REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 053180/2022

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

DATE: 21 January 2025

SIGNATURE OF JUDGE:

In the matter between:

SANDBAKEN BOERDERY (PTY) LTD	Applicant
and	
COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	First Respondent
THE SOUTH AFRICAN REVENUE SERVICE	Second Respondent

JUDGMENT

Woodrow, AJ:

INTRODUCTION:

[1] The applicant is Sandbaken Boerdery (Pty) Ltd ("**Sandbaken**"). Sandbaken conducts a mixed farming operation, comprised of livestock and crop farming, on a number of farms in Mpumalanga.

[2] The first respondent is the Commissioner for the South African Revenue Service (the "**Commissioner**"), and the second respondent is the South African Revenue Service ("**SARS**").

[3] Sandbaken is a registered vendor for purposes of the Value Added Tax Act, Act 89 of 1991, and is also registered for diesel refund purposes as contemplated in section 75(1A) and (4A) of the Customs and Excise Act, Act 91 of 1964 (the "**Customs Act**").

[4] Sandbaken uses diesel in its farming operations and for farming purposes. Sandbaken utilised the provisions of section 75(1A)(a) and (b), read with item 670.04 of Schedule 6, Part 3 of the Customs Act, to recoup the fuel levy on its fuel purchases and fuel usage in conducting its farming operations, (commonly referred to as 'diesel rebates').

[5] On 31 March 2021, the Commissioner made a determination (the "**determination**") disallowing the diesel rebate claims of Sandbaken in the sum of R711,223.08 in respect of the tax period from December 2018 to October 2020 (the "**relevant tax period**"). As a result of the disallowance of

the diesel rebate claims, the Commissioner further levied interest in the amount of R56,699.20.[1]

[6] Sandbaken seeks *inter alia* to set aside the determination. Sandbaken has brought a statutory appeal in terms of section 47(9)(e) of the Customs Act.[2]

[7] Sandbaken claims the following relief in its notice of motion:

1. That the First Respondent's decision to refuse the Applicant's refund of the fuel levy and Road Accident Fund levy leviable on distillate fuel and/or on diesel purchases in accordance with the provisions of section 75(1A) of the Customs and Excise Act, 91 of 1964 ("*the Act*") and Rebate Item 670.04 of Schedule 6, Part 3 to the Act, to the extent stated in the said Rebate Item, dated 31 March 2021 be set aside;

2. That it be declared that the Applicant is entitled to the refunds of the fuel levy leviable on distillate fuel and/or diesel in terms of section 75(1A) of the Act in accordance with the provisions of section 75 of the Act and in accordance with Rebate Item 670.04 of Schedule 6, Part 3 to the Act, to the extent stated in the said Rebate Item, in respect of the 2018/12 to 2020/10 tax periods (both periods inclusive);

3. That the First Respondent's decision to impose penalties and/or interest, in respect of the aforesaid disallowed claim for a refund to the Applicant in respect of the aforesaid tax periods, be set aside;

4. That the First and/or Second Respondent(s) be ordered to pay the amount of R711,223.08 to the Applicant, in respect of funds received by the First and/or Second Respondents which are due and owing to the Applicant;

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[1] The determination is contained in the 'letter of demand' ("**SB7**" to the founding affidavit), the content of which is dealt with more fully under the heading "Factual Background" later herein.

[2] Section 47(9)(e) of the Customs Act provides: "*(e) An appeal against any such determination shall lie to the division of the High Court of South Africa having jurisdiction to hear appeals in the area wherein the determination was made, or the goods in question were entered for home consumption.*"

5. That the First and/or Second Respondents be ordered to pay the costs of this application, inclusive of the costs of two counsel."

THE CUSTOMS ACT:

[8] The long title to the Customs Act describes its purpose as:

> To provide for the levying of customs and excise duties and a surcharge; for a fuel levy, for a Road Accident Fund levy, for an air passenger tax, an environmental levy and a health promotion levy; the prohibition and control of the importation, export, manufacture or use of certain goods; and for matters incidental thereto.

[9] The purpose of the fuel levy is to raise revenue for the fiscus:

> The primary taxing provision – the fuel levy – has as its purpose to raise revenue for the State. The rebate scheme, which was introduced later, has as its purpose to grant a financial indulgence to firms engaged in certain forms of primary production.[3]

[10] A fuel levy and Road Accident Fund levy ("**RAF levy**") are payable on all distillate fuel (which includes diesel)[4] manufactured or imported into the Republic on entry or deemed entry for home consumption thereof.[5] Accordingly, when purchasing diesel, included in the price of such diesel is (**a**) a fuel levy and (**b**) a RAF levy.

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[3] **Commissioner, South African Revenue Service v Glencore Operations SA (Pty) Ltd** (Case no 462/2020) [2021] ZASCA 111 (10 August 2021) par [57].

[4] Section 75(1C)(b)(ii) provides that:

"(b) For the purposes of this section and the said item of Schedule 6-

(i) …

(ii) '**distillate fuel**' includes diesel and '**diesel**' includes distillate fuel."

[5] Section 47(1) of the Customs Act reads as follows: "*Subject to the provisions of this Act, duty shall be paid for the benefit of the National Revenue Fund on all imported goods, all excisable goods, all surcharge goods, all environmental levy goods, all fuel levy goods and all Road Accident Fund levy goods in accordance with the provisions of Schedule 1 at the time of entry for home consumption of such goods …*"

[11] Section 75(1)(d) of the Customs Act[6] provides that a refund of the fuel levy and the RAF levy levied on fuel may be granted by the Commissioner under certain conditions:

> (1) Subject to the provisions of this Act and to any conditions which the Commissioner may impose-
>
> …
>
> (d) in respect of any excisable goods or fuel levy goods manufactured in the Republic described in Schedule 6, a rebate of the excise duty specified in Part 2 of Schedule 1 or of the fuel levy and of the Road Accident Fund levy specified respectively in Part 5A and Part 5B of Schedule 1 in respect of such goods at the time of entry for home consumption thereof, or if duly entered for export and exported in accordance with such entry, or a refund of the excise duty, fuel levy or Road Accident Fund levy actually paid at the time of entry for home consumption shall be granted to the extent and in the circumstances stated in the item of Schedule 6 in which such goods are specified, subject to compliance with the provisions of the said item and any refund under this paragraph may be paid to the person who paid the duty or any person indicated in the notes to the said Schedule 6:
>
> Provided that any rebate, drawback or refund of Road Accident Fund levy as contemplated in paragraph (b), (c) or (d), shall only be granted as expressly provided in Schedule 4, 5 or 6 in respect of any item of such Schedule.

[12] Section 75(1A)(a) and (b) of the Customs Act provide that:

> (1A) Notwithstanding anything to the contrary contained in this Act or any other law-

[6] Section 75 is headed "***Specific rebates, drawbacks and refunds of duty***"

(a)(i) a refund of the fuel levy leviable on distillate fuel in terms of Part 5A of Schedule 1; and

(ii) a refund of the Road Accident Fund levy leviable on distillate fuel in terms of Part 5B of Schedule 1; or

(iii) only a refund of such Road Accident Fund levy,

shall be granted in accordance with the provisions of this section and of item 670.04 of Schedule 6 to the extent stated in that item;

(b) such refunds shall be granted to any person who-

(i) has purchased and used such fuel in accordance with the provisions of this section and the said item of Schedule 6; and

(ii) is registered, in addition to any other registration required under this Act, for value-added tax purposes under the provisions of the Value-Added Tax Act, 1991 (Act 89 of 1991), and for diesel refund purposes on compliance with the requirements determined by the Commissioner for the purposes of this Act and the Value-Added Tax Act;

[13] It is common cause that Sandbaken is duly registered as contemplated by section 75(1A)(b)(ii) of the Customs Act.[7]

[14] Rebate item 670.04 is for "*Distillate fuel purchased for use and used for the purposes specified in, and subject to compliance with Note 6.*"

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[7] See also: Section 75(1C)(b)(i) and Note 6(a)(vii) of Schedule 6, Part 3 the Customs Act.
Section 75(1C)(b)(i) provides that:
"*(b) For the purposes of this section and the said item of Schedule 6-*
*(i) '**user**' shall mean, according to the context and subject to any note in the said Schedule 6, the person registered for a diesel refund as contemplated in subsection (1A);*"

[15] The refund in the present matter is calculated on ‘eligible purchases’ and may be claimed on 80% of the total eligible purchases.[8]

[16] The payment of the refund is deemed to be provisional. Section 75(1A)(e) of the Customs Act provides:

> (e) any such payment or set-off by the Commissioner shall be deemed to be a provisional refund for the purpose of this section and the said item of Schedule 6 subject to the production of proof by the user referred to in subsection (1C) (b) at such time and in such form as the Commissioner may determine that the distillate fuel has been-
>
> (i) purchased as claimed on the application for a diesel refund; and
>
> (ii) used in accordance with the provisions of this section and the said item of Schedule 6;

[17] The Commissioner is entitled to investigate any application for a refund. Section 75(1C)(a) of the Customs Act provides:

> (1C) (a) 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) duly entered or is deemed to have been duly entered in terms of this Act;
>
> (ii) purchased in the quantities stated in such return;
>
> (iii) 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 6.

[8] Schedule 6, Part 3, note 6(b)(i)

[18] Section 75(1C)(d) of the Customs Act contains certain deeming provisions in respect of the consequences of a user failing *inter alia* to provide the Commissioner with a declaration in such form and supported by such documents as may be prescribed in the notes to item 670.04:

(d) (i) Any user who has been granted such a provisional refund shall, in relation to the purchase and use by him of the fuel concerned, furnish the Commissioner at such times as may be prescribed in the notes to item 670.04, with a declaration in such form and supported by such documents as may be prescribed in such notes.

(ii) Any user who fails to comply with the provisions of subparagraph (i) shall be deemed to have used such fuel for a purpose or use other than the purpose or use stated in the said item of Schedule 6 and the amount of such refund shall be deemed to be a refund not duly payable to such user and shall be recoverable in terms of section 76A.

[19] Section 75(4A) of the Customs Act provides as follows:

(a) Any person who registers for a diesel refund as contemplated in subsection (1) shall be deemed to have registered in addition for the purposes of section 59A.

(b) (i) Any return for refund of such levies shall be in such form and shall declare such particulars and shall be for such quantities and for such periods as may be determined by the Commissioner.

(ii) Any return for refund of such levies shall be submitted within two years from the date of purchase of such fuel.

(c) Any seller of such fuel shall furnish such user with an original invoice reflecting the particulars, and shall keep a copy of such invoice for such time, as may be prescribed in the notes to item 670.04.

(d) Any user shall complete and keep such books, accounts and documents and furnish to the Commissioner at such times such particulars of the purchase, use or storage of such fuel or any other particulars as may be prescribed in the notes to item 670.04.

(e) (i) Notwithstanding anything to the contrary in this Act contained, any user of distillate fuel who has been granted such refund and who fails to-

(aa) keep any such invoice;

(bb) complete and keep such books, accounts and documents; or

(cc) forthwith furnish any officer at such officer's request with such invoice and the books, accounts and documents required to be completed and kept,

shall, in addition to any other liability incurred in terms of this Act in respect of the fuel to which such failure relates, be liable, as the Commissioner may determine, for payment of an amount not exceeding the levies refunded on such fuel, unless it is shown by the user within 30 days of the date of any demand for payment of such amount in terms of this section that the fuel has been used in accordance with the provisions of the said item of Schedule 6.

(ii) Any amount for which any person is liable in terms of this section shall be payable upon demand by the Commissioner.

(f) …

(g) …

(h) …

(i) The Commissioner may by rule prescribe any form or procedure or condition reasonably required for the effective administration of such refunds.

