THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 311/2024

In the matter between:

ASSMANG (PTY) LTD **APPELLANT**

and

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

THE MINISTER OF JUSTICE **SECOND RESPONDENT**

THE MINISTER OF FINANCE **THIRD RESPONDENT**

Neutral citation:	*Assmang (Pty) Ltd v The Commissioner for the South African Revenue Service and Others* (311/2024) [2025] ZASCA 121 (29 August 2025)
Coram:	NICHOLLS JA and SALDULKER and DLODLO AJJA
Heard:	13 May 2025
Delivered:	29 August 2025

Summary: Customs and Excise Act 91 of 1964 – diesel refunds – rebate Item 670.04 in Part 3 of Schedule 6 of the Act – whether contracts on wet or dry basis – deductions from contractors' invoices amounted to wet rates – compliance with record

keeping obligations in Note 6(q) of Part 3 of Schedule 6 of the Act – failure to keep logbooks disentitles claim – constitutional challenge to s 47(9)*(c)* and s 75(1A)*(f)* of the Act – appeal dismissed with costs.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Francis-Subbiah J sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel where so employed.

JUDGMENT

Nicholls JA (Saldulker and Dlodlo AJJA concurring):

Introduction

[1] This appeal concerns an entitlement to tax refunds for fuel levies and Road Accident Fund levies in terms of the Customs and Excise Act 91 of 1964 (the Act). After a referral to oral evidence, the Gauteng Division of the High Court, Pretoria (the high court) dismissed an application that the appellant, Assmang (Pty) Ltd (Assmang) be paid all diesel refunds since June 2011. In doing so, the high court confirmed the determination made by the Commissioner of the South African Revenue Service (the Commissioner) that the diesel refunds claimed by Assmang did not qualify for rebates. A constitutional challenge raised by Assmang to certain sections of the Act was also dismissed, on the grounds that it had not been properly and timeously pleaded. The high court granted leave to appeal to this Court.

[2] Schedule 1 to the Act imposes fuel levies and Road Accident Fund levies (fuel levies),[1] on all distillate fuel (diesel) imported into or produced in South Africa. In terms of s 75(1A) of the Act, 'users'[2] can claim a refund of the levies if the fuel is used in

[1] Part 5A and 5B of Schedule 1 of the Customs and Excise Act (the Act).
[2] Section 75(1A)*(b)*(ii) of the of the Act.

accordance with s 75 of the Act and complies with Note 6 of Item 670.04 in Part 3 of Schedule 6 of the Act. Section 47(9)*(a)*(i)*(bb)* of the Act empowers the Commissioner to determine whether the fuel has been used in compliance with the requirements of the said item. The inquiry in this appeal is whether Assmang has complied with rebate Item 670.04 in Part 3 of Schedule 6 of the Act which would entitle it to a refund of the fuel levies.

[3] Section 75(1C) permits the Commissioner to investigate any application for a refund and the repayment of any refund already paid. A user is deemed to have used fuel for a purpose other than that set out in Item 670.04 if the user has failed to furnish a declaration or supporting documents, according to s 75(1C)*(d)*(ii).

Background

[4] Assmang carries on a mining business in the Northern Cape Province of South Africa where it mines iron ore, chrome, manganese ore and produces manganese alloy. It operates two mines, Khumani and Beeshoek, both of which are separately registered as 'users'[3] and 'vendors'[4]. In the course of its business, it employs various contractors who, inter alia, provide various mining services to Assmang in respect of drilling, loading and hauling of waste material. In certain prescribed circumstances the diesel used by the contractors for primary production activities on the mines is subject to a refund from the South African Revenue Service (SARS). Although several contractors were initially involved, this appeal is confined to the claims for diesel refunds in respect of three service providers, Aveng Moolmans (Moolmans), Blue Sky Carriers CC (Blue Sky) and Blue Chip Mining (Blue Chip) who operated at the Khumani mine.

[5] Prior to claiming the refunds, in 2011, KPMG on behalf of Assmang, approached SARS for a ruling on whether a diesel refund in respect of the contractors could be claimed in terms of rebate Item 670.04 in Part 3 of Schedule 6 of the Act.

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[3] Ibid.
[4] Section 1 of the Value Added Tax Act 89 of 1991.

SARS notified Assmang of its intention to conduct a broader diesel refund audit. On completion of the audit, SARS issued an amended letter of demand dated 4 July 2014, claiming the repayment of diesel refunds, plus interest and penalties in the amount of R39 566 010.40. On 9 October 2014, Assmang filed an internal administrative appeal, disputing the findings of SARS. This was rejected and the contents of the letter of 4 July 2014 were confirmed.

