REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

13//02/25
DATE [redacted] SIGNATURE

Case Number: 51712/2017

In the matter between:

JACOBUS PETRUS JACOBUS NAUDE	**Applicants**
And	
COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	**First Respondent**
SOUTH AFRICAN REVENUE SERVICE	**Second Respondent**

JUDGMENT

Joyini AJ

INTRODUCTION

[1] The applicant seeks an order setting aside the first respondent's tariff determination and/or decision in terms whereof the first respondent resolved not to allow a refund of the fuel levy and Road Accident Fund levy ("the fuel 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 (as amended) ("the Act") and Rebate Item 670.04 of Schedule 6, Part 3 to the Act, to the extent stated in the said Rebate Item.

[2] The application is opposed by the first and second respondents ("the respondents").

RELIEF SOUGHT BY APPLICANT

[3] The court is called upon to issue an order as follows:

"1. The first respondent's tariff determination and/or decision [in terms whereof the first respondent resolved not to allow a refund of the fuel levy and Road Accident Fund levy ("the fuel 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 (as amended) ("the Act") and Rebate Item 670.04 of Schedule 6, Part 3 to the Act, to the extent stated in the said Rebate Item], is set aside;

2. It is declared that the applicant is entitled to 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 following tax periods: 12/2013, 02/2014, 04/2014, 06/2014, 08/2014, 10/2014, 12/2014, 02/2015, 04/2015, 06/2015, 08/2015, 10/2015, 12/2015, 02/2016, 04/2016, and 06/2016 ("the tax periods");

It is declared that:

3.1. Pursuant to the first and second respondents' letter of finalisation of audit dated 06 October 2016, the first and second respondents have failed to issue any notice of assessment to the Applicant in respect of refunds of the fuel levy leviable on distillate fuel and/or diesel in accordance with the provisions of the Act and/or the Value-Added Tax Act, 89 of 1991 (as amended), for the tax periods;

3.2. The purported tax debt relied on by the first and second respondents (insofar as the first and/or second respondents contend that the applicant is liable to make payment of a refund of the fuel levy leviable on distillate fuel and/or diesel in terms of the Act, for the tax periods) are not due and payable by the applicant to any of the respondents;

3.3. All collection steps taken by the first and second respondents against the applicant, in respect of the purported tax debt, including notice(s) issued by the First and/or Second Respondents to third parties in terms of section 179 of the Tax Administration Act, 28 of 2011 (as amended) ("the TAA") are null and void, alternatively irregular, and set aside;

4. The first and second respondents are ordered to pay the amount of R 664,637.46 to the applicant, in respect of funds received by the first and second respondents which are due and owing to the applicant by the relevant third party(ies);

5. The first and second respondents are ordered to pay the costs of this application, including the costs of two counsel, jointly and severally, the one paying the other to be absolved."

DIESEL REFUND

[4] In order to contextualise the issue and to indicate what needs to be submitted to SARS in order to qualify for a diesel refund, it is necessary to briefly restate the statutory provision.

[5] In terms of Section 75(1)(e), subject to whatever conditions the Commissioner may impose, a refund of the fuel levy and the Road Accident Fund levy levied on fuel may be granted in certain circumstances

[6] To qualify for such a refund the "*user*" of the diesel has to satisfy the requirements set out in rebate item 670.04 included in Part 3 of Schedule 6 of the Act (the rebate item). This item determines under which circumstances users who purchased diesel may become "*eligible*" for consideration of refunds.

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

"(xi) 'Logbooks' means systematic written tabulated statements with columns in which are regularly entered periodic (hourly, daily, weekly or monthly) records of all activities and occurrences that impact on the validity of refund claims. Logbooks should indicate a full audit trail of distillate fuel for which refunds are claimed, from purchase to use thereof. Storage logbooks should reflect details of distillate fuel purchases, source thereof, how dispersed/disposed and purpose of disposal. Logbooks on distillate fuel used should contain details on source of fuel, date, place and purpose of utilisation, equipment fuelled, eligible or non-eligible operations performed, and records of fuel consumed by any such machine, vehicle, device or system. Logbook entries must be substantiated by the required source documents and appropriate additional information that include manufacture specification of equipment, of operator, intensity of use (e.g. distance, duration, route, speed, rate) and other incidents, facts and observations relevant to the measurement of eligible diesel use".

