REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No.: 91960/2015

Reportable: No
Of Interest to other Judges: No
Not Revised

18/12/2023
Date

Signature

In the matter between:

ASSMANG PROPRIETARY LIMITED	**The applicant**
and	
THE COMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	**First Respondent**
THE MINISTER OF JUSTICE	**Second Respondent**
THE MINISTER OF FINANCE	**Third Respondent**

JUDGMENT

FRANCIS-SUBBIAH J:

[1] This is an application for judicial appeal. The applicant, Assmang Proprietary Limited conducts business in mining iron ore, authorized in terms of the Mineral and Petroleum Resources Development Act.[1] This activity is categorized as primary production and therefore becomes eligible for fuel rebates. Having requested these concessions for rebates from the first respondent, the Commissioner of the South African Revenue Service (SARS), it was considered and subsequently refused. The review is against the decision taken by SARS, in terms of section 47(9)(e) of the Customs and Excise Act[2] (Customs and Excise Act) read with the Promotion of Administrative Justice Act[3] (PAJA).

[2] The rebate was refused on 4 July 2014 on the basis that fuel consumed by the applicant's contractors had not been used in terms of item 670.04 as required in section 75(1A) of the Customs and Excise Act.[4] An internal administrative appeal followed and a determination on 5 December 2014, confirmed the internal refusal and disallowed the appeal in full. As the applicant

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[1] 28 of 2002.

[2] 91 of 1964

[3] 3 of 2000 and judicial review as set out in section 33 of the Constitution of 108 of 1996.

[4] 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 58 of Schedule 58 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 5 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."

did not qualify for the diesel fuel rebates in an excess of 22 million litres of fuel.

[3] The time frame of these claims is June 2011 to October 2013. The applicant at first brought its appeal in respect of all contractor diesel claims, and subsequently withdraws all, except for diesel supplied to three contractors Aveng Moolmans (Moolmans), Blue-Sky Carriers CC (Blue-Sky) and Blue-Chip Mining (Blue-Chip).

[4] The legal issue is if the applicant qualifies for the rebates, it will be exempt from paying these government levies charged in general, namely the fuel levy and the Road Accident Fund levy. The issues for decision on review is whether the mining operations in relation to the diesel refunds were claimed by the applicant have been carried out in accordance with item 670.04 in Part 3 of Schedule 6 to the Act where the diesel was purchased and used in accordance with the provisions of Note 6 as contemplated herein:

4.1 Whether the applicant contracted *de facto* with its contractors on a **dry basis** in terms of **Note 6 (a) (ii).**

4.2 The question of whether or not the applicant made **'eligible purchases**' as defined in **Note (6)(a)(iii)**.

4.3 The question of whether the fuel purchased by the user for use and used as fuel for **own primary production activities** in mining, as provided for in **Note 6 (f) (ii) and (iii)**.

4.4 Whether there was compliance with the requirements regarding '**logbooks**' as contemplated in terms of **Note 6 (a)(xi)** for the period in respect of which such requirements were operative and

4.5 whether there was compliance in terms of **Note 6 (q)** that relates to the keeping of books, accounts and other documents for the purposes of the rebate item.

[5] In brief the dispute between the parties relates to the wet/ dry contracting and implementation thereof and the keeping of documents and logbooks in determining whether the rebates are eligible or non- eligible.

[6] It was held in ***Pahad Shipping CC v Commissioner for the South African Revenue Service***[5] that the appeal is an opportunity for parties to provide full evidentiary determination of the merits to be entitled to the refund. It remains an appeal against what was determined in the letter of demand by SARS.[6] The applicant has the onus and burden of proof on the merits of its entitlement to the refund. In arguing its appeal, the applicant further led oral

[5] [2010] 2 All SA 246 (SCA); [2009] ZASCA 172 at paras 13 and 15.

[6] *Commissioner for the South African Revenue Service and another v Richards Bay Coal Terminal (Pty) Ltd* 2023 JDR 0956 (SCA) at para 9 with reference to *Tikly & Others v Johannes NO & Others* 1963 (2) SA 588 (T) held that 'appeal' can have different connotations and explained its meaning.

evidence of three witnesses to explain its compliance with the provisions of the Customs and Exercise Act. SARS did not call any witnesses to testifiy.

