



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

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

SIGNATURE

DATE: 12 January 2024

Case No. 2021/49805

In the matter between:

BP SOUTHERN AFRICA (PTY) LTD

Applicant

and

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

Respondent

JUDGMENT

WILSON J:

- 1 The applicant, BP, imports, refines and distributes fuel throughout Southern Africa. BP appeals under section 47 (9) (e) of the Customs and Excise Act 91 of 1964 ("the Customs Act") against determinations made under the Act by the respondent, the Commissioner. Those determinations are that BP is not entitled to a refund of duty payable on diesel BP says it exported from South

Africa to Zimbabwe between June and September 2019. BP says that it sold the fuel to purchasers incorporated in South Africa for delivery in Zimbabwe. BP incurred liability for import duty on the fuel it says was exported, and then claimed that duty back from the Commissioner on the basis that the fuel was not consumed in South Africa, but was sent out of the country for consumption there. The refund claims BP pursues in this application arise from a very large number of transactions. BP claims that it is owed just over R220 million in refunds.

- 2 The Commissioner disagrees. In just over forty separate letters of demand and intent to seize, which were issued to BP between February 2020 and August 2021, the Commissioner determined that BP is not entitled to the amounts it claimed, because the fuel BP says it exported never left South Africa, or, at least, that there was no evidence that it had. The Commissioner also declined the refunds because, whether or not it ultimately left the country, the fuel had not been dealt with consistently with the Customs Act and its subordinate legislation, which create a regime of tracking and control that enables the Commissioner to determine a taxpayer's liability in respect of taxable goods that are constantly on the move. Furthermore, the Commissioner decided that BP had been party to a fraudulent scheme to claim refunds to which it was not entitled. The essence of the fraud alleged was that BP attempted to mislead the Commissioner into believing that it had exported the fuel, when BP knew that it had not in fact exported the fuel. On the basis of that alleged fraud, the Commissioner assessed BP as liable, in terms of section 88 (2) (1) (a) of the Customs Act, for forfeiture penalties in the sum of

just over R275 million. The total amount at stake in this application is accordingly a little under half a billion rand.

- 3 In addition to its statutory appeal under section 47 (9) (e) of the Customs Act, BP also seeks to review the Commissioner's decision to refuse its refund claims and the Commissioner's decision to levy forfeiture under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

The questions before me

- 4 This application was first enrolled for a day-long argument in my interlocutory court on 4 May 2023. The question BP placed before me at that stage was whether its appeal and review should be referred to trial because there are disputes of fact on the papers that cannot be resolved without the hearing of oral evidence. What Mr. Joubert, who appeared with Mr. Louw and Mr. du Bruyn for BP, envisaged and prepared for was a hearing only on that issue. Mr. Joubert contended that, if the application to refer the matter to trial succeeded, there would obviously have to be a postponement. But even if it failed, Mr. Joubert submitted that the main application would still have to be postponed for argument on the merits at a later stage. Mr. Joubert accordingly restricted himself to submissions in support of BP's application to refer the application to trial. He addressed neither the merits of BP's appeal, nor those of its review.

- 5 Very early on in his oral argument, however, it became clear that Mr. Peter, who appeared with Mr. Coetzee for the Commissioner, had a different approach. Mr. Peter's view was that the whole application had to be argued on its merits, and I would then be required to decide whether to dismiss the

application or refer it to trial. There would not be, and there ought not to be, any postponement for a hearing of the appeal and review application on the merits. If the application to refer the matter to trial failed, I would be called upon to make a final order on the merits of the appeal and the review on the papers as they stand.

6 The parties' contrasting approaches to arguing the matter caused a great deal of trouble. They led to the unfortunate consequence that only the papers in BP's application for referral to trial (which had been drafted as a separate motion with its own set of affidavits) were placed before me, these papers having been prepared by BP's attorneys in anticipation that the matter would be approached in the way that Mr. Joubert said it should be. Accordingly, in seeking to advance his case on the merits, Mr. Peter was unable to refer me to material parts of the record which set out the merits of BP's appeal and review, and I was unable to make proper notes on them.

