IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED. ✓

2024-11-14 [redacted]

DATE SIGNATURE

Case Number: A216/2023

In the matter between:

DANKIE OUPA DELWERY CC Appellant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES Respondent

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 14 November 2024.

JUDGMENT

POTTERILL J

Introduction

[1] Before us is an appeal pursuant to Ceylon AJ granting leave to appeal against his judgment dismissing the appellant's, Dankie Oupa Delwery CC's, application to set aside the determination by the respondent, The South African Revenue Services, that the appellant does not qualify for the diesel refunds it claimed. At the commencement of the appeal the respondent abandoned the "counter-appeal." This appeal is known as a wide appeal; this Court determines the appeal *de novo*.

Common cause facts

[2] The appellant is authorised to conduct diamond mining in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 [MPRD] on the farm Welverdiend in the North West Province. The appellant claimed a refund for the diesel used to conduct this mining. The appellant is entitled to claim this under Section 75 of the Customs and Excise Act 91 0f 1964 [the Act] which provides for a refund of a percentage of the levies for distillate fuel [diesel] consumed by commercial users of equipment and/or machines powered by diesel engines. Any claim is made in terms of Part 3 to Schedule 6 to the Act providing that the diesel must be used for specified purposes and such claim is subject to compliance with Note 6.

[3] The respondent paid the refund so claimed, but pursuant to an audit claimed the paid refunds back. The respondent is entitled to do so because the refund paid is a provisional refund subject to proof that the diesel was purchased as claimed and used as provided for in s75 of the Act and Schedule 6 to the Act.

The issues for determination.

[4] The nub of the appeal centres around three issues:

4.1 Must the tax invoices issued to the appellant's suppliers contain the appellants physical address;

4.2 Did the appellant's logbooks comply with the requirements set out in Note 6;

4.3 If the record-keeping was deficient did the respondent comply with section 75(4A)(d) and (e) of the Act granting the appellant 30 days from demand to prove that the diesel in question had been used for the specific eligible activity.

Did the logbooks/bookkeeping comply with the requirements set out in Note 6?

I find it prudent to decide this issue first.

The relevant legislation

[5] To qualify for such a refund the "user" of the diesel has to satisfy the requirements set out in rebate item 670.04 included in Part 3 of Schedule 6 of the Act. This item determines under which circumstances users who purchased diesel may become eligible for consideration of refunds. The relevant parts of Note 6 read as follows:

> "f(i)(aa) In accordance with the definition of 'eligible purchases' the distillate fuel must be purchased by the user for use and used as fuel for own primary production activities in mining as provided in sub-paragraphs (ii) and (iii) to this note ..."

The mining activities which qualify for a refund have been qualified in the aforementioned sub-paragraphs as being that carried on "... for own primary production activities in mining" which sets out an exhaustive list of activities.

[6] Section 75(1C)(a)(iii) provides as follows:

"Notwithstanding the provision of subsection (1A), the Commissioner may investigate any application for a refund of such levies on distillate fuel to establish whether the fuel has been –

(i) Delivered to the premises of the user and is being stored and used or has been used in accordance with the purpose declared on the application for registration and the said item of Schedule No. 6."

This has to be read in conjunction with the provisions of section 75(1A) and (4A), with the following definitions provided in Note 6:

(iii) "eligible purchases" means purchases of distillate fuel by a user for use and used as fuel as contemplated in paragraph (b);

(v) "non-eligible purchases" means purchases of distillate fuel by a user not for use and not used as prescribed in these Notes as fuel for own primary production in farming, forestry or mining on land or in offshore mining, any vessel contemplated in paragraphs (b)(ii) and (b)(iii) to this Note, or in any locomotive contemplated in paragraph (b)(iv) to this Note and includes such fuel used in transport for reward or if resold;

(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 claims, 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 use 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 documentation 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.

Note 6(q) of Part 3 of Schedule No. 6 of the Act requires the keeping of books, accounts and other documents for the purposes of the items referred to in the preceding sub-sections.

The relevant provisions of Note 6(q) provides as follows:

"6(q) Keeping of books, accounts and other documents for the purposes of this item:

(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 ...