[20] Section 75(7A) of the Customs Act provides:

(7A) Any person to whom a refund of levies has been granted on any distillate fuel in terms of the provisions of item 670.04 of Schedule 6, as the case may be, and who has disposed of such fuel or has applied such fuel or any portion thereof for any purpose or use otherwise than in accordance with the provisions of such items and the use declared in the relevant application for registration shall pay on demand to the Commissioner the full amount of any refund granted to him in respect of such fuel or such portion thereof, failing which such amount or such portion shall be recoverable as if it were a duty payable under this Act.

[21] Section 76A(1) of the Customs Act provides:

(1) If the Commissioner, purporting to act under the provisions of section 75 or 76, pays to any person by way of a refund or drawback any amount which was not duly payable to that person under those provisions or which was in excess of the amount due to that person by way of a refund or drawback under those provisions, that amount or the excess, as the case may be, shall be repaid by the person concerned to the Commissioner upon demand, failing which it shall be recoverable in terms of this Act as if it were the duty or charge concerned or part of such duty or charge, as the case may be.

[22] Schedule 6, Part 3, Note 6 is relevant to the determination of this matter. The relevant provisions thereof are not repeated here but dealt with in relevant part when dealing with the findings in this matter.

ISSUES

[23] In terms of the joint practice note filed by the parties, the court has to decide upon four main issues:

a. Whether the invoices supplied to the respondents are in compliance with Part 3[9] of Schedule 6 of the Customs Act?

b. Whether the record keeping of Sandbaken, with specific reference to its logbooks for diesel usage, are in compliance with Part 3 of Schedule 6 of the Customs Act?

c. Whether the diesel storage records of Sandbaken are in compliance with Part 3 of Schedule 6 of the Act?

d. Whether the diesel was used in the applicant's primary production activities in farming?

[24] There are certain related issues that are raised on the papers and in the parties' respective heads of argument that require adjudication. The question ultimately is whether Sandbaken has met its *onus* in the present 'wide appeal' in respect of its claim for the refunds in respect of the relevant tax period.

FACTUAL BACKGROUND

[25] I set out the background facts in order to provide some context to the issues referred to above. I attempt to provide a synopsis in this regard. It is neither

[9] The parties repeatedly refer to 'Note 3' in this section of their joint practice note which appears to be a mistake.

sensible nor feasible to rehash all of the background facts. I point out that the exposition provided includes substantial reference to what has been included in correspondence and documentation attached to the founding affidavit. The founding affidavit in various instances does not deal in any detail with such attachments.[10]

[26] On 12 January 2021, SARS directed a letter of engagement to Sandbaken indicating that SARS intended "*… to conduct a diesel refund audit covering tax period 12/2018 — 10/2020.*" (the "**letter of engagement**").[11] In the letter of engagement Sandbaken was requested to provide copies of the following documents/information for each period under audit within 14 days as follows:[12]

- Detailed description of the following:
    - Nature of the business activities/operations on which the diesel for the audit period was claimed
    - Place where the business activities/operations on which the diesel for the audit period was claimed.
- Type of accounting system used
- A plan (size of ground/map of the farm) indicating the size of land utilised for mixed farming.
- An organogram (process flow) of how the farming process is done,

[10] See, for instance, founding affidavit paragraph 8.5: "*[Sandbaken] … responded on 25 March 2021, providing further information regarding the issues as identified, and mentioned above. A copy of that letter is annexed as* ***Annexure "SB6"****.*"
[11] "**SB3**" to the founding affidavit.
[12] SARS pointed out that the listed information is not an exhaustive list, but that further documents / information may be requested if necessary.

- Monthly diesel purchases. In this regard, you must provide a copy of the purchase invoices as well proof of payment thereof in respect of each month of the audit period.

- General ledger accounts for diesel purchases,

- Individual usage logbooks for each of the vehicles into which diesel was dispensed.

- Indication of who is responsible for the transportation of your products and where are they delivered.

- Confirmation on whether you employ any contractors and/or subcontractors to perform any of the business activities /operations on your behalf. If applicable, provide the following additional information/documents:

    - Contract entered into between yourself and each of the contractors/subcontractors

    - Invoices issued by each of the contractors /subcontractors for the audit period.

- Records reflecting the storage and use of the diesel for the audit period(storage tanks), reflecting the following (distribution/and usage logbook/records)

    - The date or period of use;

    - The quantity and purpose of usage;

    - Full particulars of any diesel supplied on a dry basis to any contractor or other person who renders qualifying services to you;

- The capacity of each tank in which diesel is stored and the receipt and removal from such tanks;

- The quantity of diesel supplied to each vehicle and what the vehicle was used for

- The closing balance of the diesel for the various periods.

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

- Power of attorney if communication will be presented by the accountant/bookkeeper.

- List of assets on which diesel rebates are claimed.

- Copy of latest annual financial statements.

[27] On 3 February 2021, Sandbaken's accountants, VDM chartered accountants ("**VDM**") responded to the letter of engagement.[13] In the response, VDM briefly described the mixed farming operation and activities conducted by Sandbaken, attached a map of the farms on which the operations take place (being farms leased by Sandbaken), stated the accounting system as 'Pastel', deferred to the director of Sandbaken in respect of the process flow of how the farming process is done, stated that it "*… is practically impossible for each of the vehicles into which diesel was dispensed to have an individual logbook...*" but that there is a separate detailed logbook for each of the diesel tanks "*… where the purpose of disposal as well as the vehicle into which diesel was dispensed is clearly indicated.*", stated that the transportation of goods by Sandbaken "*… is limited to the transportation of harvested crops from the lands to the storage facilities on the farm and*

[13] "**SB4**" to the founding affidavit.

occasionally to silos ...", and that there are no contractors or subcontractors that perform any of the farming activities on behalf of Sandbaken.

[28] On 5 March 2021, SARS issued a letter / notice of intention to assess Sandbaken (the "**notice to assess**").[14] The notice to assess contained certain *prima facie* audit findings under three headings: "*Invalid invoices*"[15], "*Distribution Logbook*"[16] and "*Failure to provide supporting documentation*"[17]. In the notice to assess, Sandbaken was informed that the Commissioner was of the *prima facie* view that 6,451 litres[18] of distillate fuel was "*non-eligible purchases*" as Sandbaken did not comply with the provisions of section 75 of the Customs Act and Note 6 to Part 3 of Schedule 6 thereof. The aforesaid *prima facie* view was stated to be based on the following:

a. Invalid invoices: "*All diesel claimed was considered non-eligible as invoices were addressed to CJ Cronje and not Sandbaken Boerdery as required in terms of Schedule 6 Part 3 Note 6(d)(cc) to the [Customs] Act.*"

b. Distribution Logbook: The logbook provided by Sandbaken does not meet the requirements of a logbook as certain information – "*opening and closing hour meter/odometer readings, distance, duration of use, purpose of utilisation*" – is lacking or insufficient. In

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[14] "**SB5**" to the founding affidavit.

[15] SARS stated that the diesel purchase invoices supplied by Sandbaken were addressed to 'PJ Cronje and Seuns' as the purchaser of the diesel and not Sandbaken, and that the invoices did not reflect the address of the purchaser.

[16] SARS stated that the distribution logbook "*… contains no details regarding hour meter or odometer readings, kilometres travelled or running time..*", that no "*non-eligible usage was recorded*", that the descriptors of "*the purpose of the use of diesel consist of generic descriptions*", and that a sample of (i.e. certain/some of) the assets / vehicles identified in the logbook could not be traced to the asset register of Sandbaken.

[17] SARS stated that Sandbaken had failed to supply certain documentation as had been requested in the letter of engagement, namely:

"• *Process flow of how the farming process is done*
• *The number of tanks and the capacity of each tank*
• *Place where the business activities /operations on which the diesel for the audit period was claimed.*
• *Individual usage logbooks for each of the vehicles into which diesel was dispensed.*"

[18] See paragraph 4 of the notice to assess. This number is clearly incorrect. Schedule A to the notice to assess reflects the 'non-eligible purchases (Litres)' as 262,511 litres. See also *inter alia* paragraph A of the notice to assess, and the notice to assess read as a whole.

combination, the lack/insufficiency of such information "*made it impossible for the auditor to carry out basic tests in an attempt to determine whether the litres allocated to the alleged activity could reasonably have been so utilised. This is required per Schedule 6 Part 3 Note 6 paragraph (a)(xi).*" Further, only diesel usage relating to primary production [may be claimed] and "*logbooks should specify exactly what primary production was done and not general activities.*" Further, there were no entries relating to non-eligible usage but the Customs Act "*… requires that logbooks show a record of both eligible and non-eligible diesel usage.*"

c. Failure [to] Provide Supporting Documentation: Section 75(1C)(d)(i) and (ii) and Section 75(4A)(d) of the Customs Act have been contravened due to failure to provide information and documentation specified above (under the provisional audit finding "*Failure to provide supporting documentation*".[19])

[29] In the notice to assess, the Commissioner proposed to make an adjustment in the total amount of R767,922.28, comprised on R711,223.08 in respect of the diesel rebate claims of Sandbaken in respect of the relevant tax period and R56,699.20 in respect of interest. Sandbaken was afforded an opportunity to respond to the notice to assess, and its attention was drawn to sections 101 and 102 of the Customs Act pointing out that the *onus* to prove compliance with the Act rested upon Sandbaken.

[30] On 25 March 2021, VDM responded to the notice to assess and to the *prima facie* findings[20] in the notice to assess.[21] VDM indicated *inter alia* that:

a. Invalid invoices: The invoices are incorrectly made out to PJ Cronje en Seuns (Pty) Ltd instead of Sandbaken Boerdery (Pty) Ltd. The supplier of the diesel neglected to change the name of the company

[19] The documents are set out under footnote 17 above.
[20] From the response it is apparent that the response is to the *prima facie* audit findings of SARS contained in par B.2 of the notice to assess.
[21] "**SB6**" to the founding affidavit.

to be invoiced to Sandbaken. The main farming operations "*moved*" from PJ Cronje en Seuns to Sandbaken. Sandbaken only started claiming diesel refunds from the 2018/08 VAT period when the farming operations moved from one company (PJ Cronje en Seuns – in which the farming operations were previously performed) to Sandbaken. The tax invoices meet all the requirements of a valid tax invoice but one – namely the name of the purchaser as explained.

b. Distribution Logbook:

i. In respect of what VDM referred to as "*Finding 1 - the logbook contains no details regarding hour meter or odometer readings, kilometers travelled or running time*", VDM stated that the information that had been sought under bullet point 10 of the letter of engagement[22] had been supplied in two documents 'SANDBAKEN BOERDERY - DIESEL STORAGE LOGBOOK' and 'SANDBAKEN BOERDERY - DIESEL USAGE LOGBOOK' sent via e-mail on 3 February 2021.[23] VDM explained further that for each of the four tanks "… *there is a separate diesel usage logbook*" and that the name of the tank from which diesel is disposed of is contained on the top of the page of the usage logbook. These 'diesel usage logbooks' are completed as and when diesel is disposed of, are pre-printed and completed by the staff members disposing of the diesel at the diesel tanks.

[22] Quoted in paragraph [26] of this judgment above – the tenth 'round' bullet point.

[23] It is unclear precisely what these documents are or what was contained therein. What is stated in the founding affidavit regarding what was sent to SARS on 3 February 2021 is the following (at FA par 8.2): "*The applicant, through its accountants, Van Der Merwe Auditors ("the Auditors"), complied with the notification and provided relevant documents and information to SARS, on 3 February 2021, a copy of which is annexed as* ***Annexure "SB4"***." "**SB4**" to the founding affidavit has no attachments attached to it but for a "*map of the farms*". Sandbaken states in its founding affidavit that "*the Excel documents*" were submitted on 29 September 2021 (FA, par 9.15). What is stated by Sandbaken in the founding affidavit at par 8.2 is denied in the answering affidavit at *inter alia* par 95 – 96 thereof. This is met in reply with a bare denial, and a statement that this is in any event a *de novo* hearing and the court can ignore any failure to supply documents (which failure Sandbaken denies) "*… and adjudicate upon the application on the facts as it is before the Court at this stage.*" (RA par 75) Whilst it is correct that the present matter is a wide appeal, the failure of Sandbaken to attach documents to its affidavits does not assist its case in the wide appeal.