[7] The first witness, Wilson Bruce Smith (Smith), is the financial manager at Khumani Mine who has first-hand knowledge of how the systems in place operated at the mines, the conversion of wet to dry rates, the contracts and the controls of the diesel usage and the operation of the Liquid Automated System (LAS System). The second witness Edward Webb Grobler (Grobler) is the owner and managing member of the contractor Blue-Sky. All matters of financial management and control of diesel for Blue-Sky fell under his supervision and control. Lastly Charles Arthur Stride (Stride), is an auditor and expert on mining, who analyzed the source documents and gave evidence on the LAS system reflecting on how the use of diesel by the applicant was controlled and used by its contractors.

Contracted on a Wet/Dry Basis

[8] In determining the question of whether the applicant contracted or hired its contractors on a dry basis in accordance with the provisions of Note 6(a)(ii), in particular, Note 6(f)(ii) and (iii) requires that mining activities which qualify for refund of levies must be carried on for own primary production by the user or by a contractor of the user who is contracted on a dry basis. Contracting on a "wet basis" will result in the rebate being disallowed.

[9] This was clearly evident in ***Thuthugani Contractors (Pty) Ltd v The Commissioner of South African Revenue Service***[7] where after interpreting the Act and Notes to the tariffs, the court found that Thuthugani carrying out forestry activities was a contractor on a wet basis. Thuthugani, was contracted to Mondi and had further purchased its own diesel for use and supplied the diesel for the machinery and equipment in its activities and therefore failed to meet the required criteria as set out in Note 6.[8] Thuthugani's economic benefits were derived from Mondi through their agreement, and not from the products of the forestry activities it undertook. It could not, therefore, have undertaken the forestry activities for 'own primary production'.[9] However, under the current legislation, only primary producers are entitled to claim diesel refunds where the primary producer provides the diesel to the contractor on a dry basis.

[10] In the present matter, unlike in Thuthugani, the applicant, as 'user' is the primary producer and owner, claiming rebates used in its own activities by its contractors to whom it has supplied the fuel. Note 6(f)(ii) provides that the mining activities which qualify for a refund of levies must be carried on:

> (i) for own primary production by the user or by a contractor of the user who is contracted on a dry basis;
>
> (ii) at the place where the mining operation is carried on; and
>
> (iii) by the mining right holder.

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[7] (13812/2014) (17 February 2016) at para 22.
[8] To part 3 of Schedule No. 6 – contract must be contracted on a dry basis
[9] *Ibid* at para 29.

[11] The applicant is the holder of the requisite authorisation for mining at the Khumani and Beeshoek Mines. Although, each mine has its own registered vat number, it is common cause that activities relating to "own primary production" in mining qualify for a refund of fuel levies. Note 6(f)(iii) comprehensibly sets out activities that fall under the category of own primary production activities in mining and this is not in dispute in the present matter. However, SARS persists in its objection to claims relating to the Beeshoek Mine on the basis that fuel was supplied for Beeshoek from Khumani and Khumani is making a claim for usage of Beeshoek. The applicant controls both Khumani and Beeshoek Mines as a business unit and therefore each claim should be brought under the individual registered vat number of that unit, appropriately quantified.

[12] Returning to the provisions of Note 6(a)(ii), it allows fuel to be supplied to contractors and defines the criteria as follows:

> *"dry or contracted on a dry basis" means that any vehicle, vessel, machine or other equipment whatsoever using distillate fuel is hired by 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"*

[13] It is common cause that the written contracts concluded by the applicant with the contractors refer to a wet rate. A wet rate includes the cost of fuel. Note 6(a)(xi) provides that:

" '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' "

[14] Contract agreement FEK0109/10 entered between the applicant and Blue Sky provide at clause A1.1.18 that the "*contractor is responsible to supply diesel and re-fueling facilities.*" Smith testified that this was the only contract that he is aware of that is incorrect. Respectively in the Moolman's contract as well, at clause A.2.7 it provides that "*The employer will supply diesel to the Contractor at cost. 33% of total rate tendered is attributable to diesel [variable portion of rate].*"

[15] The golden rule of contract interpretation as guided in ***Coopers & Lybrand and others v Bryant*** [10] included having regard to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract, the background circumstances which explain the genesis and purpose of the contract. As well as to apply extrinsic evidence regarding the surrounding circumstances.

