REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 66454/2017

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

10 JUNE 2021 .....

DATE SIGNATURE

UMBHABA ESTATES (PTY) LTD PLAINTIFF

And

THE COMMISIONER OF SOUTH AFRICA
REVENUE SERVICE DEFENDANT

DATE OF HEARING: This matter was enrolled for hearing on 18 January 2021, with appearance on Microsoft teams. DATE OF JUDGMENT: This judgment was hand down electronically by circulation to parties by email/caselines. The date of hand-down is deemed to be 10 June 2021.

JUDGMENT

Kollapen J

Introduction

[1] This case centres around a dispute as to whether the Defendant, the Commissioner of the South African Revenue Service was correct in refusing an application by the Plaintiff, one of the major banana farmers in the country, for a refund of the fuel levy paid by it in terms as contemplated in Section 75(1A) of the Customs and Excise Act 91 of 1964 ("the Act").

[2] The matter initially commenced by way of application which was then referred to trial. The Plaintiff called three witnesses to testify in advance of its case while the Defendant closed its case without calling any witnesses.

The relief sought

[3] In its Declaration dated the 25 September 2018 the relief sought by the Plaintiff was in respect of some 6 claims and could be summarised as follows:-

"***Claim 1***

1.1 Payment of the sum of R2 382 020,35;

1.2 Interest on the aforesaid sum calculated at the rate of 10.5% per annum from 1 January 2015 until date of final payment.

Claim 2

2.1 That the appeal of the plaintiff in terms of section 47(9)(e) of the Customs Act be upheld;

2.2 That the determination of the defendant dated 17 June 2015, alternatively the determination of the defendant dated 29 September 2016, further alternately both of the aforesaid determinations, disallowing the refunds (of the fuel levy and road accident fund levy) for diesel by the plaintiff for the period June 2012 to December 2014 be set aside.

Claim 3

3.1 Payment of the sum of R7 506 311,96

3.2 *Interest on the aforesaid sum calculated at the rate of 10.5% per annum from 1 August 2017 until date of final payment.*

Claim 4

4.1 *That it be declared that the defendant is not entitled to withhold payment of a legitimate and payable Value Added Tax ("VAT") refunds from the plaintiff, in excess of any amount in dispute between the parties at the relevant time, and that such withholding constitutes a breach of the right of the plaintiff to receive such VAT refunds*

Claim 5

5.1 *That it be declared that the defendant is not entitled to withhold payment of legitimate and payable diesel fuel refunds from the plaintiff, in excess of any amount in dispute between the parties at the relevant time, and that such withholding constitutes a breach of the right of the plaintiff to receive such diesel fuel refunds.*

Claim 6

6.1 *That it be declared that the plaintiff's usage of buses for the transportation of certain of its farm employees constitutes eligible usage in primary production in farming as envisaged by the Customs Act."*

[4] The Plaintiff sought costs on a punitive scale in respect of all the claims set out in its Declaration.

[5] At the commencement of the trial the Plaintiff placed on record that it was not persisting with the relief sought in Claims 4 and Claim 6 and during closing argument, and with the leave of the Court, amended the relief sought to seek the following;

"A: Claim 1 and 2:

1. *That the Plaintiff's appeal in terms of section 47(9)(e) of the Act be upheld and that the Commissioner's determination in respect of the period June 2012 to December 2014 be set aside;*

2. *That the determination be substituted with an order that the Plaintiff's refund claims under rebate item 670.04 (save for the diesel refunds claimed in respect of diesel used by busses, private vehicles and "depot") for the period June 2012 to December 2014, qualify under rebate item 670.04;*
3. *The extent of the qualifying claims are as set out in annexure "A" hereto and the Commissioner is ordered to forthwith recalculate the plaintiff's refund claims for the period June 2012 to December 2014, and to make payment of any amount refundable to the plaintiff in terms thereof;*
4. *Cost on the scale as between attorney and client;*
5. *Further and alternative relief.*

B: Claim 3:

6. *It is declared that the plaintiff's refund claims claimed under rebate item 670.04 (save for the diesel refunds claimed in respect of diesel used by busses, other private vehicles and "depot") for the period January 2015 to December 2017, qualify under rebate item 670.04;*
7. *The extent of the qualifying claims are as set out in annexure "A' hereto;*
8. *It is declared that the Commissioner is liable to pay interest on all amounts refundable, from date on which the refund claim was submitted, to the date of final payment, at the applicable rate of mora interest, alternatively from date of demand;*
9. *Cost on the scale as between attorney and client;*
10. *Further and alternative relief."*

[6] The parties are in agreement that the appeal instituted by the Applicant under section 47(9) of the Act and covered by Claim 1 and 2 is an appeal in the wide sense and entails to the extent necessary a re-hearing of the matter and if need be a fresh determination on the merits of the matter.