[8] Having regard, yet again, the exclusions alluded to in Note 6, it must follow that whatever logbooks are produced, must contain sufficient detail that it can be determined therefrom which of the diesel used was for primary and which for secondary or other operations. This detail requirement has already been determined by our courts as follows: "*There are many instances where a*

dispensing record would indicate the use of the vehicle at the time of dispensing but that use would change over time and conceivably cover eligible as well as non-eligible activities and the dispensing record in such instances would not be a correct reflection of a diesel usage which occurred" and "*... the question is not whether it is fair or logical to include only one leg of a trip as being eligible but rather what the scope of the eligible activity is when regard is had to the schedule and in this regard there is no reason to depart from the clear language used by the legislator.*"[1]

LEGISLATIVE PROVISIONS

[9] Diesel refunds are regulated by Chapter X, Section 75 of the Act, read with item 670.04 and Part III of Schedule 6. In summary, an applicant for diesel refund must satisfy the Commissioner that the following requirements have been met:

(i) The applicant must be registered as a VAT vendor in terms of the VAT Act, Act 89 of 1991.

(ii) Once the applicant qualifies as a user and claims a refund of diesel that qualifies as distillate fuel, which includes diesel, then:

(a) Applicant must have purchased the diesel and the diesel purchased must qualify as an 'eligible purchase'.

(b) Applicant or the contractor must use the diesel for the user's own primary production activities.

[10] An applicant for diesel refund must provide the necessary documents to substantiate its claim for diesel. Only then can the Commissioner make a determination. For present purpose, the following provisions apply:

(i) An applicant must show, in respect of each claim, how the quantity of diesel purchased and used on which the refund is claimed, was calculated.

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[1] *Umbhaba Estates (Pty) Ltd v The Commissioner for the South African Revenue Services (66454/2017) [2021] ZAGPPHC (10 June 2021) para. [76] to [85] as referred to in Mbali Coal (Pty) Ltd v The Commissioner for the South African Revenue Services (81950/2019) [2023] ZAGPPHC1792 (5 October 2023).*

(ii) If applicant carried on business in more than one...

(iii) Applicant must show how the diesel was used, sold or otherwise disposed of.

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

(v) Applicant must provide logbooks in respect of diesel supplied to each vehicle and or equipment used and specify how the vehicles and equipment was used for each trip travelled or for each hour used, including a full audit trail.

[11] Section 75 (14) provides in peremptory language that SARS is prohibited from paying any refund under the provisions of Section 75 unless it receives an application within a specified period, duly completed and supported by the necessary documents.

[12] To the extent that an applicant cannot provide SARS with the required record of proof for the refund, or that the claim relates to activities which are not own primary production activities of applicant, the Commissioner cannot allow a refund and any provisional refund allowed must be recovered by SARS.

APPLICANT'S CASE

[13] In prayers 4 to 4.3 of the notice of motion, the applicant seeks a declarator to the effect that no additional assessment has been issued by the respondents in respect of the alleged indebtedness of the applicant, and that no amount is therefore payable by the applicant to SARS. Consequential relief is sought in prayer 5 of the notice of motion, to the effect that the amounts previously irregularly collected by SARS be repaid to the applicant.

[14] At the time of preparing the applicant's heads of argument, it was anticipated that the aforesaid declaratory relief would be determined by the outcome of the

tariff appeal (i.e., the main relief sought in prayers 1 and 2 of the notice of motion).

[15] The declaratory relief however remains to be adjudicated by this Court, because of the prolonged failure by SARS to issue an assessment herein: SARS can no longer issue an assessment, because SARS is precluded in terms of s 99(1)(b)(i) of the TAA from issuing an assessment after the lapse of 5 years after the date of the original self-assessment (i.e., the date upon which the applicant submitted its value-added tax return to SARS).