(ii) 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 ...

(iv) ...

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

(aa) keep books, accounts or other documents or all purchases or receipts of distillate fuel, reflecting - (A)...the number and date of each invoice and (B) ... the quantities purchased or received.

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

(dd) keep logbooks in respect of fuel supplied to each vehicle ...used in ... on land mining."

Since April 2013, definition of a logbook has been expanded to expressly include the requirement that it should "indicate a full audit trail of distillate fuel for which refunds are claimed, from purchase to use thereof."

The appellant's argument

[7] The Court a quo was incorrect in accepting the respondent's argument and finding that the appellant's logbooks did not detail the usage of the diesel. The further finding by the Court a quo and argument of the respondent that the appellant's logbook did not detail the usage of the diesel for eligible purposes is similarly simply wrong.

[8] The reason for this is that the definition of logbook refers one to the website of SARS for an example as to the minimum logbook requirements for completion of a logbook. This example shown only relates to farming, but if regard is had thereto then the example as a specific eligible activity performed is "ploughing" and "transport to first point of delivery." However, "ploughing" is not listed under Note 6(h)(iv)(A) as an activity necessary for the production of farming products. The respondent's own example thus does not specify that the description in the logbook must be specified as a necessary activity for farming. Likewise "Delwery" is also not listed under Note 6(f)(iii) as a necessary activity but, loosely translated, "mining", can only be a necessary activity as mining.

[9] When the refund was initially claimed the logbook was submitted. It is reflected in FA5 before us. In a column it set outs the amount of diesel used with reference to a "Reg no". Under this column, examples of what are reflected on FA5 inter alia are the following; "EC250; B30D; KRAGPLANT; EC380; ISUZU." FA6 was attached which sets out a description of the assets, for example EC250 is a Volvo Excavator, "KRAGPLANT" is a "200 KVA Kragopwekker" and ISUZU is a "Isuzu Vragmotor." The argument went that upon a reading of FA5 with FA6 the respondent could ascertain what the diesel was used for in "delwery" as a necessary claimable activity.

[10] Pursuant to the demand and the appeal the appellant filed FA17 referred to as the corrected logbooks. It was submitted that in FA17 the qualifying activity is

described in more detail than in FA5. Upon perusal of FA17 a few examples are:

Excavators: "Delf";

Dumpers: "Neem grys(sic) na panne;

Front-end Loaders: "voer panne" and "pad onderhoud."

It was submitted that if the original logbooks did not comply then the corrected one most definitely did.

[11] On behalf of the Appellant it was submitted that the test the Court had to apply in deciding whether there was compliance is the test formulated in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (1) SA 604 (CC) par [30]:

> "Assessing the materiality of compliance with legal requirements in our administrative law is, fortunately, an exercise unencumbered by excessive formality. It was not always so. Formal distinctions were drawn between 'mandatory' or 'peremptory' provisions on the one hand and 'directory' ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance. That strict mechanical approach has been discarded. Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision. In this court O'Regan J succinctly put the question in *ACDP v Electoral Commission* as being 'whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose'. This is not the same as asking whether compliance with the provisions will lead to a different result.'" [Footnotes omitted]

[12] The ratio relied on by the respondent in *Canyon Resources (Pty) Ltd v*

Commissioner for the South African Revenue Service Case number 68281/2016[1] was a matter after the *Canyon Resources* matter and Davis J was not referred to this Constitutional matter. He accordingly did not apply the principle of whether there was compliance in view of the provisions purpose, but found the provisions to be in nature peremptory.

Argument on behalf of the respondent

[13] It was submitted that the provisions of Note 6 read with the rebate item 670.04 and section 75 of the Act are all peremptory and any user wanting to receive the benefit of the rebate item must ensure strict compliance with these provisions.

[14] The log book submitted [FA5] did not comply with the requirements because *ex facie* the document it cannot be determined how the diesel was used because the description in the logbook is generic; "delf". The respondent attempted to remedy FA5 by submitting the revised logbook as reflected in FA17. This did not rectify the logbook because the schedule in the logbook still failed to specify the details of the mining activities performed. But, more importantly one cannot ascertain whether the diesel claimed was in fact utilised for eligible purposes.