[6] The internal administrative appeal having been unsuccessful, Assmang brought the present application in which it claimed first, that the Commissioner's determination that the diesel refunds claimed under rebate Item 670.04 in Part 3 of Schedule 6 of the Act did not qualify, be set aside and substituted with an order that the refunds do apply. Second, it sought an order that in the event that the Court finds that Assmang was entitled to the diesel refunds claimed then all refunds claimed since June 2011 and not refunded, be processed and paid out as well as diesel refunds not claimed since SARS' amended letter of demand dated 4 July 2014, also be processed and paid out. Third, that SARS pay interest on the diesel refunds from the date that they were submitted to SARS. Finally, in the event of the Court refusing the relief, then an order setting aside Assmang's liability for payment of a penalty. Pursuant to a notice of amendment granted on 27 June 2023, the claim for interest was amended to an order of constitutional invalidity in respect of s 47(9)*(c)*[5] and s 75(1A)*(f)*[6] of the Act, the net effect of which was to make SARS liable to pay interest on diesel refunds from the date of submission of the claims for the refunds.

In the high court

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[5] Section 47(9)*(c)* provides: 'Whenever a court amends or orders the Commissioner to amend any determination made under subsection (9) *(a)* or *(d)* or any determination is amended or a new determination is made under paragraph *(d)* or as a result of the finalisation of any procedure contemplated in Chapter XA, the Commissioner shall not be liable to pay interest on any amount refundable which remained payable in terms of the provisions of paragraph *(b)* (i) for any period during which such determination remained in force.'

[6] Section 75(1A)*(f)* provides: '(1A) Notwithstanding anything to the contrary contained in this Act or any other law-

…

(f) the provisions of the Value-Added Tax Act, 1991 (Act 89 of 1991), shall *mutatis mutandis* apply in respect of the payment of interest on any amount of fuel levy or Road Accident Fund levy which is being recovered as it is in excess of the amount due or is not duly refundable.'

[7] In the high court the matter was referred to oral evidence on five issues. These were:[7]

(a) Whether Assmang contracted *de facto* with its contractors on a dry basis in accordance with Note 6(a)(ii).

(b) Whether Assmang made 'eligible purchases', namely 'purchases of distillate fuel by a user for use and used as fuel' in Note 6(a)(iii).

(c) Whether the distillate fuel was purchased by the user for use and used as fuel for own primary production activities as provided for in Note 6(f)(ii) and 6(f)(iii).

(d) Whether there was compliance with the requirements of 'logbooks' as contemplated in Note 6(a)(xi) for the relevant period.

(e) Whether there was compliance with the bookkeeping provisions contained in Note 6(q) for the purposes of the rebate item in respect of which refunds are claimed.

On appeal

[8] In this Court the primary dispute is whether the fuel was supplied on a 'wet' or 'dry' basis. Encompassed in this was whether the fuel was an eligible purchase used for primary production. What constitutes eligible use is related to whether Assmang's bookkeeping complied with the relevant legislation. Significantly, the constitutional challenge was not one of the issues referred to oral evidence by the high court although it was raised in argument before the high court. In this Court it has again been raised, and we are urged to determine the constitutional challenge, irrespective of whether Assmang is successful in setting aside the Commissioner's determination to disallow the diesel refunds. The Minister of Finance did not participate in the proceedings in the high court. In this Court his participation is confined to opposing the constitutional challenge.

[9] Both parties accept that this is a wide statutory appeal empowering the Court to consider the matter afresh. While it remains an appeal of what was determined in SARS' determination, SARS is entitled to raise any further legitimate grounds for its

[7] See para 4 of the high court judgment.

determination. [8]

Legislative framework

[10] SARS explained that the rationale behind the refund legislation was to make mining companies internationally competitive by providing for the provision of refunds on diesel and at the same time ensuring that there was no abuse of the refund system. While the legislation permits the mine to use contractors, in order to take advantage of the refund system, the mine has to contract on the basis that the diesel consumed by the contractor would not be purchased by, or in any way recovered from, the contractor. Because the service providers or contractors are not registered with SARS and have no statutory obligation to account to SARS, the legislation makes provision for SARS to monitor the purchase, the dispensing and the diesel usage of the primary producer (the mine). SARS has no right to inspect the contractors' books. It is the mine which is in a position to know how much diesel is required to perform its primary activities. In addition, as the mine would be responsible for payment, it is in its interest to ensure that no more diesel, than that actually utilised, can be claimed. To prevent abuse, the legislation imposes stringent bookkeeping requirements on the mine.