Administration of diesel refunds under the VAT Act / payability of refund to SARS

[16] Section 75(1C)(e) of the Customs and Excise Act[2] provides that an amount for which a person is liable under the section, shall be "paid ... upon demand". However, as demonstrated herein below, it is submitted that such "demand" can only be validly made by SARS where an assessment has been issued. Diesel refund claims (specifically) are administered under the Value-Added Tax Act[3], and[4] a "user" for purposes of diesel refund claims is required to register for purposes of VAT under the VAT Act.[5] A diesel refund claim is made by submitting a VAT 201 return to SARS.[6]

[17] In terms of s 91(2) of the TAA,[7] if a tax Act requires a taxpayer to submit a return which incorporates a determination of the amount of a tax liability (or a refund), the submission of the return is an original self-assessment of the tax liability. The term "assessment" is defined in s 1 of the TAA to mean the determination of the amount of a tax liability or refund, by way of self-assessment by the taxpayer or an assessment by SARS. The return in terms whereof a user claims a diesel refund under the VAT Act for purposes of s 75 of the C&E Act, is

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[2] Act 91 of 1964 (as amended) ("the C&E Act").

[3] Act 89 of 1991 (as amended) ("the VAT Act").
[4] See s 75(1A)(b), (d), and (f) of the C&E Act.
[5] Section 75(1A)(b)(ii) of the C&E Act.
[6] Section 75(1A)(d) and s 75(4A)(b) of the C&E Act.
[7] As it read at the time, prior to a recent amendment in 2024.

therefore an original self-assessment by the user. Where SARS is satisfied that an assessment does not reflect the correct application of a tax Act to the prejudice of SARS or the fiscus, SARS must make an additional assessment to correct the prejudice.[8] However, SARS may not make an assessment after 5 years after the date of the original self-assessment (i.e., the date of the user's VAT 201 return claiming a diesel refund).[9]

[18] It is submitted that a user is only liable for an amount under section 75, and that an amount can only be "paid on demand", where a user and the amount has been assessed by SARS for purposes of and under the VAT Act, read with the Tax Administration Act[10].[11] Put differently: only where an amount is payable under the VAT Act read with the TAA in terms of a duly issued additional assessment, can an amount be validly demanded as contemplated in s 75 of the C&E Act and thereafter recovered by SARS.

No assessment issued to the applicant

[19] By the time that SARS issued an audit findings letter to the applicant on 07 September 2016, the applicant had submitted (and had received) the diesel refunds for the relevant tax periods, 12/2013 to 06/2016.

[20] The applicant has demonstrated that no additional assessment was issued by SARS pursuant to issuing the audit finalisation letter on 06 October 2016. In this regard: Neither the applicant nor his accountants ever received an additional assessment. No additional assessment has been issued to the applicant by SARS' system on e- filing.

[21] SARS' auditor and deponent to the answering affidavit, Mr Sangweni, did not (and manifestly unable to) provide a copy of an additional assessment to this

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[8] See s 92 of the TAA, and see s 31(4) of the VAT Act.

[9] Section 99(1)(b)(i) of the TAA.

[10] Act 28 of 2011 (as amended) ("the TAA").

[11] Section 4(2) of the VAT Act: "Administrative requirements and procedures for purposes of the performance of any duty, power or obligation or the exercise of any right in terms of this Act are, to the extent not regulated in this Act, regulated by the Tax Administration Act". See s 4 of the TAA.

Court, and instead attached a data form printout to his answering affidavit, suggesting that this should be construed to be an additional assessment. This allegation stands to be rejected:

[21.1] The document purports to be a "print of assessment detail", not an additional assessment. The document further states to the reader "use these figures to complete the VAT217DP". This is not explained by Mr Sangweni in his affidavit.

[21.2] Section 96(1) of the TAA provides that notice of assessment must be issued to the taxpayer, and that such assessment must satisfy certain requirements.