[15] Reliance was placed on the unreported judgment of *Canyon Resources (Pty) Ltd v The Commissioner for the South African Revenue Service* (68281/2016) delivered on 27 March 2019 wherein it was found that: "This enquiry postulates an application of the injunction, to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a Court might hold that, even though the position as it is, is not identical with what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been a compliance with the injunction the objection

[1] Case number 68281/2016 [2023] ZAGPPHC 1957 (30 November 2023)

sought to be achieved by the injunction and the question of whether the object has been achieved are of importance."[2]

It was further held in this *Canyon* matter that: "In the present case 'the injunction' to users was that those who wish to claim rebates had to demonstrate with sufficient particularity 'the journey the distillate fuel has travelled from purchase to supply' and then with equal particularity indicate the eventual use of every litre of such fuel in eligible purposes. Should the eventual use not be stated or sufficiently indicted, the claim fails. Should the volume of diesel used not be clearly determinable, the claim should also fail. Should the 'journey' of every litre not be particularized, the claim would, once again, fail."[3] It was thus submitted that the appellant's logbooks did not provide the detail of the diesel used nor the journey from purchase to use.

[16] In argument reliance was also placed on the matter of *Umbhaba Estates (Pty) Ltd v The Commissioner for the South African Revenue Service*, Case No 66454/2017 dated 10 June 2021 wherein the Court found that a full audit trial was necessary because use could cover eligible as well as non-eligible activities and the records should reflect the eligible activities. The argument went that the Isuzu, and in fact all the items in FA16, could be used for non-eligible activities.

[17] The argument highlighted the majority finding in *Commissioner, South African Revenue Service v Glencore Operations SA (Pty) Ltd* (Case no 462/2020) [2021] ZASCA 111 (10 August 2021) that the legislature did not intend all mining activities to benefit from the scheme, but only production activities and not secondary activities. The primary activities are listed in Note 6 (f) and are exhaustive as found in *Graspan Colliery SA (Pty) Ltd v The Commissioner for South African Revenue Service* (8420/18) [2020] ZAGPPHC 560 (11 September 2020) par [25].

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[2] Paragraph 9.4
[3] Paragraph 9.5

Decision on the logbooks/recordkeeping.

[18] The fact that a claim for diesel refunds should be limited to eligible uses has more recently been confirmed by the Supreme Court of Appeal as follows:

> "... the diesel rebates were never intended to be a complete reversal of the fuel levies in the mining sector. This explains why Note 6(f)(iii) provides for a long and comprehensive list of what is encompassed by 'own primary production activities in mining'. Put differently, the long list of inclusions serves to carefully circumscribe the ambit of the activities in respect of which rebate refunds may be claimed under the relevant item, thereby dispelling any notion that the list of inclusions is open-ended."[4] This much is common cause between the parties.

[19] I do not find the judgments of *Allpay* and *Canyon Services* to be in conflict or that *Allpay* has overruled *Canyon Services*. The Constitutional Court found that an over-technical approach was not to be adopted, but that in considering a number of factors, the central element is to link the question of compliance to the purpose of the provision. In *Canyon Services* with reference to the *Maharaj* matter below this was exactly the approach adopted with reference to: "It is quite conceivable that a Court might hold that, even though the position as it is, is not identical with what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been a compliance with the injunction the objection sought to be achieved by the injunction and the question of whether the object has been achieved are of importance."[5]

[20] The object to be achieved in claiming the refund is to prove that the diesel was used for mining's eligible purchases. I cannot find that the logbook [FA5] or the further

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[4] *Glencore supra* par [53]

[5] *Maharaj and Others v Rampersad* 1964 (4) SA 638 (A) at 646D-E

logbook [FA16] had particularity whereupon the Commissioner could distinguish between eligible and non-eligible usage; it did not set out the ambit of activities that qualify as primary use. The inscriptions of the appellant in the logbooks do not reflect the fuel used for the primary use as eligible. The Isuzu vehicle could be used for non-eligible purposes and the descriptions does not put one in a position to ascertain what is was used for to render it within the ambit of eligible purposes.