7 By early afternoon on 4 May 2023, the prejudice to all concerned was manifest. Mr. Joubert had not argued the merits of BP's case because he did not believe that he would be called upon to do so. Mr. Peter was unable to take me through the evidence in the way he wanted to. I had not absorbed the merits of BP's appeal and review, because the papers in that application had not been given to me. In these circumstances, the matter could not be finalised on 4 May 2023.

8 By agreement, the application was postponed on the basis that BP should return to court prepared to argue the merits of its appeal and review if called upon to do so. I would also be placed in possession of the papers in that

application. The application was originally to be heard on 24 and 25 August 2023. However, on 7 July 2023, BP sought leave to introduce new evidence of some heft. The affidavits containing that evidence ran to over 1000 pages. The Commissioner filed an answering affidavit opposing my reception of the new material on 21 August 2023, leaving virtually no time for replying affidavits and written argument to be generated before the hearing date.

9 Again, by agreement, the parties postponed the hearing to 5, 6 and 7 December 2023, which is when the matter finally proceeded in earnest. By then, however, the questions before me had multiplied. The first issue was whether I had any jurisdiction over the merits of the appeal and review at all, or whether, as Mr. Joubert had originally argued, my role was limited to deciding whether or not the matter should be referred to trial. The second issue was whether BP's application to introduce new affidavits ought to succeed. The third issue was whether, and to what extent, BP's application should be referred for the hearing of oral evidence.

10 A fourth, ancillary, issue was how BP's statutory appeal under section 47 (9) (e) of the Customs Act interacted with its review of the Commissioner's decisions to refuse the refunds BP claimed and to levy forfeiture penalties. That BP has a choice of remedy in seeking to challenge the Commissioner's determinations is clear from the decision of the Supreme Court of Appeal in *Commissioner for the South African Revenue Service v Richards Bay Coal Terminal (Pty) Ltd* (1299/2021) [2023] ZASCA 39 (31 March 2023) ("*Richards Bay*"), paras 20 to 29. However, *Richards Bay* does not provide much help to a court faced, as I was, with a review and a statutory appeal brought

simultaneously against the same decision. Section 47 (9) (e) provides for an appeal in the widest sense – a complete rehearing of BP’s entitlement to the refunds it claims. That appeal is far broader than any review that might be available under PAJA. Once that appeal had been determined, the question was what, if anything, was left of the review BP also pursued.

11 At the hearing of the matter, I ruled that I had jurisdiction to entertain BP’s appeal and review on their merits. I also made an order dismissing BP’s application to introduce new affidavits with costs, including the costs of two counsel. I reserved judgment on BP’s application for a referral to trial, and on the merits of the appeal and the review, assuming that those could be reached on the papers before me.

12 In what follows, I explain my reasons for ruling that my jurisdiction in this matter extends to the merits of the appeal and those of the review if these can properly be decided on motion. I also explain why I dismissed BP’s application to introduce new evidence. I furthermore hold that there is no material dispute of fact on the papers about whether BP qualifies for the refunds it claimed. On the undisputed facts, BP plainly does not qualify for those refunds. BP’s appeal under section 47 (9) (e) of the Customs Act against the Commissioner’s determination that it does not so qualify must accordingly be dismissed. That outcome renders moot BP’s review of the Commissioner’s determinations that BP is not entitled to the refunds it claims.

13 However, I also conclude that there is a material dispute of fact on the papers about whether BP has sought to defraud the Commissioner. Consequently, the question of BP’s liability for forfeiture should be referred to trial. Finally, I

hold that BP's review may appropriately be considered at trial, as it is in substance a review of the exercise of the Commissioner's powers under section 88 (2) (1) (a) of the Customs Act, rather than an appeal under section 47 (9) (e) of the Act. There is no reason in principle why BP ought not to be able to challenge under PAJA the rationality, lawfulness and procedural fairness of the Commissioner's decision to levy forfeiture.

