IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2023-099811

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

[redacted] 06/12/2024

SIGNATURE DATE

In the matter between:

| | |
|---|---|
| **ASPASA NPC** | First Applicant |
| **AFRISAM (SOUTH AFRICA) (PTY) LTD** | Second Applicant |
| **LAFARGE (PTY) LTD** | Third Applicant |
| **AFRIMAT AGGREGATES EASTERN CAPE (PTY) LTD** | Fourth Applicant |
| **AFRIMAT AGGREGATES (KZN) (PTY) LTD** | Fifth Applicant |
| **AFRIMAT CONTRACTING INTERNATIONAL (PTY) LTD** | Sixth Applicant |
| **AFRIMAT SILICA (PTY) LTD** | Seventh Applicant |
| **AFRIMAT AGGREGATES (OPERATIONS) (PTY) LTD** | Eighth Applicant |
| **AFRIMAT LYTTELTON (PTY) LTD (formerly Infrasours Holdings (Pty) Ltd)** | Ninth Applicant |
| **AFRIMAT MARBLE HALL (PTY) LTD (formerly Lyttelton Dolomite (Pty) Ltd)** | Tenth Applicant |
| **GLEN DOUGLAS DOLOMITE (PTY) LTD** | Eleventh Applicant |

and

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

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**JUDGMENT**

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LABUSCHAGNE J

[1] This is an application that relates to the calculation of the royalty payable to the State for the extraction of aggregates as a non-refined mineral resource. All minerals belong to the nation and the State is the custodian of the nation's mineral resources. The respondent ("SARS") administers the Mineral and Petroleum Resources Royalty Act, 28 of 2008 (the "Act"), that governs the imposition of the royalty.

[2] The applicants approached the court for relief in the following terms:

> *"1. To the extent required, leave is granted under section 105 of the Tax Administration Act, 28 of 2011 to assume jurisdiction to adjudicate this application.*
>
> *2. Declaring that "bulk" as used in respect of "aggregates" in Schedule 2 to the Mineral and Petroleum Resources Royalty Act, 28 of 2008 means the condition in which shot rock (i.e. blasted rock) exists at the quarry face prior to processing (i.e. crushing or other form of*

*beneficiation). Accordingly, "aggregates" as at muck pile is the condition stipulated by Schedule 2.*

*3. Granting the applicants costs of this application.*

*4. Granting further or alternative relief."*

[3] The first applicant (ASPASA) is a registered non-profit company whose members are small businesses and individuals holding an interest in small surface mines. The first applicant promotes the South African small surface mining industry and the second to eleventh respondents are members of ASPASA.

[4] The fourth to eleventh applicants are all extractors of a non-refined mineral resource in the form of aggregates. Aggregates are used in the construction industry and various products required in the marketplace are provided. The first point of sale is at the quarry face, and this is referred to as the *"muck pile"*. Products with varying specifications are produced by putting the shot rock (i.e. as excavated) through processes like crushing, washing and screening.

[5] The second applicant is a supplier of construction materials, including aggregate of various categories. Such aggregates comprise road stone (i.e. asphalt pavements and road surfacing, concrete aggregate, road layer works (made from crushed parent rock and partially weathered material), and speciality aggregate. The latter is used in the production of the surface layer in road construction. The aggregate also includes ballast, used as foundations in constructing rail tracks and usually consists of crushed stone.

[6] The third applicant is a global supplier of building supplies, including aggregates. It operates in 90 countries and provides 600 categories of aggregates that are derived from fragments of rocks and gravel.

[7] The fourth to eleventh applicants are subsidiaries of the second applicant and they operate quarries for the extraction of aggregates.

[8] Aggregates do not have their own status on the periodic table and are not a mineral. However, in the context of the Act, aggregates are a non-refined mineral resource. Each of the applicants advances an own interest basis for *locus standi in terms of sec 38(a)* of the Constitution. The first applicant also acts as an association, acting in the interests of its members (section 38(e) of the Constitution) and in the public interest (section 38(d) of the Constitution).

[9] The application turns on the correct legal interpretation of the word *"bulk"* as used in Schedule 2 of the Mineral and Petroleum Resources Royalty Act, 2008 in relation to aggregates. In terms of the Act, a royalty is payable upon the transfer (disposal) of a mineral resource after extraction. The royalty is calculated with reference to a formula set out in section 4 of the Act. What triggers the obligation to pay a royalty is the *"transfer"* of a mineral resource. This refers to the disposal of a mineral resource after extraction, typically through a sale. The condition specified in Schedule 2 in respect of aggregates is *"bulk"*. The question is whether the word *"bulk"* refers to aggregates upon extraction (i.e. at the muck pile), or whether it refers to the beneficiated state of the aggregates stockpile at the time of the transfer. SARS contends that *"bulk"* in terms of its dictionary meaning indicates that the condition of

aggregates does not change in the process of beneficiation. Bulk remains bulk at whatever stage of beneficiation the aggregate is found at the time of transfer. This is the core of the legal issue raised by this matter.

[10] SARS has raised a number of preliminary defences in its answering affidavit. The first relates to section 105 of the Tax Administration Act that provides that taxpayers may only dispute an assessment in terms of Chapter 9 of the Tax Administration Act (i.e. in the Tax Court) unless a High Court directs otherwise. SARS contends that this matter should be decided in the Tax Court.

[11] Further, SARS contends that the applicants have not made out a case for declaratory relief. There is, according to SARS, another statutory remedy, i.e. an appeal to the Tax Court in terms of Chapter 9 of the Tax Administration Act. Further, SARS contends that there are material disputes of fact.

[12] SARS has further challenged the *locus standi* of the applicants in respect of section 38 of the Constitution and has also challenged the authority of the applicants' deponent to depose to the affidavit.

[13] SARS has also raised a non-joinder point pertaining to Blurock Quarries (Pty) Ltd, whose tax appeal turns on the same interpretation issue referred to above.

[14] Arising from a letter from SARS to the DJP dated 1 November 2024, the applicant contended for a limitation of disputes.

**DID SARS LIMIT THE SCOPE OF THE ENQUIRY TO THE MERITS?**

[15] At the commencement of the hearing the question whether the disputes have been limited to the merits (i.e. the declarator sought in the notice of motion) was debated. The applicants contended that there was such a limitation arising from a letter by the attorneys for SARS to the Deputy Judge President, seeking a special allocation. The letter is dated 1 November 2024. In the letter the attorney records that she is instructed by SARS to make submissions and to request a special allocation of the hearing of the matter and she then sets out the grounds. The letter states the following:

*"5.* *<u>Grounds for allocation of a special/expedited hearing date:</u>*

*5.1 Our instructions are that it would be in the best interest of the aggregates industry that the Honourable Court pronounces on whether our client's interpretation of the relevant clause mentioned in paragraph 3.2 supra is correct, or not as the case may be, as it will allow the industry to regulate their tax affairs accordingly;*

*5.2 It is further in the interest of tax collection purposes that there exists legal certainty as to whether the assessments already raised, and those to be raised in future, are correct in law, reasonable and fair towards both taxpayers and the fiscus;*

*5.3 The tax dispute in the Blurock matter has been enrolled for hearing in the tax court; however it has been pended indefinitely pending the outcome of the matter currently under review;*

*5.4 At present, there is no legal certainty as to whether a dispute regarding an Interpretation Note by our client, which is generally held to be of persuasive value only and not legally binding, or qualify as an exceptional circumstance for not having same heard in the tax court, but instead in the high court. This is due to the current legal position as per case law that leans towards tax disputes being adjudicated upon in the tax court; and*

*5.5 It is indeed so that, broadly, the delays in the finalisation of the determination of tax disputes or interpretations thereabout inevitably result in delays in the collection of revenue by our client."*

[16] While the applicants contend that the aforesaid formulation constitutes an abandonment of many of the defences raised *in limine* by SARS, that contention is disputed by counsel for SARS. He contended that the letter is not intended to limit the ambit of the enquiry, but to obtain an expedited hearing.

[17] I accept the proposition that an attorney who adopts a formal position in litigation thereby binds his client (**MEC for Economic Affairs, Environmental & Tourism: Eastern Cape v Kruizega and Another** 2010 (4) SA 122 (SCA) at paragraphs [6] and [17]). I also bear in mind that the letter under discussion

did not arise in the context of a pretrial, where such binding agreements are usually made.

[18] In the letter there is no express abandonment of defences. But the need for clarity in the industry was raised as the primary reason for an expedited hearing. In this regard it seems as though SARS did not advance its case in court in the spirit in which it sought a special allocation. There is a reference to the section 105 jurisdiction point in the letter. The content of the letter will also be relevant in the discussion as far as the Blurock matter is concerned.