See *Pahad Shipping CC v Commissioner for the South African Revenue Service [2010] 2 All 246 (SCA; [2009] ZASCA 172 at paras [13] and [14]*

[7] In this regard however it will be noted that the determination which is the subject of the appeal was in respect of diesel refunds for the period June 2012 to December 2014. It is that determination which is the subject of the challenge in Claim 1 and 2.

[8] Claim 3 however relates to refund claims for the period Jan 2015 to December 2017 and while no determination has been made in respect of that period the Plaintiff's stance is that if it is successful in obtaining the relief in Claim 1 and 2 it would be entitled to the order in respect of Claim 3 as even in the absence of a determination as the same facts and method of recording diesel usage as applied in the period ending December 2014 would have been applied from January 2015 onward. It accordingly takes the view that it would be entitled to the declaratory relief sought under Claim 3 while the Defendant is of the view that such relief is not competent.

The legal framework

[9] The Act provides for a mechanism to ensure that the purpose for which the refund was introduced is met and provides for a refund to be paid by way of self-assessment by the user. The refund is a provisional one, which is subject to proof by the user that the diesel was purchased and used in accordance with what was provisionally allowed. If it was found that duty was payable, then SARS could recover the amount from the user together with interest.

[10] Section 75(1A) of the Act provides:

> *"(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 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 purpose on compliance with the requirements determined by the Commissioner for the purposes of this Act and the Value-Added Tax Act."

[11] Section 75(1C) of the Act provides

> *"(a) Notwithstanding the provision of the 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 the registration and the said item of schedule 6."*

[12] Section 75(14) of the Act provides:

> *"No refund or drawback of duty shall be paid by the Commissioner under the provisions of this section unless an application therefor, duly completed and supported by the necessary documents and other evidence to prove that such refund or drawback is due under this section is received by the Controller..."*

[13] Schedule 6 (and part 3 thereof) to which reference is made in Section 75(1A) provides the detail and the mechanics under which rebates and refunds are dealt with, covering both definitions, eligibility and non-eligibility of refunds and the rate or the extent at which such refunds are to be calculated.

[14] The Schedule also deals in some detail with eligibility by reference to specific sectors of the economy and they include Mining on land, Forestry, Farming and Commercial Fishing to name but a few and in each such instance tabulates a list of activities that are expressly included under the broad rubric of eligible activities. The

parties are in disagreement whether such lists (in particular in the Farming sector) are exhaustive or closed lists or whether other activities not expressly included can also be regarded as eligible activities.

[15] The schedule also provides for the keeping of proper logbooks and defines with some precision what a logbook means. Again the parties are in disagreement as to whether the Plaintiff kept and maintained logbooks as required by the Act read with the Schedule.

The background facts

[16] By agreement between the parties two videos of the farming operations of the Plaintiff were projected onto a large screen in Court. In general, the 1st video depicted the nature and scope of the Plaintiff's business as a banana farmer producing some 25% of the country's banana crop and 100% of its organic banana crop. It is by all accounts an extensive business operation and its activities extend to and include the preparation of the fields for planting, planting, irrigation, weeding and harvesting. The Plaintiff also has a packaging plant where the harvested bananas are stored, ripened and packed for onward delivery to its clients. It undertakes its own deliveries to various parts of the country using its own vehicles (commonly described as a horse and trailer.)

[17] In addition the Plaintiff manufactures its own compost on the farms, is responsible for the construction of all structures including packing houses and storage units, dams, security fences and the like.

[18] A second video depicted the type of vehicles used on the farm including tractors, excavators, harvesters, grinders, machines used to deal with bush encroachment and the harvesting of wood.

[19] Most if not all of these operations require and consume diesel and so do the generators on the farm which are run on diesel and are activated when there is a power outage on the national power grid.

The claims for the diesel refunds all related to these general activities

[20] The Plaintiff led the evidence its witnesses, Mr Roy Plath the Chief Executive Officer and Managing Director of the Plaintiff. Mr Joshua Grimm a director of the Plaintiff and responsible for its technical operations and Mrs Tracy Grimm, the internal

accountant of the Plaintiff and responsible for the submission of its diesel refund claims to SARS.

[21] Mr Plath gave an overview of the various operations undertaken on the farms as well as the planning and co-ordination that went into its execution. He described the banana producing cycle from the identification of virgin land to the delivery of the product to clients in some detail that started with the treatment of the soil using cattle and sheep in an enclosed area, the removal of the animals and the introduction of bulldozers to mix the dung into the soil, deep ripping of the soil. ridging, spreading of compost, the demarcation of the planting area by drawing lines in the soil, planting, weeding, maintenance of the plants and then finally harvesting, ripening, packaging and delivery to clients.

[22] Much of those activities would require diesel and he estimated that about 173 000 litres of diesel per month was used in the operations on the farms and the vehicles could broadly fall into 3 categories – tractors, harvesters and other machines used exclusively on the farms; LDVs used by management within the farms as well as on trips outside the farm; Horse and Trailers used in the main to deliver bananas and at times to bring back packaging and other material on the return trip.