[11] To be eligible for a diesel refund it has to be determined whether the fuel was contracted on 'wet basis' or a 'dry basis' as defined in Note 6(a) of Part 3 of Schedule 6 to the Act. The relevant provisions of Note 6(a) are:

'…

(ii) "dry" or "contracted or hired on a dry basis" means that any vehicle, vessel, machine or any other equipment whatsoever using distillate fuel is hired or a person using such vehicle, vessel, machine or other equipment is contracted by a user for the purpose of performing any qualifying activity and the user supplies the distillate fuel from eligible purchases;

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

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[8] *Tholo Energy Services CC v Commissioner for the South African Revenue Service* [2024] ZASCA 120; [2024] 4 All SA 89 SCA paras 33-40 and *Commissioner, South African Revenue Service v Levi Strauss South Africa (Pty) Ltd* [2021] ZASCA 32; [2021] 2 All SA 645 (SCA); 2021 (4) SA 76 (SCA) para 26.

…

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

…

(ix) "wet" or "contracted or hired on a wet basis" means distillate fuel is supplied with the vehicle, vessel, machine or other equipment contracted or hired as contemplated in the definition of "dry";

…'

[12] There are general conditions relating to refunds. Note 6(f)(i)(aa) of Schedule 6 of the Act provides that for the purposes of a refund, 'in accordance with the definition of "eligible purchases", the distillate fuel must be purchased by the user for use and used as fuel for own primary production activities in mining as provided in subparagraphs (ii) and (iii) to this Note'. Note 6(e)(i)(B) of the Act provides that:

'Where a contract for such services is only on a dry basis, the user who supplies the distillate fuel to the contractor may apply for a refund in respect of the fuel actually used…'

[13] Note 6(e)(i)(C) of Part 3 provides that any person who uses fuel for eligible and non-eligible purchases, shall deduct the non-eligible purchases from the quantities for which a refund is claimed. Note 6(e)(iii)(aa) states that:

'(A) Where a user sells eligible purchases of distillate fuel, such user must issue a tax invoice to the buyer, whether or not the buyer is a user or any other person.

(B) The user who sells such fuel may not claim a refund of levies thereon and the fuel sold must be shown as a non-eligible purchase on the return for a refund.'

[14] Therefore, in order to qualify for a refund of the fuel levies Assmang has to show: (a) the fuel was for primary production; (b) it supplied the fuel from eligible purchases; (c) the contractors who purchased Assmang's fuel were contracted on a 'dry basis' (in which event they would qualify for a rebate) and not a 'wet basis' (in which event they would not qualify for a rebate); and (d) that Assmang complied with

the record keeping requirements in respect of its logbooks which would enable SARS to ascertain whether Assmang was entitled to a refund. Assmang's attitude is that each and every litre of fuel used by its contractors qualifies for a refund.

Wet and dry rates

[15] It is not disputed that Assmang arranged for fuel to be supplied by Engen at a preferential rate which it would dispense on site, at the mine. It was used for Khumani's mine vehicles and by some of Khumani's contractors to carry out certain activities. Assmang would pay Engen and, in accordance with the contracts between the contractors and Assmang, an amount for this diesel would be deducted from the invoices issued by the contractors. What is in dispute is whether the manner in which the fuel was invoiced and accounted for, qualifies for a refund, or whether the contractors paid Assmang for the diesel used by their equipment.

[16] In order to be eligible for a refund, the legislation contemplates that the diesel has to be purchased by the mine and supplied to the contractor without recovery. This would accord with the definition of contracting on a 'dry basis'. The difficulty with the strict dry rate is that it is not always beneficial to the mine in that the contractor, not itself being liable for payment of the diesel, is unconcerned about its diesel usage. (For example, some of the mining equipment is more fuel efficient than others). A wet rate, where the contractor brings its own diesel, is a safer option for the mine. With a wet rate, the rate payable to the contractor is fixed and excludes all diesel costs. It is therefore irrelevant to the mine how much fuel is used by the contractor. The disadvantage with the latter is that once the mine contracts on a wet rate, it is not eligible for the diesel refund. This has seemingly led to creative ways in which the mine attempts to convert a wet rate into a dry rate.

[17] If one has regard to Assmang's contracts with Moolmans and Blue Sky, the rates were expressly stated as being 'wet rates'. The contracts capped diesel at 33 percent of the total contract price for Moolmans and 31.3 percent for Blue Sky. These rates would be adjusted monthly whenever the price of diesel increased or decreased.

[18] Mr Edward Webb Grobler, the owner and managing member of Blue Sky, confirmed that the contract it had with Assmang was for a 'wet rate' which included a fixed rate for the non-diesel portion but with a fluctuating rate for the diesel portion.[9] The variable rate in the table would be adjusted on a monthly basis in accordance with the actual diesel price. At the end of each month the mine would supply Blue Sky with the average diesel price and the quantity of diesel consumed for the month, then such amount would be deducted from the payment certificate. Mr Grobler insisted that Blue Sky did not buy diesel from the mine but conceded that it was not supplied by the mine free of charge, the cost of diesel was deducted from the contractors' charges. The less diesel utilised, the more the contractor would be paid. It was therefore an incentive to use diesel efficiently.