[19] Most of the argument advanced on behalf of SARS at the hearing related to why the matter should not be heard or cannot be heard in the High Court. As stated, this is at variance with the approach set out in the letter. Despite there being merit in the contention that SARS wanted the High Court to interpret "bulk" in Schedule 2 of the Act, I err on the side of caution in dealing with all defences raised in the papers.

**FACTUAL BACKDROP**

[20] Before dealing with the remainder of the defences, it is necessary to set out the factual backdrop leading up to the current application. The central theme is that the applicants engaged with SARS and contend that there was consensus on the meaning of *"bulk"* until SARS had a change of heart in 2019. Such a change of heart is hotly disputed by SARS.

[21] The backdrop from the applicants' perspective is the following:

21.1 ASPASA contends that it had extensive engagements with SARS and National Treasury since the inception of the Mineral and Petroleum Resources Royalty Act 28 of 2008 ("the Act").

21.2 ASPASA contends that it was seeking engagements to ensure compliance by its members, being predominantly small businesses or individuals holding an interest in small surface mines. In pursuit of the aforesaid, it requested an independent multinational firm of auditors (KPMG) in 2009 to prepare a memorandum on the correct approach to be applied by aggregate produces in implementing the Act. The final document was known as the Industry Practice Note (IPN) which was shared in draft form with SARS as Senior Manager: Taxpayer Interface for the Mining Sector, Mr Anthony Cohen.

[22] On 4 May 2009 a site visit was held at the AfriSam Jukskei Quarry, which was attended by various SARS representatives, including Mr Cohen. The purpose of the visit was to explain the operations of mines engaged in extracting aggregates.

[23] On 29 April 2009 ASPASA's representatives met with National Treasury and explained the significance of the concept "muck piles". National Treasury's representatives confirmed their acceptance and the significance of that concept.

[24] In January 2011 ASPASA requested KPMG to finalise the draft IPN. It was submitted to Mr Cohen of SARS on 31 January 2011. SARS responded that it had no objection to the IPN or its distribution to ASPASA's members and

SARS commended ASPASA's initiative and fostering its consistent and correct compliance with the Act.

[25] Mr Cohen made a presentation on 14 to 15 April 2011 at a conference hosted by the Institute of Quarrying. Mr Cohen made a presentation on the application of the Act to the Quarrying Industry. During a panel discussion the principles articulated in the IPN were discussed and the principles set out therein would pervasively be applied and supported within the industry without dissent.

[26] On 9 March 2012 SARS issued a non-binding private opinion in respect of Afrimat. SARS concluded in the opinion that the condition specified in Schedule 2 for aggregates is the bulk rock on the quarry floor once extracted, i.e. as at muck pile. Hence, those sales must be calculated, SARS concluded, pursuant to section 6(2)(b), not section 6(2)(a) of the Act.

[27] SARS's new construction appeared from its Interpretation Note issued in 2019, which was issued without prior consultation with the industry. In its Interpretation Note 108 SARS refers to the common understanding set out in the IPN and states that SARS does not accept this view. The applicants contend that, until the issue of that Interpretation Note in 2019, the industry and SARS had been *ad idem* on the methodology pertain to royalties payable in respect of aggregates in terms of the Act.

[28] The methodology involved in extracting aggregates involves the following steps:

28.1 Firstly, topsoil is removed to expose the rock face. The topsoil is preserved for future use during environmental rehabilitation.

28.2 Solid rock is drilled and blasted into shot rock.

28.3 Shot rock (also known as “blasted rock”) comprises the muck pile.

28.4 The muck pile is the first saleable point. Products sold directly from the muck pile include gabion walls, armour rock and various other products used in public infrastructure, like bridges and roads.

[29] Products that require further processing beyond the much pile undergo the following three steps:

29.1 Shot rock undergoes further crushing to reduce the size of particles. The secondary rushing is conducted to bring the aggregates to a condition required for the intended industrial use or the needs of the individual customer in question.

29.2 The product is then screened and separated into various standard sizes or crusher dust. The product is also washed if it is intended for use as road stone. Washing removes dust.

29.3 The product is then moved from the screening bins and removed to the stockpile areas. Sales the proceed from such stockpiles.

29.4 The further processes referred to after blasting are referred to as *“beneficiation”.*

[30] The IPN records the muck pile as the first saleable point. The IPN equates *"muck pile"* with *"bulk"* as set out in Schedule 2, contending that the ordinary meaning of the word *"bulk"* refers to a *"pile"*.

[31] ASPASA contends that the ordinary grammatical meaning of *"bulk"* as used in the mining industry, and as referred to in Schedule 2 of the Act, sets the condition for aggregates as they are at muck pile, before beneficiation. SARS says that the condition remains *bulk"* at every beneficiated stockpile thereafter.

[32] SARS contends that Mr Cohen could not and did not bind SARS to the applicants' interpretation of "bulk". SARS contends that it has only ever expressed itself officially once on the meaning of *"bulk"* and that is in its 2019 Interpretation Note 108. In the Interpretation Note SARS contends as follows:

*"In the context of schedule 2 'bulk' refers to a body of a particular type of mineral resource which is treated as a single mass, the intention being to not require an analysis of its quality, as opposed to other unrefined minerals for which a quality standard is specified."*

[33] SARS contends that sec 6(2)(a) applies. Section 6(2)(a) provides that the amount of gross sales for the disposal of an unrefined mineral resource is the amount received or accrued during the year of assessment in respect of the transfer of that mineral resource. In using the word *"bulk"*, a range of values was not envisaged and hence there is no need for an adjustment under section 6A to the default value set out in section 6(2)(a). The gross sales amount for unrefined minerals with the condition specified as *"bulk"* is thus equal to the amount received by or accrued to the extractor from the disposal.

[34] It was conceded during argument that since SARS contends that *"bulk"* remains bulk, regardless of beneficiation, that section 6(2)(b) of the Act would never be applicable in respect of aggregates. The industry contends that the beneficiation results in disposals of aggregate in a condition other than as *"bulk"* (at the muck pile) is governed by section 6(2)(b), which acknowledges the increased value of beneficiation, but requires the royalty to be determined on the mineral resource as extracted. The applicants contend that SARS' interpretation resulting in the redundancy of section 6(2)(b) as far as aggregates are concerned, is an absurd result. The applicants contend that it penalises beneficiation, as the value of the product after the muck pile is higher than at muck pile. As the royalty is calculated on the gross sales of the beneficiated product, the royalties are higher to the extent that it becomes too expensive to mine quarries. The contention is further that the royalties imposed by SARS on its approach, would result in the construction industry countrywide being placed under an additional tax burden, pushing up the costs of construction generally.

**DOES THE HIGH COURT HAVE JURISDICTION?**

[35] The purpose of section 105 of the TAA is to determine the Tax Court as the forum for the resolution of disputes pertaining to tax assessments or decisions described in section 104.

[36] While the Tax Court is the only port of call in respect of such tax disputes (further appeals aside) there are rare instances where the High Court is entitled to deal with a legal issue in the context of a tax assessment or

decision. In such rare occasions, the High Court would first issue a direction in terms of section 105, indicating that the High Court has assumed jurisdiction (See **Barnard Labuschagne Inc v South African Revenue Service** 2022 (5) SA (CC) at para 41).

[37] Blurock Quarries (Pty)(Ltd) is a competitor of the applicant quarries. It has received an assessment as envisaged in sec 104 of the TAA in respect of aggregates based on the SARS interpretation of “bulk” and that assessment is being challenged in the tax appeal court.

[38] SARS contends that the Blurock tax dispute is the backdrop of the current application and therefore regards the tax decision or assessment in the Blurock tax appeal as the reason why this court does not have jurisdiction. It is common cause that none of the parties to this application is a party to that tax appeal. It is also common cause that there is no issued assessment or decision in respect of the applicants before this court.

[39] Counsel for SARS argued strenuously that this court does not have jurisdiction by virtue of section 105 of the Tax Administration Act. It was contended that the default position is that the matter should be heard by the Tax Appeal Court. It is only in exceptional circumstances where the High Court can order otherwise, and it was contended that such circumstances are not present.

[40] Section 105 of the Tax Administration Act, 28 of 2011 reads:

***“105. Forum for dispute of assessment or decision***

*A taxpayer may only dispute an assessment or 'decision' as described in section 104 in proceedings under this Chapter, unless a High Court otherwise directs."*

[41] The foundation of the contention by SARS is that the tax dispute on the assessment in the Blurock tax appeal is the driving consideration for the current application and that it must be heard by the Tax Court in terms of section 105. It was contended that the High Court lacks jurisdiction to do so, unless it vests itself with jurisdiction by granting an order directing that the matter be heard by the High Court as envisaged in section 105. The default position is that the objection and appeal process in terms of the Tax Administration Act needs to be exhausted before an appeal to the High Court and the SCA would be competent.