[23] His evidence was that there was no paper logbook assigned to each vehicle but that the details of diesel dispensed would be recorded in a diesel sheet which would then be recorded on a dedicated software system. He indicated that the educational and skills level of drivers would make the keeping of a paper log book difficult for them and would be discriminatory. In addition, he said it would be impractical to have to record every segment of the usage for each day in respect of each vehicle as the nature of farming operations would require numerous trips, most of very limited duration in the course of a working day. His view however was that the Plaintiff had developed a system that was efficient in monitoring its usage of fuel. He also said that the failure by the Defendant to process and pay diesel fuel rebates over the past few years has had a negative impact on the profitability of the Plaintiff.

[24] In cross examination it was put to him that while the Defendant did not as a matter of principle dispute that there was diesel usage by the Plaintiff would constitute eligible use, the Defendant had difficulty in identifying from the claims submitted what was the eligible use. His response to this was that the Plaintiff was engaged in

horticulture whose definition was very wide and covered all the activities of the Plaintiff in producing bananas, private use excluded.

[25] His view was that every activity related to the Plaintiff's business would be an eligible activity and accepted that when a vehicle was refuelled the activity description of the vehicle at the time would be recorded even though that vehicle may thereafter, and until its next refuelling, be involved in a number of other activities which would not be separately recorded. His view however was that all such activities would in any event be eligible activities and it would be impractical to record each different activity separately.

[26] In this regard and simply by way of example it was put to the witness that an LDV was filled up on 5 occasions during the month of December 2014 and on each occasion it was filled up there was a single activity recorded in respect of some 500 to 600 km of usage and covering a multitude of journeys. The activity recorded was "Check team". The response of Mr Plath was that all those journeys would have related to management activities in relation to the farming operations and was part of eligible activities and recording them separately would have been impractical.

[27] In addition, it was put to the witness that there were activities carried out such as for example the construction and maintenance of roads that were not recorded as an activity but which occurred and for which diesel would have been used. The difficulty the Defendant would have, beyond the question of whether the activity was an eligible activity, was that what was recorded was general farming as opposed to road construction and therefore the debate on whether it was eligible could not even begin when the description of the activity differed from what was recorded and was recorded in general and wide terms.

[28] Again the stance of the witness was that the general as opposed to specific recording was not a problem as the activities would all be covered by horticulture and would all constitute eligible activities.

[29] Mr Joshua Grimm, a director of the Plaintiff as well as its technical, information technology and electrical automation manager testified on behalf of the Plaintiff and was reasonably well acquainted with the operations on the farms as well as the information management systems in place.

[30] He too expressed the view that the Plaintiff was entitled to claim diesel rebates in respect of all the activities in respect of its banana farming operations and accordingly all diesel usage except private usage would constitute eligible activities and usage.

[31] The procedure followed in dispensing diesel was that an employee of the Plaintiff authorised and designated to dispense diesel , would complete a diesel sheet in respect of the vehicle that would be receiving the diesel and what would be recorded would be the opening and closing odometer value of the dispensing tank, details of the vehicle by reference to the Plaintiff's asset register and registration number if applicable, the vehicle odometer or usage in hours (as many farm vehicles do not have odometers but record usage in hours), as well as the activity the vehicle was currently involved in as described by the driver of the vehicle. Finally, the driver would be required to sign the diesel sheet as confirmation of what was recorded therein.

[32] The regularity of filling up would depend largely on the vehicle type and activity it was involved in this could range from daily refills to refills after a few days. LDV's and small trucks would fill up as and when needed except he said for local trips outside of the farm where the policy was they would fill up before and after each such the trip. He also described in some details the measures taken by the Plaintiff to enhance the efficient usage of fuel. He testified that there was a record of every litre of fuel dispensed.

[33] The position with regard to usage records and claims based thereon differed over time as systems were introduced and upgraded and how this worked in practise was also the subject of the evidence of Mrs Grimm who was responsible for the submission of diesel refund claims to SARS.

The changes in the recording system over time

[34] During the period June 2012 to September 2012 the Plaintiff's systems did not record the activity the vehicle was involved in but activities were subsequently allocated to those vehicles based on the category or class of vehicle that such a vehicle would have been traditionally used for.

[35] In October 2012 a system known as the Fleetman system was introduced which was an electronic system that was populated from the information recorded on the

diesel dispensing sheets. This system enabled the Plaintiff to have at its disposal both a complete record of all the data contained in the diesel sheets as well as the ability to extrapolate that data to provide information in respect of diesel dispensing in respect of specific vehicles or vehicle type, dispensing details for specific days or time periods as well as dispensing details in respect of particular activities of the farming operation.

[36] In December 2012, the diesel dispensing sheets were amended to include a column to record the usage description of the vehicle at the time of refuelling.