[16] It follows that adopting a flexible and pragmatic approach to this matter, which will serve the interests of justice best by considering the context of the contract entered into between the applicant and contractors. In this context the purposive intention of the legislation is significant that majority of fuel is used in farming, forestry,

[10] 1995 (3) SA 761

mining and in encouraging international competitiveness of farmers, foresters and miners, where fuel concessions under strict compliance were adopted. The purpose of the legislation is succinctly set out in ***Commissioner for the South African Revenue Service v Glencore Operation SA (Pty) Ltd***.[11]

[17] In considering both contract and legislation the trite principle of interpretation is summarised by the Supreme Court of Appeal in ***National Joint Municipal Pension Fund v Endumeni Municipality***[12] as follows:

> "*Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weight in light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.....*

[11] 2021 JDR 1806 (SCA) at para 7 and 29
[12] 2012 (4) SA 593 (SCA) at [18]

The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and background to the preparation and production of the document."

Aided by the above interpretation process, the contracts, legislation, submissions and evidence including oral evidence is considered in the determination of the fuel rebates.

[18] Smith and Stride explained that although the written contracts were concluded on a wet rate basis, these contracts were implemented on a dry rate basis. By removing the diesel portion out of the wet rate, it reaches a dry rate. In essence the contract price, excluding the payment for diesel used by the contractor, was paid to the contractor. Stride testified that this is the reason why a wet rate calculation is simply a rate, and not a charge.

[19] The reason given for the inclusion of a wet rate in the composition of the contract price to the contractor is to determine the value of the work outsourced. When contractors tendered for the work, diesel prices were included in the contract price at the rate at which the applicant could receive the diesel from Engen. It is trite that the price of diesel fluctuates, and the applicant receives preferential diesel rates. The applicant explains that this method was created to enable the applicant to make a fair comparison of the different tendered prices and make an informed decision regarding the most cost and time-effective contractor. Since each piece of machinery has varying fuel efficiencies, one contractor may require more diesel than another to perform the same work, resulting in the applicant incurring greater overall costs.

[20] Fuel usage is represented as a percentage of the total tendered in the contract price to enable the applicant to ascertain the volume of diesel required by each contractor to perform its specific activities. A percentage cap was set in the wet rate. For instance, in the Blue-Sky contract, diesel made up 31,2% of the wet rate. In Moolmans contract it consisted of 33% of the total rate. If the diesel portion of Blue-Sky for the work performed in any particular month was less than 31, 2% Blue-Sky would benefit for being more efficient. In other words, the applicant would have supplied less diesel to Blue-Sky and Blue-Sky would have used less diesel, but the productivity would not have decreased, and the contractor would have received more money.

[21] Grobler testified that his company Blue-Sky transported export material produced at Beeshoek Mine to Khumani Mine. No diesel was paid for in the execution of the contracts with the applicant and therefore it performed the qualifying activities on a dry basis because its vehicles and equipment were hired by the applicant. From the applicant's fuel farms the diesel is supplied to the applicant's contractors. He relied on the applicant regarding the volume of diesel dispensed into his tank and for the total amounts invoiced to the applicant for each month. Although there was a debate between them, the amounts were reconciled throughout the month. Therefore, there was no discrepancy. He acknowledged that diesel is never free, and he did not have any risk on the fuel rate but only on how much diesel he used. The applicant advances together with the oral evidence that the diesel was not sold to contractors.

[22] Smith explained that contracts on a dry rate basis will lead to various concerns and not be practical, because there are large volumes of fuel used. When a wet rate is contracted with a contractor, he retains a vested interest about his usage of the fuel. Smith testified that when a contractor used too much fuel there would be penalties and that the penalty was built into the calculation. Over-usage of diesel by contractors is recovered from them by payment of a penalty. Anything over this percentage was perceived by the applicant not to be used for mining activities or in excess of the diesel usage upon which the contractors tender was based. In cross examination it was put to him that there is no penalty provision in the contract, to which he recanted that the penalty is implied and conceded that there are different ways of calculating the cost. By example Blue-Sky' s penalty would come from deductions made from its invoice.

[23] The invoice of the contractor is composed of a wet rate which includes the diesel usage. The volume and amount of diesel used by the contractor is provided by the applicant and not the contractor. The diesel was supplied to the contractor by the applicant obtained from Engen. The contractor subtracts this amount from its invoice and then submits his invoice to the applicant to be paid.