[19] Mr Wilson Bruce Smith, the financial officer of Moolmans, agreed that the contract with Assmang was stipulated as being on a 'wet rate' with diesel capped at 31.2 percent.[10] He maintained that although the rates in the contract were described as 'wet', because the mine provided the diesel and Moolmans would deduct it from their total invoice, this meant that the contract was for a 'dry rate' as far as they were concerned. He explained that the calculation of Moolmans' entitlement started off with the full wet rate from which was deducted the cost of diesel consumed, to a net amount, and then the contractor issued an invoice for that net amount.

[20] Blue Chip provided drilling services to the mine. Unlike Moolmans and Blue Sky, the contract provided for 'dry rates'. However, in practice the same method was used, namely Khumani supplied diesel to the contractor and deducted the cost of usage from the contractor's invoice. On occasion the contractors would make a profit on the diesel that the mine provided to them. This was when they were particularly fuel efficient.

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[9] Clause A.2.7 of the contract agreement between Assmang and Blue Sky.
[10] Clause A.3 price schedule of the contract agreement between Assmang and Blue Sky.

[21] As explained by Assmang, the cap on the amount of diesel was a control method which had a dual purpose to both penalise a contractor for using an excessive quantity of fuel, alternatively to reward a contractor for being fuel efficient. If the diesel consumed totalled more than the 31.2 percent cap, the contractor was penalised amounting to the difference between the 31.2 percent and the actual diesel consumed. If it were less than the 31.2 percent of the contract value, the lower percentage was deducted from the total value. This meant that the contractor would be paid more than 67 percent, thus benefitting for being fuel efficient. This could differ from month to month, for example, where the contractor was excavating hard rock or digging deep into the mine, thus utilising more fuel. This, Assmang contended, should not be interpreted as the contractor paying for diesel. Rather, the plant hire costs were always 67 percent, sometimes a little less because of the contractual penalty and sometimes a little more, as an incentive for its efficiency.

[22] Assmang sought to justify its stance by submitting that the ‘wet rate’ quoted by the contractor included two elements, the plant equipment hire costs and the diesel costs. But it was only the equipment hire which the contractor supplied, contended Assmang. This was because the mine’s calculation deducted the diesel element from the wet rate, leaving only the plant hire costs, which was all the contractor provided and the only thing it expected to be paid for. Assmang argued that only if the rate quoted by the contractor was for one element, being the hire of equipment, could Assmang be said to be contracting on a ‘wet basis’. In such an instance the diesel component would be deducted from the plant hire, and the contractor could be considered to be paying for the diesel by way of a deduction. But this was not the case, stressed Assmang. Rather it purchased the diesel and supplied it to the contractor and at no time did ownership of the diesel pass to the contractor. Therefore, it was on a ‘dry basis’.

[23] SARS contended that the fuel was sold by Assmang to its contractors on a ‘wet rate’ which included an agreed rate for diesel from which an amount equal to the value of the diesel supplied, was deducted. The cost to the contractors was that paid by

Assmang to Engen and represented the price charged by Assmang for the diesel. This, says SARS, was specifically provided for in two written agreements and the oral evidence in respect of the third contract confirmed this. Each contractor paid Assmang for the actual quantity of diesel it received from Assmang. The calculation of the invoice was the gross rate of diesel from which it deducted the agreed cost of the diesel received. The more diesel a contractor utilised the less the contractor got paid for any given quantity of work with the converse also being applicable. It is immaterial that the full amount was not reflected on the invoice. Set-off still occurred but was reflected on a spreadsheet rather than an invoice.

[24] The conversion of wet rates to dry rates was dealt with by Davis J in *Canyon Resources (Pty) Ltd v The Commissioner for the South African Revenue Service* (*Canyon Resources*).[11] There, the coal mine purchased diesel from Chevron South Africa (Pty) Ltd (Chevron) at a discounted price and authorised its contractors to place orders directly with Chevron.[12] Consignments of diesel were delivered to tanks at the respective collieries allocated by the mine to each of its contractors. When the mine claimed diesel refunds, the manner in which the total of the diesel supplied each month was calculated in a separate reconciliation document.[13] The wet rate was then supposedly converted to a dry rate by the contractor passing credit notes in favour of the mine for the diesel it had used, at an agreed price.[14] It was also subject to a cap. Davis J found that the credit note was merely a bookkeeping exercise and that the contractor was in effect purchasing the fuel.[15]

[25] The court in *Canyon Resources* went on to say:

'It is clear that Note 6 and the descriptions of "wet" and "dry" rates envisage that, when a user contracts a contractor on a "wet" basis, the contractor procures diesel (and pays for it) and invoices the user with an invoice which includes the total of the costs for services rendered i.e. including diesel costs. When a contractor is contracted on a "dry" basis however, it invoices