[42] SARS relies on the case of **CSARS v Rappa Resources (Pty) Ltd** 2023 (4) SA 488 (SCA) where the following is stated at paragraph [17]:

*"[17] Section 105 is an innovation introduced by the TAA from 1 October 2011. It has moreover been narrowed down by an amendment made in 2015. Its purpose is to make clear that the default rule is that a taxpayer may only dispute an assessment by the objection and appeal procedure under the TAA and may not resort to the high court unless permitted to do so by order of that court. The high court will only permit such a deviation in exceptional circumstances. This much is clear from the language, context, history and purpose of the section. Thus, a taxpayer may only dispute an assessment by the objection*

*and appeal procedure under the TAA, unless a high court directs otherwise."*

[43] In **Lueven Metals (Pty) Ltd v CSARS** (728/2022) [2023] ZASCA 144 (8 November 2023) a supplier of gold bars to Absa Bank was notified by SARS that it intends levying VAT at the standard rate on such supplies. The taxpayer approached the High Court for a declarator that the supply of gold bars was zero rated in terms of the VAT Act. When the matter reached the SCA, the SCA *mero motu* stated as follows at paragraph [13] etc., which reads:

*"[13] At the outset of the hearing of the appeal, Counsel were required to address whether absent a directive in terms of section 105 of the TAA, the high court could enter into and pronounce on the merits of the application for declaratory relief. This, in the light of the relief sought in prayer 1 of the Notice of Motion. At the bar in this Court, the argument advanced by both counsel was that as there was neither an 'assessment' nor a 'decision as described in section 104', and as the nature of the relief sought was a declaration of rights, the default rule that a taxpayer may only dispute an assessment by the objection and appeal procedure under the TAA, did not find application.*

*[14] The legislative scheme is designed to ensure that the objection and appeal process and the resolution of tax disputes by means of alternative dispute resolution and then the tax board or the tax court be exhausted, before the high court can be approached. It also contemplates that in the ordinary course the tax court deal with the*

*dispute, by way of a trial, as the court of first instance before the high court can be approached. Nowhere is this clearer than from the language, context, history and purpose of s 105, which makes it plain that a taxpayer may only dispute an assessment by the objection and appeal procedure under the TAA, unless a high court directs otherwise (**CSARS v Rappa Resources (Pty) Ltd**).*

*[15] What Counsel's argument boiled down to was not that s 105 did not find application at all in circumstances where declaratory relief was sought; but, properly construed, reduced itself essentially to one of timing. There seemed to be an acceptance that if the appellant had approached the high court for precisely the same relief after an assessment had issued, then s 105 would apply. However, because an assessment had not yet issued, but only a notice of intention to assess, the section did not apply. Why the one taxpayer would be better placed, when both sought precisely the same relief, could not be explained. The illogicality of such a differentiation appears to be compounded when one considers that a taxpayer (such as the appellant) on the receiving end of a decision that is capable of revision and reconsideration would have a lower bar to surpass as opposed to one with a final decision in the form of an assessment. The latter would have to establish exceptional circumstances for a high court to authorise a departure from the default rule."*

[44] What this indicates is that, even where a tax dispute regarding an anticipated decision or assessment arises, Section 105 finds application. Section 105

was referred to as a gatekeeping provision to ensure that tax disputes are resolved through the Tax Court, and not the High Court.

[45] The exception to the aforesaid default position, as stated above, arises when an income tax case turns purely on a legal issue or legal issues. In **Metcash Trading Limited v Commissioner for the South African Revenue Service and Another** 2001 (1) SA 1109 (CC) the Constitutional Court recorded at paragraph [44] that:

> *"[44] Indeed, it has for many years been settled law that the [High] Court has jurisdiction to hear and determine income tax cases turning on legal issues."*

[46] The Constitutional Court was approached regarding the nature and constitutionality of default judgments obtained by SARS in terms of section 174 of the TAA, read with section 170, which provides that an assessment is *"conclusive evidence"* of liability (**Barnard Labuschagne Inc v CSARS** 2022 (5) SA 1 (CC) at paragraph [41]). The Constitutional Court said:

> *"[41] Apart from the 'conclusive evidence' provision in section 170 of the TAA, another limitation on bona fide defences arises from section 105 of the TAA, which forms part of the dispute resolution procedures of Chapter 9. These procedures are initiated by an 'objection'. In terms of sections 104(1) and (2), a taxpayer may only object to an 'assessment' or 'decision' of the kind specified in section 104(2). If the taxpayer's grievance concerns an 'assessment' or 'decision', section 105 stipulates that the taxpayer may only dispute such*

*assessment or decision 'in proceedings under this Chapter, unless a High Court otherwise directs'. The 'unless' proviso caters for those relatively rare situations where a High Court regards it appropriate to grant declaratory relief on legal questions relating to assessments. For present purposes, the point to note is that section 105 will generally have the effect that, in rescission proceedings, the taxpayer will struggle to demonstrate a bona fide defence if its grievance relates to an assessment or decision governed by Chapter 9."*

[47] The authorities therefore indicate that the High Court will only have jurisdiction in relation to tax assessments (whether issued or not) in rare situations or exceptional circumstances. Such circumstances will exist where the issue is to be determined on a purely legal point and the High Court regards declaratory relief as appropriate.

[48] Counsel for SARS's contention that the Blurock tax assessment is subliminally at issue in these proceedings and that those proceedings are pending in the Tax Court, needs clarification. This contention is advanced despite Blurock not being a party to the current proceedings and the current proceedings not reflecting a *"decision"* or *"assessment"* in terms of section 104 as the basis of the application.

[49] The submission that Blurock is involved in these proceedings is motivated with reference to a chronology. The position adopted by SARS as to the meaning of *"bulk"* in Schedule 2 of Act 28 of 2008 was known in 2019 in official SARS Interpretation Note 108. While this note was not generally distributed, it is

contended that the applicants knew of SARS's interpretation since 2019, but only launched the current application a few days before the close of pleadings in the Blurock tax appeal in September 2023.

[50] The meaning of *"bulk"* as a legal issue arises in the Blurock tax appeal. In a schedule handed up during the hearing, counsel for SARS demonstrated the overlap of the subject matter to be adjudicated in the declarator as sought in these proceedings and the issues in dispute in the Blurock tax appeal. SARS contends that gross sales must be calculated with reference to section 6(2)(a) of Act 28 of 2008 and not section 6(2)(b). That is an issue that exists in both the current proceedings and in the Blurock tax appeal.

[51] SARS consequently contends that Blurock and the applicants have made common cause on the interpretation of *"bulk"* and the consequences for the determination of the royalty for aggregates, and SARS contends that Blurock should have been joined as a party to the current proceedings. SARS contends that the applicants have approached the High Court on the basis that SARS is spearheading its alleged new interpretation of *"bulk"* in its treatment of Blurock. The applicants therefore anticipate that they will receive similar assessments by SARS in regard to the issues which form the substratum of the Blurock tax appeal.

[52] SARS contends that there are no exceptional circumstances as to why the current application should be heard in the High Court, rather than in the Tax Court.

[53] Blurock is a small quarry which is a competitor of the fourth to the eleventh applicants. SARS assessed Blurock's liability for the royalty due in terms of Act 28 of 2008 on its interpretation of *"bulk"* in Schedule 2 to that Act and that interpretation has been challenged by Blurock in the tax appeal.

[54] After the current application was launched in September 2023, the applicants and SARS agreed in October 2023 to keep the Blurock tax appeal in abeyance pending finalisation of these proceedings. This is not disputed. However, SARS contends that it expressly withdrew that position and insisted that the Blurock tax appeal proceed.

[55] In a letter attached to its answering affidavit dated 17 October SARS refers to the agreement to pend the Blurock tax appeal in its email of 11 October 2023 and the response by the applicants' attorneys on 12 October 2023. The following is stated from paragraph 2:

> *"2. When the initial request was made to consider staying the tax court process and the tax appeal of Blurock Quarries, the application brought in the High Court by ASPASA was not considered to the extent that it now has been.*
>
> *3. Therefore, after having had the opportunity to fully consider the nature of the relief sought in the ASPASA high court application and taking into account the fact that SARS intends opposing the declaratory relief sought, as well as the unnecessary delay which will be occasioned in the adjudication of the Blurock Quarries tax appeal if it is stayed pending the finalisation of the ASPASA high court application, SARS*

*hereby revokes its decision to stay the proceedings in the tax court appeal of Blurock Quarries."*

The applicants' attorneys tried to hold SARS to its agreement and SARS disputed that it was bound by it. This is however not a dispute that I need to decide. In the 1 November 2024 letter of the attorneys for SARS to the Deputy Judge President to secure the special allocation serving before this court, the attorneys for SARS state expressly in par 5.3 quoted above that the Blurock Quarries tax appeal has been pended, pending finalisation of this application. That letter was written on the instructions of SARS.