[37] In 2014 there was a further change to the system to streamline the description of activities as they were considered too wide and this also involved a cleaning up of the system retrospectively to record the activities in line with the streamlined approach. In August 2015 what was described as a drop down menu was introduced into the Fleetman system to ensure that in capturing the data onto Fleetman from the diesel sheets there was only a limited number of predefined uses. It does appear that these changes made over time were effected in order to ensure a more streamlined system that was able to produce reports of usage that corresponded with the range of activities provided for in the note to schedule 6.

[38] What is significant however is that the electronic Fleetman system is substantially dependant on the information contained in the diesel sheets. The system was however refined in time to enable those capturing the information on Fleetman to more accurately describe the activity involved eg "skoffel" would be recorded on the diesel sheets but this was understood as "weeding" and would be captured a such on Fleetman.

[39] In this regard however, the evidence revealed that while many activities were recorded by reference to the nature of the activity in general, the actual diesel usage would in fact have been more specific and limited. By way of example both "weeding" and "harvesting of bananas" were accepted to be activities involving the use of manual labour. To the extent that diesel usage was allocated to such activities it would have related to the transporting of workers involved in weeding to and back from the fields and the transportation of the harvested bananas from the fields back to the packing house. The system did not record the usage as transportation but rather as the activity of "weeding" or "harvesting' as the case may be. The Plaintiff's stance was that it did not really matter in this regard as the transportation for which the diesel was used was

an integral part of the activity which in their view was an eligible activity and would include the transport necessary to undertake that activity. This would apply to various of the activities for which labour was the essential component of the activity eg. repairing fences, vehicles etc.

[40] The Plaintiff witnesses expressed the view that the diesels sheets as extrapolated onto Fleetman constituted a logbook that complied with the requirements of a logbook for the purpose of the Act as read with the Schedule and the note thereto.

[41] Given the centrality of the diesel dispensing sheets in determining the question of whether logbooks were kept and maintained it was not in dispute that there were no individual logbooks for each of the vehicles in respect of which diesel claims were submitted but that the diesel sheets constituted at the very least a dispensing record. What was disputed however was whether the diesel sheets were reliable in properly describing and recording the activity in compliance with the Act and in particular constituted a usage record it being accepted that the system of diesel refunds was based on usage.

[42] The further evidence of the Plaintiff in respect of claims and its records in respect of transportation costs incurred outside of the farms where its business was conducted was that it was entitled to the costs of both the outbound and inbound trips undertaken in respect of deliveries as well as the procurement of farming equipment and anything else related to and required for its business operations. The *modus operandi* when produce was delivered to its clients was that the return trip would be used to bring back to the farms pallets and lugs (bins) used for packaging, packaging material and boxes. It was however estimated by Mrs Grimm from a limited survey of its records that inbound vehicles would bring back such material about 80% of the time and return empty on the other 20% of trips.

[43] In cross examination and regard being had to the record keeping system of the Plaintiff it was put to Mr Grimm and accepted by him that despite the Plaintiff's policy that refuelling for local trips off the farm was done before and after each trip, the evidence showed otherwise in that LDVs were refuelled between three to five times per month and engaged in a number of activities which included local trips which were not recorded separately. The effect of this was a single usage description at the time of refuelling was used and the full usage would be ascribed to that description even

though the vehicle may have been involved in other activities and used diesel for other purposes during the refuelling periods.

[44] In addition, it was also pointed out by reference to the dispensing records that many of the activities were recorded in generic terms such as growing and tending of crops to which the witness responded that all activities on the farm would constitute eligible activities. It was further pointed put that in October 2013 when an LDV was refuelled and assigned to attend to a breakdown in Middelburg (some distance away from the farm) the Fleetman system recorded it under the category of "Growing and tending to crops" suggesting that the accuracy of the system and the reliability of what was recorded was questionable.

[45] The cross examination sought to advance the proposition that the diesel sheets and the electronic records generated from them largely constituted a diesel dispensing record as opposed to a diesel usage record, that in other instances the Plaintiff failed to record alternatively properly record an activity on the diesel sheet that accorded with the actual activity undertaken, while it many instances the actual activity undertaken in respect of the diesel dispensed would be unknown and finally that even where such activities appeared to be recorded with sufficient details they would constitute activities that are not eligible for diesel refunds.

The submission of diesel refund claims

[46] In the period June 2012 to February 2014 claims were based on purchases of diesel and the claim was the equivalent of total diesel purchases as there was no private usage in this time as vehicles used for private trips at that time were petrol driven. In the sub period December 2012 to February 2014 when private vehicles were acquired which used diesel, private usage was deducted from purchase and the rebate claim was based on total purchases less private usage.