[24] The oral evidence at length dealt with financial and accounting calculations in the tax invoices of the contractors. Arising from the calculations it was put to Smith that Blue Chip in August 2013 went over the wet rate cap and there was no penalty. He agreed but he could not explain the penalty provision.

[25] There is a judgment on this precise issue. In ***Canyon Resources (Pty) Ltd v The Commissioner for the South African Revenue Service***[13] Davis, J asked the same probing questions:

> *"As to the "conversion" argument, why not deduct from the "wet" rate the difference between it and the "dry" rate prior to invoicing? Why the credit note procedure? A credit note is simply a bookkeeping exercise whereby a creditor reduces the amount exchanging hands (which would also have resulted in a credit entry). The Commissioner's view that this is exactly the same as a purchase of diesel by the contractor is logically sound: rather than actually paying for the diesel it used, the contractor issued credit notes i.e. book entries rather than payment sounding in money."*

[26] SARS proceeds to argue similarly in the present matter, that once the contractor raises an invoice with charges of amounts which include diesel it cannot commercially or financially represent a dry rate arrangement. If the contractor was contracted on a dry basis, then the contractor should have raised invoices and VAT against the applicant in amounts which would require no deduction for diesel obtained from the applicant and no other diesel charges should have been raised by the contractor.

[27] Stride in his testimony explained that when the diesel rate goes up, the deduction on the invoice goes up but the charge remains the same. If the contractor

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[13] *Canyon Resources (Pty) Ltd v CSARS* 82 SATC 315 at para 7.3.4

uses less than 33% in Moolman's example, "all is good, he makes a little profit, but when he uses more, he gets penalized." He was adamant that nobody's going to say that a discount is revenue. In cross examination it was put to Stride that the contractor made a large sum of money out of the diesel price fluctuations and when the contractor used less liters, he made a larger profit margin. Stride responded that what SARS is proposing is that one is creating liability where the other party is not aware of it. It has the effect of increasing the wet rate.

Was the fuel sold to the contractors?

[28] According to SARS, for financial and accounting purposes, it is necessary to evaluate the economic substance and financial reality and not just the legal form. In this determination if the applicant charged its contractors for the cost of the fuel, then the claim for rebate cannot succeed and this brings the entire matter to an end. If this is so, was the charging of the fuel disguised in the tender process. In other words, the contractor agreed to charge a wet rate and then deduct it to enable a reclaim from SARS. Once the contract was accepted, the applicant provides the diesel to the contractor and pays Engen the diesel used by the contractor. This will appear as if fluctuations in the diesel price do not affect the contractor.

[29] On the contrary it does. SARS contends that based on the tax invoices the applicant recovers the cost of the total diesel used by the contractor. Correspondingly the contractor's payment is reduced by the diesel utilized and this is contrary to a dry based contract wherein the cost of diesel is borne by the applicant and not recovered from the contractor. It should be the applicant that bears the risk of diesel price

fluctuations and not the contractor. These fluctuations are not within the contractors' control. SARS contends that this confirms that the contractors charge is a wet rate that is inclusive of diesel otherwise there could be no deduction from the contractors charge for diesel used by the contractor.

[30] The applicant persists in its argument that the contractor's charge remains the same, it is evident however from the invoicing that the contractor's charge does not remain the same because the contractors' invoice is adjusted to remove the full cost of diesel used. The significance of this is that the diesel is not supplied to the contractor without charge. The value of the diesel supplied to the contractor is taken into account by way of a deduction in calculating the contractor's invoice. The result is that the contractor carries the profit or loss of both usage of diesel and the risk of diesel fluctuations. It is noted that the applicant does not retain any continuing managerial involvement or effective control over the diesel. Once the diesel is deposited into a tank at the fuel farm or a bowser of the contractor, the LAS system stops tracking the usage of the diesel thereafter.

[31] Grobler stated that his efficiency grew better profit. When he was efficient, he made a profit, and he had no problem with the percentage cap. In cross examination when it was put to Grobler that he was paid for diesel that he did not use, and he was not just paid a dry rate, he gained more than R930 000, 00 for the month of September, he conceded.