[56] From the aforesaid it is apparent that SARS has vacillated in the past on the issue, but has as at 1 November 2024 (the date of the letter to the DJP) agreed to pend the Blurock Quarries tax appeal indefinitely pending finalisation of these proceedings.

[57] SARS's contention that the Blurock tax appeal is the reason for the current application and that the matter should not be heard by the High Court because of that reason, therefore has no substance. As SARS has agreed to pend the Blurock tax appeal, it cannot attack this court's jurisdiction on the basis that it has advanced.

[58] The question arises whether, despite the aforesaid, section 105 does not find application because the relief sought relates to an anticipated assessment or decision by SARS of the royalties due by the applicant quarries.

[59] Despite the absence of a *"decision"* or *"an assessment"* of the tax liability of the applicant quarries being before me, the envisaged assessment or decision of SARS in regard to such royalty liability is the motivation for the current application. The default position is then that the Tax Court should hear the application. That is, unless there are exceptional circumstances, and the High Court directs otherwise.

[60] The High Court has an inherent jurisdiction to decide any dispute brought before it, unless expressly ousted by legislation. Section 105 is an ouster of the High Court's jurisdiction in respect of a tax assessment or decision, unless the High Court rules otherwise in exceptional or rare circumstances (See Unreported judgment of Van der Westhuizen J in **Richards Bay Mining (Pty)(Ltd) v CSARS (case number 2023-045310)(26 March 2024)** at par 8).

[61] For the reasons that follow, I am satisfied that the current application does fall within those rare circumstances when the High Court can hear an application which would otherwise fall within the ambit of section 105 of the Tax Administration Act. The reasons are:

61.1 SARS has expressed the pressing need for clarity in the industry by means of a hearing in the High Court to the DJP in seeking a special allocation.

61.2 The interpretation of *"bulk"* in Schedule 2 of Act 28 of 2008 is a purely legal issue that affects an entire industry. If this issue had to be decided on a case-by-case determination in the Tax Court, such rulings would not be binding on the industry, but only binds the

immediate parties. Certainty would only be established through the further appeal processes when the High Court and/or the SCA rules on the issue and the principle of *stare decisis* applies.

61.3 The Tax Court cannot issue a declaratory order on the meaning of *"bulk"* that is binding industry wide. In fact, it cannot grant declaratory relief.

61.4 The contention by SARS that certainty would be achieved faster through the Tax Court dispute and appeal process than through the High Court, is not persuasive. An order by the High Court is binding on the parties in terms of sec 165(5) of the Constitution. The court cannot enter into speculation in respect of a time race if the finding of this court is challenged on appeal compared to appeal challenges in the Tax Court. The issue to be decided cannot be decided on the basis of a race between court processes. The outcome of appeals in this forum or in the tax forum cannot be prejudged with any certainty and shouldn't be prejudged. Such an approach would undermine section 165(5) of the Constitution as it assumes the ineffectiveness of judgments until finally pronounced upon by an apex court.

61.5 While SARS disputes that it has made a **volte face** in respect of its interpretation of *"bulk"* (an issue which will be dealt with in more detail below), the mere existence of a standoff between SARS and the industry pertaining to aggregates is in itself an indicator of the need for certainty in the industry. It matters not whether SARS changed its

mind. What is clear is that the parties are currently at loggerheads on a legal interpretation of *"bulk"*.

61.6 The argument that the tax assessment of Blurock Quarries will be prejudged in these proceedings has been put to rest by SARS, accepting that the tax appeal has been pended as set out in its letter to the Deputy Judge President during October 2024. The application of the agreement to pend the tax appeal does indicate that SARS wants this court to rule on the meaning of *"bulk"* (referred to during argument as the merits). I have nevertheless not considered this to be a single consideration, but it is part of a conspectus of considerations. The I November 2024 letter of the Diale Mogashoa on behalf of SARS to the DJP expresses in trenchant terms the need for clarity in the industry on the meaning of "bulk" in regard to aggregates.

[62] In the premises I find that sec 105 does find application due to the dispute between the applicants and SARS being in respect of an anticipated assessment or decision in terms of sec 104 of the TAA.

[63] Nevertheless, I am inclined to grant an order as envisaged in section 105 of the Tax Administration Act, and as sought in prayer 1 of the notice of motion, that this court will hear the current dispute due to the presence of exceptional circumstances.

**NON-JOINDER OF BLUROCK QUARRIES (PTY) LTD**

[64] Blurock Quarries (Pty) Ltd is aware of these proceedings and has filed an affidavit in which it indicates that it does not insist on being joined, i.e. it does not assert its interests in these proceedings. Nevertheless, it will abide an order if the court directs it to be joined to these proceedings.

[65] It expressly states that it regards itself to be bound by the precedent this judgment would represent. Insofar as it does not seek to assert its interest in these proceedings and abides the decision of the court on its joinder, this in itself is sufficient to render the joinder of Blurock Quarries unnecessary (see **In re: BOE Trust Ltd NO (in their capacities as co-trustees of the Jean Pierre de Villiers Trust 5208/2006)** 2013 (3) SA 236 at para 20).

***LOCUS STANDI***

[66] SARS has challenged the *locus standi* of the applicants on two bases:

66.1 Firstly, a challenge was raised as to the authorisation of the first applicant's deponent to depose to the affidavit. This is incorrectly referred to as a locus standi challenge as it is a challenge to the deponent's authority to depose.

66.2 SARS responded to an assertion by the deponent for the applicants that he was authorised to depose on behalf of the applicants. SARS launched Rule 7 proceedings, but the applicants' attorneys pointed out defects in the Rule 7 notice. SARS indicated that it would seek

condonation in this regard, but never proceeded with such an application for condonation.

66.3 The contention that a deponent needs to be authorised is fundamentally flawed. What qualifies a deponent is his knowledge of relevant facts. A deponent need not to be authorised to make an affidavit. The proceedings and the institution thereof need to be authorised and the challenge to the authority of the attorney needs to be done through Rule 7.

66.4 In **Ganes and Another v Telecom Namibia Ltd** 2004 (3) SA 615 (SCA) Streicher JA stated at paragraph [19]:

*"[19] There is no merit in the contention that Oosthuizen AJ erred in finding that the proceedings were duly authorised. In the founding affidavit filed on behalf of the respondent Hanke said that he was duly authorised to depose to the affidavit. In his answering affidavit the first appellant stated that he had no knowledge as to whether Hanke was duly authorised to depose to the founding affidavit on behalf of the respondent, that he did not admit that Hanke was so authorised and that he put the respondent to the proof thereof. In my view, it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the*

*proceedings and the prosecution thereof which must be authorised. … In any event, rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant."*

66.5 The first challenge to standing therefore fails.

66.6 The second challenge to standing is based thereon that the applicants have not made out a case for a declarator. The applicants have asserted a right to approach the court in terms of section 38 of the Constitution. However, this was without expressly identifying the fundamental rights allegedly infringed or at risk of infringement in the founding affidavit.

[67] This was pointed out by SARS in its answering affidavit and in the replying affidavit the applicants contended that the constitutional rights at play were section 22, section 25 and section 33 of the Constitution.

[68] What SARS has advanced as a *locus standi* point is not a locus standi point. Correctly characterised it is rather a challenge to whether the applicants have established a right to a remedy in terms of sec 38, i.e. a declarator as appropriate relief.

[69] However, the issue of *locus standi* is not considered merely from the vantage point of section 38. The relief sought is an invocation of the High Court's power in terms of section 21(1)(c) of the Superior Courts Act, 10 of 2013, in

respect of declaratory relief. If the applicants prove that they have a direct and material interest in a right or obligation, whether present, contingent or future, and they have persuaded the court to exercise its discretion to grant declaratory relief, then the issue of *locus standi* has been established. It is factual.

[70] The applicants have not alleged in the founding papers that specific constitutional rights are being infringed or imperilled. The fundamental rights were only identified in the replying affidavit, and it is trite that a party cannot make out its case in the replying affidavit. Such an allegation in the founding affidavit is the foundation of section 38 relief.

[71] The applicants no doubt have *locus standi* under section 38. The first applicant acts in its own interest and in the interests of its members (section 38(e)). Each of the other applicants asserts an own interest (section 38(a)). The contention that the applicants lack *locus standi* is without substance.

[72] The applicants' failure to allege which fundamental rights are infringed in the founding affidavit means that a declarator in terms of sec 38 is not properly pleaded. But that is not the end of the enquiry. As the applicants have not established a right to declaratory relief for the infringement of fundamental rights as appropriate relief in terms of sec 38, do they establish the right to a declarator on any other basis?

[73] The true issue is whether the applicants established a right to declaratory relief in terms of section 21(1)(c) of the Superior Courts Act, 10 of 2013.

**THE REQUIREMENTS FOR DECLARATORY RELIEF**

[74] There are two requirements for declaratory relief.