VDM explained that these "*hand-written usage logbooks were transferred to excel, as complete as possible, but merely for the fact to be able to use the excel function to sum the diesel usage per month.*", but that, as this was not indicated as required in the letter of engagement, the odometer/hour meter readings were not transferred to the existing excel logbook. VDM emphasised that this (the odometer/hour meter readings) is part of the hardcopy usage logbooks and can easily be added to the excel logbook.

ii. In respect of what VDM referred to as "*Finding 2 - no non-eligible usage was recorded.*", VDM stated as follows: "*The diesel disposed of on the farm is only used for farming purposes and thus there were no non-eligible liters for the taxpayer to record. Please note that the majority of the assets used are not even licensed, as they never leave the farm. The licensed vehicles that do leave the farm, do so in order to perform farming activities such as purchasing parts, feed, medicine, etc. Please also note that only 80% of the eligible liters on the logbook are allowed by SARS. Thus, provision for non-eligible liters were made.*"

iii. In respect of what VDM referred to as "*Finding 3 - descriptions of the purpose of use of diesel consist of generic descriptions, for example 'daily farming activities', 'livestock activities', 'farm construction' etc.*", VDM stated that the descriptors are "*… more of a summary of the activities on which the disposed diesel is being spent rather than a generic description.*" For example, 'livestock activities' "*... contains all or most of the activities listed below and the diesel usage logbook simply does not allow for this extensive description.*" The 'diesel usage logbooks' remain at each of the four tanks and do not "*travel with the drivers*". Certain activities, such as (**a**) checking and maintaining fencing and

(**b**) checking on livestock often happen simultaneously/on the same trip, and it is not possible to attribute diesel used for each activity hence the reason for the generic descriptions. "*All of the activities as described, although not detailed enough, relates to the primary production of the farming operations.*" VDM provided the following detail regarding the descriptors used in the logbook:

"*Farm construction — Creating and maintaining roads on the farm, digging of ditches to lay electric cables and water pipes, constructing of contour walls in lands, levelling of lands, repairing and maintaining dam walls, creating water ways to guide the water away from the lands, etc.*

Livestock activities — Checking and maintaining fences, check the wellbeing of the livestock and do stock counts of livestock, transporting of feed to livestock, tending to ill livestock, etc.

Daily farming activities — transporting of staff, checking crops already planted, tending to breakdowns of farming equipment, checking up on work progress of lands being worked, planting of crops, spraying and fertilizing of crops, harvesting of crops, managing the farming operation, etc."

iv. In respect of what VDM referred to as "*Finding 4 - a sample of assets identified in the logbook was traced to the asset register and the following could not traced to the asset register: … [Land Cruiser; New Holland LB 90; MB 2624; Ford 7600; Case 111]*", VDM explained that the staff who dispose of diesel to the vehicles do not know the description of the vehicles as per the asset register, and insert the registration number and/or a description of the vehicle. For example, in respect of the vehicle referred to on the asset

register as “New Holland TLB 90” this is referred to in the logbook as "NEW HOLLAND LB90”, “NH T LB 909”, “NH LB 90”, “LB 90”, “TLB”, or “TLB90". VDM provided explanations in the same way for the further vehicles queried by SARS. In essence, VDM explained the references in the hand written logbooks (which were transferred to the excel logbooks) and the nexus to the relevant vehicle in the Sandbaken asset register.

c. Failure to provide supporting documentation: VDM reiterated that (as previously indicated) the director of Sandbaken ought to be contacted for purpose of the ‘process flow of how the farming process is done’, stated that the ‘number of tanks and the capacity of each tank’ had been provided in the document referred to as 'SANDBAKEN BOERDERY - DIESEL STORAGE LOGBOOK' and further provided such information in respect of the four tanks, and referred to their previous response and attached map in respect of the place where the farming operations take place. VDM indicated that there are no individual usage logbooks for each vehicle, and explained again that “*… it is practically impossible for each of the vehicles into which diesel was dispensed to have an individual logbook as most of the staff members are illiterate ...*” but that the logbooks for each of the four diesel tanks where fuel is dispensed indicate the vehicle into which diesel is dispensed and the purpose of the disposal. VDM indicated that Sandbaken was prepared to adjust the existing usage logbook to contain such information as may be required.

[31] On 31 March 2021, SARS directed a letter of demand to Sandbaken (the “**letter of demand**”)[24] demanding repayment of the refunds for the fuel levy and RAF levy in respect of the relevant tax period based on the fact that Sandbaken “*… did not comply with the requirements of the diesel refund*

[24] “**SB7**” to the founding affidavit.

provisions as a result of which they were not entitled to the diesel refunds paid to them." The letter of demand confirmed the majority of the findings in the notice to assess, and confirmed the adjustments referred to in the notice to assess (as dealt with above). The letter of demand provided that the "*… Commissioner is of the view that the distillate fuel that is the subject of the present investigation is non-eligible purchases, as SANDBAKEN BOERDERY (PTY) LTD did not comply with the provisions of Note 6 to Part 3 of Schedule No. 6.*" Under the heading "*Explanation of the assessment*" SARS stated as follows:

a) <u>Invalid invoices</u>

All diesel claimed was considered non-eligible as invoices were addressed to CJ Cronje and not Sandbaken Boerdery as required in terms of Schedule 6 Part 3 Note 6(d)(cc) to the Customs and Excise Act.

b) <u>Usage logbook</u>

The logbook provided by the taxpayer does not meet the requirements of a logbook as some information i.e. opening and closing hour meter/odometer readings, distance, duration of use, purpose of utilisation is lacking or insufficient and in combination made it impossible for the auditor to carry out basic tests in an attempt to determine whether the litres allocated to the alleged activity could reasonably have been so utilised. This is required per Schedule 6 Part 3 Note 6 paragraph (a)(xi).

Furthermore, only diesel usage relating to primary production as required in terms of Schedule 6 Part 3 Note 6 paragraph (h) to the Customs and Excise Act, thus descriptions per the logbooks should specify exactly what primary production was performed and not general activities.

There were no entries relating to non-eligible usage. However, the Act requires that logbooks show a record of both eligible and non-eligible diesel usage.

c) <u>Failure to submit supporting documents</u>

Section 75(1C)(d)(i) & (ii), Section75(4A)(d) of the Customs and Excise Act have been contravened due to failure to provide information and documentation specified above.[25]

[32] The letter of demand further contained a relatively detailed response to the letter of VDM dated 25 March 2021 ("**SB6**"). The decision contained in the letter of demand constituted a '*determination*' which is subject to an appeal as contemplated in section 47(9)(e) of the Customs Act.

[33] On 29 April 2021, VDM responded to the letter of demand.[26] The response from VDM repeated much of that which had been stated in the VDM response dated 25 March 2021 ("**SB6**") and contains "… *a list of all the supporting documentation attached.*"[27] I do not rehash the entire content of the correspondence but refer to certain portions below:

a. The response contained certain additional information regarding the 'invalid [tax] invoices' made out to PJ Cronje en Seuns (Pty) Ltd instead of Sandbaken, such as that the two companies have the same directors and shareholders, that Sandbaken (via the directors) made payment of the purchase invoices for diesel even though the invoices were made out to PJ Cronje en Seuns which is apparent from the proof of payments and the financial statements. Further, it appears that invoices were generated from PJ Cronje en Seuns to Sandbaken Boerdery and provided to SARS in addition to the original invoices to

[25] The "information and documentation specified above" is recorded in par 2(c) of the letter of demand as follows: Process flow of how the farming process is done; Place where the business activities /operations on which the diesel for the audit period was claimed; Individual usage logbooks for each of the vehicles into which diesel was dispensed.
[26] "**SB8**" to the founding affidavit.
[27] But which is not attached to "**SB8**" in the application papers.

PJ Cronje en Seuns and the proof of payments. VDM stated as follows *inter alia* in this regard: "*The invoices made out from PJ Cronje en Seuns to Sandbaken Boerdery reflects the exact same date, invoice number and invoice details as the original invoice from Verco Energy (Pty) Ltd [to PJ Cronje en Seuns]. The invoice was made out to Sandbaken Boerdery in order to move the expense in the accounting records from the PJ Cronje en Seuns to Sandbaken Boerdery.*"

b. Under the heading "*Distribution Logbook*", VDM again set out why the logbooks met the requirements of bullet point 10 of the letter of engagement, repeated the descriptors pertaining to "*Farm construction*", "*Livestock activities*", and "*Daily farming activities*" (as already quoted above), and stated that the "*majority of the activities as described, although not detailed enough, relates to the primary production of the farming operations*" and that the only secondary farming activities listed in the descriptors "*is the transporting of staff.*"

c. Under the heading "*Process flow of how the farming process is done*", VDM stated as follows:[28]

Sandbaken Boerdery's farming activities are classified as mixed farming, which consists of both livestock and crop farming. Activities include:

- Crop farming (grains such as maize and soya beans): working the lands in preparation for planting, planting, fertilizing, spraying chemicals, topdressing, harrowing the fields and reaping grain.

- Fodder banks for animal feeding: preparing, fertilizing, cutting, bailing and carting bales to central stock piles and eventually carting them to different camps for animal feed.

[28] In the present appeal proceedings, Sandbaken has attached a further document to its founding affidavit which it contends constitutes "written confirmation of the process flow" ("**SB14**").

- Carting fodder and animals to different units and markets as needed.

d. Under the heading "*Usage logbooks*", VDM stated as follows:

> As stated in the 'SANDBAKEN BOERDERY - RESPONSE TO ENGAGEMENT', it is practically impossible for each of the vehicles into which diesel was dispensed to have an individual logbook as most of the staff members are illiterate. There is however a separate detailed logbook for each of the diesel tanks where the purpose of disposal as well as the vehicle into which diesel was dispensed is clearly indicated. It does however not reflect purported future use but rather actual usage. The dispensing logbook at the diesel tank does not have a column for the use of the disposed diesel. The details regarding the disposal is only added at the end of the day, which makes the logbook submitted to SARS a usage logbook instead of a dispensing logbook. The staff members report back to the farmer on what was done that day and he adds the description to the Excel usage logbook. As was explained earlier, the farm workers are illiterate and cannot write detailed descriptions as they go. There physically are not individual usage logbooks at my disposal to send to you and we were not going to fabricate these logbooks for the audit. Please consider to accept the global usage logbook instead.

[34] Sandbaken submitted an internal administrative appeal in terms of the Customs Act on 30 April 2021. The first page of the appeal document is attached to the founding affidavit.[29]

[35] On 30 August 2021, SARS communicated to Sandbaken that its Internal Administrative Appeal Committee convened to consider the matter and provided its *prima facie* view regarding the insufficiency of the logbook details to prove that the diesel was used in the primary activities of

[29] "**SB9**" to the founding affidavit.