[32] The applicant denies that it sold diesel to its contractors. However, the applicant received a credit or reduction in respect of each invoice rendered by the contractor for each liter of diesel used by them in the generation of the service reflected in the invoices. At the end of each month, the calculation is done by the applicant of what was to be paid to the contractor. The measured units of output would be multiplied by the relevant rate to arrive at an amount, called the gross amount and from this amount an amount representing the value of the diesel which had been dispensed to the contractor for that money would be deducted to arrive at a net amount which the contractor was permitted to invoice and in fact invoiced the applicant. SARS argues that to contend that this converted their contracts to dry contracts, is an attempt to avoid the prescripts of Note 6 to the rebate item.

[33] I accept SAR'S view that the current method employed by the applicant is consistent with a wet-based contract and inconsistent with the dry-based contract where risk should be borne by the applicant. If the contractor is efficient, he makes a profit and if he uses more diesel than planned for, he pays a penalty. Based on this the contractor carries the risk and the financial reality is that a wet rate is contracted. The fuel is not supplied for free to the contractor. So, it is evident that the tax invoice is a financial record that the contractor has 'paid' the applicant for the fuel by deduction in the invoice. The diesel has come at a cost to the contractor. That cost is precisely the cost paid by the applicant to Engen, it represents the same price charge by the applicant to the contractor for that supply of diesel.

[34] SARS maintains that the applicant has contravened the rebate provisions and that it has resold the fuel to its contractors. If the fuel is resold, it is a non-eligible purchase. The following provisions state that:

> ***"Note 6(e)(iii)(aa)(B)*** *requires that a 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. In this regard* ***Note 6(a)(v)*** *defines "non-eligible purchases" as 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 . . . such fuel used in transport for award or if resold".*

[35] It was confirmed in the Supreme Court of Appeal in ***Glencore***[14] that **Note 6(e)(i)(bb)(C)** requires that any person who includes in any purchase of fuel, fuel for eligible and non-eligible purchases, shall deduct the non-eligible purchases from the quantities when a refund is claimed.

[36] The applicant was aggrieved by Mr Passalaqua's assessment of the rebates. In particular, that he did not consider the contract as evidence, any third-party evidence, such as the contractors evidence that they did not pay for the diesel and that the cost of diesel was not deducted from the amounts due to them for the services rendered. They did not supply the diesel with their equipment and the diesel was supplied by the applicant and paid by the applicant to Engen. He failed to examine logbooks and he deemed the annual financial statements to be irrelevant.

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[14] 2021 (4) All SA 14 SCA

This complaint is no longer relevant in light of the evidence led by the applicant through its witnesses to fill in any omissions relating to the particularity of its claims.

[37] In ***Graspan Colliery SA (Pty) Ltd and The Commisioner for the South African Revenue Service***[15] it was explicitly said that the legislative purpose of Section 75 of the Customs Act is to grant a refund in respect of applicants who purchased and used diesel in strict compliance with the requirements as provided for in section 75, Item 670.04 and note 6. SARS argues that it is only in the primary sector as in mining, that class privileges apply where a rebate on diesel tax is claimable applies to registered users who do not have to bear the same burden in respect of taxes as the rest of the population. And as such, it is a privilege and the statutory provisions should be strictly or narrowly interpreted. These are class privileges and in determining the extent in a strict construction of the empowering legislation is applied. [16]

[38] I therefore conclude, taking into account the oral evidence, that the contracts entered into between the applicant and the contractors and the implementation of those contracts remain on a wet basis and therefore do not qualify for the rebates as envisaged in item 670.04 of Schedule 6 subject to compliance with Note 6. The financial accounting in the tax invoices collaborates with this view.

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[15] (8420/18) [2020] ZAGPPHC 560 (11 September 2020) at para 25.

[16] A similar approach was taken in *Commissioner for the South African Revenue Service v Glencore Operation SA (Pty) Ltd 2021 JDR 1806 (SCA).*

Record keeping and log books

[39] The next issue relates to record keeping and logbooks. The review referral on record keeping was accepted as a first instance hearing at which the applicants sought a reconsideration of the findings by SARS on additional facts and grounds. There is no dispute regarding the purchase and supply of diesel from Engen. What is in dispute is how the diesel is used. Record keeping and logbooks are a requirement of Schedule 6 and part 3 that provides the particularity and the mechanisms to calculate and claim the refunds and rebates. The parties disagree as to whether there was compliance in terms of **Note 6 (q)** that relates to the keeping of books, accounts and other documents for the purposes of the rebate item.

