in question in that matter, were tainted by misrepresentation and based on fictitious invoices. These contentions appeared nowhere in the determination in question, or in SARS' answering affidavit in the High Court. The SCA held in respect of these contentions:

'[28] …Had they been the subject of the determination the proceedings in the high court would have taken a very different course. Levi SA would have been required to demonstrate not only that it had properly and adequately responded to the 48 cases identified by SARS, where an incorrect invoice had been used to enter the goods and determine their transaction value, but that there were no other cases where that had happened.'

[81] During oral argument, the applicants referred me to, *inter alia*, the judgment of the full court of the Western Cape Division, in *Tunica Trading 59 (Proprietary) Limited v Commissioner, South African Revenue Service* [2022] 4 All SA 571 (WCC), in support of their submissions. However, it appears this judgment has subsequently been overturned on appeal – See: *CSARS v Tunica Trading 59 (Pty) Ltd* [2024] 4 All SA 1 (SCA).

[82] In its judgment in *Tunica*, the SCA held that *'in construing a taxing act, a court "will not presume in favour of any special privilege of exemption from taxation". On the contrary, a rebate of excise duty is a privilege and strict compliance with its conditions may be exacted from the claimant.'* – [footnotes omitted], 53.

[83] The SCA in *Tunica*, went on to state – [footnotes omitted]:

'As was held by a Full Court in *BP v Secretary for Customs and Excise* approved by this Court in *Toyota South Africa*:

"[T]he rebate of excise duty is a privilege enjoyed by those who receive it. It has been stated that it is neither unjust nor inconvenient to exact a rigorous observance of the conditions as essential to the acquisition of the privilege conferred and that it is probable that this was the intention of the Legislature… Moreover, the provision is obviously designed to prevent abuse of the privilege and evasion of the conditions giving rise to such privilege and again this supports the view that a strict compliance with the requirements laid down is necessary."'

[84] A claimant for a refund of excise duty or fuel levy must strictly comply with the requirements for such refund. An appellant's failure to comply with a single requirement would justify the rejection of its refund claims – *Tholo Energy*, 67.

[85] In the present matter the issue of proper record keeping was raised in the LOE of 25 February 2015, in the query of 22 August 2016, and in the LOI of 23 January 2018. While it is conceded by SARS in the answering affidavit, that no adverse finding relating to logbooks was recorded in the LOD, SARS contends in the answering affidavit that this fact did not preclude the Appeal Committee from enquiring into the issue, since the nature of the internal appeal is *'a full appeal or complete re-consideration of the entire matter.'*

[86] The fact remains that the issue of logbooks was expressly raised by the Appeal Committee and in the answering affidavit. The Appeal Committee afforded the applicants an opportunity to provide the required documents. The applicant elected not to do so. I do not think that I can ignore the issue. It seems to me that the present matter is distinguishable from the judgment in *Levi Strauss* on the facts.

[87] The appellants argue that the conclusion reached by Collis J in this court in *Glencore Operations SA (Pty) Ltd and Others v Commissioner for the South African Revenue Service and Another* (15988/2020) [2023] ZAGPPHC 565 (17 July 2023) – ('Goedgevonden') - *'that the Appeal Committee is not bound to say yes or no but can make a finding that effectively amends the decision of the Commissioner',* is clearly wrong. In view of what I have referred to above, I am unable to find that the learned judge was clearly wrong in this regard.

[88] Based on the judgment of the SCA in *Tholo Energy,* I find that in these circumstances, both the Appeal Committee and this court, may raise and consider the issue of proper record keeping.

[89] I am consequently not persuaded that the Appeal Committee had no power to make a finding on the adequacy of the logbooks/record keeping.

[90] SARS argues that GMV must show:

(a) How the quantity of diesel on which the refund was claimed, was calculated.

(b) That it has kept the records regarding each eligible and/or ineligible activity, separate.

(c) How the diesel purchased was used, sold, or otherwise disposed of.

(d) The records of all purchasers or receipts of fuel, storage and use of fuel reflecting the date or period of use, the quantity and purpose of use, the full particulars of any fuel supplied on a dry basis to any contractor or other person who renders qualifying services to the applicant, and GMV's capacity of each tank in which fuel is stored and the receipt and removal from such tanks.