[11] *Canyon Resources (Pty) Ltd v Commissioner for the South African Revenue Service* (68281/2016) delivered on 27 March 2019 para 7.3.4.
[12] Ibid para 4.3.
[13] Ibid para 4.4.
[14] Ibid para 7.3.1.
[15] Ibid para 7.3.4.

the user with a price or tariff which excludes the diesel. The reason for this is that the diesel is then supplied by the user at his own cost. The contractor then has no diesel expenses to pay by way of payment (or credits). It is clear in both the Close-Up and Ni-Da instances (for the relevant periods), the contractors rendered "globular", "composite" or inclusive invoices. If these had been paid in full, the contractors then would still have had to pay for the diesel used by them. Rather than write out cheques or making interbank or electronic transfer payments, they issued credits or credit notes and received payment of the balance of their invoices from the Applicant. Despite the Applicant's denial that it effectively sold the diesel, it received a "credit" or a reduction in respect of each invoice rendered to it by these contractors in respect of each litre of diesel used by them in the generation of the services reflected in their invoices. To argue that this "converted" their contracts to "dry" contracts amounts to nothing other than an attempt to avoid the prescripts of the Note to the rebate item.'[16]

[26] Assmang criticised the high court for not following the binding precedent of *Canyon Resources* in that Davis J stated that when a contractor is contracted on a dry basis, it invoices the user with the price or tariff which excludes diesel. This, says Assmang, is precisely what it did but the high court found that these contracts were on a wet basis. The high court compounded the error by purporting to make this finding in pursuant to its reliance on *Canyon Resources*, submitted Assmang.

[27] This submission is misplaced. Instead of passing a credit note, which Davis J said did not suffice to convert the wet rate into a dry rate, what Assmang did was to calculate on a spreadsheet what each contractor owed it on a monthly basis for fuel. While Assmang was invoiced without the diesel component, instead of utilising a credit note as in *Canyon Resources*, these calculations were merely done on a spreadsheet. The net effect was the same and, in my view, analogous to the situation in *Canyon Resources*. Assmang received a credit or reduction in respect of each invoice rendered by the contractor for each litre of diesel used in generation of the services reflected in the invoices.

[28] The high court cannot be faulted for finding that in reality, Assmang contracted

[16] Ibid para 7.5.

with its contractors on a wet basis and not on a dry basis (where the risk is borne by the mine). Instead, the contractors carried the risk, so the financial reality was that a wet rate was contracted. The fuel was not supplied for free to the contractor. The high court accepted SARS' submissions that it was a non-eligible purchase in terms of Note 6(e)(iii)(aa)(B) of Part 3 of Schedule 6 to the Act. As such the non-eligible portion should have been deducted from any claim for a diesel refund.[17]

[29] Assmang argued that it paid the contractors for hire of the equipment only and merely made the diesel available to the contractors at preferential rates, thus complying with the dry rate required by the legislation. However, what cannot be ignored is that the incentive scheme permitted the contractors to make a profit from the diesel made available to them by Assmang. The ineluctable conclusion supported by the oral evidence, is that the contracts entered into between Assmang and the contractors, and the implementation of those contracts remained on a wet basis and did not qualify for the rebates envisaged in Item 670.04 in Part 3 of Schedule 6 to the Act. The financial accounting in respect of the tax invoices supports this conclusion. The appeal against the high court's finding that Assmang contracted on a wet basis must fail.

[30] The high court also found that the record keeping of Assmang was insufficient and there was no substantive compliance with Note 6(q) of Part 3. This, too, had the effect of disqualifying Assmang from its entitlement to a diesel refund.

Bookkeeping requirements

[31] The record keeping requirements were amended on 1 April 2013 when the definition of a logbook came into operation. The relevant period is 1 June 2011 to 31 October 2013. For the greater part of this period Assmang was obliged to comply with Note 6(q) of Part 3 of Schedule 6 to the Act. This provided:

'Keeping of books, accounts and other documents for the purposes of this item:

[17] *Commissioner, South African Revenue Service v Glencore Operations SA* (Pty) Ltd [2021] ZASCA 111; [2021] 4 All SA 14 (SCA); 84 SATC 227 para 14.

(i)

(aa) All books, accounts or other documents to substantiate the refund claim (including purchase invoices, sales invoices and logbooks) must be kept for a period of 5 years from the date of use or disposal of the distillate fuel or the refund return, whichever occurs last.