[40] Accordingly, the LAS system records all the diesel purchased from Engen. However, it is common cause that the LAS system stopped tracking once the diesel was dispensed to a bowser or tank. The contractor's equipment or machinery do not have a tag. SARS contends that the applicant has not quantified its claim. The applicant through its counsel argues that every liter of diesel need not be accounted for. Further that SARS letter of demand quantified the diesel usage per contractor by making use of the applicant's LAS system to determine the precise quantities of diesel used by each contractor. The onus still rests with the applicant to quantify the rebate claim with sufficient particularity.

[41] SARS observed that the cost center report in diesel dispensing is not accurate. That the system does not properly provide substantial descriptions of when and what

diesel was purchased and used by the user accurately. Furthermore, the cost center system information that relates only to the vehicle to which the diesel was dispensed does not provide detailed recordings regarding the usage by the vehicles and machinery. SARS contends that it is therefore not possible to qualify the activities as the deficiencies with the records failed to distinguish between earned primary activities and non- eligible activities.

Rebates on Blue-Chip Usage

[42] The applicant contends that the rebate recovery for Blue-Chip is limited to the argument on wet or dry and the rest of the evidence presented by it has not been contradicted by SARS. It was not contested that the activities performed by Blue-Chip are primary mining activities or that the diesel dispensed to the Blue-Chip equipment was used for primary mining activities.

[43] Smith's evidence explained the activities performed by Blue-Chip, a contractor to the applicant that provided drilling services at the applicant's Bruce and King Mines. The contracted rates were on a wet basis, and implementation of the contract remains on a wet basis. Blue-Chip invoices the applicant for the services rendered which includes the diesel rate. The diesel consumed by Blue-Chip was deducted from the total of all the work undertaken. Blue-Chip did not supply the diesel. The applicant estimated 4.2 litres per meter drill by Blue-Chip as the diesel portion of the rates provided by Blue-Chip. The applicant's mine accountant determines the amount that is drilled by Blue-Chip in a particular

month by reference to the surveyor reports and geology reports. The diesel used in the tariff reconciliation represents a deduction of the actual diesel consumed. This figure is obtained from the applicant's LAS system.

[44] Accordingly, Blue-Chip has a diesel bowser situated inside the mining pit which was fitted with a tag from the LAS system. The tag on the bowser recorded the precise volume of diesel dispensed into the bowser and the date and the time that the diesel was dispensed. These bowsers refueled only Blue-Chip drill rigs which were restricted to the mining site of the yellow fleet. These yellow fleet machineries are not capable of leaving the mining site, because they are too big to fit through the boom gate at the entrance of the mine, not registered to drive on national roads and are too big to fit on national roads. The machine is assembled on the site.

[45] In addition the diesel bowsers do not leave the pit at the mine site and are defined in note 6F as its function is integral to the performance of primary mining activities by the vehicles and equipment that they refuel. Without the bowsers none of the yellow fleet would be able to function and other equipment would consume far more diesel and be far less efficient because of being required to drive to the diesel tank farm to refuel.

[46] ***Umbhaba Estates (Pty) Ltd v CSARS***[17] is another case where the court considered record keeping and logbooks and referred to an Appellate Division decision in ***Maharaj and Others v Rampersad***.[18] In this case the Appellate Court considered the enquiry as not so much whether there has been 'exact', 'adequate' or 'substantial' compliance with the provision but whether there has been sufficient particularity and stated the following:

> *"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."*

[47] The diesel dispensed from the tank and bowsers fail to provide sufficient particularity to which vehicle and machinery it is dispensed. It fails to describe the journey from the bowser or tank to its ultimate usage and therefore fail to qualify as an eligible activity under Note 6F in respect of the rebates relating to all three contractors.

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[17] (66454/2017) [2021] ZAGPPHC (10 June 2021)
[18] 1964 (4) SA 638 (A) in this regard at 646 C

Logbooks

[48] The keeping of proper logbooks is further disputed. Whether there was compliance with the requirements regarding '**logbooks**' as contemplated in terms of **Note 6 (a)(xi)** for the period in respect of which such requirements were operative**.** The applicant argues that the stringent requirements contained in the definition of logbooks were only affected from the 1st of April 2013.[19] This requirement applies only to Blue Chip and Blue Sky.