Jurisdiction

- 14 Mr. Joubert argued that, since BP had chosen to pursue only its application to refer the review and appeal to trial at this stage, I had no jurisdiction to determine anything else. In particular, it was argued that the merits of the review and appeal were not before me, and could not properly be entertained. I rejected that submission for the following reasons.
- 15 It is of course true that the issues before a court are defined by the parties, and that a court has no general power to raise and dispose of issues or disputes that do not arise on the parties' pleadings or affidavits (*Fischer v Ramahlele* 2014 (4) SA 614 (SCA), para 14). It is equally true that a court should be reluctant to decide issues on the pleadings or affidavits that the parties agree it should not decide. But this is not such a case. BP asks me to determine, on the affidavits in the appeal and review papers, whether there is a dispute of fact that is material to the relief it seeks in the appeal and in the review. To the extent that there is such a dispute, BP also asks me to refer the matter to trial. Relying on the same papers, the Commissioner asks me, if I should find that there is no material dispute of fact, to determine the appeal

and the review on their merits. My jurisdiction is defined by the issues as both parties have defined them, not merely by BP's preferred procedural approach.

16 Moreover, it is clear from Rule 6 (5) (g) of the Uniform Rules of this court that a reference to trial is only appropriate once a court is satisfied that an application "cannot properly be decided on affidavit". It follows that a party seeking such a referral – in this case BP – must first convince a court, having argued the merits of the application, that a resolution of those merits is impossible on the papers. That plainly entails the court having jurisdiction to decide the merits of the application, unless a dispute of fact prevents it from doing so. If a court has no jurisdiction over the merits of an application, it could have no jurisdiction over any application to refer those merits (or some part of them) to a trial of fact. Either I have jurisdiction over both the main application and the application to refer the main application to trial, or I have jurisdiction over neither. It seems obvious to me that my jurisdiction extends to both applications.

The application to introduce new evidence

17 In any application there are three sets of papers: the founding papers, the answering papers and the replying papers. A court may "in its discretion" permit further papers to be filed (Uniform Rule 6 (5) (e)). Although there is rich case law setting out a wide variety of considerations relevant to whether a court should receive further affidavits, most cases, including this one, come down to an assessment of the materiality of the evidence contained in the affidavits sought to be introduced and an explanation for why those affidavits

were not filed earlier. The more material the evidence, the weaker the explanation for its late production is required to be.

18 In this case, almost none of the material BP seeks to introduce is relevant to the merits of its appeal against the Commissioner's determinations that it is not entitled to the refunds it claimed. The small quantity of material that might be relevant to the appeal adds nothing to what BP has already placed before me in the affidavits in the main application.

19 The bulk of the new material is really directed at the Commissioner's decision to demand payment in lieu of forfeiture. In particular, it is intended to demonstrate that BP was not party to the fraud the Commissioner alleges. Mr. Joubert accepted that I would not need to introduce that new material if I am satisfied on the papers as they stand that there is a dispute of fact that prevents my deciding whether BP was party to that fraud. In that event, the new material would make no difference to the outcome of BP's application for a referral to trial, and there would be nothing to stop BP discovering and seeking to introduce the new material at that trial. Given my ultimate conclusion – that the issue of whether BP is party to a fraud must be referred to trial – there is no need to introduce the new evidence BP seeks to place before me at this stage.

20 Finally, it weighed with me that the application to introduce new evidence appears to have been triggered by the preview of the Commissioner's case on the merits that BP was given at the aborted hearing of 4 May 2023. Mr. Joubert all but admitted that the application was formulated in response to Mr. Peter's submissions on the merits at that hearing. It is hard to avoid the

conclusion that, given the apparent strength of those submissions and the evidence of fraud to which they adverted, BP was keen to buttress its case with new facts. However, I do not think it is fair to permit BP to proceed in this way. It will seldom be appropriate to permit a party to introduce new factual material once it has heard its opponent's case fully argued after all the evidence has been adduced and the parties' cases have been closed. New evidence received at that stage would have to be so material to a proper outcome that to ignore it would be to produce a palpably incorrect and unjust result. The new material BP seeks to introduce is not of that nature, and so cannot hope to counter the obvious unfairness to the Commissioner of its very late introduction.