[21] In order to qualify for the rebate the appellant must complete a logbook with sufficient clarity. This is not a mechanical approach, but an approach whereby the object of the diesel refunds, not to be a complete reversal of the fuel levies in the mining sector, is borne out by the list meticulously circumscribing the ambit of activities that do qualify for the rebate. To qualify for the rebate the respondent must *ex facie* the logbook be able to determine that the rebate sought falls under the list. Furthermore, the logbook must contain the specified usage of the fuel in respect of a specified vehicle or equipment. Last mentioned requirement is also to fulfil the object of the requirement reflecting only eligible activities from purchase of the diesel to use.

[22] Relying on an example on the website of the respondent non-related to mining is not helpful to the applicant. Even if an analogy is to be drawn then the generalisation of description on the website does not excuse the appellant to comply with the requirements. This is simply so because the duty to ensure that the appellant is entitled to the refund lies with the appellant. There is no duty on the respondent to visit the mining operation or make its own deductions on generic inscriptions in the logbook. More generic than "delf" one cannot find. The responsibility to claim and prove the refund is on the appellant.

Alternative argument

The appellant's argument

[23] The appellant submitted that the respondent failed to in terms of s75(4A)(e) afford the appellant thirty days from the date of demand for payment of the refunds to prove the usage of the fuel.

[24] It is common cause that the appellant received the letter of demand on 11 May 2018. On 14 May 2018 the respondent via its auditor informed the respondent that it would file an internal appeal and enquired whether new logbooks could be submitted in this appeal. The answer thereto was that for the audit itself it was too late.

[25] The argument was that had the respondent afforded the 30 days in terms of s75(4A)(e) the appellant would have been able to demonstrate that the diesel had been used for its own primary mining operations. The incorrect procedure followed by the respondent denied the appellant the opportunity to do so.

The respondent's argument

[26] The respondent answered that already on 12 December a letter of engagement was sent to the Appellant wherein the respondent requested the documents for the rebate claim submitted. However, only in May 2018 did the appellant provide further information, but it was still insufficient and the logbooks failed to meet the requirements.

[27] The logbooks did not comply with the Note and Schedule and therefore the appellant was not entitled to a rebate. It could then not be provided with a further period

to provide information that was lacking, it could only appeal.

[28] But, in any event, the appellant has had many bites at the cherry because FA5 and FA17 were considered by the respondent and in this appeal it had the opportunity to place evidence before the Court which was not before the respondent at the time of its determination and it has not done so.

Decision on the alternative argument.

[29] I cannot find that the respondent acted procedurally unfair. The appellant had already given notice of its internal appeal and did not seek 30 days before appealing. The answer provided by the respondent that pursuant to the audit being finalised further documents cannot be submitted it patently correct. It could have been done after the letter of engagement.

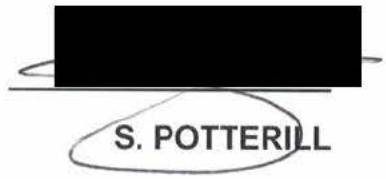
[30] The appellant has been afforded the opportunity to submit further logbooks that where considered. It could have placed further documents to prove its entitlement to the rebate before this Court. I am satisfied that the award must not be reviewed and set aside on due process not being followed.

Decision on the address on the invoice

[31] I find it unnecessary to make a finding hereon. There is no appeal or cross-appeal before us on this issue.

[32] I accordingly make the following order:

The appeal is dismissed with costs including the costs of two counsel where so employed on Scale C.



S. POTTERILL

JUDGE OF THE HIGH COURT

I agree

G.N. MOSHOANA

JUDGE OF THE HIGH COURT

I agree

N. ENGELBRECHT

ACTING JUDGE OF THE HIGH COURT

CASE NO: A216/2023

HEARD ON: 9 October 2024

FOR THE APPELLANT: ADV. J.P. VORSTER SC

INSTRUCTED BY: Couzyn Hertzog & Horak

FOR THE RESPONDENT: ADV. K. KOLLAPEN
ADV. T. CHAVALALA

INSTRUCTED BY: Maponya Inc.

DATE OF JUDGMENT: 14 November 2024