[49] In this regard logbooks are defined in Schedule 6 Part 3 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 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)*

[19] The examples of minimum logbook record requirements are deemed to be on the SARS website at www.sars.gov.za, however it was submitted by the applicant that only an invoice is published.

of minimum logbook record requirements are available on SARS website at www.sars.gov.za."

[50] In ***Canyon*** [20] 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 trail of distillate fuel for which refunds are claimed, from purchase to use thereof. The applicant argues for substantial compliance these requirements are sufficient and that they are merely directory and not peremptory. Having regard to the particularity required 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."*[21]

[51] Further, in ***Umbhaba***,[22] Kollapen, J as he was then, considered the difference between a dispensing record and a usage record involved in an eligible activity. Although the facts are different to the present matter, the finding remains relevant on this point when he concluded that:

> *"there are instances where a dispensing record would indicate the use of a vehicle at the time of dispensing but that use could change over time and conceivably cover eligible as well as non-eligible activities, resulting in the*

[20] [2020] 82 SATC 315 GP
[21] *Canyon ibid* at para 9.2-9.3
[22] *Umbhaba Estates (Pty) Ltd v CSARS* (66454/2017) [2021] ZAGPPHC (10 June 2021) para 82-83

dispensing record in such instances not to be a correct reflection for the diesel usage."[23]

[52] This too, is a convincing reason why maintaining logbooks aid the 'journey of the fuel' until its consumption. The applicant submits that no reference to logbooks were made in the letter of demand of SARS. The applicant explains that logbooks are actually diesel dispensing records. But SARS says that is not a logbook. Instead, a logbook should be a systemic record of activities. They argue that logbooks have always been a requirement. In ***Umbhabe***, it was held that "*if a diesel usage activity is not recorded it is simply not possible to determine whether it is an eligible activity or not.*"[24] Grobler testified that they maintained diesel dispensing slips with a reading of the amount of fuel dispensed, the liters used, kilometers travelled, the time taken and into which piece of equipment the fuel was used. Moreover 12 years later they did not have the slips, they were taken out of the archive, and some were water damaged.

[53] Applicant submits that if the objects of the statutory requirements in Note 6 are achieved, application thereof should not be too strict and literal. They rely on ***Liebenberg No v Bergrivier Municipality***[25] that there must be substantial compliance. In referring to ***Unlawful Occupiers, School Site v City of Johannesburg***[26] the court held that even where the formalities arising from

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[23] *Ibid* para 83.
[24] *Ibid* at para 83.
[25] 2013 (5) SA 246 at para 23 and 26.
[26] 2005 (4) SA 199 (SCA); [2005] 2 All SA 108.

statute are peremptory, not every deviation from the prescript is fatal and the question remains that despite the defects the object of the statutory provision is achieved.

[54] I accept that Note 6(q) extensively regulates the keeping of books, accounts and other documents to substantiate the refund claim including logbooks, as contemplated in Note 6(a)(xi), which are expressly mentioned in 6(q)(i) and (v). Note 6(q)(v) expressly requires that the documents must show how the fuel purchased was used, sold or otherwise disposed of. Note 6(q)(v)(bb)(A) and (B) expressly required the documents to reflect the date or period of use along with the quantity and purpose of use.

[55] Taking into account, the evidence, on a balance of probabilities, it remains questionable how the diesel was used by the vehicle and machinery. There is no record describing the activity, in certain instances the record stops at the fuel tank and bowser. I am unsatisfied that there is substantial compliance that the diesel used was used in terms of the object of the provisions of the legislation. A document or an electronic trail is essential to a valid claim even if it was not in the form of a prescribed logbook prior to 1 April 2013. The onus remains on the applicant to prove that it had substantially complied with all the requirements of item 670.04 in terms of section 75 (1A)(e) and section 102(3) and (4).

Has the applicant quantified its refund claim?

[56] In ***Mbali Coal (Pty) Ltd v Commissioner for the South African Revenue Services***[27] it was emphasised that a narration and/ or proof of which fuel was used for eligible and non-eligible activities be demonstrated. The applicant could not simply claim all its fuel purchases. Equally in the present matter it was for the applicant to keep proper records and when applicable proper logbooks to qualify for the privilege extended to it and to quantify its claim.