21 It was for these reasons that I dismissed BP's application to file further affidavits.

BP's appeal under section 47 (9) (e) of the Customs Act

22 Section 75 (1) of the Customs Act requires the Commissioner to refund excise duties, fuel levies and Road Accident Fund levies paid on fuel manufactured in South Africa but ultimately exported elsewhere. Section 64F (2) (a) provides that such a refund may only be claimed by a licensee of a customs and excise warehouse or a licenced distributor of fuel. BP is such a licensee, and is entitled to the refund, provided that the fuel it produces is exported, and provided that the fuel is dealt with in compliance with Schedule 6 of the Customs Act and the Items it contains. The Items in Schedule 6 define the circumstances under which a refund will be allowed.

- 23 At issue in this case is the meaning of Items 623.23 and 674.07. Read together, the effect of these Items is that BP may claim a refund of duty on distillate fuel (including diesel) provided that the diesel is exported in compliance with the rules made under section 19A of the Customs Act. Those rules specify that BP does not itself have to physically remove the diesel from South Africa, but that if it does not, and if the diesel leaves South Africa by road, it may only be removed by a “licenced remover of goods” (Rule 19A4.04 (v)). The rules also require that any “consignor” of diesel for export (in this case BP), must keep “proof of receipt by a consignee at a destination inside or outside the Republic” (Rule 19A.04 (xii)).
- 24 BP manufactured the diesel on which it claimed the refunds at issue in this application at a refinery in Durban. It then pumped that diesel to a storage facility at Island View, near Durban, where it was mixed with imported diesel. It was then pumped to a tank farm in Tarleton, near Johannesburg. Once there, it was sold to third party local purchasers who, BP says, then took the diesel out of the country and delivered it to its final destinations in Zimbabwe. The sale was recorded in an invoice. On that invoice, the local purchaser was not recorded as the buyer. The buyer was identified as the consignee in Zimbabwe, who, BP says, ultimately received the diesel. At the point of sale, the diesel was “entered for home consumption” and BP became liable to pay duty on it.
- 25 The price reflected on that invoice is not the final price paid either by the local purchaser or by the consignee. For complex regulatory reasons which are not directly relevant, the final price of the diesel can only be determined at the end

of the month in which it is sold, once the state fixes it. That necessitates the production of a further invoice. On this second invoice, the sale is recorded as a sale to the local purchaser, not as a sale to the consignee. However, BP's position is that the sale is at all times a sale for export and that it is entitled to reclaim the duty paid, because the diesel has as a matter of fact been exported to a consignee in Zimbabwe.

26 The Commissioner contends that BP is not entitled to the refunds it claims in this case for a number of reasons. I need deal with only two of these in order to decide BP's appeal. The first contention is that the diesel in respect of which the refunds are claimed never left South Africa. The second contention is that the diesel was not entrusted to a licenced remover of goods.

Whether the diesel ever left South Africa

27 BP's approach in this application has been to press its case by reference to one specimen fuel consignment, extracted from many consignments on which it claims a refund. It has not attempted to show that it complied with the Customs Act and the applicable subordinate legislation in the case of each and every consignment in respect of which it claims a refund. It follows that, if that BP has not demonstrated that it is entitled to a refund on the specimen consignment, there is no basis whatsoever to interfere with the Commissioner's determinations of that or of any of the other refund claims BP pursues. Nor can there be any basis to refer BP's appeal to trial.

28 In my view, BP has simply not demonstrated that the specimen consignment ever left South Africa. The Commissioner says that it has no record of the consignment ever having done so. It says that the document which purports

to record the consignment's exit from South Africa (referred to as a "CN2" before me) is forged, though the Commissioner accepts that BP probably had nothing to do with that. BP does not seriously dispute that the document was forged, but says that, as a result of the general unreliability of the Commissioner's record-keeping, I cannot simply take the Commissioner's word for the fact that the consignment never left South Africa.