Sandbaken. Sandbaken states that the only *prima facie* view expressed for alleging that Sandbaken did not qualify for the diesel refunds was for the reason that "*(t)he logbook provided is considered a dispensing logbook and not a usage logbook. It shows a record of diesel disposed. There is no record of the amount of diesel used. Whether the diesel recorded as disposed was all used or there was any diesel left after the performance of an activity is not indicated.*"[30]

[36] The Committee requested Sandbaken to provide full submissions as to why the *prima facie* view of the Committee should not be confirmed and the diesel refund appeal be partially disallowed. VDM responded on 29 September 2021.[31] In the response letter, VDM in essence repeated its explanation as had been set out under the heading "*Usage logbooks*" in the VDM response letter of 29 April 2021 ("**SB8**") (addressed above); indicated that the "*diesel disposed of on the farm is only used for farming purposes*", that most of the vehicles are unlicenced and those that are licenced that leave the farm "*do so in order to perform farming activities such as purchasing parts, feed, medicine, etc.*"; referred to the descriptors that appear in the submitted logbook and again stated that the "*… majority of the activities as described, although not detailed enough, relates to the primary production of the farming operations.*"

[37] The hearing/appeal before the Committee constituted a *de novo* hearing. On 29 October 2021, the Committee communicated the outcome of the appeal, which was to confirm the letter of demand and to disallow the appeal in full.[32] The outcome letter stated as follows in material part:

> 9. The following is specifically to be noted as set out in the Umbhaba judgement, "Even if it were found that the activities for which the refund claim has been submitted are all eligible activities, the claim still stands

[30] The parties have not attached this communication to the papers.
[31] "**SB10**" to the founding affidavit.
[32] "**SB11**" to the founding affidavit.

to be rejected on the basis that there was no compliance with the requirement to keep and maintain proper logbooks."

10. Further to the above, partial or unsatisfactory compliance by the Appellant is not sufficient to validate such a diesel refund claim, due to the prescriptive nature of Section 75, read with Note 6 of Part 3 to Schedule 6 of the Act.

11. Compliant "logbooks" must provide sufficient details of all the eligible and non-eligible activities; where and when it was conducted, etc. Further to that, all the entries must be supported by evidentiary documentation that the Appellant must provide as part of the records.

12. The Committee therefore decided to confirm the letter of demand and disallow the appeal in full based on the following:

    a. The Appellant did not keep and/or provide compliant records to substantiate the refund claims;

    b. The Appellant did not provide supporting documentation for the entries in the 'global usage logbooks'.

    c. The Appellant's logbooks and recordkeeping did not meet the prescribed requirements of Section 75, read with Notes 6(a)(xi) and (q) of Part B to Schedule 6 of the Act; and

    d. Therefore, the Appellant was not entitled to any of the refunds submitted for the audit period of 12/2018 to 10/2020.

[38] I pause to point out that in the respondents' answering affidavit they state *inter alia* that the letter of demand ("**SB7**") and Appeal Committee outcome letter ("**SB11**") should be read together as they constitute proper grounds for disallowing the diesel rebate claims, and they incorporate the content thereof into the answering affidavit.

[39] On 29 November 2021, Sandbaken addressed correspondence to the Committee regarding the outcome of the internal administrative appeal.[33]

[40] Sandbaken's request for alternative dispute resolution was not accepted by the Commissioner. Sandbaken accordingly instituted the present tariff appeal.

[41] In the present appeal, Sandbaken states that the following documents should also be considered by the court, copies of which it attaches to its founding affidavit:

a. Copies of the original, handwritten logbooks marked "**SB13(A)**".

b. Printouts of the logbooks electronically generated from the information extrapolated from the handwritten logbooks marked "**SB13(B)**".

c. The fuel purchase invoices marked "**SB13(C)**".

d. Sandbaken's VAT201 Returns marked "**SB13(D)**".

e. Sandbaken's financial statements [for the financial year ending February 2021] marked "**SB13(E)**".

CERTAIN PRINCIPLES RELEVANT TO THE APPROACH TO THE APPEAL

An appeal in the wide sense

[42] The appeal is one in the 'wide sense'. It "*… entails to the extent necessary a re-hearing of the matter and if need be a fresh determination on the merits of the matter.*"[34]

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[33] "**SB12**" to the founding affidavit.

[43] In **Cell C (Pty) Ltd v Commissioner, South African Revenue Service**,[35] Tolmay J refers to the characteristics of a wide appeal as follows:

a. "*… in a wide appeal the court hears the matter de novo and is not bound by the reasons given*"[36]

b. It "*… is a complete rehearing and fresh determination on the merits, with or without additional evidence or information…*"[37] and "*… allows for a complete reconsideration.*"[38]

c. "*It is therefore apparent that a wide appeal is fundamentally different from an appeal in the strict sense or a review, because the matter is heard de novo. The court is not confined to the record and is in the same position as the first-instance decision-maker. As a result the record and reasons have very little value in a wide appeal. It follows that a wide appeal could, if evidence is led, be compared to a trial in all material respects.*"[39]

d. "*… the object of the de novo appeal is to permit a first-instance hearing at which the applicant may seek reconsideration on additional facts and grounds. …*"[40]

Onus

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[34] **Umbhaba Estates (Pty) Ltd v The Commissioner for the South African Revenue Services** (66454/2017) [2021] ZAGPPHC (10 June 2021) ("**Umbhaba**") par [6] referring to **Pahad Shipping v SARS** (529/08) [2009] ZASCA 172 (2 December 2009) (SCA) par [13] and [14]
[35] 2022 (4) SA 183 (GP) ("**Cell C**").
[36] **Cell C** par [8] citing **Acti-Chem SA (Pty) Ltd v Commissioner, South African Revenue Service KZP** 8540/2017 ([2019] ZAKZPHC 58, 15 August 2019) para 2; **Distell Ltd v Commissioner, South African Revenue Service** 2012 (5) SA 450 (SCA).
[37] **Cell C** par [9] referring to **Tikly and Others v Johannes NO and Others** 1963 (2) SA 588 (T).
[38] **Cell C** par [9] referring to **Levi Strauss SA (Pty) Ltd v Commissioner for the South African Revenue Service** GP 20923/2015 (2 May 2017)
[39] **Cell C** par [10] excluding the footnote.
[40] **Cell C** par [25] referring to **Levi Strauss SA (Pty) Ltd v Commissioner for the South African Revenue Service** GP 20923/2015 (2 May 2017) para 41.

[44] Sandbaken bears the onus of convincing the court that the Commissioner's determination should be set aside and the onus on its papers (being those which had served before the Commissioner supplemented by those placed before the court) that it is entitled to an order reflecting its entitlement to diesel rebates in the specific amounts claimed. Should disputes of fact arise on the papers, the 'Plascon-Evans-rule' applies.[41]

Interpretation of statutes

[45] In terms of the unitary exercise of interpretation, the inevitable point of departure is the language of the provision, understood in the context in which it is used, and having regard to its purpose.[42]

[46] The matter necessitates the interpretation of a 'tax statute'. The trite principles of interpretation apply:[43]

> [11] A statute must be interpreted in line with ordinary rules of grammar and syntax taking cognisance of the context and purpose thereof. That approach is equally applicable to a taxing statute.

FINDINGS

Whether the invoices supplied to the respondents are in compliance with Part 3 of Schedule 6 of the Customs Act?

[47] It is common cause that the original tax invoices (i.e. not those generated later by Sandbaken/PJ Cronje en Seuns to "*move the expense in the*

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[41] **Canyon Resources (Pty) Ltd v Commissioner for South African Revenue Service** 82 SATC 315 at par [9.10]. See also: **Mbali Coal (Pty) Ltd v Commissioner for the South African Revenue Services** (81950/2019) [2023] ZAGPPHC 1792; 84 SATC 353 (5 October 2023) par [21] – [22]

[42] **Commissioner for the South African Revenue Service v Tunica Trading 59 (Pty) Ltd** (1252/2022) [2024] ZASCA 115 (24 July 2024) par [62]

[43] **Commissioner for the South African Revenue Service v Langholm Farms (Pty) Ltd** (1354/2018) [2019] ZASCA 163 (29 November 2019) par [11] (footnotes omitted).

accounting records"[44]) do not contain the name of Sandbaken as the purchaser but rather "*PJ Cronje en Seuns*".

[48] The respondents contend that the tax invoices submitted are invalid as they fail to comply with the requirements of Note 6(d)(i)(cc)[45] read with Note 6(q)(ii)[46] of Part 3 of Schedule 6 of the Customs Act, as they fail to prove that such diesel was bought by Sandbaken and that it was delivered at its premises where the farming activities are conducted. The respondents place emphasis on the peremptory terms of the Notes.[47]

[49] Counsel for Sandbaken criticise the approach of the respondents, which they describe as a "check list" approach. They contend in heads of argument that "*… a literal interpretation of the Act is not consistent with the purpose of the Act and that substantial compliance with the requirements of the Act is to be regarded as sufficient for a rebate claim to be allowed.*"[48] In oral submissions before court, a nuance was placed on the submission (in my understanding) namely that strict compliance is required but such strict compliance is achieved if the purpose of the provision is met. It was submitted that tax invoices were submitted and the fact that the wrong name (ie. PJ Cronje and Seuns) appears on the invoice, does not render the invoice invalid. It was

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[44] PJ Cronje en Seuns did not sell fuel to Sandbaken – see: replying affidavit, par 38. SARS was informed by VDM that these invoices were "*made out to Sandbaken Boerdery in order to move the expense in the accounting records from the PJ Cronje en Seuns to Sandbaken Boerdery.*" Whilst it is not explained why the expenses would have appeared in the 'accounting records' of PJ Cronje en Seuns in the first place, nothing more need be said about these invoices as Sandbaken does not rely on a sale of diesel by PJ Cronje en Seuns to Sandbaken.

[45] Note 6(d)(1)(cc) provides:

"*(d) The tax invoice*

(i) For the purposes of section 75 (4A)(c), the invoice must be a tax invoice containing the following information:

…

(cc) the name and address of the purchaser (if the invoice value is over R500);

…"

[46] Note 6(q)(ii) provides:

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

(i) …

(ii) Purchase documents must be in the name of the user.

(iii) …

(iv) …"

[47] Answering affidavit, paragraphs 16.1 and 62 - 65.1

[48] See also: par 11 of the replying affidavit.

submitted that the purpose of the submission of an invoice is to show that he who claims has purchased and paid for the diesel.

[50] In heads of argument, counsel for Sandbaken rely on **Commissioner for the South African Revenue Service v Glencore Operations SA (Pty) Ltd** 2021 (4) All SA 14 (SCA) in support of their contention that "*… a purposive interpretation should be followed when interpreting the Act and its schedules…*". In my view, the relevant part of the aforesaid decision relied upon[49] confirms the trite principles of interpretation of statutes entailing the simultaneous consideration of the triad of language, context and purpose. It is not authority for a proposition that purpose is to be elevated above language or context.

[51] Counsel for Sandbaken further submit that the approach adopted in **Commissioner for the South African Revenue Service v Glencore Operations SA (Pty) Ltd** 2021 (4) All SA 14 (SCA) is aligned with what the Constitutional Court held in **Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others** 2014 (1) SA 604 (CC) ("**Allpay**") at par [30] regarding compliance with statutes. Counsel for Sandbaken submit that in line with **Allpay** strict compliance is achieved if the purpose of a provision is met. However, in my view, it is important to provide the context of **Allpay** and to consider what was held in the paragraph relied upon by Sandbaken. **Allpay** dealt with a PAJA review in the context of procurement in determining whether the award of a tender was constitutionally valid. It was in this context that the Constitutional Court found that the "*… materiality of compliance with legal requirements depends on the extent to which the purpose of the requirements is attained.*"[50] In essence, in this regard, **Allpay**

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[49] The paragraphs of the judgment relied upon by Sandbaken (par [19] – [22]) are contained in the judgment penned by Petse DP, Mbha JA concurring.