[21.3] Nothing in the document confirms that an additional assessment has been issued to the applicant. On Mr Sangweni's own version, where an additional assessment has not been uploaded to the applicant's e-filing profile, no such assessment exists.

[22] The best evidence of the existence of a VAT additional assessment is the assessment itself. Significantly, SARS has failed to provide a copy of the VAT additional assessment to this Court, or provided any proof that same was issued to the applicant. The ineluctable conclusion is that such assessment (as defined in s 1 and compliant with s 96 of the TAA) does not exist.

[23] In the premises, it is respectfully submitted that:

[23.1] SARS may only demand payment of a diesel refund amount in terms of s 75(1C)(e) of the C&E Act, where such amount is duly payable in terms of an additional assessment issued under the VAT Act, read with the TAA.

[23.2] It is undisputed that SARS has not issued an additional assessment reflecting an amount payable by the applicant to SARS.

[23.3] The period of 5 years after the date of the original assessment have expired by September 2021, and SARS is no longer entitled to issue an additional assessment under s 99(1)(b)(i) of the TAA.

[23.4] No amount is payable by the applicant to SARS, regardless of the outcome of the tariff appeal.

[24] In the premises, the declaratory relief sought in prayers 4 to 4.3 of the notice of motion, as well as the consequential relief in prayer 5 thereof, stands to be granted with costs, such costs to include the costs of two counsel.

RESPONDENTS CASE

[25] In prayers 1 and 2 of the notice of motion, the applicant seeks orders setting aside the Commissioner's decision to disallow certain refunds claimed by the applicant for fuel levy ("diesel refunds") in terms of section 75 (1A) of the Customs Act during the period 12/2013 to 6/2016 ("tax periods").

[26] The applicant's supplementary heads of argument pertain to prayer 4 of the notice of motion in which he seeks an order declaring that, because SARS failed to issue notices of assessment following the letter of finalisation of audit of 6 October 2016, the diesel refunds demanded therein were not due and payable, and the collection steps undertaken by SARS – at the time – in terms of the third party procedure under section 179 of the Tax Administration Act 28 of 2011 ("TAA") were null and void, and must be set aside.

[27] At the commencement of argument, it was submitted on behalf of the applicant that the issues in prayer 4 were raised in *limine* such that in the event the court is with the applicant, all the disputes between the parties will be disposed of.

[28] We submit not. The relief in prayer 4 is only competent, let alone as a preliminary point, if it is sought an ancillary to the main appeal relief in prayers 1 and 2 of the notice of motion, as correctly characterised in paragraph 10 of the applicant's founding affidavit.

[29] In other words, if the applicant is liable for the disallowed diesel refunds, which we submit he is, and payment was due and payable, under the Customs Act, it is the end of the debate, the remainder of the prayers must be dismissed.

Applicant is liable and the tax debt was due and payable

[30] In terms of section 75(1A)(e) of the Customs Act, any payment by the Commissioner of claimed refunds shall be deemed to be a provisional refund subject to the production of proof that the diesel was purchased and used in accordance with the provisions of this section and item of Schedule 6 thereto.

[31] In terms of section 75(1C)(e)(i) if, after an audit of the user's books and records, the amount of the provisional refund paid to the user concerned was not duly refundable or exceeds the amount refundable, any such amount or the excess shall be paid by the user on demand to the Commissioner.

[32] The letter of finalisation of audit of 6 October 2016 follows an audit in terms of section 75(1C)(e)(i). It communicated the disallowance of the diesel refunds over the contended tax periods to the applicant and constitutes the Commissioner's (SARS) demand for payment. Therefore, the applicant was liable as at 6 October 2016 and the disallowed diesel refunds were due and payable upon such demand.

[33] The applicant does not dispute that in terms of the Customs Act, an amount for disallowed diesel refunds is payable to the Commissioner (SARS) on demand.

[34] The applicant however argued that a user is only liable for the amount under section 75, and that such amount can only be paid on demand, where the amount has thereafter been assessed by SARS under the VAT Act and the TAA and thus payable in respect thereof.