(e) Logbooks in respect of fuel supplied to each vehicle and or equipment used in on land mining activities and specify how the vehicles and equipment was used.

[91] SARS argues that in the absence of compliance with the requirements of Notes 6(a) and 6(q), SARS cannot grant GMV any diesel refund as claimed.

[92] In *Canyon Resources (Pty) Ltd v Commissioner for the South African Revenue Service* (68281/2016) [2023] ZAGPPHC 1957 (30 November 2023), this Court held:

'[10] How does one then indicate to SARS which use of diesel or which operations performed by vehicles and equipment would qualify to be "eligible" for a refund? It is quite apparent that meticulous records must be kept, such as logbooks. The details to be reflected in such logbooks which would satisfy SARS that the refund claimed was for eligible use, is to be found in the following definition thereof, also contained in note 6:

"(xi) 'Logbooks' means systematic written tabulated statements with columns in which are regularly entered periodic (hourly, daily, weekly or monthly) records of all activities and occurrences that impact on the validity of refund claims. Logbooks should indicate

a full audit trail of distillate fuel for which refunds are claimed, from purchase to use thereof. Storage logbooks should reflect details of distillate fuel purchases, source thereof, how dispersed/disposed and purpose of disposal. Logbooks on distillate fuel used should contain details on source of fuel, date, place and purpose of utilisation, equipment fuelled, eligible or non-eligible operations performed, and records of fuel consumed by any such machine, vehicle, device or system. Logbook entries must be substantiated by the required source documents and appropriate additional information that include manufacture specification of equipment, of operator, intensity of use (e.g. distance, duration, route, speed, rate) and other incidents, facts and observations relevant to the measurement of eligible diesel use".'

[93] On the evidence presented, the applicants have not persuaded me that they have complied with the requirements of Note 6(q) of Part 3 of Schedule 6 to the Customs Act, dealing with keeping of books, accounts and other documents.[9] – *Graspan*, 29.

[94] In *Umbhaba Estates (Pty) Ltd v The Commissioner for the South African Revenue Services* (66454/2017) [2021] ZAGPPHC (10 June 2021), 79, this court considered the logbook requirement on the basis that even if it were found that the activities for which the refund claim has been submitted are all eligible activities, the claim still stands to be rejected on the basis that there

[9] The relevant portions of the note provide:

'(i)(aa) All books, accounts or other documents to substantiate the refund claim (including purchase invoices, sales invoices and logbooks) must be kept for a period of 5 years ...

…

(iii) Books, accounts or other documents must show in respect of each claim how the quantity of distillate fuel on which a refund was claimed was calculated.

…

(v) Documentation must show how the distillate fuel purchased was used, sold or otherwise disposed of. The user must:

(aa) keep books, accounts or other documents of all purchases or receipts of distillate fuel, reflecting -

(A) the number and date of each invoice relating to such purchases or receipts;

(B) the quantities purchased or received.

…

(bb) keep books, accounts or other documents in respect of the storage and use of the distillate fuel. Reflecting -

…

(dd) keep logbooks in respect of fuel supplied to each vehicle, vessel or other equipment used in the following activities –

(A) on land mining…'

was no compliance with the requirement to keep and maintain proper logbooks.

[95] It is not disputed that the GMV did not provide SARS with the usage and dispensing records sought to substantiate the diesel refunds as requested by the Appeal Committee on 24 June 2021.

[96] In the absence of compliance with the requirements of Notes 6(a) & 6(q), SARS cannot grant GMV any diesel refund as claimed.

[97] In my view the Appeal Committee did not make a *'wholly different determination'* when it requested logbooks and further documents.

[98] The Appeal Committee did not act *ultra vires* as contended by the applicants.

[99] The first issue must therefore be decided against the applicants.

NOTE 6(f)(ii)(cc) AND THE MINING AUTHORISATION:

[100] It is common cause that the mining rights in question were not registered in the name of GMV.

[101] The applicants contend that in terms of the joint venture agreement, the pooled assets, under the control of the joint board, included the right to use the second and third applicants' mining rights. The applicants contend that the present matter differs from *Goedgevonden*, in that the joint venture agreement in *Goedgevonden*, provided for co-ownership of the joint venture assets, which included the mining rights, while in the present matter the second and third applicants retained ownership.