[50] **Allpay** par [22](b). At par 28 under the heading "*Materiality*" the Constitutional Court held:
"*[28] Under the Constitution there is no reason to conflate procedure and merit. The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground under PAJA has been established.*"

is authority for the point that in the legal evaluation of whether an irregularity (whether procedural or substantive) amounts to a ground of review under PAJA, such legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements by linking the question of compliance to the purpose of the provision, before concluding that a review ground under PAJA has been established. The findings in **Allpay** do not support an argument that in the context of a claim for a diesel rebate in terms of a tax statute substantial compliance will do, nor (with reference to the submissions in court) that one considers whether the purpose of a provision has been met in determining whether strict compliance has been achieved.

[52] Counsel for Sandbaken refer to the Western Cape decision of **Petroleum Oil and Gas Corporation of South Africa (SOC) Ltd v Commissioner for the South African Revenue Service and Another**[51] ("**PetroSA WCC**") where the court held that material (i.e. substantial) compliance with the Rules of the Customs Act, can be achieved by way of other means than with strict compliance with the Rules. However, it is important to place context to the findings. The paragraphs referred to relate to what is referred to in the judgment as "Finding 2" which constituted a determination in terms of section 47(9)(a)(i)(bb) of the Customs Act to the effect that PetroSA is not entitled to a set-off (in terms of section 77 of the Customs Act) because "*Export*

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[51] (8808/2020) [2024] ZAWCHC 3; [2024] 1 All SA 824 (WCC); 86 SATC 533 (18 January 2024) ("**PetroSA WCC**") par [36] – [37].
In these paragraphs De Waal AJ held as follows:
"*[36] In my view compliance, or at least material compliance, with the requirements of the Rules were proven by PetroSA. This was done through provision of affidavits; the SAD500 and SAD502 documents; the CN1 and CN2 documents; as well as the delivery notes which recorded that fuel had been delivered in the country of destination. The purpose of the requirement, which is to provide proof of removal or export, was achieved. In* ***Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others*** *(2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC), the Constitutional Court held as follows:*
"[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." (my underlining)
[37] In the present instance I am satisfied that there was material compliance with the requirements in the Rules and the purpose of the requirements (to provide proof of removal / export) was achieved."

acquittal documentation was absent, inadequate or not provided in substantiation of the account set-off."[52] The determination in the letter of intent and letter of demand in respect of "Finding 2" was that "*PetroSA did not submit a request for approval to the relevant excise office in order to submit affidavits as proof of export in the absence of the relevant original export documentation.*"[53] De Waal AJ held that Rule 19A4.04(e) makes provision for an affidavit to be provided in circumstances where a person cannot produce a document containing a statement or declaration (a procedure relied upon by PetroSA), and that prior approval is not required for reliance on the Rule. PetroSA is accordingly distinguishable. Further, the aforesaid decision was decided prior to the Supreme Court of Appeal decision of **Tholo Energy Services CC v Commissioner for the South African Revenue Service**[54] which I deal with below.

[53] Finally, counsel for Sandbaken submit that "*… the approach in **Allpay**, as adopted to compliance with the Act in [**PetroSA WCC**], is aligned with the pre-Constitutional approach followed in **BP SA** …*"[55] and cite the portion of **BP SA 1985** which reads as follows:[56]

> The above submission in my view unjustifiably equates "subject to the provisions of this Act" with "subject to compliance with" such provisions. As already stated, the latter phrase was employed in s 75 (d) and s 75 (5) (a) (i) of the Act and, had it been the Legislature's intention to make the right to a rebate dependent on actual compliance with all the other sections of the Act and also the regulations, it would no doubt have said so. Consequently I have little doubt that it could not have been the intention to grant a right to a rebate subject to compliance with each and every provision of the Act and the regulations, or at any rate such provisions as have a bearing on the entry or disposal of goods under rebate of duty.

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[52] **PetroSA WCC** par [9] and [30] – [37]
[53] **PetroSA WCC** par [30]
[54] (Case no 378/2023) [2024] ZASCA 120 (6 August 2024)
[55] Ie. **BP Southern Africa (Pty) Ltd and Others v Secretary for Customs and Excise and Another** 1985 (1) SA 725 (A) at 736A-D ("**BP SA 1985**")
[56] At 736A-D

[54] **BP SA 1985** dealt with the interpretation of reg 410.04.04 of the Customs Act, and the consequences of non-compliance with such regulation. At p 736E the Appellate Division (as it then was) held as follows: (my emphasis)

> If the phrase under consideration [the introductory phrase of s 75 (1)] is read in conjunction with the operative provisions of s 75 it plainly means that the rebates provided for in paras (a) to (e) are subject to such other provisions of the Act (including the regulations) as may further qualify the entitlement to a rebate. I have already pointed out that reg 410.04.04 contains no such qualification. It does not provide, either expressly or by implication, that a right to a rebate conferred by s 75 (c) is conditional on compliance with its provisions, or that a pre-existing right to a rebate falls away in case of non-compliance.
>
> The regulation falls to be contrasted with a number of other regulations which indeed qualify the right to a rebate. I mention only the following examples … [reg 608.01.01 read with item 608.01; reg 609.04.10; 609.04.20]."

[55] In my view, **BP SA 1985** in fact supports the case of the respondents. Section 75(1)(d) of the Customs Act contains the express terms – "*… subject to compliance with the provisions of the [item of Schedule 6 in which such goods are specified] …*". Note 6(c) read with Note 6(d) of Schedule 6, Part 3, qualify the entitlement to a rebate. In terms thereof, a refund "*may only be applied for*" in respect of diesel purchased in and for use in the Republic and "*for which a duly completed tax invoice is issued as contemplated in [Note 6(d)]*".[57]

[56] The Customs Act read with the aforesaid Notes qualify the right to apply for a refund.

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[57] *Cf.* **JT International Manufacturing South Africa (Pty) Ltd v Commissioner for the South African Revenue Service** (29690/14) [2023] ZAGPPHC 2061 (10 October 2023) par [146]

[57] In the matter of **Dankie Oupa Delwery CC v Commisioner of the South African Revenue Services**,[58] one of the issues to be decided was whether a physical address (as opposed to a postal address) is a requirement for a valid tax invoice. Ultimately, Ceylon AJ held (in this regard) that the meaning of address in the relevant Notes to the Customs Act refers to the physical or postal address (or both) of the purchaser.[59] **Dankie Oupa** is of limited assistance in the context of the present dispute regarding tax invoices as the decision contains no finding on what the consequence would have been of non-compliance with Note 6(c) read with Note 6(d) of Schedule 6, Part 3.[60]

[58] However, the cases dealt with below support the case of the respondents.

[59] In **Petroleum Oil and Gas Corporation of South Africa (SOC) Limited v The Commissioner for the South African Revenue Service**,[61] Mabuse J held:

> … only once both the substantive and procedural prescripts and requirements of the relevant rebate item and the provisions governing the payment of refunds have been complied with does the participant become entitled to the refund of duty. …

[60] In **Graspan Colliery SA (Pty) Ltd v Commissioner for the South African Revenue Service**[62] Collis J held: (my emphasis)

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[58] (39598/20) [2022] ZAGPPHC 898 (6 September 2022) ("**Dankie Oupa**")
[59] **Dankie Oupa** par [27]
[60] The matter of **Dankie Oupa** was taken on appeal, which appeal was dismissed by a full court of this Division - **Dankie Oupa Delwery CC V Commissioner for the South African Revenue Services** (A216/2023) [2024] ZAGPPHC 1202 (14 November 2024) ("**Dankie Oupa appeal decision**"). The full court found it unnecessary to make a finding on whether the lack of a physical address on the relevant tax invoices was fatal to the rebate claim - **Dankie Oupa appeal decision**, par [4.1] read with par [31].
[61] (42716/15) [2018] ZAGPPHC 871 (6 November 2018) at par [37.2] – a review which dealt with a claim for a refund on duty paid in respect of unmarked Kerosene and stated in the context of the "das" ['duty at source'] system.
[62] (8420/18) [2020] ZAGPPHC 560; 83 SATC 10 (11 September 2020) par [25] and [30] ("**Graspan**"). As the case name suggests, this matter dealt with diesel refunds claimed by the applicant in the mining sector (for rehabilitation activities), under rebate item 670.04. *Cf*. also: **BP Southern Africa (Pty) Ltd v Commissioner for the South African Revenue Service** (Case no 801/2022) [2024] ZASCA 2 (12 January 2024) par [37] - [38].

[25] The legislative purpose of Section 75 of the Customs Act is therefore to grant a refund in respect of applicants who purchased and used diesel in strict compliance with the requirements as provided for in section 75, Item 670.04 and note 6 thereto.

…

…

[30] It will thus follow that to the extent that an applicant for a refund cannot provide SARS with the required record of proof for the refund claimed or where the claim relates to activities which are not own production activities of the applicant, the Commissioner cannot allow a refund and where a provisional refund has been allowed, it will have to be recovered by SARS.

[61] In **Glencore Merafe Venture and Others v Commissioner for the South African Revenue Service**,[63] Coertzen AJ held:

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

[62] In **Commissioner for the South African Revenue Service v Tunica Trading 59 (Pty) Ltd**,[64] the Supreme Court of Appeal held as follows:

> [69] There is a deliberate use of the phrase 'subject to compliance with' in s 64F(3)(a) and s 75(1) of the Act; rebate item 623.25; and Note 10. This means that a claimant for a refund of duty must satisfy the requirements of those provisions, failing which a refund may not be granted.

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[63] (38144/22) [2024] ZAGPPHC 1196 (7 November 2024) par [84].

[64] (1252/2022) [2024] ZASCA 115 (24 July 2024) par [69]. The 'endnote' at the end of this paragraph is to **BP Southern Africa (Pty) Ltd and Others v Secretary for Customs and Excise and Another** 1985 (1) SA 725 (A) at 734B-E; 735H-I and 737A.

[63] In **Tholo Energy Services CC v Commissioner for the South African Revenue Service**,[65] (dealing with a refund claim by a licenced distributor of fuel), the Supreme Court of Appeal recently held as follows:[66]

> [50] It must be emphasised that each of these requirements must be met, failing which a refund of a fuel or RAF levy may not be granted. This is because a rebate of excise duty (or a refund of fuel levy) is a privilege and strict compliance with its conditions may be exacted from the claimant. In *BP v Secretary for Customs and Excise*, approved by this Court in *Toyota South Africa*, a full court held:
>
> > '[T]he rebate of excise duty is a privilege enjoyed by those who receive it. It has been stated that it is neither unjust nor inconvenient to exact a rigorous observance of the conditions as essential to the acquisition of the privilege conferred and that it is probable that this was the intention of the Legislature ... Moreover, the provision is obviously designed to prevent abuse of the privilege and evasion of the conditions giving rise to such privilege and again this supports the view that a strict compliance with the requirements laid down is necessary.'
>
> [51] Consequently, the appellant's submission that '[t]he right to a refund is not dependent on actual compliance with all sections of the Act (and the schedules), unless expressly stated', is wrong. Moreover, the above statutory and regulatory provisions and in particular ss 75(1) and 64F(3)*(a)* of the Act are cast in peremptory terms. A refund 'shall be granted to the extent and the circumstances stated in the item of Schedule 6'; and any refund of duty is expressly subject to compliance with the requirements specified in the Schedule 6 items and any rule prescribing any requirement relating to the export of fuel.

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[65] (Case no 378/2023) [2024] ZASCA 120 (6 August 2024) ("**Tholo SCA**")
[66] at par [50] – [52]. Footnotes are omitted however I point out that the footnote at the end of par [52] in **Tholo SCA** is to **BP Southern Africa (Pty) Ltd and Others v Secretary for Customs and Excise and Another** 1985 (1) SA 725 (A) at 734B-E; 735H-I and 737A.
See also: **Umbhaba** par [65](d).

And rule 64F.06*(d)* requires any load of fuel obtained from the licensee of a VM to be wholly and directly removed (from the VM) for export, before a refund may even be considered.