[75] In **Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd** 2005 (6) SA 205 (SCA) the two-stage approach to declaratory relief is referred to as follows:

> *"[18] Put differently, the two-stage approach under the subsection consists of the following. During the first leg of the enquiry the court must be satisfied that the applicant has an interest in an 'existing, future or contingent right or obligation'. At this stage the focus is only upon establishing that the necessary conditions precedent for the exercise of the court's discretion exist. If the court is satisfied that the existence of such conditions has been proved, it has to exercise the discretion by deciding either to refuse or grant the order sought. The consideration of whether or not to grant the order constitutes the second leg of the enquiry."*

[76] This approach was confirmed by the Constitutional Court in **Competition Commissioner of South Africa v Hosken Consolidated Investments Limited and Another** 2019 (3) SA 1 (CC) at paragraphs [79] to [80].

**THE FIRST REQUIREMENT: AN INTEREST**

[77] SARS disputes particularly the first applicant's interest and contends that the first applicant has no live controversy with SARS, does not get tax

assessments or opinions for aggregates and is therefore not able to assert an interest in an existing, future or content right or obligation.

[78] As far as the remaining applicants operate quarries and are extractors of aggregates, they are exposed to mineral royalties being payable on extracted unrefined minerals in the form of aggregates.

[79] The first applicant is a registered non-profit company which advances the interests of its members in the aggregates industry. The first applicant acts in its own interest and in the interest of its members.

[80] The contention of SARS that there is no live controversy between the applicants and SARS and that they therefore lack *locus standi* cannot be upheld. In **Forestry South Africa v Minister of Human Settlements, Water and Sanitation and Others** [2024] 1 All SA 22 (SCA) the following is stated in respect of a challenge to standing:

> *"[16] The Statutory Authorities challenged the standing of Forestry SA to have sought declaratory relief. The Statutory Authorities contend that Forestry SA has failed to establish its standing, whether in its own interest, in the public interest, or in the interests of its members. In essence, the Statutory Authorities sought to persuade us that the members of Forestry SA could and should have appealed, in terms of s 148 of the Act to the Water Tribunal, against specific decisions that have been taken that bear upon the interests of its members. Forestry SA lacked standing to seek declaratory relief on behalf of its members, when those members could have sought relief directly before the*

*Water Tribunal. Furthermore, not all members of Forestry SA are affected in the same way by the declaratory relief that is sought, and some may not be affected at all.*

*[17] This objection merges two separate issues. The first is whether Forestry SA has standing to seek declaratory relief on behalf of its members. The second is whether that relief is appropriate relief, given other statutory remedies available under the Act.*

*…*

*[20] The application of Forestry SA has much utility. It avoids a plethora of applications by timber growers that would be costly, take up much court time, and may give rise to inconsistent interpretations. What Forestry SA has sought to do is to have one authoritative interpretation that will bind its members and the Statutory Authorities. There is no want of standing on the part of Forestry SA to secure such an outcome o behalf of its members. It is also difficult to understand how certain members of Forestry SA are not affected by the declaratory relief that is sought. All the members of Forestry SA fall within the regulatory remit of the Act, and the provisions of the Act that give rise to contested interpretations have application to these members."*

[81] The aforesaid considerations also apply in this matter. The challenge to ASPASA's *locus standi* is consequently without substance or merit.

[82] The presence of a live controversy as a basis for declaratory relief is assumed by SARS to be a prerequisite for declaratory relief. This is not so. Once the applicants have shown that they have a direct interest in the declarator sought, then the presence or absence of a live controversy is a consideration in the exercise of the court's discretion whether to grant interdictory relief or not. The existence of a dispute is not a prerequisite. The court's enquiry is after all into the infringement of existing, contingent or future rights and obligations, and not only existing rights and obligations. The declarator affects such rights or potential rights or interests. The applicants therefore have standing (**Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others** 2013 (3) BCLR 251 (CC) at paragraph [37], citing **Ferreira v Levin NO and Others** 1996 (1) SA 984 (CC) at paragraph [41(a)]. A broad approach to standing should be adopted, and this approach should apply not only to instances in which constitutional rights are asserted (**Director General of the Department of Home Affairs v De Saude Attorneys** (2019) 2 All SA 665 (SCA) at paragraph [48].

[83] I am consequently satisfied that the applicants have a direct interest in respect of a declarator affecting their future obligations to pay royalties for aggregates they have extracted in terms of the Act. The first leg of the inquiry into relief in terms of sec 21(1)(c) has been established.

**THE SECOND REQUIREMENT: DISCRETION**

[84] The exercise of a discretion to grant declaratory relief or not, is a discretion to be exercised judicially, taking into account all the circumstances of the case. There are specific issues that need specific consideration in this regard.

[85] In **Minister of Finance v Oakbay Investments (Pty) Ltd and Others** six factors were listed by the full court of the Gauteng Division that a court should take into account in determining whether to exercise its discretion in favour of entertaining an application for a declaratory order.

> *"[59] Herbstein and Van Winsen extrapolate from decided cases factors Courts have taken into account to determine whether judicial discretion should be exercised positively or negatively in an application for declaratory relief. These include:*
>
> *(i) the existence or absence of a dispute;*
>
> *(ii) the utility of the declaratory relief and whether, if granted, it will settle the question in issue between the parties;*
>
> *(iii) whether a tangible and justifiable advantage in relation to the applicant's position appears to flow from the grant of the order sought;*
>
> *(iv) considerations of public policy, justice and convenience;*
>
> *(v) the practical significance of the order; and*
>
> *(vi) the availability of other remedies."*

[86] SARS contends that this case is not one in which the discretion should be exercised to grant the declarator as there are irresoluble disputes of fact on the papers. SARS highlights the following in this regard:

86.1 The applicants contend that SARS initially accepted one approach to the meaning of *"bulk"*, and then subsequently changed its view. SARS denies this and contends that its only interpretation was the one communicated by way of its Interpretation Note 108 in 2019, which has been given effect in the Blurock appeal.

86.2 Notwithstanding SARS's basic acceptance of the historical interactions between SARS and ASPASA, SARS disputes the inferences and conclusions drawn by ASPASA on those interactions as well as the alleged legal consequences that result therefrom.

86.3 This is a reference thereto that *"bulk"* was allegedly accepted by the industry and SARS to refer to the muck pile (i.e. blast rock) with the result that section 6(2)(b) would be applicable. By contrast, SARS contends that *"bulk"* does not have a range (as envisaged by section 6(2)(b)) as bulk remains bulk in whatever form the aggregate is sold. The general grammatical meaning of the word is indicative that beneficiation is irrelevant when it comes to aggregates. As a result, section 6(2)(a) is applicable.

86.4 SARS contends that the dispute revolves around *"transfer"* and not *"bulk"*. The applicants are of the view that an artificial first point of sale, placed at the mouth of the mine, is to be used to determine those

sales. SARS is of the view that the Act levies the royalty on “transfer”, which means the actual point of sale, not the artificial or deemed first possible point of sale. SARS therefore is of the view that the condition specified remains *“bulk”* at the point when it is sold, due to the inherent nature of aggregates.

86.5 SARS disputes that the interpretation of *“muck pile”* in the IPN and the proposed requested amendments to the Act was adopted by either Treasury or SARS.

86.6 SARS contends that these disputes are factual disputes.

86.7 Regarding the first of the alleged disputes, the only issue is whether SARS ever agreed with the applicants’ interpretation or not. Whether SARS agreed with the applicants’ interpretation or not, does not assist in the interpretation of the meaning of *“bulk”*. Its interpretation remains a matter of a legal nature. While the context might refer to the history leading up to the present dispute, that history, regardless of which version is adopted, points to the existence of a standoff between the industry on the one side and SARS on the other side regarding the meaning of *“bulk”*. It is not a material dispute since, even if SARS agreed with the applicants’ interpretation, that does not *per se* render it the correct interpretation. Interpretation is to be determined with reference to the triad of text, context and purpose as set out in Endumeni.

86.8 Regarding the second alleged dispute, it relates to the inferences and conclusions drawn from the interactions between the parties. Insofar as this is a reference to the inference whether section 6(2)(a) or section 6(2)(b) finds application, that too is a legal issue depending on the meaning of the word *"bulk"*. That is not a dispute of fact but is a difference of opinion on the legal consequence of the interpretation of the word *"bulk"*.

86.9 As far as the third of the alleged disputes is concerned, SARS contends that the *"transfer"* (i.e. disposal) fixes the time on which the royalty is to be determined. It contends that the stockpile from which the disposal took place is determinative of the meaning of *"bulk"*. The counter argument from the applicants is that SARS is conflating the timing of the disposal with the condition specified at that time. What is correct is that the date of disposal triggers the duty to pay a royalty, but it is determined with reference to the condition specified in Schedule 2, i.e. *"bulk"*. The latter is a legal issue and not a factual one.