[102] The mining activities under audit and appeal relate to the period December 2012 to September 2017.

[103] Note 6(f)(ii)(cc), since 27 May 2016, provides:

'The mining activities which qualify for a refund of levies must be carried on–

…

(cc) by the holder or cessionary of the necessary authorisation granted or ceded in terms of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002).'

[104] Prior to its amendment, Note 6(f)(ii)(cc) required that mining activities which qualify for a refund must be carried on by a person who is in possession of the necessary authorisation granted in terms of the MPRDA. It is not disputed by the applicants that it has always been the legal position applied as such by SARS, that the claimant of diesel refunds must be the "holder" of the mining right concerned.

[105] In terms of s 1 of the MPRDA, "holder" means *'in relation to a…mining right… the person to whom such right… has been granted or such person's successor in title.'* – [emphasis added].

[106] The MPRDA does not define *'person'*. The provisions of the Interpretation Act 33 of 1957 therefore apply, which defines "person" in s 2 thereof, as including *'(c) any body of persons corporate or unincorporate.'*

[107] There is no dispute between the parties that a joint venture is in law regarded as an unincorporated body of persons.

[108] According to the applicants it is the text, context and purpose of the definition of "holder" in the MPRDA, which must be interpreted, as incorporated in Note 6.

[109] The applicants referred to the long title of the MPRDA,[10] the preamble of the MPRDA,[11] and the objects of the as set out in s 2 thereof.[12]

[110] According to the applicants the purpose of Note 6(f)(ii)(cc) is to require that the activities conducted by the user have been authorized by the MPRDA.

[111] The applicants further contend that clause 17 of the mining rights read with clause 13.1.2 make it clear that the joint venture agreement must be complied with, failing which the mining right could be cancelled or suspended.

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[10] 'To make provision for equitable access to and sustainable development of the nation's mineral and petroleum resources; and to provide for matters connected therewith.

[11] *'RECOGNISING that minerals and petroleum are non-renewable natural resources;*
ACKNOWLEDGING that South Africa's mineral and petroleum resources belong to the nation and that the State is the custodian thereof;
AFFIRMING the State's obligation to protect the environment for the benefit of present and future generations, to ensure ecologically sustainable development of mineral and petroleum resources and to promote economic and social development;
RECOGNISING the need to promote local and rural development and the social upliftment of communities affected by mining;
REAFFIRMING the State's commitment to reform to bring about equitable access to South Africa's mineral and petroleum resources;
BEING COMMITTED to eradicating all forms of discriminatory practices in the mineral and petroleum industries;
CONSIDERING the State's obligation under the Constitution to take legislative and other measures to redress the results of past racial discrimination;
REAFFIRMING the State's commitment to guaranteeing security of tenure in respect of prospecting and mining operations; and
EMPHASISING the need to create an internationally competitive and efficient administrative and regulatory Regime.'

[12] *'The objects of this Act are to—*
(a) recognise the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources within the Republic;
(b) give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources;
(c) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;
(d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;
(e) promote economic growth and mineral and petroleum resources development in the Republic, particularly development of downstream industries through provision of feedstock, and development of mining and petroleum inputs industries;
(f) promote employment and advance the social and economic welfare of all South Africans;
(g) provide for security of tenure in respect of prospecting, exploration, mining and production operations;
(h) give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development; and
(i) ensure that holders of mining and production rights contribute towards the socioeconomic development of the areas in which they are operating.'

[112] The applicants concede that the mining rights could in principle have been issued in the name of GMV, however that the actual physical mining activities could only have been conducted by the second and third applicants.

[113] In my view the reference in Note 6, to the *necessary authorisation granted or ceded* in terms of the MPRDA, does not support an argument that Note 6 must be interpreted through the prism of the preamble and objects of the MPRDA. Note 6 forms part of a taxing act and constitutes and exemption from taxation. As such, it must be strictly interpreted.[13]

[114] It is common cause that GMV, is the "person" registered as an "enterprise" under the VAT Act, and as "user" registered under the Customs Act.

[115] It is common cause that GMV is not the holder or cessionary of a mining authorization granted or ceded in terms of the MPRDA.

