CONSTITUTIONAL COURT OF SOUTH AFRICA

Tholo Energy Services CC v Commissioner for the South African Revenue Service

CCT 252/24

Date of judgment: 16 January 2026

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Friday, 16 January 2026 at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal instituted by Tholo Energy Services CC (Tholo) against the judgment and order of the Supreme Court of Appeal, in which that Court dismissed Tholo's appeal against the judgment and order of the High Court of South Africa, Gauteng Division, Pretoria (High Court) in favour of the Commissioner for the South African Revenue Service.

The applicant is Tholo, a licensed distributor of fuel as per section 64F(1) of the Customs and Excise Act 91 of 1964 (CEA). The respondent is the Commissioner for the South African Revenue Service. The applicant Tholo has an affiliated entity, Tholo Energy Services (Pty) Ltd (Tholo Lesotho) operating in the Kingdom of Lesotho (Lesotho) under the same beneficial ownership of Mr Morohae, which is involved in the business of supplying fuel to mining and construction companies in Lesotho. The consignments in question were not obtained from PetroSA's refineries in Mossel Bay instead were collected from PetroSA's storage tanks in Bloemfontein and Tzaneen and one consignment from TotalEnergies' depot in Alrode.

The invoice was issued to Tholo, but payment was made on Tholo's behalf by Tholo Lesotho. Commissioner's custom officials confirmed that all fuel purchased by Tholo was transported with Lesotho oil tankers and by Lesotho nationals. During the period April to June 2016, Tholo purchased and collected 25 consignments of diesel fuel from PetroSA for direct removal for its customers in Lesotho. In March 2017, Tholo submitted four refund claims totalling 4.25 million Rands to the Commissioner with respect to the diesel fuel purchased. On 3 May, the Commissioner issued a notice of intention to disallow the funds but withdrew the notice on 9 May requesting additional information from Tholo.

On 27 June 2017, the Commissioner issued a new intention to disallow the funds, Tholo responded on 30 June 2017, subsequently the Commissioner issued his final notice of disallowance on 20 July 2017. The reasons for the disallowance were because first, that the fuel had not been obtained from a VM as required by the CEA and secondly that Tholo lacked the required export permits from ITAC as required by the CEA read with the rules. Tholo appealed against the determination to an internal

appeal committee which disallowed the appeal and confirmed the determination. Tholo indicated its intention to appeal after which SARS re-investigated the matter.

Tholo appealed to the High Court seeking an order declaring the determination invalid, alternatively reviewing, setting aside and substituting the determination. The High Court dismissed the Appeal on the basis that Tholo had not complied with section 64F of the CEA. Further, the Court found that Tholo had exported the fuel without the requisite permit. Leave to appeal was granted to the Supreme Court of Appeal.

The Supreme Court of Appeal confirmed additional grounds for refusing the refund claims. With reference to section 64F(1) and (3) of the CEA, the origin of the fuel was not shown to be South Africa by Tholo (as contemplated in section 75(1) of the Act), as none of the depots from which the fuel was obtained is registered as a VM. The fuel was also not a direct removal as contemplated in rule 64F.06(d) (which states that the fuel must be wholly and directly removed for delivery) as it was first removed from a manufacturing warehouse for home consumption to depots in Bloemfontein, Tzaneen and Alrode before being removed to Lesotho. The fuel was not transported by a licensed remover of goods (section 64D of the CEA) as it was transported by Tholo Lesotho (which is not a registered remover of goods). Tholo also failed to comply with the requirement to remove fuel in the common customs area by the licensed distributors of fuel in terms of item 671.11 of Schedule 6 of the CEA and Note 12.

In relation to the first question, this Court finds that the Commissioner is entitled to lead additional evidence and advance additional grounds in support of his determination, but he is not permitted to make a wholly different determination – one that concerns an entirely different question or rests on an unrelated legal foundation to that which was originally determined.

On the second question. It is common cause that the consignments of fuel in question were obtained from the PetroSA depots in Bloemfontein and Tzaneen and TotalEnergies' depot in Alrode. And Tholo conceded that these were not licensed VMs. This is contrary to Schedule 6 Item 671.11 which requires fuel to be obtained from stocks of a VM – that is, stocks held at the licensed warehouse premises, not stocks belonging to an entity that happens to hold a VM license for different premises elsewhere. Therefore, Tholo does not comply with this requirement as it is pertinently clear that fuel refunds must only be allowed for fuel obtained from the VM and not any other premises operated by a VM licensee.

On the third question, this Court finds that Tholo's reliance on an alleged practice generally prevailing under section 44(11A) of the CEA lacks merit to say that it did not need an export permit. This finding is based on the fact that, section 6 of the ITA, read with, Government Notice R92 of 10 February 2012 prescribes that certain goods, including diesel, may not be exported except under authority of a permit. In relation to the additional grounds, evidence establishes that Tholo did not use its own transport to transport fuel to Lesotho. Instead, the transport was undertaken by Tholo Lesotho using vehicles registered in Lesotho and driven by Lesotho nationals. Tholo Lesotho is neither a Licensed distributor of fuel nor a licensed remover of goods in bond as contemplated in section 64D. The fact that related entities share common ownership and management does not satisfy the statutory requirement. Moreover, evidence shows that payment to PetroSA was made by Tholo Lesotho, not Tholo. While Tholo argues that payment by its affiliated entity should be accepted, the statutory requirement is clear: the refund may be paid to "the person who paid the duty" under section 75(1)(d). Since Tholo did not make the payment, it cannot claim the refund, regardless of its relationship with Tholo Lesotho.

The Court found that Tholo failed to establish compliance with multiple statutory requirements

and therefore there is no basis for interfering with the Supreme Court of Appeal's judgment. And therefore, leave to appeal was granted and the appeal was dismissed.

The Court ordered Tholo to pay the respondent's costs, including the costs of two counsel.