[47] The evidence of Mrs Grimm was that from March 2014 to September 2015 the refund claim was based on usage and relied on the generation of reports from the Business Information System (BIC) of the Plaintiff and from October 2015 the claim was also based on usage relying on the BIC reports as well as the reports generated by the Fleetman system. She said that the change in the claim from purchases to usage was triggered by an e-mail from SARS advising that the claim should be

submitted on the basis of usage whereas the understanding of the witness was that prior to March 2014 it was acceptable to submit the claim on the basis of purchases.

The determination of the 17 June 2015 alternatively the 29 September 2016

[48] The determination which is the subject of Claims 1 and 2 commenced on the 19 May 2014 and on the 17 June 2015, SARS informed the Plaintiff that following the investigation conducted by it, it concluded that the Plaintiff did not comply with the requirements of the diesel refund provisions and as such were not entitled to the diesel refunds. SARS reasons for rejecting the claim was amongst others that the usage logbooks submitted did not reflect activities, that the activities recorded on the electronic system (Fleetman) did not correspond with the activity recorded in the hand written logbooks (diesel dispensing sheets) and that in respect of the claim for refunds relating to LDVs, horses and semis that such vehicles do not have individual logbooks and that diesel refund were claimed for non-eligible activities.

[49] SARS in explaining the assessment took the view that claims submitted under the activity of "general farming" would be disallowed as there was no indication what the actual activity was and whether such activity would constitute an eligible activity. It also pointed out that there was no usage logbooks for LDVs and it could therefore not be ascertained for what activities the vehicles had been used for nor differentiate the primary and secondary activities the vehicle may have been used for. It also arising from the above said that the Plaintiff claims included claims for non-eligible activities and then proceeded to disallow part of the claim totalling some 1.9 million litres.

The issues for determination

[50] During the course of the trial the parties at the direction of the Court prepared an agreed list of what they regarded as common cause issues and those in dispute.

[51] In this regard there was no dispute with regard to the plaintiff's storage and dispensing logbooks and that the April 2014 sample as contained in Bundle F is generally representative of the Plaintiff's evidence in respect of all periods. This

agreement between the parties obviated the need for evidence to be led in respect of each record for the period covered by the determination of the Commissioner.

[52] The parties also recoded that the Plaintiff's records in respect of the period January 2015 to December 2017 (the subject of Claim 3) have been reviewed by SARS but that no determination has been made in respect of that period and no refunds paid for that period except for August 2017.

[53] The issues for determination are the following:-

> *"Whether and which of the Plaintiff's activities qualify for the diesel refund in terms of Note 6(h) of Part 3 of Schedule 6 to the Act (eligible usage)*
>
> *Whether and in respect of which categories of vehicles/ equipment/machinery, the plaintiff's record-keeping is sufficient to the requirements of Note 6(a)(xi) and 6(q) as regards usage (usage logbooks).*
>
> *Whether the return journeys of the long-distance trips undertaken by horses, after farming products are delivered to the Plaintiff's customers constitute eligible usage.*
>
> *Which of the material/items/supplies collected by the horses are essential farming requirements.*
>
> *Whether the determination dated 17 June 2015, read with the appeal committee's- outcome dated 29 September 2016, is applicable to the periods subsequent to December 2014."*

Which of the Plaintiff's activities qualify for the diesel refund in terms of Note 6(h) Part R of Schedule 6 to the Act

[54] The Plaintiff's stance which emerged from the evidence of Mr Plath and Mr Grimm was that generally all diesel used for the farming activities and operations of the Plaintiff would constitute eligible usage and that private usage would constitute non eligible usage.

[55] The Defendant's submissions if this regard was that Note 6(h) is not open to the interpretation that all farming activities would constitute eligible use but rather

activities that constituted primary production activities and that were listed under (B) to the note. In addition, it says that the specific language in Note 6(h) (iv)(aa) and (cc) clearly point to the limited nature of the usage that would be regarded as eligible in the case of transportation.

[56] In the main the requirement that would trigger a right to a refund is that the user has purchased and used such fuel in accordance with the Act and the terms of Schedule 6. Clearly in the context of this dispute the purchase of the fuel is not in dispute but its usage.

[57] Part 3 of Schedule 6 which is to be read with the Act covers both the nature of the activities that are eligible as well as the record keeping in the form of logbooks that is required and that would impact on the validity of refund claims. I will deal separately with eligibility and the adequacy of the logbooks.

Eligibility

[58] In Note 6 eligible purchases as fuel for use and used as contemplated in paragraph b of the note while non-eligible purchases cover the purchase and use of fuel "not as prescribed in these Notes as fuel for own primary production in farming..."

[59] Accordingly the concept of eligible versus non- eligible is not as Mr Plath and Mr Grimm testified, the difference between private usage and business usage. If that were the case the note would have made that clear and it would have been a relatively simple matter to deal with by way of the basis for the distinction.

[60] The next question that arises is whether the nature of activities that are eligible constitute a closed list or whether the Note is open to wider interpretation.