[116] In terms of s 59A of the Customs Act, 59A:

'(1)(a) Notwithstanding any registration prescribed in terms of any other provision of this Act, the Commissioner may require all persons or any class of persons participating in any activities regulated by this Act, to register in terms of this section and its rules.'

[117] Under the Rules for s 59A the Customs Act, "person" includes – (a) any natural person or any insolvent or deceased estate; (b) any juristic person incorporated in the Republic or a juristic person not incorporated in the Republic, or any other association of persons whether or not formed in the Republic.'

[118] GMV falls within the ambit of a "person" as contemplated in section 59A of the Customs Act and the Rules.

[13] As per the judgment of the SCA in *Tunica*.

[119] SARS argues in light of the above that the "person" who claims the refunds, must also be the "person" holding the mining right. It argues that Note 6(f)(ii)(cc) requires the claimant to be the purchaser, and user of the fuel, and also the holder of a mining authorisation. SARS argues that it is clear from the context that the legislator took great care to limit the concession provided by the fuel levy refund system, to a limited and closed number of persons and activities within the mining sector. I agree. Strict compliance with the relevant provision is required.[14]

[120] The manifest purpose of the Customs Act and Item 670.04 itself is to broaden the government's revenue base through the imposition of fuel levies. Note 6(f)(iii) circumscribes the ambit of the activities in respect of which rebate refunds may be claimed under the relevant item – *Commissioner, South African Revenue Service v Glencore Operations SA (Pty) Ltd* (Case no 462/2020) [2021] ZASCA 111 (10 August 2021), 53. In my view the same holds true for Note 6(f)(ii)(cc), which circumscribes the purpose for which the mining activities which qualify for a refund of levies must be carried on; and the place where the mining operation must be carried on; and by whom the mining activities which qualify for a refund must be carried on.

[121] It is not the applicants' case that a transfer of mining rights occurred, which would have required the prior written consent of the Minister in terms of s 11 of the MPRDA.

[122] The applicants rely on the fact that in the registered mining rights, reference is made to an empowerment partner. The mining rights do not set out the requirements of the joint venture agreement that would be concluded pursuant thereto. The mere requirement to establish a joint venture, does not make the joint venture the "holder" of the mining right.

[14] As per the judgment of the SCA in *Tunica*.

[123] The joint venture agreement does not confer a mining authorization on GMV as contemplated in the MPRDA and Note 6.

[124] Simply put, GMV does not carry on the mining activities (which would qualify for a refund of levies), as the holder or cessionary of a mining authorisation granted or ceded to GMV, as required by Note 6(f)(ii)(cc).

[125] In light of the above, the second issue must also be decided against the applicants.

NOTE 5 AND THE COMMISSIONER'S DISCRETION:

[126] Note 5 of Part 3 of Schedule 6 to the Customs Act provides – [emphasis added]:

'Except where the Commissioner authorizes on good cause shown payment of a refund of duty granted in terms of any item of this Part to any other person on complying with such conditions as the Commissioner may reasonably impose in each case, such refund shall be paid only to -

(a) …

(b) …; or

(c) … a user as contemplated in this Part.

[127] The Appeal Committee also considered GMV's request to apply its discretion in terms of Note 5, with reference to *Graspan*. The Appeal Committee found that the Commissioner had no discretion to apply in the present instance. I quote again from the outcome of the internal appeal:

> *'10. The Committee also considered the Appellant's request to apply its discretion in terms of Note 5, to Part 3 of Schedule 6 of the Act. In this regard, and with reference to the Graspan Judgement, it was confirmed that this note only applies to the actual payment of an approved refund to another entity, and not to the qualification requirements for such a refund. There was therefore no discretion for the Committee to apply in this instance.'*

[128] In *Goedgevonden*, 127, this court quoted *Graspan*, where it was held:

'[69] Note 5 envisages an instance where any refund due to a user is to be paid to another person, other than the user on good cause shown. It as such follows, that in order for the Commissioner to be called upon to exercise his discretion in terms of Note 5, the registered user should have been entitled to the refund. In the present instance this was not the position. The applicant was not entitled to a refund as it was not the holder of a mining right as from 15 August 2013. As such, it follows, that no reliance can be placed on the Commissioner to have exercised his discretion in terms of Note 5.'