[52] In addition, the use of the phrase 'subject to compliance with' in s 64F(3)*(a)* and s 75(1) of the Act; and rebate item 671.11, is deliberate. This means that a claimant for a refund of duty must satisfy the requirements of those provisions, failing which a refund may not be granted.

[64] In **Tholo SCA**, at par [67], the Supreme Court of Appeal reiterated that "*… a claimant for a refund of excise duty or fuel levy must strictly comply with the requirements for such refund. The appellant's failure to comply with a single requirement would justify the rejection of its refund claims.*" Further relevant to the present enquiry is the finding in **Tholo SCA** at par [59][67] that: "*Three consequences flow from the appellant's failure to comply with s 64F(1)(b) of the Act, which also show that its appeal was correctly dismissed. First, … Second, it could not produce an invoice issued to it by the licensee of the VM, showing (i) the rate and the amount of duty included in the price to the LDF (rule 64F.04(c)); and (ii) the licensed name and customs client number of the licensee of the VM (the licensed warehouse), and the physical address of the storage tank from which the fuel was obtained (rule 64F.04(a)(ii)) …*"

[65] Section 75(1)(d) of the Customs Act expressly provides that the relevant refund "*… shall be granted to the extent and in the circumstances stated in the item of Schedule 6 in which such goods are specified…*" and "*… subject to compliance with the provisions of the [item of Schedule 6 in which such goods are specified] …*".

[67] Read together with par [21](d), [43] – [44], and [49](c).

[66] Rebate item 670.04 is for: (my emphasis) "*Distillate fuel purchased for use and used for the purposes specified in, and subject to compliance with Note 6.*"

[67] Note 6(c) of Schedule 6, Part 3, contains the heading "*Application for registration and claiming of refunds*". Note 6(c)(iv) provides that: (my emphasis)

> A refund may only be applied for in respect of distillate fuel purchased in and for use in the Republic and for which a duly completed tax invoice is issued as contemplated in paragraph (d) to this Note.

[68] Note 6(d)(cc) provides (as one of the eight requirements for a 'duly completed tax invoice') that "*… the invoice must be a tax invoice containing the following information … (cc) the name and address of the purchaser (if the invoice value is over R500);*".

[69] In my view, and considering that I am bound by the decisions dealt with above, in terms of section 75(1)(d) of the Customs Act read with Rebate item 670.04 read with Note 6(c) read with Note 6(d) of Schedule 6, Part 3, Sandbaken was not entitled to apply for the refunds herein as it failed to provide a "*duly completed tax invoice*" as contemplated in Note 6(d) in respect of any of the fuel purchased. The clear language of a provision cannot be ignored merely because the result may be unpalatable.[68]

[70] For the reasons set out above, I cannot find that the Commissioner was wrong.

[71] On this ground, Sandbaken's appeal must fail.

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[68] **Commissioner for the South African Revenue Service v Langholm Farms (Pty) Ltd** (1354/2018) [2019] ZASCA 163 (29 November 2019) par [17] citing **City of Johannesburg v Cantina Tequila & another** [2012] ZASCA 121 par [8].

[72] There are further reasons why, in my view, Sandbaken cannot succeed in respect of this ground. The respondents contend that a valid tax invoice together with other documents serve to prove that Sandbaken has paid for the fuel and that it has failed to discharge that onus.[69]

[73] Sandbaken has provided an explanation why the tax invoices are made out to PJ Cronje en Seuns (Pty) Ltd instead of Sandbaken. Such explanations are set out under the heading "***FACTUAL BACKGROUND***" herein as contained in the letters addressed by VDM. In the founding affidavit Sandbaken repeats such explanations and adds that Sandbaken has contacted the supplier of the diesel to rectify the invoices but this has been in vain.[70] Sandbaken contends in its affidavits that there has been "*substantial compliance*" by Sandbaken and that it is not disputed at a factual level that Sandbaken was the purchaser and user of the diesel.[71]

[74] The respondents level a number of criticisms regarding the allegations of Sandbaken regarding its explanation for the incorrect tax invoices and contend that Sandbaken has not met its onus. On my reading of the answering affidavit, it is not correct that it is not disputed at a factual level that Sandbaken was the purchaser and user of the diesel. The respondents state *inter alia* that it is "*irreconcilable*" that Sandbaken allowed the supplier to issue incorrect invoices for a period of almost two years and never raised this issue with the supplier, that the allegation that the farming operations "*moved*" from PJ Cronje en Seuns to Sandbaken is not supported by any proof of when this "*purported move*" took place and how it was effected, and that a valid invoice together with other documents serve to prove that Sandbaken has paid for the fuel and it has failed to discharge that onus. Counsel for the respondents, in heads of argument, further points out that the delivery notes attached to the replying affidavit "*are also addressed to PJ Cronje and en Seuns and not Sandbaken and were signed off as such without any queries raised regarding the supposedly incorrect names*" and

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[69] Answering affidavit, paragraph 106.
[70] Founding affidavit, par 9.11
[71] Founding affidavit, par 9.12

that "*the reference on the proof of payment to Verco, indicates that these payments were made with full appreciation that the invoices were issued to PJ Cronje en Seuns*".

[75] In my view, there are certain issues in respect of the version of Sandbaken itself that create problems in meeting its *onus* in this regard. In "**SB8**" VDM stated that Sandbaken paid the diesel purchase invoices from 1 July 2018 which is clear from "*… the proof of payments submitted as well as the fact that the diesel is reflected as an expense to Sandbaken Boerdery (Pty) Ltd and not to PJ Cronje en Seuns (Pty) Ltd on the financial statements.*" This is repeated in the founding affidavit:[72] "*and the refunds claimed during the audit period, is an expense to the applicant and not to PJ Cronje en Seuns as reflected on the applicant's financial statements.*" The respondents challenge this and state that the financial statements "*do not support the allegations that payment was made to either PJ Cronje en Seuns or Verco, who supplied the diesel to PJ Cronje en Seuns.*"[73] The parties do not provide any proper assistance to the court in their affidavits with reference to the financial statements (nor in fact with reference to a number of the further attachments). However, the court is told that such financial statements must be considered, and considering that the present is a wide appeal, I accordingly turn to the financial statements.

[76] When one compares the financial statements ("**SB13(E)**") with the fuel purchase invoices ("**SB13(C)**"), there appear to be certain contradictions that impact upon the onus that rests on Sandbaken:

a. For the 2020 financial year (i.e. 1 March 2019 to 29 February 2020) fuel and oil ("*Brandstof en Olie*") is reflected on the financial statements in the total sum of R810,380.00.[74] However, the sum total of the purchases over the aforesaid period for which Sandbaken claims and as reflected in the purchase invoices reflects an amount

[72] Founding affidavit, par 9.8
[73] Answering affidavit, par 111
[74] Financial statements par 9, CL01-422

of R1,631,051.98 in respect of the same period.[75] Even if one deducts the diesel refunds claimed over the aforesaid period as reflected in the VAT 201 forms (in the total sum of R303,372.16)[76] from the total reflected in the purchase invoices (R1,631,051.98) one arrives at a figure of R1,592,487.82,[77] which does not accord with the expense/liability in the financial statements of approximately half that amount (R810,380.00).

b. Doing the same exercise for the 2021 financial year (i.e. 1 March 2020 to 28 February 2021)[78] also results in discrepancies, although one is limited in this regard by the fact that the purchase invoices submitted and the diesel refunds (VAT 201 forms) are included only up until October 2020 being the end of the 'relevant tax period' (and accordingly not for the full financial year).

c. That which Sandbaken has called in aid in support of meeting its onus, the financial statements, do not accord with the proofs of payment.

[77] There is also a reference to an expense / liability in the financial statements of a "*Deel Oes: PJ cronje en Seuns*" in the sum of R1,390,959.00 in respect of the 2021 financial year.[79] This is entirely unexplained by Sandbaken.

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[75] Invoice dated 3 April 2019, CL01-320: **R206,400.00** +
Invoice dated 11 June 2019, CL01-323: **R372,373,36** +
Invoice dated 30 August 2019, CL01-326: **R350,500.00** +
Invoice dated 6 November 2019, CL01-331: **R359,764.39** +
Invoice dated 30 December 2019, CL01-334: **R170,774.23** +
Invoice dated 21 February 2020, CL01-337: **R171,240.00 =**
a TOTAL of: **R1,631,051.98**

[76] April 2019, CL01-371: **R39,004.16** +
June 2019, CL01-375: **R42,587.38** +
August 2019, CL01-379: **R53,776.32** +
October 2019, CL01-383: **R53,376.00** +
December 2019, CL01-387: **R76,064.14** +
February 2020, CL01-391: **R38,564.16 =**
a TOTAL of: **R303,372.16**

[77] R1,631,051.98 - R303,372.16 = **R1,592,487.82**

[78] Fuel and oil ("*Brandstof en Olie*") for this period is reflected on the financial statements in the total sum of R1,390,959.00 (financial statements par 9, CL01-422)

[79] Financial statements par 9, CL01-422

[78] In addition, in terms of the diesel storage records that Sandbaken relies upon, as at 1 November 2018, the four diesel storage tanks contained a total of 6,650 litres of diesel.[80] Sandbaken has not attached a tax invoice (or any other supporting documentation or evidence) to meet its onus that it purchased such diesel at all.[81]

[79] By virtue of Sandbaken's broad and general approach adopted in its affidavits, read together with the discrepancies and contradictions on its own version and in terms of the supporting documentation that it relies upon, and that raised by the respondents in criticism, the court cannot simply reject the version of the respondents that the supplier supplied the diesel to PJ Cronje en Seuns and not to Sandbaken. Further, considering the aforesaid, and that dealt with above, Sandbaken has failed to meet its onus.

[80] For such further reasons the appeal of Sandbaken cannot succeed.

[81] In addition to the findings set out above, Sandbaken is required to show that the diesel purchases qualify as 'eligible purchases'.[82] In terms of Note 6 'eligible purchases' are defined as "*purchases of distillate fuel by a user for use and used as fuel as contemplated in paragraph (b)*". Note 6(h) contains the heading "*Farming: Refund of levies on eligible purchases of distillate fuel for farming as specified in paragraph (b)(i) to this Note.*". Note 6(h)(i) provides: "*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 farming as provided in paragraphs (h)(ii)(cc), (h)(iii) and (h)(iv) to this Note.*". The findings detailed below are accordingly relevant to whether Sandbaken has proven 'eligible purchases'.

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80 "**SB13(B)**" at CL01-221 – under the heading "*Totaal*" first line commencing "*2018/11/01 … Begin*".

81 "**SB13(B)**", CL01-221. The first tax invoice furnished by Sandbaken is dated 5 November 2018 – "**SB13(C)**" at CL01-313 to CL01-314 – 25,000 litres of diesel delivered according to the storage logbooks on 5 November 2018.

82 Answering affidavit, paragraphs 36.3.

Whether (a) the record keeping of Sandbaken, with specific reference to its logbooks for diesel usage, and (b) the diesel storage records of Sandbaken, are in compliance with Part 3 of Schedule 6 of the Customs Act?

[82] I intend to deal with the second and third issues identified in the parties' joint practice note together.

[83] Note 6(a)(xi) of Schedule 6, Part 3, defines 'logbooks' as follows:

> means systematic written tabulated statements with columns in which are regularly entered periodic (hourly, daily, weekly or monthly) records of all activities and occurrences that impact on the validity of refund claims. Logbooks should indicate a full audit trail of distillate fuel for which refunds are claimed, from purchase to use thereof. Storage logbooks should reflect details of distillate fuel purchases, source thereof, how dispersed/disposed and purpose of disposal. Logbooks on distillate fuel 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, particulars 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. Example(s) of minimum logbook record requirements are available on SARS website at www.sars.gov.za.