86.10 SARS contends that an *"aggregate"* does not include the *"muck pile"*. In this regard it refers to the IPN definition of a muck pile, meaning *"crushed rock"*. SARS therefore contends that the first reference to aggregate is after crushing. This is clearly incorrect. As sales take place from the muck pile, i.e. from shot rock at the muck pile, a royalty cannot be avoided on such sales. If it is not an aggregate that is sold from the muck pile, as SARS suggests, then there is no guidance on

what it is in terms of Schedule 2. The only reference to an unrefined mineral resource in the schedules is the reference in Schedule 2 to *"aggregates"* in regard to such sales.

86.11 SARS further contends that aggregates do not envisage a range like other minerals. Bulk remains bulk in whatever form the aggregate is sold at the time of disposal. It is a truism that sales from the first stockpile (i.e. the muck pile) would be at a lesser rate per ton than aggregates that have been subsequently beneficiated. The price differences can be quite dramatic, ranging from R55.00 per ton to R600.00 per ton. To base a royalty on aggregates on the assumption that beneficiation is irrelevant, loses sight thereof that the royalty payable would increase with the degree or nature of beneficiation.

86.12 The correct interpretation of the interplay between *"transfer"* and *"bulk"* in the context of aggregates is only factual in the sense that the time of the disposal determines the time when the obligation to favour royalty is triggered. Whether the condition specified in Schedule 2, i.e. *"bulk"* refers to the stockpile from which the sale is made, or whether it refers to the muck pile, is a legal issue and not a factual one. This alleged dispute is therefore not a factual dispute, but a legal one.

[87] I am satisfied that the alleged disputes of fact are either not factual disputes or are not material disputes when it comes to the interpretation from a legal perspective of *"bulk"* in Schedule 2 of the Act.

[88] It is axiomatic to state that the core of the exercise of the discretion to grant declaratory relief is whether the court's interpretation of the word "bulk" is consistent with the declarator sought. That affects the utility of the declarator to the industry and SARS and answers the question whether the declarator settles a material issue between the parties.

**THE MEANING OF *"BULK"***

[89] The purpose, text and context is examined in that sequence.

**THE PURPOSE OF THE MINERALS AND PETROLEUM RESOURCES ROYALTY ACT, 28 OF 2002**

[90] The interpretation of *"bulk"* in Schedule 2 is a unitary process with reference to text, context and purpose. In this matter the purpose of the Act presents a vantage point that assists in the consideration of both text and context.

[91] The preamble to the Act and section 3(1) of the Act reflects the change in mindset pertaining to minerals in South Africa. Contrary to its predecessors, section 3(1) contains an acknowledgement that South Africa's Mineral and Petroleum Resources belong to the nation and the State is the custodian for the benefit of all South Africans.

[92] Section 2 of the Act imposes a royalty payable to the National Revenue Fund in respect of the transfer of a mineral resource. The *"transfer"* refers to a disposal of mineral resources if that mineral resource has not previously been disposed of. This refers therefore to mineral resources as extracted and does

not include on-sales (which are subject to different taxes, e.g. VAT or Income Tax.)

[93] Section 6 of the Act sets a basic condition at which the royalty is determined. The purpose is to ensure that the State is compensated at a base value which extractors cannot undermine in order to reduce the extent of the royalty payable. In terms of section 6(2) gross sales in respect of an unrefined mineral resource transferred attracts a royalty in the condition specified in section 6(2)(a). In respect of gross sales of an unrefined mineral resource transferred in a condition other than as specified in Schedule 2, the gross sales are determined as if the mineral resource were transferred in the condition as specified in Schedule 2.

[94] The ostensible purpose of the aforesaid is to, firstly, set a base condition for purposes of determining the royalty to avoid manipulation of the royalty by extractors and, secondly, not to penalise beneficiation where the condition has changed through a process of beneficiation.

[95] The dual purpose of the Act is therefore:

95.1 To promote beneficiation; and

95.2 To prevent under-compensation of the State by setting a base condition at which the royalty is determined.

[96] There is a fundamental difference between a royalty and a tax. In the context of the Act, the royalty payable to the State as custodian for the nation is to

compensate the nation for the loss of minerals that have been extracted. Once the minerals have been severed from their consolidated base, those minerals are lost to the State and compensation needs to be paid. The condition of the refined minerals is set out in Schedules 1 and 2 respectively to set the base for compensation payable to the State.

**TEXTUAL INTERPRETATION**

[97] SARS contends for the ordinary grammatical meaning of *"bulk"* in ordinary parlance. It refers to a pile or heap. The Shorter Oxford English Dictionary defines the word *"bulk"* as:

*"2. a heap, a pile … a large quantity*

*5. … magnitude, body, size, weight*

*6. a (large) mass or shape."*

[98] SARS contends that it is common cause between the parties that *"aggregates"* means *"crushed stone or crushed rock"*. It relies on the IPN for this proposition.

[99] SARS refers to ASPASA's attempts to persuade Treasury to amend the Act to substitute the word *"bulk"* with *"muck pile"*. As the word *"bulk"* is undefined, ASPASA was pushing for an amendment to *"muck pile"* as *"muck pile"* is a concept that is commonly used in the industry. In the founding affidavit the applicants state:

*"The concept of the 'muck pile' is a concept that is commonly used in the aggregate, cement at lime industries to refer to the broken and fragmented or unconsolidated material at the quarry, especially earth, rock, clay and/or soil after being crushed by blasting (where the mineral deposits being mined are in compact form) or after being excavated (where the mineral deposits being mined are in loose form) which is ready to be taken to the primary crusher if applicable".*

[100] The applicants contend that the milieu in which the word *"bulk"* is used in the Act is not to be determined by its meaning in general parlance. The word *"bulk"* is used in the Act in the context of the mining industry. If the milieu affects the meaning, then the correct milieu must be identified. It is therefore an issue to determine what the general meaning of *"bulk"* in the mining industry would be rather than in general parlance. Further, if the general meaning is in a specialised setting, it may acquire a technical meaning.

[101] Whether that is its general meaning or its technical meaning depends on whether "bulk" also applies to stockpiles after the muck pile, as first point of sale. In general parlance the word "bulk" does bear the meaning contended for by SARS. But if that general meaning is applied, absurd results ensue, like the redundancy of sec 6(2)(b) in respect of aggregates.

[102] The word *"bulk"* in Schedule 2 is used in a technical context in the schedule in which it appears. In such an instance the presumption is that the technical meaning of the term is to be interpreted (Bennion on Statutory Interpretation, 5th Edition, LexisNexis 2008 at 1206). The list of the contents of Schedule 2

demonstrates that the term is used in respect of mineral resources in scientific terms. So, for example, the conditions stipulated for antimony, the entry immediately succeeding "aggregates" refers to "65% Sbb content in the concentrate".

[103] The Act is passed with reference to the mining industry and the words used need to be understood by those in that industry, even if it differs from the ordinary meaning of the word (**Unwin v Hanson** [1891] 2 QB 115 (CA) at 119).

[104] The use of dictionaries in this context also needs to be assessed with reference to determining for whom the word was intended to bear meaning. In **South African Nursing Council v Khanyisa Nursing School (Pty) Ltd and Another** 2024 (1) SA 103 (SCA), Unterhalter AJA provides the following guidance:

> *"[15] The principles that guide our approach to interpretation have often been stated: interpretation is a unitary exercise that takes account of text, context and purpose. Frequently, lawyers have recourse to dictionaries as the repository of the ordinary meaning of the words. This is often a good starting point. But the lawyer's reverence for dictionaries has limits. As this Court has observed, to stare blindly at the words used seldom suffices to yield their meaning in a statute or contract. Dictionaries record the history of how (often disparate) language communities have used words. There is no straightforward attribution of a dictionary meaning of a word as the word's ordinary meaning so as to construe a statute, subordinate legislation or a*

*contract. The dictionary meaning of a word will often give rise to further questions: for whom is this the ordinary meaning, as used in which community? And the different shades of meaning with which a word has been used, over time, quite often lead to selectivity bias. That is to say, the interpreter chooses the dictionary meaning that best suits the preferred outcome of the case, rather than the meaning that shows the greatest fidelity to the meaning that best fits what has been written, given what we know as to the institutional originator of the words, what the words are used for, and the larger design of the instrument we are called upon to interpret."*

[105] In that matter, the meaning of *"a calendar year"* in regulations relating to the training of nurses had to be determined. Rather than finding that an "academic year" runs from January to December, the court found differently. In paragraph [18] the following is stated:

*"[18] … There is no reason to think that, in a modern era of vocational training, there is any convention that requires an academic year to run from January to December. On the contrary, there are very good reasons to suppose, as the founding affidavit reminds us, that the shortage of qualifying nurses requires flexibility as to the period within which an academic year can run. Moreover, since vocational training requires practical training in hospitals and other health care facilities, rigidity as to the time period that may constitute an academic year is not indicated."*

[106] The court embarked upon a process of attributing the meaning to the words *"any calendar year"* by interpreting it in the context of training for nurses and accepting *"the altogether greater weight that would attribute a meaning that is functionally satisfactory, while also allowing for flexibility appropriate to vocational training."*

[107] The interpretation must be functionally satisfactory. The term *"bulk"* therefore needs to be defined with reference to the mining industry, rather than the meaning in common parlance. Further its meaning in a Schedule of a technical nature needs to be taken into account.