Conclusion

[57] For the foregoing reasons I am satisfied that although the applicant was registered as a "user" in terms of the Act, the purchases of diesel on which the refunds were claimed were not "eligible purchases" for the purposes of Note 6 as the diesel was used in mining activities carried on by the applicant on a wet basis and failed to keep proper records with substantial and sufficient particularity in terms of Note 6 (q). Consequently, the purchases of diesel did not qualify for refund under the provisions of section 75(1A) and Schedule 6 of Part 3 as claimed by the applicant and the determination by the Commissioner of SARS to disallow the refunds was correct.

[27] (81950/2019) [2023] ZAGPPHC 1792 (5 October 2023) at para 37 and 8.

Penalty claim

[58] The applicant seeks an order to set aside its liability for penalties should it not succeed in the appeal. In the letter of demand from SARS a penalty was considered in terms of section 91 of the Customs and Excise Act as reasonable. However, no assessment was done in this regard and both parties correctly agree that SARS' power to levy a section 91 penalty only arises when the applicant agrees to abide by the decision and pays the amount determined by SARS. Therefore, no claim exists before this court in respect of penalties. The prayer in this respect is set aside with no order for costs.

Constitutionality challenge

[59] The applicant seeks a declaration of the invalidity of section 47(9) (c) and section 75(1A) of the Customs and Excise Act as being inconsistent with the Constitution of the Republic of South Africa (The Constitution),[28] by invoking the equality clause in Section 9 of the Constitution. The amendment to the notice of motion was granted on 27 June 2023. The constitutional issue was not raised in the applicant's founding papers. A case cannot be made out on appeal [29] and in particular in the heads of argument. The courts have held that a party cannot supplement and make a case on appeal but must challenge the constitutionality of a provision in a statute at the time of the institution of the legal proceedings.[30]

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[28] Act 108 of 1996

[29] *Zondi v MEC for Traditional & Local Govt Affairs* 2005 (3) SA 589 (CC) at para 19.

[30] *Prince v President, Cape Law Society* 2001 (2) SA 388 (CC) at para 22.

[60] The court in ***Crown Restaurant CC v Good Reef City Theme Park (Pty) Ltd*** [31] further emphasised that courts and practitioners are to ensure that all necessary material is available to enable proper adjudication of cases at all levels of the judicial system. A consideration of the legislation sought to be impugned that infringes a right in the Bill of Rights must be fully canvassed together with the consideration of the limitation clause in terms of section 36 of the Constitution. A declaration of invalidity in terms of section 172(1)(a) and a consequential order relating to 'just and equitable' made in terms of section 172(1)(b) of the Constitution requires factual material. The applicant has failed to plead the constitutional issue on interest in the founding papers, replying affidavit or in its fifth set of affidavits. Full address on both factual and legal arguments have not been made.[32] Given the finding in this matter, the applicant is not entitled to any interest. It follows that the challenge on constitutionality is therefore set aside.

The following order is made:

[61] The appeal is dismissed with costs, including the costs of three counsel where so employed.

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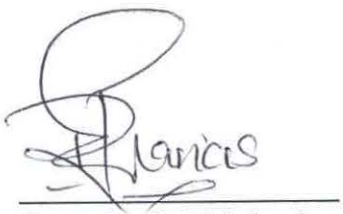
[31] 2008 (4) SA 16 (CC) at para 6.

[32] *SAPS v Solidarity obo Barnard (Popcru as Amicus Curiae)* 2014 (6) SA 123 (CC) at 188 para 204, the court held that the purpose of pleadings is to define and inform the court about the issues between the parties and give the opponents an opportunity to present factual material and legal argument to meet the case.



Francis-Subbiah, J
Gauteng Division of the High Court
Pretoria

APPEARANCE:

For the applicants: Adv. AP Joubert SC

Adv. LF Laughland

Instructed by: ENSafrica

For the respondent: Adv. J Peter

Adv. MPD Chabedi

Adv. NK Nxumalo

Instructed by: Bosman Du Plessis Inc

Date of Hearing: 04-14 September 2023

Date of Judgment: 18 December 2023

This judgment has been delivered by uploading it to the court online digital data base of the Gauteng Division, Pretoria and by e-mail to the attorneys of record of the parties. The deemed date for the delivery is 18 December 2023.