[84] It is common cause that Sandbaken does not have an individual 'diesel usage logbook' for any one of the vehicles in respect of which the rebates were claimed.

[85] Sandbaken explains that the hand-written dispensing logbook for each tank is used to draw up an excel 'usage logbook' in the following way:

a. A pre-printed, hard copy, logbook [at each of the tanks] is completed by its staff members by hand when the diesel is dispensed.

b. These hardcopy, handwritten dispensing logbooks are used to draw up 'usage logbooks' in electronic Excel format – this is done by staff members reporting back to the farmer on what was done that day and the farmer adds the description to the Excel 'usage logbook.[83]

[86] The above *modus operandi* is employed according to Sandbaken as "*the majority of the farm workers are illiterate and are thus unable to complete diesel usage logbooks with [details] of the descriptions as the diesel is used.*"[84]

[87] The respondents level various attacks in respect of Sandbaken's 'usage logbooks'. I deal with certain of these in the findings addressed below.

[88] In my view, for the various reasons addressed, Sandbaken has failed to provide diesel usage logbooks that accord with Note 6. It is not possible from the 'logbooks' furnished by Sandbaken to make a determination or a verification of the correctness of the amount of eligible and non-eligible diesel usage. This is due to the following *inter alia*: the discrepancies between the handwritten logbooks and the excel 'usage' logbooks; the deficiencies in the descriptors utilised; the fact that there are in fact no individual usage logbooks, and that the reconstructed excel 'usage logbooks' are in fact not usage logbooks and do not comply with the requirements of or the purpose of usage logbooks. The 'usage logbooks' are in fact dispensing records with descriptors inserted at the end of the day[85] but in respect of diesel dispensed rather than used.

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[83] Founding affidavit, paragraphs 9.13.
[84] Founding affidavit, paragraphs 9.14. The *modus operandi* and the motivation for such *modus* is comparable to that stated in **Umbhaba** at *inter alia* par [23]
[85] According to Sandbaken.

[89] The respondents point out that the "… *information supposedly extracted by Sandbaken from the original manual dispensing record does not accord with the information populated in the reconstructed diesel usage logbook*…"[86]

[90] The respondents illustrate this point by means of an example – comparing the "*dispensing records at annexure "SB13(A)" 2 [CL01-104] and the reconstructed diesel usage logbook annexure "SB13(B)" 6 [CL01-226 to 227]*". The discrepancies include *inter alia*: (**a**) original dispensing record: 33 entries versus reconstructed usage logbook: 36 entries; (**b**) additional entries in the reconstructed usage logbook that do not appear in the original dispensing record; (**c**) entries in the original dispensing record that reflect no litres of diesel dispensed whilst the reconstructed usage logbook reflects litres having been dispensed; (**d**) entries regarding the litres of diesel allegedly dispensed to some vehicles and equipment in the diesel usage logbook exceeding the recorded litres in the original dispensing record. Whilst Sandbaken provides its explanation, it ultimately concedes that it is not entitled to a rebate for the litres not recorded in the manual logbooks.

[91] Unfortunately, however, the examples cited by the respondents are not isolated examples. Without being exhaustive in this regard:

a. The entire original dispensing record ("**SB13A**") contains diesel litres very often with fractions of litres recorded, whilst the reconstructed usage logbook ("**SB13B**" at CL01-226 onwards) contains only round numbers, with not a single fraction recorded.

b. There are significant discrepancies between the original dispensing record and the reconstructed usage logbook which are simply not explained. I do not intend to deal with all of these but simply include a few, apart from the example cited by the respondents, in order to illustrate.

[86] Answering affidavit, paragraphs 77.4.

c. A comparison between the original dispensing record (at CL01-113) and the reconstructed usage logbook (at CL01-230 to 231) reflects the following discrepancies *inter alia*: (**a**) original dispensing record: 33 entries (although the last 2 entries are dated February 2019) versus reconstructed usage logbook: 34 entries; (**b**) original dispensing record reflects litres up to the fraction whilst the reconstructed usage logbook contains only round numbers; (**c**) there are discrepancies between the litres in the respective logbooks – see, for example, the first entry 16,6 litres in the original dispensing record versus 26 litres in the reconstructed usage logbook; no entry for litres at 29 January 2019 for vehicle B[…], driver 'Fliep', in the original dispensing record versus 42 litres in the reconstructed usage logbook; (**d**) the reconstructed usage logbook contains an additional entry for "spraying crops – chemicals/fertilizer" of 242 litres (but with various details thereof not recorded) and which does not appear on the original dispensing record at all; (**e**) if one adds up all of the litres on the original dispensing record one arrives at a figure of approximately 1,844 litres whilst the total diesel used as reflected in the reconstructed usage logbook is 2,201 litres; *et cetera*.

d. A comparison between the original dispensing record (at CL01-115) and the reconstructed usage logbook (at CL01-293) reflects entirely different litres.

e. A comparison between the original dispensing record (at CL01-117) and the reconstructed usage logbook (at CL01-273) reflects the following discrepancies *inter alia*: (**a**) the reconstructed usage logbook has an additional two entries; (**b**) the original dispensing record reflects litres up to the fraction whilst the reconstructed usage logbook contains only round numbers; (**c**) there are discrepancies between the litres in the respective logbooks; (**d**) if one adds up all of the litres on the original dispensing record one arrives at a figure of 805,6 litres whilst the total diesel used as reflected in the reconstructed usage logbook is 1,000 litres; *et cetera*.

[92] The ‘source documentation’ provided by Sandbaken (the original dispensing record) does not accord with the claims made by Sandbaken in the reconstructed usage logbook. This, as illustrated briefly above, constitutes an insurmountable obstacle to Sandbaken in meeting its onus.

[93] In aggravation, the “generic” (as the respondents contend) or “summary” (as Sandbaken contends) use of descriptors does not enable an evaluation of eligible and non-eligible usage and does not comply with Note 6. Such generic descriptors appear throughout the reconstructed usage logbook. As has been addressed, Sandbaken provided the following explanation in respect of what it contended the generic descriptors entailed:

> Farm construction — Creating and maintaining roads on the farm, digging of ditches to lay electric cables and water pipes, constructing of contour walls in lands, levelling of lands, repairing and maintaining dam walls, creating water ways to guide the water away from the lands, etc.
> Livestock activities — Checking and maintaining fences, check the wellbeing of the livestock and do stock counts of livestock, transporting of feed to livestock, tending to ill livestock, etc.
> Daily farming activities — transporting of staff, checking crops already planted, tending to breakdowns of farming equipment, checking up on work progress of lands being worked, planting of crops, spraying and fertilizing of crops, harvesting of crops, managing the farming operation, etc.

[94] Without being exhaustive, the following flaws are apparent from Sandbaken’s own version:

a. Each of the generic descriptors concludes with the phrase ‘*et cetera*’ – *id est*, there are other unstated activities that are included in the generic descriptions. It is not possible to ascertain what those other

activities are. This does not constitute compliance: "*Should the eventual use not be stated or sufficiently indicated, the claim fails.*"[87]

b. The list of activities as set out in Note 6(h)(ii)(cc)(B)[88] constitutes a closed and exhaustive list.[89] Included in the list of activities that Sandbaken provides for such generic descriptions are activities that fall outside of the exhaustive/closed list of activities. Sandbaken does not explain how each of these activities are activities that are carried on for own primary production in farming.[90] In addition, it is not possible to establish from the reconstructed usage logbook precisely what activity Sandbaken claims it performed where the generic descriptor includes one of a number of activities (which is in fact further indefinite by virtue of the use of '*et cetera*') in the explanations. Such descriptors do not assist in identifying the actual activity performed in relation to Note 6(h) and whether such activity qualifies for a diesel refund.[91]

c. VDM in correspondence claims that the majority of the vehicles do not leave the farm and that licenced vehicles that do leave the farm "*do so in order to perform farming activities such as purchasing parts, feed, medicine, etc.*". It is unclear which descriptor Sandbaken uses for such activities. A further difficulty arises in this regard, namely that eligible use in such context would only include

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[87] **Canyon Resources (Pty) Ltd v Commissioner for South African Revenue Service** 82 SATC 315 at par [9.5]

[88] The list included under the heading "own primary production activities in farming"

[89] **Umbhaba** par [69].
In the context of 'mining' with reference to the same question see: **Graspan** par [45] (dealing with the list in the mining sector). See also, the Supreme Court of Appeal decision of **Commissioner, South African Revenue Service v Glencore Operations SA (Pty) Ltd** (Case no 462/2020) [2021] ZASCA 111 (10 August 2021) par [51] - [54] (Judgement of Petse DP, Mbha JA concurring) read together with the majority separate judgment par [71]

[90] Note 6(h)(iii).

[91] The manner in which Sandbaken has presented its 'usage logbooks' and evidence leaves a gaping factual void. *Cf*. **Commissioner, South African Revenue Service v Glencore Operations SA (Pty) Ltd** (Case no 462/2020) [2021] ZASCA 111 (10 August 2021) par [32] (Judgement of Petse DP, Mbha JA concurring)

transportation by Sandbaken of "*farming requirements*" (as defined) "*from any place to the farming property.*"[92]

d. The reconstructed diesel usage logbook further does not indicate the place where the diesel is used. Apart from being a requirement in respect of a diesel usage logbook, this gains further significance by virtue of the fact that the diesel tanks are on four of the farms, and Sandbaken alleges that it farms on thirteen farms. It appears from the map furnished by Sandbaken that not all of the farms are contiguous to each other. For example, the farm referred to as "Bosmanskrans (Bk 13) (313 ha)" does not appear to border any of the other farms. There is no explanation of the manner in which vehicles that are either on such other farms (if this is the case) are refuelled, and there is no reference to vehicles travelling to farms on which there are no diesel tanks. In addition, no indication is given of places travelled to or from for purposes of obtaining 'farming requirements' or otherwise.

e. Certain of the descriptors inevitably involve an activity where labour is an essential component of the activity but no transportation of employees is recorded.

[95] In my view the reconstructed diesel usage logbook presented by Sandbaken does not comply with the requirements of Note 6. In fact, such 'logbook' as presented does not constitute a usage logbook as envisaged in Note 6 at all. This may be illustrated with reference to the logbook itself, using the following example. In respect of the vehicle with registration number "H[…]", referred to as a "Toyota Hilux", the following appears in the reconstructed diesel usage logbook:[93]

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[92] Note 6(h)(iv)(cc)(B). *Cf*. **Umbhaba**, par [74] – [78].