[129] The applicants argue that Note 5 contains no prior requirement that the registered user must be entitled to a refund, before the Commissioner may depart from the default rule that the refund is paid to the registered user. Such an interpretation of Note 5 would in my view lead to uncertainty.

[130] Note 5 creates an exception to the rule that the refund may only be paid to a "user" as contemplated in Part 3. The Note expressly provides that the refund may only be paid to another person, other than the user, on good cause shown, and subject to compliance with such conditions as the Commissioner may reasonably impose. In my view, Note 5 similarly calls for strict interpretation and compliance.[15]

[131] The words '*payment of a refund of duty granted'*, presuppose a payment of a refund of duty granted to someone who is legally entitled thereto. Such a refund can only be claimed by and only be granted to a registered user, who is entitled to payment of such. If the registered user is not entitled to the refund, the Commissioner's discretion to allow payment to another person does not arise. If it were different, it would mean that the Commissioner may conceivably exercise its discretion to allow payment of a 'refund' not actually due or granted.

[132] I am therefore unable to find that the conclusion reached in *Graspan* and in *Goedgevonden* in this regard, is clearly wrong.

[15] As per the judgment of the SCA in *Tunica*.

[133] I have already found that GMV does not carry on the mining activities (which would qualify for a refund of levies), *as the holder or cessionary of a mining authorisation granted or ceded* to GMV, as required by Note 6(f)(ii)(cc).

[134] It follows that GMV was not entitled to the refund. The discretion of the Commissioner therefore does not arise.

[135] The third issue must consequently also be decided against the applicants.

CONCLUSION:

[136] Even if I am wrong on the first issue, in finding that the Appeal Committee was entitled to raise and determine the adequacy of the logbooks/record keeping, it is common cause that the issue of the mining authorisation and GMV's non-compliance with Note 6 (the second issue) was raised in the LOD. This issue was raised as a ground of appeal before the Appeal Committee. It is common cause that the Commissioner's discretion under Note 5 (the third issue) was also raised as a ground of appeal before the Appeal Committee.

[137] Having found that GMV was not entitled to the refunds, for want of non-compliance with Note 6, it follows that I am unable to disagree with the Appeal Committee's finding in respect of the second issue.

[138] Similarly, having found that GMV was not entitled to the refunds, it follows that I am unable to disagree with the Appeal Committee's finding in respect of the third issue that there was no discretion to exercise in terms of Note 5.

[139] The appeal against the LOD and against the Appeal Committee's decision can therefore not succeed.

[140] The remaining relief sought in the notice of motion, predicated thereon that this court should find that GMV was entitled to the refunds, can therefore similarly not succeed.

[141] In the result the appeal falls to be dismissed.

[142] As for the question of costs, both the applicants and SARS have employed the services of senior and junior counsel. Both the applicants and SARS sought costs of senior and junior counsel. SARS employed four counsel, two of whom are senior counsel. SARS seeks the costs of three counsel, to include the costs of two senior counsel. It is apparent that the applicants (and related entities) and SARS, have been, and still are, involved in several matters where similar issues are involved. Upon a consideration of the matter and of the issues involved, I am not persuaded that such a costs order is warranted. In my view the costs of one senior and one junior, where so employed, is more appropriate.

ORDER:

[143] In the result I make the following order:

1. The expiry of the one-year period, as provided for in s 96(1)(b) of the Customs and Excise Act 91 of 1964, is extended to 25 October 2022;

2. The late filing of the respondent's answering affidavit in the applicants' condonation application is condoned;

3. The application is dismissed;

4. The first to third applicants are to pay the respondent's costs, jointly and severally, the one paying the others to be absolved; such costs to include

the costs of one senior and one junior counsel, where so employed, on Scale C.

Y COERTZEN
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 20 March 2024

Date of judgment: 7 November 2024

The judgment was provided electronically by circulation to the parties' legal representatives by email and by uploading the judgment to the electronic case file on Caselines. The date and time for delivery of the judgment is deemed to be at 10h00 on 7 November 2024.

Appearances:

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Counsel for the respondent:	G Marcus SC P Ellis SC L Haskins M Musandiwa
Instructed by:	Ramushu Mashile Twala Incorporated