…

…

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

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

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

(B) the quantities purchased or received;

(C) the seller's name and business address; and

(D) the date of purchase and receipt;

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

(A) the date or period of such use;

(B) the quantity and purpose of use;

(C) full particulars of any fuel supplied on a dry basis to any contractor or other person who renders qualifying services to the user;

(D) the capacity of each tank in which fuel is stored and the receipt and removal from such tanks,

(cc) where the fuel was sold or otherwise disposed of or used (except supplied on a dry basis), record in such books, accounts or other documents-

(A) the quantity of fuel involved;

(B) in each case, whether the fuel was sold or otherwise disposed of or used and the date thereof;

(C) where applicable, to whom the fuel was sold or otherwise disposed of;

(D) the price received for the fuel, including details of any offsetting arrangements, barter or other dealings involved,

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

(A) onland mining;

(B) …

…’

[32] The amendment in 2013 introduced a definition of Note 6(a)(xi) which defines logbooks as:

‘“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 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.’

Both eligible and ineligible activities are required to be recorded.

[33] Thus, while the amendment in 2013 introduced a definition of logbooks, the requirement to keep a logbook predates this, and was present throughout the relevant period. Substantial compliance is not sufficient. A logbook is a systemic written record of things done or activities undertaken. Thus, the prescribed particulars must be furnished in respect of every such litre so that SARS can discern between eligible and non-eligible purchases. Note 6(q) obliges a party to provide documentary evidence of how the distillate fuel was purchased, stored, used, sold or otherwise disposed of.

[34] Assmang relies on the Liquid Automation System (LAS) which it states records the precise quantity of diesel dispensed, the price of diesel at the time, the time and date the diesel was dispensed and to whom it was dispensed. The diesel was dispensed to a contractor in a dedicated browser or a dedicated tank specific to each contractor. The LAS has a tag on every fuel dispensing nozzle on the mine. It only

permits fuel to be dispensed if the equipment to which it is dispensed has a similar tag which identifies the piece of equipment. When fuel is dispensed on the mine, there is a record of the date, time, quantity of fuel and the equipment. Assmang contends that as each piece of equipment has a unit number, the reasonable assumption is that diesel dispensed into a drill rig, was used to perform drilling on the mining site. LAS provides a printout of all diesel dispensed thus providing a 'systematic record' as required by the legislation. Assmang accuses SARS of holding it to a higher standard that was only applicable once the amendment came into effect for the last seven months of the contract.

[35] The difficulty with the LAS system is that once the diesel goes into the bowser of a specific contractor, there are no further records. Assmang's record keeping went no further than recording the quantity of diesel supplied to the contractor. This is all that the LAS system tracks. Thereafter there were no logbooks or records of the contractors' use of the diesel reflecting the usage of the contractor in the various activities which would have fallen into the definition of 'primary production' in mining. The records relate to the dispensing of fuel but no other information is provided on how and for what purpose the relevant vehicles and other equipment was used upon filling up. It is not sufficient to make 'a reasonable assumption'. Note 6(q) of Part 3 of Schedule 6 of the Act requires specific detail which is essential to ascertain whether the fuel was utilised for an approved activity and the quantification thereof. In the absence thereof, the fuel does not qualify as eligible purchases.

[36] Although not stated in so many words, it seems that Assmang admits that it did not comply with the statutory definition of logbook when the amendment was introduced, which affects the last seven months of the period in question. As to the rest of the relevant audit period, there has not been compliance with Note 6(q) of Part 3 of Schedule 6 of the Act particularly (dd) which requires a logbook to be kept. The fact that there was no definition of logbook at the time does not absolve Assmang from attributing the normal meaning of logbook. The Law Dictionary[18] defines a logbook as

[18] The Law Dictionary (https://thelawdictionary.org).

'a record of activities/events and/or occurrences, systemically daily or hourly'. In view of the particularity required by Note 6(q) of Part 3 of Schedule 6 of the Act in order to successfully claim a rebate, SARS must be capable of discerning every litre of the 'journey the distillate fuel has travelled from purchase to supply'.[19] This is self-evidently not the case here. In respect of Moolman and Blue Sky, some of the vehicles did not perform primary production activities, or at least it is impossible to ascertain if they did so. Neither Assmang nor the contractors kept logbooks of the individual journeys and distances. The result is that, on this basis too, Assmang's claim for refunds must fail.

Constitutional challenge

[37] On 16 May 2022, some five years after the close of pleadings, Assmang filed a Rule 16A Notice in terms of the Uniform Rules of Court,[20] and on the same day launched an application for leave to amend its notice of motion to include relief pertaining to a constitutional challenge. By that stage the second and third respondents, the Minister of Justice and the Minister of Finance, respectively, had been joined as parties to the proceedings.[21] The Rule 16A Notice set out a 'description' of the constitutional issue as this: while s 75(1A)*(f)* of the Act provides for the payment of interest on any outstanding diesel fuel levies, SARS is not liable to pay interest on any outstanding diesel refunds due to taxpayers. The denial of a customs and excise taxpayer from recouping interest on amounts withheld or not refunded, which were due to be refunded, is an arbitrary deprivation which violates the taxpayer's constitutional right to equal treatment before the law and their right to property. This constitutional imbalance was said to be striking when compared to other statutes such as the Income Tax Act 58 of 1962, the Value-Added Tax Act 89 of 1991 and the Tax Administration Act 28 of 2011, which provided for payment of interest by both the taxpayers and SARS.