Note 6(h) which deals with refunds in relation to farming has a number of components to it

[61] Note6(h)(i) is clear that the distillate fuel must be purchased and used **for own primary production activities in farming**

[62] The term own primary production activities in farming is further defined in Note 6(h) (ii) (cc) to mean the production of farming products by the user for gain on a farming property and then says "it" includes the following activities "and some 29 specific activities are then listed.

[63] For the sake of completeness farming products are defined in Note 6(h) (ii)(aa) as any products in their natural state produced during the farming activity contemplated in paragraph h(ii)(cc)(B).

[64] The Plaintiff on the basis that the Note, before listing the specified activities uses the word "includes" and argues that the list is therefore not exclusive or closed and in this regard relies on the judgment in ***De Reuck v Director of Public Prosecutions 2004 (1) SA 406 CC at 421-422 [par 18]*** where the Court said the following:-

> *"The correct sense of "includes" in a statute must be ascertained from the context in which it is used. R v Debele provides useful guidelines for this determination. If the primary meaning of a term is well known and not in need of definition and the items in the lists introduced by "includes" go beyond that primary meaning, the purpose of that lists is then usually taken to be added to the primary meaning so that "includes" is non-exhaustive.*
>
> *If, as in this case, the primary meaning already encompasses all the items in the list, then the purpose of the list is to make the definition more precise. In such a case "includes" is used exhaustively. Between these two situations there is a third, where the drafters have for convenience grouped together several things in the definition of one term, whose primary meaning – if it is word in ordinary, non –legal usage – fits some of them better than others. Such a list may also be intended as exhaustive, if only to avoid what was referred to in Debele as "'n moeras van onsekerheid" (a quagmire of uncertainty) in the application of the term."*

[65] If indeed one has regard to the context in which the word includes is used then the following is relevant:-

a) An eligibility for a refund relates to farming activity for the production of farming products. I have made reference to the definition of farming products and what that definition does is to link the product to the list of activities in Note 6h(ii)(cc)(B). There must at the very least be a link between the product and not any general

farming activity but an activity contemplated in Note 6h(ii)(cc)(B). This is clearly indicative of a limited list of activities.

b) If regard is had to the comprehensive list of activities in Note 6(h)(ii)(cc)(B), some of them such as servicing and maintaining of vehicles, firefighting, go beyond the activity of directly producing a product but are included in the list. It follows that "includes" entails activities that extend beyond those that directly produce a product but with the important proviso that the other activities are listed. This careful carve out as to what activities would be included militates against an interpretative approach that suggests that notwithstanding a comprehensive list of the farming activities included, there should be provision for other farming activities that fall outside of the list.

   It would appear that regard being had to the context; the list would fall into the 3rd situation described in ***De Reuck*** above.

c) While this is case involving farming activities Schedule 6 Part 3 deals with refunds and rebates in various economic sectors including mining on land and forestry. It is instructive that by way of comparison there are specific activities listed in other sectors which have not been specifically included in farming eg. construction and maintenance of access roads in mining on land sector and the forestry sector; land preparation including the clearing of land ploughing, discing and hoeing in forestry. The inclusion of these activities in mining and forestry and their exclusion in farming must suggest that the lawmaker specifically sought to include them in some sectors and not in others. There is nothing inconsistent about this.

d) Finally, it must be recalled that the right to a diesel levy refund constitutes an exception to the general rule that all users are required to pay full taxes on diesel. If indeed the refund dispensation was intended to encourage farming, there is no reason why it should be given the wide and generous interpretation that the Plaintiff contends for. On the contrary the Court in ***Ernst v Commissioner for Inland Revenue 1954 (1) SA 318 (A) at 323 C-E*** took the view that a statutory provision which grants a privilege should be narrowly or strictly interpreted.

[66] In ***Glencore Operations SA (Pty) Ltd and The Commissioner for The South African Revenue Services*** this Court in dealing with a levy refund dispute in the mining sector took the view that the activities listed in note 6(f) (iii) was non exhaustive and explained its stance in the following terms:-

"It follows that the activities in note 6(f0(iii0 are non-exhaustive activities forming part of, i.e. included in, "own primary production activities in mining". It further follows that where activities conducted by the applicant do not fit exactly within any of the activities referred to in note 6 (f)(iii) of the Schedule, but are in reality part and parcel of the kind of operations which the legislature intended to include in the concept of primary activities in mining, the non- exhaustiveness of list in note 6 (f)(iii) of the Schedule permits that such activities are also subject to the concession relating to rebates of distillate diesel fuel. Thus, those activities qualify as primary production activities in mining as defined in note 6(f)(iii) of Schedule 6 part 3 of the Act."