29 That response is inadequate. Entirely absent from BP's papers is a positive factual case that the diesel it said it sold to the Zimbabwean consignee actually crossed the border into Zimbabwe. The best evidence of that fact would have been an affidavit from the person who physically took the fuel across the border. That was not produced. Nor is there an affidavit from the consignee confirming that the diesel was received. Nor does BP appear to have any documentary basis on which it can assert that the consignee received the diesel. Indeed, BP does not assert, anywhere in its papers, that the diesel was delivered to the consignee. The Commissioner contends that the consignee probably does not exist, but I need not go that far. The fact is that no case has been made out that the diesel ever left the country, the Commissioner has no record of it ever having done so, and everyone accepts that the document purporting to record the export is a forgery. Finally it is common cause the BP did not itself transport the diesel out of South Africa, and so has no personal knowledge of whether the diesel did in fact make its way across the border.

30 The high water mark of BP's case is that the diesel must have left the country, because, if all the diesel in respect of which it claims refunds had remained in South Africa (there are millions of gallons of diesel at issue), there would have

been a massive distortion in the South African fuel market. There was no such distortion. It follows, BP says, that the fuel must have left.

31 That misses the point. On its own case, BP was required to demonstrate that the particular consignment on which it chose to mount its appeal left the country, not that every consignment of diesel on which it claims a refund did. Even if BP had demonstrated that every other consignment of fuel was exported as a fact, that would not have shown that the specimen consignment did. The absence of a distortion in the South African fuel market is perfectly consistent with the proposition that the particular consignment of diesel on which BP has chosen to stake its appeal was not in fact exported.

32 In these circumstances there can be no genuine or material dispute. Everyone accepts that the diesel was entered for home consumption at Tarleton. Without positive evidence that the diesel was then exported, the presumption must be that the diesel did not then leave South Africa. It is, of course, possible that at least some of the diesel on which BP claims refunds might have left the country, but BP has not shown this. At best for BP, it has shown that it sold the diesel to local purchasers on the assumption that they would take it to the consignees in Zimbabwe. But BP does not know whether that actually happened, and it has not produced evidence from anyone who does. On the papers before me, therefore, I am bound to conclude the diesel was not exported, because it did not cross the border to Zimbabwe.

33 Given BP's failure to show that the specimen consignment on which it chose to build its factual case left the country, no basis has been laid to conclude that any of the other consignments on which BP claims refunds were exported

either. Without such a basis, there can be no genuine dispute raised on the papers in relation to the factual question of whether any of the diesel on which BP claims refunds was exported.

- 34 To put it another way, BP has failed to demonstrate that there is controversy on the papers that would be resolved by a trial of fact. BP has not identified who would be able to give admissible evidence at trial that the diesel was exported. Nor has it demonstrated that its case would be improved by the opportunity to cross-examine any of the Commissioner's officials. In these circumstances, a reference to trial would be futile.

No licensed remover of goods

- 35 In any event, even if the diesel left South Africa, BP has not demonstrated that it was transported by a licenced remover of goods, as the applicable Rules require. Mr. Joubert freely accepted in argument that BP has no idea whether the specimen consignment – or indeed most of the rest of the consignments on which it claims a refund – was removed from the Tarleton tank farm by a licenced remover of goods. Nor do BP's papers go further than the assertion that BP had no reason to believe that the local purchasers were not licenced removers of goods. BP says that it has asked the Commissioner whether any of the local purchasers were such removers, but has received no response.

- 36 That is a plainly inadequate basis on which to interfere with the Commissioner's determinations on appeal. It is for BP, not the Commissioner, to show that BP has complied with the applicable Rules, and that it is entitled to a refund. In the absence of any evidence that any of the diesel in respect of which BP claims a refund was taken from Tarleton by a licenced remover of

goods, there can be no genuine dispute that BP has failed to comply with the applicable Rules, and that it is not entitled to a refund under them.