[35] There is no merit to this argument:

[35.1] First, the decision to disallow the applicant's diesel refunds in the letter of finalisation of audit of 6 October 2016 constitutes a determination as contemplated in terms of section 47(9)(a))i)(bb) of the Customs Act.

[35.2] Second, in terms of section 47(9)(b)(i), whenever a determination is made under section 47(9)(a) above, the amount due in terms thereof shall remain payable even if there are court proceedings instituted to challenge the determination. Provided that the Commissioner may on good cause shown,

suspend such payment until the date of any final judgment by the High Court or a judgment by the Supreme Court of Appeal.

[35.3] Third, neither the VAT Act, nor the TAA, contain a provision that an amount of disallowed diesel refunds can only be paid on demand where such amount has been assessed by SARS under the TAA or VAT Act, and thus payable in terms thereof.

Diesel refunds, TAA and VAT Act

[36] The diesel refund scheme is administered through the VAT system and refunds are only payable when the user fully comprise with the provisions of section 75(IA) of the Customs Act.

[37] Section 75(1A)(d) provides that the Commissioner may:

"(i) pay any such refund upon receipt of a duly completed return from any person who has purchased distillate fuel for use as contemplated in the said item of Schedule No. 6;

(ii) pay any such refund by means of the system in operation for refunding value-added tax; and

(iii) for the purposes of payment, set off any amount refundable to any person in terms of the provisions of this section and the said items against any amount of value-added tax payable by such person."

Assessments were issued

[38] A search on SARS electronic filing system ("SARS e-Filing"), on which the applicant is registered, reflects that assessments were in fact issued to the applicant on 29 November 2016 for various amounts in respect of the disallowed diesel refunds with the second date of expiry at 30 December 2016. The assessments, which were printed from the SARS e-Filing profile of the applicant are attached to SARS's answering affidavit as "SARS-9.1" to "SARS-9.16".

[39] In *MTN International v CSARS,*[12] the Supreme Court of Appeal stated the following: "[9] It is common cause in this case that: (a) on 31 March 2011 SARS assessed MTN to additional tax; (b) that assessment was made within the prescriptive period allowed by the Act; and (c) the assessment was notified to MTN on that day. An 'assessment' is defined in s 1 of the Act as: '. . . the determination by the Commissioner, by way of a notice of assessment (including a notice of assessment in electronic form) served in a manner contemplated in section 106 (2)—

(*a*) of an amount upon which any tax leviable under this Act is chargeable; or

(*b*) of the amount of any such tax; or

(*c*) of any loss ranking for set-off; or

(*d*) of any assessed capital loss determined in terms of paragraph 9 of the Eighth Schedule . . . .'

"[9] [...] An assessment, so First South African Holdings (Pty) Ltd v Commissioner for South African Revenue Service ***73 SATC 221*** *para 15 held, is a determination by SARS of one or more matters. What is required is at least a purposeful act – one whereby the document embodying the mental act is intended to be an assessment (Commissioner for the South African Revenue Service v South African Custodial Services (Pty) Ltd* ***2012 (1) SA 522*** *(SCA) para 29).*

[10] As is apparent from the definition of 'assessment' it is not a requirement that in order for a notification of a determination by SARS to be a valid assessment, it should be dated. Much less that a valid 'due date' should be fixed. On the contrary the legislature in s 1 of the Act defined 'date of assessment' to mean '. . . the date specified in the notice of such assessment as the due date or, where a due date is not so specified, the date of such notice'. It follows that where no 'due date' (to be read 'lawful or valid' due date) is specified (S v Mapheele ***1963 (2) SA 651*** *(A) at 655D-E), it cannot be said that the assessment is a nullity."*

[12] **[2014] ZASCA 8** (14 March 2014) (275/2013).

[40] In conclusion, the respondents persists in their request that the entire application should be dismissed and the determination of 6 October 2016 be confirmed, with costs including costs of a counsel who is a senior on scale C.