[67] In ***Graspan Colliery SA (Pty) Ltd and The Commisioner for the South African Revenue Service*** this Court also in dealing with a levy refund distinguished ***Glencore***, and concluded that in the context of the use of the word 'include 'in own primary production activity the list was exhaustive. It explained this in the following terms :-

"..... I am persuaded that the use of the word "include" in phrase own primary production activity in the note is to give the phrase a more precise meaning by listing what will encompass own primary production activities in mining. The word "include" is therefore, aimed at illustrating that the list is exhaustive of the meaning of primary production activities in mining. To hold otherwise, would render the usage of the word "include" nugatory and it will bring about a superfluous usage of the word in the phrase which could not have been what was intended by the legislator. Differently put, the legislator would not have embarked on the exercise to list twenty activities [Note 6(f0(iii0 (aa)-(uu)] which expanded what the phrase own primary production activities in mining would include and after 27 May 2016, add an additional activity by amending the note with the addition of note 6(f)(iii)(vv), if the legislator had no intention of having a list which is exhaustive and whereby rehabilitation was already provided for in activities prior to the amendment."

[68] In both these matters the Court was dealing with the mining sector and the judgments are fact specific but for the reasons I have already given I would support the view that the list is exhaustive, and in this regard once again refer to the dicta in ***De Reuck*** to which reference has been made.

[69] On this issue I must therefore conclude that the list of activities as set out in Note 6(h)(ii)(cc)(B) constitutes a closed and exhaustive list. To suggest otherwise would mean that the carefully crafted provisions of Schedule 6 Part 3 would be largely redundant. On the Plaintiff's argument any activity associated with and linked to the farming activities undertaken would qualify for inclusion. If this was indeed the intention of the legislature, then a simple formulation to that effect would have sufficed in achieving the legislative intent. It is also so that the list is described as inclusive and not illustrative, the latter certainly would have been indicative of the list constituting an example of qualifying activities.

[70] That is was drafted with the kind of detail one finds in the Schedule and the Notes is a clear indication that the refund levy system was intended to provide a comprehensive but nevertheless limited benefit to users of diesel in the faring sector.

[71] Having regard to the context within which the word "includes" is used and to which reference has been made I conclude that its use followed by the specific and quite comprehensive activities listed for inclusion is exhaustive and cannot on the ordinary interpretation of the Schedule and the Notes to it constitute a general dispensation to cover all farming and related activities as was understood by Mr Plath and Mr Grimm in their evidence – that the Plaintiff was entitled to a diesel fuel refund for all farming activities except for the private use of diesel.

[72] The evidence of the Plaintiff was that the diesels refund claim included the use of diesel in a compost making operation. I am not convinced that this activity neither falls under growing crops and harvesting crops in (AA) and nor for the reasons given does not fall to be considered as a separate activity given the closed nature of the list. The same reasoning would apply in relation to the inclusion in the refund claim of activities related to the construction and maintenance of roads, and the preparation of land, including the clearing of land, discing etc.

[73] I therefore conclude that the diesel refund claim has included ineligible activities that fall outside of the list in B and that the Commissioner was justified in regarding such activities as ineligible.

Transportation and return trips

[74] Note 6(h)(iv) which deals with eligible use says:-

> *"(aa) where farming products or farming requirements are transported by a contractor of the user, and the distillate fuel is supplied by the user on a dry basis the user may claim a refund in terms of section 670.04 in respect of the quantity of fuel actually used-*
>
> ***(A)** Where such farming products **are transported from the farming property to the market or fist point of delivery or***
> ***(B)** The farming requirements **are transported from the supplier's loading point to the farming property.***
>
> *(cc) Elegible use in farming includes the transportation by the user by means of own vehicles of*
>
> *(A) Farming products to any place; or*
> *(B) Farming requirements for use by such user from any place to the farming property."*

[75] There can be no dispute from the clear and unambiguous language used that the eligibility requirement in (cc) is limited to the transportation of farming products **to any place** and the transportation of farming requirements **from any place to the farming property.**

[76] The question is not whether it is fair and logical to include only one leg of the trip as being eligible but rather what the scope of the eligible activity is regard being had to the Schedule and in this regard there is no reason to depart from the clear language used by the legislature.

[77] Accordingly an ordinary return trip would not be eligible in its entirety except if the outward trip and the inward trip were both covered by (A) and (B). Thus an outward trip from the farm property to deliver farming products coupled with an inward trip

transporting farming requirements would render both legs of the trips eligible for the purpose of claiming a fuel levy refund.

[78] All of the Plaintiffs claims for transportation cover both the outward and inward leg of the journey and the claim is submitted on the basis that both legs of the journey constitute eligible activity. This is not correct for the reasons given and the refusal to allow the full journey as an eligible activity was justified.

Logbooks

[79] While I have concluded that on the basis of eligibility the decision of the Commissioner cannot be faulted , I proceed however to deal with the logbook requirement on the basis that even if it were found that the activities for which the refund claim has been submitted are all eligible activities , the claim still stands to be rejected on the basis that there was no compliance with the requirement to keep and maintain proper logbooks .