[93] I provide the reference to where the recordal is made in the reconstructed diesel usage logbooks in the footnotes. I have used the kilometers travelled and the diesel used, as recorded by Sandbaken, to calculate the kilometers travelled per litre of diesel in each footnote – such figures are rounded to the second decimal point and are inserted in square brackets. I also point out in the footnote where Sandbaken has duplicated such recordals.

a. 23 November 2018 – 128 ‘litres used’ – “Daily farming activities” – no reference under heading “Total km/hour meter/engine hour USED” – filled from ‘Sandbaken 2’ tank.[94]

b. 9 January 2019 – 80 ‘litres used’ – “Daily farming activities” – 905 [km] under heading “Total km/hour meter/engine hour USED” – filled from ‘Welgezegend’ tank.[95]

c. 31 January 2019 – 128 ‘litres used’ – “Daily farming activities” – 1,737 [km] under heading “Total km/hour meter/engine hour USED” – filled from ‘Sandbaken 2’ tank.[96]

d. 28 April 2019 – 130 ‘litres used’ – “Daily farming activities” – 1,188 [km] under heading “Total km/hour meter/engine hour USED” – filled from ‘Sandbaken 2’ tank.[97]

e. 19 August 2019 – 138 ‘litres used’ – “Daily farming activities” – 615 [km] under heading “Total km/hour meter/engine hour USED” – filled from ‘Welgezegend’ tank.[98]

f. 11 September 2019 – 140 ‘litres used’ – “Daily farming activities” – 720 [km] under heading “Total km/hour meter/engine hour USED” – filled from ‘Welgezegend’ tank.[99]

g. 7 October 2019 – 103 ‘litres used’ – “Daily farming activities” – 1,371 [km] under heading “Total km/hour meter/engine hour USED” – filled from ‘Sandbaken 2’ tank.[100]

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[94] CL01-270. It is not possible to calculate kilometres per litre by virtue of the missing information in the logbook.
[95] CL01-293 – repeated / duplicate at CL01-304. [11.31 km / litre].
[96] CL01-271. [13.57 km / litre].
[97] CL01-275. [9.14 km / litre].
[98] CL01-294 – repeated / duplicate at CL01-305. [4.46 km / litre].
[99] CL01-294. [5.14 km / litre].
[100] CL01-279. [13.31 km / litre].

h. 2 January 2020 – 60 ‘litres used’ – “Daily farming activities” – 548 [km] under heading “Total km/hour meter/engine hour USED” – filled from ‘Welgezegend’ tank.[101]

i. 15 January 2020 – 134 ‘litres used’ – “Daily farming activities” – 1,065 [km] under heading “Total km/hour meter/engine hour USED” – filled from ‘Sandbaken 2’ tank.[102]

j. 6 March 2020 – 127 ‘litres used’ – “Daily farming activities” – 939 [km] under heading “Total km/hour meter/engine hour USED” – filled from ‘Sandbaken 2’ tank.[103]

k. 25 March 2020 – 80 ‘litres used’ – “Daily farming activities” – 935 [km] under heading “Total km/hour meter/engine hour USED” – filled from ‘Sandbaken 2’ tank.[104]

l. 12 June 2020 – 139 ‘litres used’ – “Daily farming activities” – 827 [km] under heading “Total km/hour meter/engine hour USED” – filled from ‘Sandbaken 2’ tank.[105]

m. 24 July 2020 – 133 ‘litres used’ – “Daily farming activities” – 1,102 [km] under heading “Total km/hour meter/engine hour USED” – filled from ‘Sandbaken 2’ tank.[106]

n. 11 September 2020 – 97 ‘litres used’ – “Daily farming activities” – 887 [km] under heading “Total km/hour meter/engine hour USED” – filled from ‘Sandbaken 2’ tank.[107]

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[101] CL01-297 – repeated / duplicate at CL01-308. [9.13 km / litre].
[102] CL01-283. [7.95 km / litre].
[103] CL01-284. [7.39 km / litre].
[104] CL01-285. [11.69 km / litre].
[105] CL01-287. [5.95 km / litre].
[106] CL01-287. [8.29 km / litre].
[107] CL01-290. [9.14 km / litre].

[96] The reconstructed diesel usage logbook does not constitute a usage logbook for purposes of Note 6 at all. The above example demonstrates that, at best for Sandbaken, it has provided a dispensing document to the respondents. For example, it is practically impossible that the abovementioned vehicle used 128 litres of diesel on 31 January 2019 to travel 1,737 kilometers. The varying fuel consumption in respect of the figures provided by Sandbaken in respect of the same vehicle – as addressed in the footnotes – further demonstrates that Sandbaken has not furnished a diesel usage logbook. Further, the inadequacy of the descriptor "Daily farming activities" has already been addressed.

[97] One cannot, on the information provided by Sandbaken, make any determination or verification of the correctness of the amount of eligible diesel usage. The logbooks do not indicate a full audit trail of distillate fuel for which refunds are claimed, from purchase to use thereof. The 'reconstructed usage logbooks' are in fact not logbooks of each of the individual items of equipment or vehicles utilised in the alleged primary farming operations. At best, these represent dispensing records. The logbooks do not reflect with any measure of certainty the volume of diesel utilised by each vehicle in primary farming operations. The 'reconstructed usage logbooks' do not qualify as a usage logbook as contemplated in Note 6.[108]

[98] The determination of the Commissioner in respect of the 'diesel usage logbook' is not wrong:

> The system adopted by the Plaintiff does not provide a full audit trial of the fuel used from purchase to use as is required. While the dispensing records exist they fall short in showing the usage to which the fuel was put.[109]

[99] The appeal cannot succeed.

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[108] **Canyon Resources (Pty) Ltd v Commissioner for the South African Revenue Service** (68281/2016) [2023] ZAGPPHC 1957 (30 November 2023) par [36] - [37].
[109] **Umbhaba**, par [85].

[100] The respondents also challenge the ‘diesel storage logbooks’ of Sandbaken. The parties have listed this as an issue for determination in their joint practice note. Having arrived at my conclusion regarding the ‘usage logbooks’ this is not an issue that is strictly necessary to be determined. However, cognisant of the fact that this is a judgment *a quo*, I shall deal with this issue briefly.

[101] Storage logbooks should reflect details of distillate fuel purchases, source thereof, how dispersed/disposed and purpose of disposal.[110] Whilst the storage logbooks do reflect the number of litres delivered (the total and the number of litres to each of the relevant tanks), and, using a bit of common sense, one is able to trace the total fuel deliveries to each of the tax invoices,[111] by virtue of the deficiencies in the reconstructed diesel usage logbooks (as addressed already) it is not possible to determine how the diesel was dispersed/disposed and the purpose of such disposal. The storage logbooks themselves do not reflect the aforesaid. Accordingly, in my view, such diesel storage logbooks also do not comply with the requirements of Note 6.

[102] The records submitted, are not accurate or complete. The records do not meet all of the peremptory requirements of the Customs Act. The cumulative inadequate record keeping serves as a further reason that the appeal cannot be upheld. As a result, further, Sandbaken has failed to properly quantify its refund claim.[112] Sandbaken has failed to demonstrate and discharge the onus of proving that it is entitled to the diesel refund claimed.

Whether the diesel was used in the applicant's primary production activities in farming?

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[110] Note 6(a)(xi).
[111] See storage logbook, CL01-221 to 01-225 read together with CL01-314, 317, 320, 323, 326, 331, 334, 337, 341 (very slight discrepancy), 345 (very slight discrepancy), 350 (very slight discrepancy), 353, and 359.
[112] **Assmang Proprietary Limited v Commissioner for the South African Revenue Service and Others** (91960/2015) [2023] ZAGPPHC 2036 (18 December 2023) at par [56]

[103] As held in **Commissioner, South African Revenue Service v Glencore Operations SA (Pty) Ltd**[113] "*… the rebate scheme (Item 670.04 read with Note 6 in Part 3 of Schedule 6) is meticulously detailed. The lawmaker was at pains to circumscribe the activities which were entitled to benefit from the scheme. …*"

[104] As has been addressed already, the list of activities as set out in Note 6(h)(ii)(cc)(B)[114] constitutes a closed and exhaustive list.[115]

[105] In "**SB12**" to the founding affidavit, VDM on behalf of Sandbaken itself concedes that not all diesel was used for eligible purposes. In this regard, VDM stated as follows *inter alia* in the letter dated 29 November 2021: "*As the above-mentioned activities are a closed list, we do understand that all entries in the global usage logbooks submitted do not qualify as eligible liters. We do however kindly request that the following liters in the usage logbooks be allowed as eligible liters to be claimed. The eligible liters in the table below should qualify for the refund as it was carried on for own primary production in farming by the user (Saudbaken Boerdery).*"

[106] I agree with the respondents that Sandbaken has again (in its founding affidavit read with the attachments thereto) failed to account for every litre of distillate fuel as it is required to do. Sandbaken's papers provide very little information about how 'own primary production activities' are conducted.[116] Sufficient evidence has not been tendered in order for Sandbaken to meet its onus.[117]

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[113] (Case no 462/2020) [2021] ZASCA 111 (10 August 2021) par [58] (the majority separate judgment)
[114] The list included under the heading "own primary production activities in farming"
[115] **Umbhaba** par [69].
In the context of 'mining' with reference to the same question see: **Graspan** par [45] (dealing with the list in the mining sector). See also, the Supreme Court of Appeal decision of **Commissioner, South African Revenue Service v Glencore Operations SA (Pty) Ltd** (Case no 462/2020) [2021] ZASCA 111 (10 August 2021) par [51] - [54] (Judgement of Petse DP, Mbha JA concurring) read together with the majority separate judgment par [71]
[116] *cf*. **Commissioner, South African Revenue Service v Glencore Operations SA (Pty) Ltd** (Case no 462/2020) [2021] ZASCA 111 (10 August 2021) par [60] (The majority separate judgment)
[117] *cf*. **Tholo SCA** par [39])

[107] As addressed already, Sandbaken's diesel refund claim has included ineligible activities that fall outside of the list of activities as set out in Note 6(h)(ii)(cc)(B).

[108] Further, the evidence presented by Sandbaken renders it impossible to conclude that all of the diesel for which Sandbaken claims a rebate was used in primary production activities in farming for purposes of rebate Item 670.04.[118]

[109] For such further reason, the appeal cannot succeed.[119]

COSTS

[110] Counsel for Sandbaken submit in heads of argument that in the event that the application is dismissed, the respondents should be disallowed a portion of their costs based on the inclusion of irrelevant and unnecessary allegations and attachments, namely with reference to the budget speech of the erstwhile Minister and the affidavit of Mr Moodley.

[111] The affidavit of Mr Moodley, the chairperson of the Appeal Committee and part of the Appeal Committee that considered Sandbaken's internal administrative appeal, serves a purpose of *inter alia* confirming relevant facts in the answering affidavit. There is nothing objectionable or unnecessary about this affidavit. However, in respect of the budget speech of 21 February 2001, I agree that this document is irrelevant to the determination of this matter,[120] and it was unnecessary to attach the document. Very little is stated about the budget speech in the answering affidavit. It was unnecessary to attach this document. I agree that the costs associated with this document,

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[118] *cf.* **Commissioner, South African Revenue Service v Glencore Operations SA (Pty) Ltd** (Case no 462/2020) [2021] ZASCA 111 (10 August 2021) par [32] (Judgement of Petse DP, Mbha JA concurring).
[119] *Cf*. **Umbhaba** par [61] – [78].
[120] See also: **Commissioner, South African Revenue Service v Glencore Operations SA (Pty) Ltd** (Case no 462/2020) [2021] ZASCA 111 (10 August 2021) par [38] (Judgement of Petse DP, Mbha JA concurring) read with par [57] (The majority separate judgment).

"**SARS1**" to the answering affidavit, ought not to form part of the costs that stand to be awarded.

[112] Apart from the aforesaid, there is no reason why costs ought not to follow the result. The respondents seek costs consequent upon the employ of two counsel. However, there is no evidence that two counsel were employed by the respondents – Mr Kalipa appeared for the respondents alone and he is the sole author of heads of argument for the respondents.

[113] Considering the relevant factors, including *inter alia* the complexity of the matter and the importance of the matter to the parties, costs on scale C are warranted.

CONCLUSION

[114] The appeal cannot succeed and stands to be dismissed.

[115] It follows that the further relief sought by Sandbaken, namely the declarator sought, the setting aside of the decision to levy interest, and the claim for payment, can also not succeed.

ORDER

[116] Accordingly, I make the following order:

a. The application is dismissed with costs on scale C.

b. The aforesaid costs are to exclude the costs associated with the inclusion of the attachment to the answering affidavit marked "**SARS1**" at CaseLines 01-505 to 01-523.

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WOODROW AJ

ACTING JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties and or parties' representatives by e-mail and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on this 21ST day of January 2025.

Appearances:

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Counsel for the Respondents: L Kalipa
instructed by: VDT Attorneys Inc

Date of Hearing: 7 August 2024
Date of Judgment: 21 January 2025