[108] Prior to the introduction of section 6A by the 2020 Amendments of the Act, ASPASA passed on comments to Treasury on behalf of the aggregates industry, for Treasury to replace the word "*bulk*" with the "*muck pile*". Concern was expressed that the term "*bulk*" has a wide definition with reference the shorter Oxford English dictionary, which may include aggregate from various points throughout the aggregate deduction or beneficiation process (for example, aggregate from blasting, crushing, screening and/or sizing). In addition to the dictionary interpretation, aggregate throughout the production process is referred to as *"bulk"* in the industry.

[109] ASPASA sought to substitute the word *"bulk"* with *"muck pile"* as the latter clearly referred to unconsolidated material at the quarry after being crushed by blasting or after being excavated. Its concern was that the term "bulk" in general parlance is not consistent with the meaning to be assigned to the term "*bulk*" in the context of royalties. The suggestion of *"muck pile"* as the

alternative to *"bulk"* was to achieve the very purpose of the Act, namely, to set a minimum condition at which the royalty is determinable and not to penalise beneficiation. ASPASA was vocalising a concern that the meaning of the word *"bulk"* as generally used, would not be appropriate for purposes of the technical purpose the term serves in the Schedule in determining the royalty.

**CONTEXT**

[110] Schedule 2 is the immediate context of the term "bulk". The Act distinguishes between refined minerals and unrefined minerals. The latter attracts a higher royalty than the former.

[111] Refined minerals and their conditions are specified in Schedule 1 and include minerals such as "gold – refined and smelted to a 99.5% purity"; "Platinum group metals – refined and smelted to a 99.9% purity"; "Nickel (base metal) – refined once processed to metal of 99.5% purity".

[112] Other refined mineral resources are defined into subcategories of concentrating, containing mineral and materials that do not contain any metal. Aggregate falls within the latter category and is referred to in Schedule 2 in the conditions specified for such materials as *"bulk"*.

[113] SARS contends that the distinction between refinable metals and polishable precious stones on the one hand and non-refinable materials such as sand, clay and aggregate (bearing the specified condition "*bulk*") is relevant. It is contended that the condition specified for the latter as *"bulk"* throughout is a

reference to such materials not being capable of being refined or purified like metals.

[114] SARS contends that its interpretation does not penalise beneficiation or value adding processes, such as crushing, washing and screening. SARS contends that the incentive is inherent in the *"lower royalty rate"*. The 2013 explanatory memorandum contain the following explanation:

*"The mineral royalty regime was designed recognising that beneficiation is beneficial to the South African economy. The ideal situation would be to impose a royalty on minerals at the mouth of the mine. This is impossible to do as all minerals have to go through some form of beneficiation (e.g. crushing, washing etc) before they can be sold. As a result, the principle is to establish 'the value' at the 'first saleable point', which will naturally have an element of beneficiation. A compromise was struck in which unrefined minerals would be subject to a royalty rate that is slightly lower than what would have been used at the mine mouth, and refined minerals as subject to an even lower rate, thus recognising the beneficiation effort."*

[115] SARS contends that the aforesaid passage indicates that any beneficiation required to bring unrefined metals to the condition specified is already recognised and incentivised in the current rate for unrefined minerals, which is lower than the rate that would be leviable on those minerals had they been transferred at the mine mouth.

[116] This proposition is not understood in reference to aggregates. If that proposition were applied to aggregates in beneficiated form, then the royalty

would increase as the value of the beneficiated stockpile increased. Even if a lower royalty were applied to different stockpiles that have been beneficiated, that would still result in a *de facto* penalisation of beneficiation. The purpose of the Schedule is to provide a fixed condition to determine a royalty. SARS's interpretation provides for a variable royalty for aggregates, which depends not on a fixed condition as specified, but on a variable presentation of such aggregate after beneficiation and at the time of disposal.

[117] As aggregates are already commercially viable at the mine mouth, i.e. at the muck pile, the royalty must recognise it as the first stockpile.

[118] SARS contends that one of the purposes of the regime is to discourage extractors from transferring minerals without undergoing meaningful transformation or processing to render them commercially viable. As a general proposition this is accepted, but applied to aggregates, it loses sight of the fact that the product is already commercially viable at the muck pile.

[119] SARS therefore considers aggregates whose condition has been specified as *"bulk"* to remain bulk whether it is at the muck pile, has been crushed, washed or screened. It is therefore contended that aggregate can never be transferred beyond the condition specified, alleging that its condition specified is not based on the level of purity or refinement. In that way aggregates are treated differently to other minerals in a manner prejudicial to the aggregate industry and the construction industry. Refinement of minerals bearing ore is achieved through beneficiation. The equivalent beneficiation of aggregates is achieved after the muck pile by crushing, washing and screening.

[120] The interpretation advanced by SARS loses sight of the difference in price between aggregates at the muck pile and those that have undergone beneficiation. While minerals containing ore are recognised as increasing in value through the process of beneficiation, somehow this is not seen to be possible as far as aggregates are concerned. This loses sight of the benefits of beneficiation applied to aggregates. It also results in absurd consequences in respect of aggregates in following respects:

120.1 Firstly, it renders section 6(2)(b) totally redundant in the context of aggregates. This is so despite the fact that aggregates that have been beneficiated are treated in the marketplace as being significantly more valuable than at muck pile. To determine a royalty based on the increased value would be to penalise aggregates in a manner in which minerals bearing ore are not penalised. This is inherently discriminatory and at variance with the purpose of the Act, which is to promote beneficiation and not to penalise it.

120.2 The effective redundancy of section 6(2)(b) and the failure to recognise the increased value of beneficiation when applied to aggregates renders SARS' interpretation contrary to the purpose of the Act.

120.3 It provides for a variable base rate depending on which bulk stockpile is the source of the sale. SARS assigns a meaning to the word *"bulk"* that does not recognise the purposes of the Act and the mining environment in which this term is used.

[121] In light of the aforesaid, the interpretation assigned to the word *"bulk"* by SARS does not withstand a proper interpretation exercise of the term with reference to text, context and purpose.

[122] SARS' interpretation defeats the purpose of the Act and renders redundant section 6(2)(b), which evidently finds application to aggregates that have undergone beneficiation and are sold in a different condition beyond the muck pile.

[123] In the premises I find that the term *"bulk"* in Schedule 2 of the Act bears the meaning contended for by the applicants.

[124] Having made out a case for the declarator, the question arises whether the court should exercise its discretion to grant the relief.

**OTHER FACTORS RELEVANT TO DISCRETION**

[125] SARS contends that there are a multitude of considerations as to why the discretion should not be exercised in favour of the applicants. The first relates to the fact that the same issue is to be determined in the Blurock tax appeal. It is further contended that if the relief were granted in this application, it would render the Blurock tax appeal moot. This has been dealt with supra.

[126] A further consideration is the presence of the disputes of fact which have been dealt with supra.

[127] A declarator will have significant utility in the aggregates and construction industries. The declaratory relief will settle an issue of great significance to

the aggregates industry and thereby bring clarity to extractors of aggregates. As a ruling in favour of the applicants would represent an advantage in that it demonstrates the incorrectness of SARS' approach in the Tax Court, that is a tangible and justifiable advantage. In respect of considerations of public policy, justice and convenience, the speedy resolution of this purely legal interpretation of the word *"bulk"* represents the advantage to the administration of justice. It avoids the case by case repeated determination of this matter in the tax court.

[128] The High Court is empowered to issue declarators whereas the tax court cannot grant declaratory relief. The declarator would have the benefit of enforcing and endorsing the purpose of the Act in a single process, rather than in multiple processes that will not have a binding effect other than on the immediate parties in a tax dispute before the Tax Court. It has practical significance.

[129] Regarding the final consideration, the availability of alternative remedies in terms of the Tax Act needs to be assessed on the basis of whether such remedies are adequate and whether the relief granted would be final.

[130] SARS contends that an alternative remedy exists in the form of the objection and appeal process pursuant to Chapter 9 of the Tax Administration Act. This implies that individual extractors need to follow the objection and appeal process in the Tax Appeal Court. This would generate a proliferation of litigation in the Tax Court, which is not in the public interest or in the interest

of justice (**Socratous v Grindstone Investments 134 (Pty) Ltd** 2011 (6) SA 325 (SCA) at paragraph [16].