[80] Logbooks is defined in Schedule 6 Part 3 as follows:-

> *""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 trial of distillate fuel for which refunds are claimed, from purchase to use thereof. Storage logbooks should reflect details of distillate fuel purchases, sources thereof, how dispersed/disposed and purpose of disposal. Logbooks on distillate fuel use should contain details on source of 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."

[81] In ***Canyon Resources (Pty) Ltd v The Commissioner for the South African Revenue Service 82 SATC 315*** the Court in dealing with the requirement of logbooks said the following

> *"In addition, since 1 April 2013, the definition of a logbook has been expanded to expressly include the requirement that it should "indicate a full audit trial of distillate fuel for which refunds are claimed, from purchase to use thereof.*
>
> *The applicant argues that substantial compliance these requirements are sufficient and that they are merely directory and not peremptory. Having regard to the particularity requires in Note (q), it is immediately apparent that, in order to qualify for a refund in respect of any litre of diesel, the prescribed particulars must be furnished in respect of any such litre so that the Commissioner can discern between eligible and non- eligible usage.*
>
> *Counsel for the Commissioner referred me to the approach of the Appellate Division (as it then was) stated in Maharai and Others v Rampersad 1964 (4) SA 638 (A) in this regard at 646 C as follows:*
>
> *'The enquiry, I suggest, is not so much whether there has been 'exact', 'adequate' or 'substantial' compliance with the injunction but rather whether there has been compliance therewith. This enquiry postulate an application of the injunction, to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a Court might hold that, even though the position as it is, is not identical with what is ought to be, the injunction has nevertheless been complies with. In deciding whether there has been a compliance with the injunction the objection sought to be achieved by the injunction and the question of whether this object has been achieved are of importance.*

In the present case 'the injunction' to users was that those who wish to claim rebates had to demonstrate with sufficient particularity 'the journey to distillate fuel has travelled from purchase to supply' and then with equal particularity indicate the eventual use of every litre of such fuel in eligible purposes. Should the eventual use not be stated or sufficiently indicated, the claim fails. Should the volume of diesel used not be clearly determinable, the claim should also fail.Should the 'journey' of every litre not be particularized, the claim would, once again, fail."

[82] The system used by the Plaintiff and which was described in some detail in the evidence of Mr Plath and Mr Grimm was what can be described as a dispensing record and not a usage record. In many instances it would not be unreasonable to make the assumption that the dispensing record would translate into a usage record in particular where a vehicle is involved in no other activity other than the one described in the dispensing record and provided it was an eligible activity.

[83] But this was always not the case. There are many instances where the dispensing record would indicate the use of the vehicle at the time of dispensing but that use could 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 the diesel usage which occurred. The examples of the LDVs refuelling after 5 day period and having travelled 600km comes to mind. It would be impossible to ascertain from the dispensing record what activities the diesel used over that period covered and what of that usage would constitute an eligible activity. If a diesel usage activity is not recorded it is simply not possible to determine whether it is an eligible activity or not.

[84] It is also so that no individual logbooks were kept for individual vehicles. The explanation offered was that for farm workers who drove tractors and other vehicles, this would be difficult to maintain and their levels of education could make this even more challenging. I am not sure if that is a convincing response as the recording of a journey is a relatively simple and uncomplicated task. If those same drivers were required to sign a diesel dispensing sheet as the basis for accepting the accuracy of the information contained therein, a simple logbook would hardly be any more

complex. In any event that explanation cannot hold good for managers and others, who presumably have a higher level of education.

[85] 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.

[86] It is for these reasons that the determination of the Commissioner with regard to logbooks also is not open to attack.

[87] The relief sought in Claim 1 and 2 is therefore sustainable

[88] For these reasons it must follow that the relief sought in Claim 3 cannot succeed as the sustainability thereof was largely dependent on the success of Claims 1 and 2.

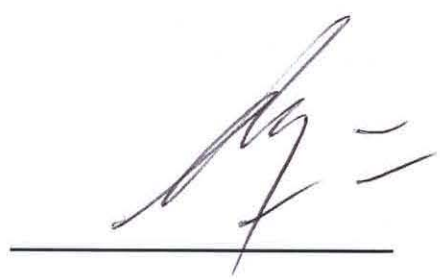
Costs

[89] There is no reason why costs should not follow the result and should not include the costs of two counsel

Order

[90] I make the following order:-

1. The Plaintiff's claim is dismissed.
2. The Plaintiff is ordered the pay the costs of the action including the costs of two counsel.



NJ. KOLLAPEN

JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES

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COUNSEL FOR THE DEFENDANT	:	**Adv J PETER SC** **Adv M MOLEA**
Instructed by	:	**THE STATE ATTORNEY**
DATE OF HEARING	:	**18 JANUARY 2021 –** **5 FEBRUARY 2021**
DATE OF JUDGMENT	:	**10 JUNE 2021**