[38] An order was also sought that Assmang should be entitled to interest regardless

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[19] See *Canyon Resources* fn 11 above paras 9.3-9.5.
[20] Rule 16A(1)*(a)* provides that: 'Any person raising a constitutional issue in an application or action shall give notice thereof to the registrar at the time of filing the relevant affidavit or pleading'.
[21] Both were joined on 18 March 2021.

of whether its unpaid rebate claims were liquidated or unliquidated claims. This was based on Assmang's right of equality before the law and to equal treatment before the law. Assmang points to various revenue statues and amendments which seemingly recognise the unconstitutionality of non-payment of interest.[22]

[39] The amendment was opposed by SARS but was granted by the high court (a special court dealing with interlocutory applications) on 27 June 2023. This was approximately nine weeks before evidence was led in the high court. The constitutional challenge was not one of the five specific issues that were referred to evidence and no mention was made of the constitutionality of any sections of the Act by any of the witnesses.[23]

[40] A constitutional challenge must be properly pleaded. The introduction of the constitutional challenge so many years later without a factual foundation therefor, inherently undermined the procedural integrity of the litigation. The Constitutional Court in *Prince v President, Cape Law Society, and Others,*[24] emphasised the following:

'Parties who challenge the constitutionality of a provision in a statute must raise the constitutionality of the provisions sought to be challenged at the time they institute legal proceedings. In addition, a party must place before the Court information relevant to the determination of the constitutionality of the impugned provisions. Similarly, a party seeking to justify a limitation of a constitutional right must place before the Court information relevant to the issue of justification. I would emphasise that all this information must be placed before the Court of first instance. The placing of the relevant information is necessary to warn the other party of the case it will have to meet, so as [to] allow it the opportunity to present factual material and legal argument to meet that case. It is not sufficient for a party to raise the constitutionality of a statute only in the heads of argument, without laying a proper foundation

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[22] Section 88(5) of the Income Tax Act 58 of 1962; s 36(1) of the Value-Added Tax Act 89 of 1991 which has since been repealed by s 271 of Act 28 of 2011; s 105 of the Act (Section 31(1) of the Taxation Laws Amendment Act 18 of 2009 amends s 105 of the Act, which Assmang miscategorised as s 21, however, nothing turns to this).

[23] Only Assmang called witnesses, namely Mr Charles Arthur Stride, Mr Grobler and Mr Smith.

[24] *Prince v President, Cape Law Society, and Others* 2001 (2) SA 388 (CC); 2001 (1) SACR 217; 2001 (2) BCLR 133; [2000] ZACC 28.

for such a challenge in the papers or the pleadings. The other party must be left in no doubt as to the nature of the case it has to meet and the relief that is sought. Nor can parties hope to supplement and make their case on appeal.'[25](Footnotes omitted.)

[41] The lack of pleading at the initial stage of the proceedings was further alluded to in *Zondi v MEC for Traditional and Local Government* Affairs,[26] where the Constitutional Court underscored that a constitutional challenge requires a complete factual and legal foundation in the pleadings, a standard which needs to be met by the parties.[27] The absence of a proper procedural foundation renders the constitutional challenge impermissible. The decisions in *Crown Restaurant CC v Gold Reef City Theme Park (Pty) Ltd*,[28] and *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*,[29] clearly establish that constitutional issues must be fully and adequately framed in the pleadings to allow for a fair and informed adjudication.

[42] The lack of evidence, the late introduction of the amendment, the failure to file a supplementary affidavit setting out the factual basis on which the constitutional challenge was sought, are all fatal to the constitutional challenge. It was, in the first place, incumbent on Assmang to set out how the impugned legislation violated the Bill of Rights, in this case the right to equality before the law. Second, if a prima facie violation was shown, then there would have to be an enquiry in terms of s 36 of the Constitution where a party may wish to justify a limitation of a right and adduce evidence in support thereof.[30] Finally in the event of a declaration of invalidity, the

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[25] Ibid para 22; See also *Singh v Commissioner for the South African Revenue Service* 2003 (4) SA 520 (SCA); 65 SATC 203 para 24; *Zondi v MEC for Traditional and Local Government Affairs* [2004] ZACC 19; 2005 (3) SA 589 (CC) (*Zondi*); 2005 (4) BCLR 347 (CC) para 13; *South African Reserve Bank and Another v Shuttleworth and Another* [2015] ZACC 17; 2015 (5) SA 146 (CC); 2015 (8) BCLR 959 (CC); 78 SATC 23 para 76.

[26] *Zondi* Ibid.