[131] SARS has suggested that an alternative remedy in terms of Chapter 7 of the TAA is available to the applicants. Chapter 7 provides for applications for a binding class ruling. Chapter 7 recourse is not available as of right (section 80(1)(b)(iii)(aa) and (cc) of the TAA. A Chapter 7 ruling cannot create a precedent, and such class rulings can be withdrawn by SARS at will. (Section 86(2) of the TAA).

[132] Such a class ruling is not the result of an adjudicative legal process, but the expression of the unilateral view of SARS. The remedy would therefore not be an effective remedy in the sense of bringing finality to a disputed interpretation as a matter of law

[133] A Tax Court has limitations that the High Court does not have. In **Lion Match Company (Pty) Ltd v Commissioner for the South African Revenue Service** (IT13950) [2017] ZATC5 the following is stated at paragraph [13]:

> *"[13] It is trite that the tax court is a creature of statute and its jurisdiction is specified in the TAA. In this context, jurisdiction means the power vested in the court by law to adjudicate, determine and dispose of a matter. Subsequently, Bertelsmann J sitting in the Tax Court, agreed that 'the tax court only has adjudicate jurisdiction allocated to it by the legislature over matters brought before it'. It is not in dispute that the powers of the tax court are limited to those specified in the TAA."*

[134] The Tax Court can therefore not make a binding declaratory order.

[135] The declarator, if granted in this instance, would avoid a multitude of disputes before the Tax Court. Rather than opening the *"floodgates"* to approaches to the High Court, rather than the Tax Court, the declarator would avert tax disputes on the proper interpretation of *"bulk"* and thereby reduce disputes that would be referred to the Tax Court. The declarator would therefore avert litigation, rather than foster such litigation.

[136] On balance, I am therefore satisfied that the declaratory relief will dispose of the true issue between the parties.

**THE STRIKE OUT APPLICATION**

[137] The applicants have sought the striking out in terms of Rule 6(15) of the following paragraphs in the answering affidavit, contending that it is prejudiced by the allegations:

137.1 Paragraph 14: The words "the applicants and Blurock attempted to subvert section 105 by creating the pretence" in the first sentence, and words *"the convenient advice allegedly receive"* in the last sentence.

137.2 Paragraph 18: The last sentence, reading *"the applicants' attorneys' attempt to delay the tax appeal pending the finalisation of this application provides a clear proof that Blurock seeks to benefit from the outcome of this application and the exclusion of Blurock from*

*these proceedings is simply a stratagem to avoid the application of section 105."*

137.3 Paragraph 22: In its entirety, which reads: *"The conduct of the applicants in this matter constitutes an abuse of this courts processes, time and resources."*

137.4 Paragraph 23: The words *"is an abuse of process"* in the second sentence.

137.5 Paragraph 41: The words *"and reflect on the bona fides of the applicants"* in the third sentence.

137.6 Paragraph 47: The words *"however, the probabilities and objective facts demonstrate that the failure in this regard if of a more sinister nature"* in the fourth sentence.

137.7 Paragraph 47.13: The words *"true reason is to conceal the true nature, purpose and effect of the relief sought in these proceedings"*.

137.8 Paragraph 54: The words *"in its attempt to conceal the nature, purpose and effect of the relief sought in this application"* in the first sentence.

137.9 Paragraph 155: The words *"ASPASA's intention in launching this application is improper that there is a lack of bona fides on its part"* in the first sentence.

137.10 Paragraph 185: The second sentence in its entirety, which reads: *"In fact, the applicants are misleading the court."*

137.11 Paragraph 195: The last sentence in its entirety, which reads: *"ASPASA is at best opportunistic and at worst trying to mislead the court."*

[138] The response by SARS in its heads of argument to the aforesaid application to strike out is to merely indicate that, if the application is persisted with, legal argument will be advanced as to why the application is lacking in merit and stands to be dismissed with costs, including the costs occasioned by the employment of two counsel.

[139] During argument, counsel for the respondent confirmed reliance on the allegations made in the answering affidavit, which form the target of the strike out. The contention is made that there is a factual underpin to the contentions made. The respondent further contends that the factual basis underpinning the allegations were in favour of the respondents in the application of the Plascon-Evans rule.

[140] Having regard to that part of par 18 that is sought to be struck out, SARS is making serious allegations in respect of the Blurock tax appeal that are diametrically opposed to what was conveyed to the DJP on 1 Nov 2024. There is no factual underpin for the allegations made.

[141] The allegations quoted in the application to strike out do not form the core defence of SARS. Since SARS agreed to pend the Blurock tax appeal, its

submissions in the answering affidavit and oral submissions conflict with that position. The alleged factual basis for the allegations is not established.

[142] The allegations of sinister motives, abusing the court process and misleading the court are regrettable , particularly coming from such an important and powerful organ of state as SARS. The language used is intemperate and disproportionate to the position advanced by SARS. The accusations are serious, scandalous and vexatious (**Helen Suzman Foundation v President of the Republic of South Africa** 2015 (2) SA 1 (CC) at paragraph [28]).

[143] The use of such intemperate language in a matter pertaining to the interpretation of a statute, is to be deprecated. The contention that there is a factual underpin is not borne out by the facts. Rather, the language used is indicative of inappropriate hostility by SARS in respect of taxpayers on a matter of pure statutory interpretation. The applicants have approached the court to ensure compliance with the Act- not to undermine SARS. SARS previously expressed an interpretation consistent with that of the applicants in the opinion filed by its in respect of Afrisam (Pty) Ltd. In a non-binding private opinion dated 9 March 2012 two specialist in respect of direct taxes, in SARS' large business centre expressed the opinion that "the conditions specified in Schedule 2 of the Royalty Act for aggregate is the bulk of the quarry for once it has been extracted from the earth ("the muck pile"). Although this is not binding, the position advanced by the applicants cannot be construed as a stratagem. Nor can devious intentions be assigned to the applicants as suggested by the paragraphs identified in the application to strike out.

[144] There is an additional requirement for a strike out in motion proceedings. That relates to the establishment of prejudice as envisaged by Rule 6(15) of the Uniform Rules of Court.

[145] The words used by the respondent and which form the subject of the application to strike out have the capacity to prejudice the applicants. The question is whether there is sufficient prejudice to come to the applicants' assistance. In **Beinash v Wixley 1997 (3) SA 791 (SCA) at 733I-734B** the presiding judge dismissed a strike out as he was assessing the words as a judge and not as a lay person. He could disabuse his mind of the scandalous and vexatious allegations.

[146] The applicants were not in fact prejudiced as I could also disabuse my mind of the objectionable allegations. However, if the test for prejudice were determined by this consideration, it would render strike out applications in terms of rule 6(15) redundant. All such applications are considered by judges. The repetition of the contentions and the invocation of Plascon Evans in such circumstances point to the appropriate test requiring as a minimum that the words must have the capacity to prejudice. Whether there are factors warranting strike out will depend on the facts of the matter at hand. In this instance the need for the applicants to submit to SARS assessments in the future, in the face of the words, is a consideration I take into account.It is an interests of justice consideration in the administration of justice.SARS or any other organ of state must treat taxpayers with respect.

[147] The prejudice in rule 6(15) must relate to the conducting of the specific case. But this case has not only a history, but a future and if SARS were permitted to use such an intemperate tone with a taxpayer who has no choice but to have continuing interactions with SARS, then the playing fields need to be levelled to avoid such intemperate language.

[148] I am satisfied that, despite there not being de facto prejudice at present, the facts of this matter are sufficient to warrant a finding of prejudice in the sense of that term in rule 6(15). The strike out application succeeds.I order the respondent to pay the costs of the application to strike out on a punitive scale, as a mark of disapproval of the conduct of SARS in its treatment of a taxpayer approaching the court for relief on a matter of law.

[149] I make the following order

1. An order as envisaged in section 105 of the Tax Administration Act, 28 of 2011, to assume jurisdiction to adjudicate this application, is granted.

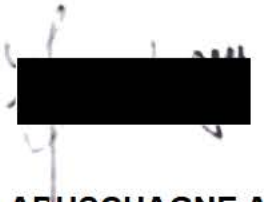
2. A declarator is issued that *"bulk"* as used in respect of aggregates in Schedule 2 to the Mineral and Petroleum Resources Royalty Act, 28 of 2008 means the condition in which shot rock (i.e. blasted rock) exists at the muck pile prior to processing (i.e. crushing or other form of beneficiation).

3. Accordingly, aggregates as at the muck pile is the condition stipulated by Schedule 2.

4. The application to strike out is granted and the quoted portions set out supra are struck from the answering affidavit

5. The costs of the application to strike out are to be paid by the respondent, including the costs of two counsel on an attorney and client scale, Scale C.

6. The respondent pays the costs of the application, including the costs of two counsel, Scale C.



**LABUSCHAGNE AJ**