ANALYSIS

[41] To qualify for a refund the "*user*" of the diesel has to satisfy the requirements set out in rebate item 670.04 included in Part 3 of Schedule 6 of the Act (the rebate item). This item determines under which circumstances users who purchased diesel may become "*eligible*" for consideration of refunds. It is common cause that the applicant in the application seeks an order setting aside SARS's decision to disallow certain fuel levy refunds previously claimed by the applicant in respect of diesel allegedly used by him in terms of section 75(1)(A) of the *Customs and Excise Act.* The main issue in dispute between the parties in the application is whether the applicant was entitled to the diesel claims he made during the period under review.

[42] In order to qualify for the diesel refund claims, the applicant ought to satisfy the commissioner that: (i) he himself purchased the diesel; (ii) he used the diesel for qualifying activities; and (iii) he kept sufficient records showing that the diesel dispensed and claimed for, was in fact used for qualifying activities.

[43] The applicant is a sole proprietor and a registered user for farming and forestry activities in terms of the *Customs and Excise Act.* The dispute in the application follows an audit undertaken by SARS on the applicant's activities. Counsel for SARS submits that SARS has demonstrated in its answering affidavit, *inter alia,* that (i) the applicant did not purchase the diesel in respect of which refunds were claimed; (ii) the diesel was purchased by Bonnie Brooks, who is not the User and VAT vendor for the purpose of the *Customs and Excise Act;* (iii) the applicant kept one logbook to register diesel usage in respect of the activities of both the applicant and Bonnie Brooks; (iv) the documents attached to the founding affidavit as proof of keeping a proper logbook are not the same as those made available to SARS for the audit.

[44] Counsel for SARS further submits that the case is important to SARS in that policy issue raised in the answering affidavit need to be fully adjudicated in order to ensure that the current regime of diesel refunds introduced in 2000 is effective. The current diesel refund regime was introduced specifically to curb the abuses that were prevalent in the previous scheme. This included the linking of the claims for diesel refund to the administration of the VAT system and to limit the entitlement to claim the refund to the primary producer (user), in order to make such a producer more internationally competitive by reducing its input costs through the grant of the refund. It is contended therefore that the application is an important case for the court to determine whether diesel refunds in respect of diesel purchases made by another entity and used by the user may be allowed.

CONCLUSION

[45] In determining this matter, I must be guided by the well-established principles referred to above applicable to applications of the this nature. In this regard, I need to draw certain inferences and weigh probabilities as they emerge from the parties' respective submissions, affidavits, heads of argument and oral submissions by parties' counsel.

[46] In considering the matter, and taking into account all the additional facts, circumstances together with submissions and authorities referred to by counsel, I am of the considered view that the applicant has not made out a case for the relief he seeks. The applicant has not satisfied the requirements set out in rebate item 670.04 included in Part 3 of Schedule 6 of the Act (the rebate item). This item determines under which circumstances users who purchased diesel may become "*eligible*" for consideration of refunds. It is therefore reasonable and fair that I should not grant the applicant's application. The Commissioner's determination therefore stands. The entire application should be dismissed and the determination of 6 October 2016 be confirmed, with costs including the costs of a counsel on scale C.

COSTS

[47] The rule that costs should follow the event is still applicable in these circumstances. The applicant has not shown any good reason why this rule should not be applied.

[48] I have considered both parties' argument relating to the costs of this application. I am accordingly inclined to grant costs in respondents' favour. The applicant is ordered to pay the costs of the application, including the costs of a counsel on scale C.

ORDER

[49] **In the circumstances, I make the following order:**

[49.1] The entire application is dismissed and the respondents' determination is hereby confirmed.

[49.2] The applicant is ordered to pay the costs of the application, including the costs of a counsel on scale C.

[redacted]

T E JOYINI

ACTING JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES:

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Dates of Hearing: 23 and 24 January 2025

Date of Judgment: 13 February 2025

This Judgment has been delivered by uploading it to the Court online digital data base of the Gauteng Division, Pretoria and by e-mail to the Attorneys of record of the parties. The deemed date and time for the delivery is 13 February 2025 at 10h00.