[27] Ibid para 23.

[28] *Crown Restaurant CC v Gold Reef City Theme Park (Pty) Ltd* [2007] ZACC 2; 2007 (5) BCLR 453 (CC); 2008 (4) SA 16 (CC) para 6.

[29] *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) para 52.

[30] Section 36 of the Constitution provides that:

'**Limitation of rights**

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

Court would have to determine the question of retrospectivity, and a just and equitable remedy in terms of s 172 of the Constitution.[31]

[43] Moreover, it is a well-established principle that courts should not decide constitutional questions unless they are necessarily required to resolve the case. If it is possible to decide a case, civil or criminal, without reaching a constitutional issue, that is the course that should be followed.[32] Absent a compelling public interest, the court should refrain from determining a constitutional question which is not indispensable to the outcome.[33] If these are not decided in context of live controversy these should be subject to an exceptionality test such as where a grave injustice or irreparable harm would occur.

[44] As the Minister of Finance correctly stated, courts ought not to give advisory opinions on questions of law. This challenge amounted to an impermissible abstract challenge to impugned provisions. The constitutional challenge is not capable of

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(e) less restrictive means to achieve the purpose.
(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

[31] Section 172 of the Constitution provides that:
'**Powers of courts in constitutional matters**
(1) When deciding a constitutional matter within its power, a court-
(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
(b) may make any order that is just and equitable, including-
(i) an order limiting the retrospective effect of the declaration of invalidity; and
(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.
(2)*(a)* The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.
(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.
(c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.
(d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.'

[32] *Zantsi v Council of State, Ciskei and Others* [1995] ZACC 9; 1995 (4) SA 615 (CC); 1995 (10) BCLR 1424 (CC) para 3 quoting with approval Kentridge AJ in *S v Mhlungu and Others* [1995] ZACC 4; 1995 (3) SA 867; 1995 (7) BCLR 793 (CC) para 13.

[33] Ibid paras 2-7.

determination outside of a factual matrix that would ground the complaint of an infringement of a constitutional right.[34]

[45] If, as I have found, that Assmang is not entitled to a diesel refund, whether they are entitled to interest, is not a live controversy at this stage. Nor is it of sufficient public interest to compel this Court to consider the issue. In sum, the constitutional challenge is not properly before this Court.

Penalty

[46] Assmang's stance that this Court should make a determination on the question of a penalty is somewhat perplexing. In its letter of demand, SARS demanded penalties in the amount of R3 281 163.73. Assmang criticised the high court for stating that no assessment had been made. That a s 91,[35] penalty can only be imposed when the taxpayer agrees to abide by the SARS' decision is common cause between the parties. So too, is Assmang's lack of consent. Thus, the jurisdictional requirements for s 91 have not been met. In the proceedings in the high court SARS did not contend that Assmang was liable for a penalty. Nor was a penalty ever imposed by the high court.

Order

[47] The final question is that of costs. There is no reason that the costs should not follow the result. There is also no reason for the award to include the costs of three counsel as contended for.

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[34] *Savoi and Others v National Director of Public Prosecutions and Another* [2014] ZACC 5; 2014 (5) BCLR 606 (CC); 2014 (1) SACR 545 (CC); 2014 (5) SA 317 (CC) para 13. See also *Minister of Health and Another v Alliance of Natural Health Products (South Africa)* [2022] ZASCA 49; 2022 (5) SA 392 (SCA); [2022] HIPR 195 (SCA) para 13.

[35] Section 91 of the Act provides that:

'**Admission of guilt**

(1)*(a)* If any person-

(i) has contravened any provision of this Act or failed to comply with any such provision with which it was his duty to comply; and

(ii) agrees to abide by the Commissioner's decision; and

(iii) deposits with the Commissioner such sum as the Commissioner may require of him but not exceeding the maximum fine which may be imposed upon a conviction for the contravention or failure in question or makes such arrangements or complies with such conditions with regard to securing the payment of such sum as the Commissioner may require, the Commissioner may, after such enquiry as he deems necessary, determine the matter summarily and may, without legal proceedings, order forfeiture by way of penalty of the whole or any part of the amount so deposited or secured.

(*b*) …'

[48] In the result the following order is made:

The appeal is dismissed with costs, including the costs of two counsel where so employed.

C E HEATON NICHOLLS
JUDGE OF APPEAL

Appearances

For the appellant:	A P Joubert SC and L F Laughland SC
Instructed by:	Edward Nathan Sonnenberg Inc, Sandton Webbers Attorneys, Bloemfontein
For the first respondent:	J Peter SC and (with N K Nxumalo) Klagsbrun Edelstein, Pretoria. Symington & De Kok, Bloemfontein
For the third respondent:	L Gcabashe SC (With N Kekana and S Moloi) State Attorney, Pretoria State Attorney, Bloemfontein.