37 On the facts, then, the diesel never left South Africa. On the law, it has not been shown that it was conveyed wherever it went by a licenced remover of goods. Either of these conclusions is fatal to BP's appeal under section 47 (9) (e) of the Customs Act. On the undisputed facts, both conclusions are sound. BP's appeal must fail.

38 Having made that finding, I cannot see what is left of BP's review of the Commissioner's determinations. A review gives BP the chance to impugn the way that a decision has been reached, not an opportunity to second-guess its correctness. Section 47 (9) (e) of the Customs Act, on the other hand, provides BP with a full rehearing on the correctness of the Commissioner's decision to refuse BP the refunds it claims. Once it is found that the Commissioner was right to conclude that BP was not entitled to the refunds, any review of the Commissioner's process is pointless. His decision is simply correct in fact and in law. No defect in procedure to which BP may advert affects that outcome.

39 In any event, BP mounts no genuine complaint on the papers about the way the Commissioner determined that it is not entitled to the refunds it claims. BP did make legal arguments about whether those determinations were lawful, but these were just as germane to the appeal as they were to the review. BP's complaints on review really relate to the Commissioner's decision to demand payment in lieu of forfeiture. It is to that decision that I now turn.

Payment in lieu of forfeiture

40 Section 75 (19) of the Customs Act forbids the diversion of “any goods entered under rebate of duty under any item of Schedule 3, 4 or 6 for export for the purpose of claiming a drawback or refund of duty under any item in Schedule 5 or 6 to a destination other than the destination declared on such entry or deliver such goods or cause such goods to be delivered in the Republic otherwise than in accordance with the provisions of this Act and, in the case of goods entered under rebate of duty, otherwise than to the person who entered the goods or on whose behalf the goods were entered”.

41 Section 75 (20) of the Customs Act provides that any goods referred to in section 75 (including diesel) which are “disposed of” or “dealt with” in a manner contrary to the Act will be liable to forfeiture. Forfeiture is simply the seizure by the Commissioner of the goods irregularly dealt with. However, if the goods irregularly dealt with “cannot readily be found”, then section 88 (2) (a) (i) of the Act provides that the Commissioner may levy in lieu of forfeiture “an amount equal to the value for duty purposes or the export value of such good plus any unpaid duty thereon, as the case may be”.

42 The Commissioner says that, instead of delivering the diesel it says it exported to consignees in Zimbabwe, BP was (perhaps unwittingly) part of a scheme by which the diesel was diverted to some other place. The diesel is then likely sold for a reduced price, roughly equal to its value less the excise duty that would be payable on it had it not been marked for export.

43 On the text of the statute, that allegation, if established, would probably be enough to allow the Commissioner to demand payment in lieu of forfeiture in

the manner that he has. I must accept on the papers that the diesel never left the country despite being marked for export. It was accordingly “diverted” in the sense conveyed in section 75 (19), and “disposed of” or “dealt with” in a manner contrary to the Customs Act.

44 However, it was accepted before me that the Commissioner’s policy, before seeking payment in lieu of forfeiture, is generally to look for “conclusive” evidence that the person liable to forfeiture knowingly and intentionally sought to defraud the Commissioner. The Commissioner says that there is ample evidence of this: BP misrepresented to the Commissioner that it had sold the diesel to consignees in Zimbabwe in circumstances where it had in fact sold the diesel to local purchasers, and must either have known that the diesel would never get to Zimbabwe, or was reckless to the possibility that it would not. The purpose of the misrepresentation was to reclaim reimbursement of the duty due on the diesel.

45 At the centre of the Commissioner’s case is what he says is the clearly fraudulent creation of two invoices in respect of the sale of the diesel. The first invoice names the Zimbabwean consignee as the purchaser in order to create the misleading impression that the diesel will be exported. The second invoice, containing the correct price, names only the local purchaser, and is the truer reflect of the nature of the transaction: one not for export, but for local use.

46 BP denies that it was party to any fraud. It describes the practice of issuing two invoices as a necessary means of dealing with the dynamic nature of fuel prices. The first invoice is necessary, so BP says, to “frame” the consignment for export, and so confirms that the fuel is destined for export at the point of

sale. The second invoice is necessary to fix the correct price payable by the local purchaser. It cannot be produced at the point of sale because the price of the diesel has not yet been fixed. BP says that this practice is something of which the Commissioner has long been aware, and to which he has not objected until now. If the intention were really to defraud the Commissioner, then BP would clearly not have been as open about its practice as it has been.

47 The question before me is whether there is a genuine dispute of fact about whether BP has engaged in the fraud the Commissioner alleges. There plainly is such a dispute. While I accept that, at least on the papers properly before me, BP has sought to claim refunds to which it is not entitled, I cannot say that it has done so with the intent to defraud the Commissioner. BP's accounting practices and apparent lack of the kind of internal controls needed to ensure compliance with the Customs Act clearly call for an explanation. It appears that BP has sold large quantities of diesel for export in circumstances where it has not been able to put up the evidence necessary to show, as the Customs Act and its subordinate legislation require, that the diesel has been lawfully dealt with, and that it has actually left the country.

48 However, it is not open to me to conclude, on the undisputed facts, that BP set things up this way in order to defraud the Commissioner, or that its attempts to claim the refunds to which it was not entitled were based on representations to the Commissioner that BP knew were untrue. A court will not lightly infer fraud, and it is generally next to impossible to show fraud in application proceedings. In my view, oral evidence is necessary to determine

whether BP's refund claims were fraudulently, or merely erroneously, submitted.

49 Once it is accepted that there is a genuine dispute of fact about whether BP's conduct was fraudulent, then the question of whether, in terms of his own policy, read in light of the Customs Act, the Commissioner was entitled to levy forfeiture, must be referred to trial. It is here, I think, that BP's review comes into its own. In deciding to levy forfeiture, the Commissioner exercised his powers under section 88 (2) (a) (i) of the Act. BP's review is, in substance, an attack on that decision. It is the review that will be referred to trial.

Order

50 It follows from all this that BP's appeal under section 47 (9) (e) of the Customs Act must be dismissed, but its review of the Commissioner's decision to levy forfeiture must be referred to trial.

51 It is presently impossible to say whether and to what extent BP will be successful in its review. For that reason, I prefer to leave to the trial court the question of costs of the proceedings to date, save for the costs of BP's application to introduce new affidavits, which I have already dismissed with costs, including the costs of two counsel. For the sake of completeness, I shall record below the order I made orally in court.

52 Accordingly –

52.1 The applicant's application to introduce the affidavits annexed to its notice of motion dated 7 July 2023 is dismissed with costs, including the costs of two counsel.

- 52.2 It is declared that the consignments of fuel levy goods, itemised in the letters of demand annexed as FA16 to FA23 to the founding affidavit of Sarel Alberts dated 4 October 2021 have not been exported as provided for in rebate items 623.23 and 671.07 of Schedule 6 to the Customs and Excise Act 91 of 1964 (“the Customs Act”).
- 52.3 The applicant’s appeal in terms of section 47 (9) (e) of the Customs Act, against the Commissioner’s determination in respect of such fuel levy goods, as provided in such rebate items, both in respect of the letters of demand and the decision of the Commissioner’s National Appeal Committee, dated 9 April 2021, is dismissed.
- 52.4 The costs of the appeal are reserved for determination by the trial court convened in terms of paragraph 52.5 below.
- 52.5 The applicant’s claim that the Commissioner’s decisions to demand payment of amounts in lieu of forfeiture under section 88 (2) (a) of the Customs Act are unlawful and ought to be set aside is referred to trial.
- 52.6 In that trial –
- 52.6.1 The notice of motion will stand as a simple summons.
- 52.6.2 The time period for the applicant to deliver a declaration in terms of Rule 20 shall run from the date of this order.

